



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 210-7808
Facsimile: (916) 327-2319
E-Mail: Robert.Swanson@doj.ca.gov
Mari.Mayeda@doj.ca.gov

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Steven E. White, Director
Fresno County Department of Public Works and Planning
2220 Tulare Street, 6th Floor
Fresno, CA 93721

cc: Sarah Owsowitz, Of Counsel, Best Best & Krieger
Alison Samarin, Deputy County Counsel, Fresno County

RE: Fresno County Draft General Plan

Dear Mr. White:

The California Attorney General's Bureau of Environmental Justice has reviewed Fresno County's draft General Plan and respectfully submits these comments to express several concerns with the latest public draft.¹ First, the draft includes a policy proposing to locate new industrial sites in two of the state's most disadvantaged, pollution-burdened communities, both of which are disproportionately Hispanic. This policy appears inconsistent with race discrimination in housing laws, the County's mandatory duty to affirmatively further fair housing, and the air district's community emissions reduction plan. Second, the draft General Plan's Environmental Justice policies do not satisfy Government Code, section 65302, subdivision (h), a law created by and commonly referred to as "SB 1000." Finally, the County has failed to enact climate adaptation and resiliency strategies as required by section 65302, subdivision (g)(4).

I. THE COUNTY PRIORITIZES TWO OF THE MOST POLLUTION-BURDENED COMMUNITIES IN THE STATE, BOTH OF WHICH ARE DISPROPORTIONATELY HISPANIC, FOR NEW INDUSTRIAL DEVELOPMENT

A. Fresno County Policy No. ED-A.7: "Locating New Industrial Sites"

Policy ED-A.7 of the draft General Plan is titled "Locating New Industrial Sites." It states that "[t]he County shall encourage the location of new and expanding industry within

¹ The Attorney General submits these comments pursuant to his independent power and duty. (See Cal. Const., art. V, § 13; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, at pp. 14-15.)

Fresno County,” and that “[i]nitial focus of potential new or redeveloped industrial areas shall include Malaga, Calwa, and the Golden State Industrial Corridor.” (Fresno County General Plan Policy Document: General Plan Review and Revision Public Review Draft (July, 2021) at p. 2-5 (“General Plan Policy Document”).) As a “policy,” ED-A.7 is a “[s]pecific statement guiding action and implying clear commitment.” (General Plan Policy Document at p. 1-15.) “Shall” is defined as “an unequivocal directive.” (*Ibid.*) The County’s “clear commitment” and “unequivocal directive” to prioritize Malaga and Calwa for new or redeveloped industrial sites in light of the known pollution burdens, health risks and population demographics raises civil rights and environmental justice concerns.

We do not have a general objection to the portion of the policy regarding locating new industrial sites in the Golden State Industrial Corridor, as there may be more land away from residences or other sensitive uses in this area available for industrial development. However, specific developments within the Golden State Industrial Corridor may raise concerns if they increase pollution and are located near sensitive uses. The County should evaluate all proposed developments to determine whether they comply with the law.

B. Disproportionate Impact on Disadvantaged Communities

Malaga and Calwa are among the most pollution-burdened communities in the state. Both communities are already surrounded by industrial uses. Satellite images of Malaga and Calwa, along with nearby industrial uses, are appended to this letter.

The County acknowledges that both are “disadvantaged unincorporated communities” as defined by state law. (General Plan Policy Document at p. 2-165-166.) The California Air Resources Board (CARB) has designated South Central Fresno, including Malaga and Calwa, as among the “highest priority locations” for community air monitoring stations under Health and Safety Code, section 42705.5, subdivision (c), a law created by and commonly referred to as “AB 617.”² Pursuant to AB 617, the San Joaquin Valley Air Pollution Control District developed a community emissions reduction program (CERP) for the area. Notably, this plan “focuses on reducing exposure to fine particulate matter (PM 2.5)” and “[r]eduction strategies target a variety of sources including ... new industrial developments.”³

CalEnviroScreen is a tool created by the California Environmental Protection Agency, Office of Environmental Health Hazard Assessment that uses environmental, health, and socioeconomic information to produce scores and rank every census tract in the state. A census tract with a high score is one that experiences a much higher pollution burden than a census tract

² “South Central Fresno” (no date), *California Air Resources Board*, available at: <https://ww2.arb.ca.gov/our-work/programs/community-air-protection-program/communities/south-central-fresno>.

³ *Ibid.*

with a low score. Many of these metrics are tied directly to housing.⁴ CalEnviroScreen 4.0 ranks Malaga in the 100th percentile for pollution burden and Calwa in the 99th percentile.⁵ Both rank among the most polluted census tracts statewide for PM 2.5 pollution, toxic releases, clean-up sites, groundwater threats, hazardous waste, and solid waste. Malaga also ranks highly in terms of pesticide use and drinking water hazards.

In both communities, residents suffer from the effects of this pollution. Asthma rates are in the 93rd and 94th percentile for Malaga and Calwa residents, respectively, and cardiovascular disease rates are in the 71st and 74th percentiles. Rates of both asthma and cardiovascular disease are indicators of exposure to pollution and make the communities more vulnerable to the health impacts of additional pollution.

Residents of Malaga and Calwa are disproportionately Hispanic: Malaga is 75.2% Hispanic and Calwa 81.1% Hispanic,⁶ whereas the County as a whole is 53.8% Hispanic.⁷ Malaga and Calwa's demographics further underscore their vulnerability. According to census and state demographic data, 64% of people in Malaga and 59% of people in Calwa have incomes under twice the federal poverty rate; 47% of people over 25 in Malaga and 50% of people over 25 in Calwa have less than a high school education; 13% of households in Malaga and 20% of households in Calwa have no English speakers over the age of fourteen; and 84% of students at Malaga Elementary School and 96% of students at Calwa Elementary School qualify for free or reduced-price meals.⁸

This combination of pollution burdens and vulnerability in these communities can result in a higher cumulative pollution impact.⁹ Here, "locating new industrial sites" in Malaga and Calwa would knowingly add to the recognized environmental and health problems faced by residents.

⁴ CalEnviroScreen 4.0 (October 2021 Report), *California Office of Environmental Health Hazard Assessment and California Environmental Protection Agency*, available at: <https://oehha.ca.gov/media/downloads/calenviroscreen/report/calenviroscreen40reportf2021.pdf>, at pp. 116 (groundwater), 126 (hazardous waste), 141 (solid waste).

⁵ CalEnviroScreen 4.0, available at: <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40> ("CalEnviroScreen 4.0").

⁶ CalEnviroScreen 4.0.

⁷ Data available at: <https://www.census.gov/quickfacts/fresnocountycalifornia>.

⁸ CalEnviroScreen 4.0; Free and Reduced Price Meal Program data available at: <https://www.cde.ca.gov/ds/sd/sd/filessp.asp>. According to CalEnviroScreen, Malaga and Calwa respectively score in the 70th and 86th percentiles for linguistic isolation, 95th and 97th percentiles for educational attainment, and 94th and 91st percentiles for income.

⁹ "Cumulative Impacts: Building a Scientific Foundation," *Office of Environmental Health Hazard Assessment* (Dec. 2010), Exec. Summary, available at: <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>, at p. ix.

II. POLICY ED-A.7 LIKELY VIOLATES HOUSING DISCRIMINATION LAWS

Policy ED-A.7's express targeting of Malaga and Calwa for new industrial sites likely violates housing discrimination laws. The California Fair Employment and Housing Act (FEHA), Government Code, section 12900, *et. seq.*, prohibits discrimination either intentionally or through a facially neutral land use practice with a discriminatory effect that "make[s] housing opportunities unavailable" based on race or other protected characteristics. (Gov. Code, § 12955, subd. (l).) This prohibition includes any land use practice that "[r]esults in the location of toxic, polluting and/or hazardous land uses in a manner that ... adversely impacts ... the enjoyment of residence...or any other land use benefit related to residential use...." (Cal. Code Regs., tit. 2, § 12161, subd. (b)(10).)

In a discriminatory effect challenge, intent is irrelevant. (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1419.) FEHA may provide greater protection than federal law and cannot be construed to provide lesser protection. (Gov. Code, § 12955.6.) A plaintiff must show that "a challenged practice caused or predictably will cause a discriminatory effect." (Cal. Code Regs., tit. 2, § 12061, subd. (a); *see also Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District* (9th Cir. 2021) 17 F.4th 950, 962 (permitting challenge where a policy "exacerbated a discriminatory effect").) Upon proof that a policy has a discriminatory effect, it would fall to the County to establish a "legally sufficient justification" for the land use policy, including without limitation the absence of an alternative with a less discriminatory effect. (Cal. Code Regs., tit. 2, § 12062, subd. (b).)

Here, ED-A.7 "predictably will cause a discriminatory effect" or "exacerbate[] a discriminatory effect." ED-A.7 targets Malaga and Calwa—two disproportionately Hispanic communities that already rank among the most polluted communities statewide—for new industrial development, bringing additional pollution to these communities. This pollution, along with the health and quality of life impacts it will cause, are discriminatory effects. (Cal. Code Regs., tit. 2, § 12161, subd. (b)(10).) The County appears to be aware of this fact. As the County's own draft Environmental Justice Element recognizes, "[i]n California, some communities with lower income levels, lower levels of education and higher proportions of minority residents bear a disproportionate burden of environmental hazards. These environmental inequities are largely a result of inappropriate zoning (e.g., residential uses located adjacent to industrial uses) and [higher pollution exposure] in lower income communities." (General Plan Policy Document at p. 2-157.)

Prior commenters have raised concerns over ED-A.7's impacts on Malaga and Calwa, further demonstrating the predictability—and the County's awareness—of these discriminatory effects. The Malaga County Water District noted that any increase in "industrial saturation or intensity in or around the Malaga Community will result in ... greater pollution burden" on the residents and that "the current and proposed land use and zoning within the Malaga Community has resulted in poor road conditions and inadequate circulation for the high frequency of truck traffic..., inadequate availability of housing particularly low-income housing, inadequate open

space and parks, and inadequate economic opportunity for the residents....”¹⁰ Similarly, Calwa is nearly encircled by the City of Fresno, so new industrial development there pursuant to ED-A.7 will necessarily further concentrate pollution in the limited County land near the community. Comments by California Rural Legal Assistance, the Catholic Diocese of Fresno, Safe Routes to Schools National Partnership, and the Leadership Counsel for Justice and Accountability have echoed these concerns.¹¹

ED-A.7 expressly states that the initial focus for the location of new industrial sites in the County “shall include” Malaga and Calwa and the draft General Plan defines “shall” to mean “an unequivocal directive.” Thus, if enacted, ED-A.7 would have a direct connection to the discriminatory effect of prioritizing “the location of toxic, polluting and/or hazardous land uses in a manner that” adversely impacts residential use, in violation of FEHA. (Cal. Code Regs., tit. 2, § 12161, subd. (b)(10).) Malaga and Calwa are disproportionately Hispanic compared to the County as a whole. (See, e.g., *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386 (permitting disparate impact challenge where policy disproportionately affected protected classes which comprised a much higher percentage in the group impacted by the policy than the percentages of those groups generally in the County); *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District* (9th Cir. 2021) 17 F.4th 950, 963.) Moreover, “awareness of the effect” of the challenged policy can support a claim for intentional discrimination under FEHA or other laws. (See *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 508.)

Finally, we remind the County of its “mandatory duty” to “take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” (Gov. Code, § 8899.50, subd. (b)(1)-(2).) “[M]aterially inconsistent actions include those that... [h]ave a disparate impact on protected classes (e.g., zoning or siting toxic or polluting land uses or projects near a disadvantaged community...).”¹²

¹⁰ Comment Letter to Fresno County Department of Public Works and Planning (March 13, 2018), *Malaga County Water District*, available at: <https://www.co.fresno.ca.us/Home/ShowDocument?id=27147>, at p. 3.

¹¹ Comment Letter to Fresno County Department of Public Works and Planning (May 4, 2018), *California Rural Legal Assistance*, at pp. 12-13; Comment Letter to Fresno County Department of Public Works and Planning (May 4, 2018), *Leadership Counsel for Justice and Accountability, Catholic Diocese of Fresno, and Safe Routes to Schools National Partnership*, at pp. 10-12, 17-18.

¹² “Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements (April 2021 Update),” *California Department of Housing and Community Development*, at p. 16.

III. POLICY ED-A.7 IS INCONSISTENT WITH THE SOUTH CENTRAL FRESNO CERP

In 2018, the communities in South Central Fresno, including Malaga and Calwa, were selected by CARB to participate in the Community Air Protection Program.¹³ As a result, the San Joaquin Valley Air Pollution Control District prepared a CERP for the area. The CERP describes a suite of strategies to reduce emissions and exposures throughout the community, specifically around the elementary schools and child daycare centers located in Malaga and Calwa. A primary concern expressed by residents during the development of the CERP was industrial development that would impact both neighborhoods. Indeed, the CERP identifies industrial development, heavy-duty trucks, and industrial processes as top community concerns in the planning area.¹⁴ The CERP also provides strategies, including incentive funding and planning collaboration with Fresno County, to address these concerns and reduce emissions. By its directive to “locat[e] new industrial sites” in Malaga and Calwa, Policy ED-A.7 would frustrate the CERP, its emissions-reduction strategies, and AB 617’s stated goals to relieve disadvantaged communities of their disproportionate pollution burden.

IV. THE ENVIRONMENTAL JUSTICE ELEMENT DOES NOT SATISFY SB 1000

SB 1000, a law that went into effect in 2018, mandates that general plans identify and describe disadvantaged communities within the local jurisdiction and include environmental justice policies (“EJ Policies”) addressing eight topics. (Gov. Code, § 65302, subd. (h).) These EJ Policies must aim to reduce pollution exposures, improve air quality, promote public facilities, increase food access, provide safe and sanitary homes, promote physical activity, promote civic engagement in the public decision-making process, and prioritize improvements and programs that address the needs of the disadvantaged communities. (*Ibid.*) California law defines environmental justice to include “deterrence, reduction, and elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution, so that the effects of the pollution are not disproportionately borne by those populations and communities” and “at a minimum, the meaningful consideration of recommendations from communities most impacted by pollution into environmental and land use decisions.” (Gov. Code § 65040.12(e)(2).)

In its draft Environmental Justice Element, the County identified over sixty disadvantaged communities. (General Plan Policy Document at pp. 2-165 to 2-166.) These communities span the County and suffer from a range of environmental challenges, such as poor air quality, lack of clean water, pesticide exposure, and/or proximity to contaminated sites.¹⁵ Many of these communities are also deprived of critical infrastructure to alleviate these

¹³ “Community Air Protection Program” (no date), *California Air Resources Board*, available at: <https://ww2.arb.ca.gov/capp>.

¹⁴ “Community Emissions Reduction Program: South Central Fresno,” *San Joaquin Valley Air Pollution Control District*, available at: <https://community.valleyair.org/media/1516/01finalscfresnocerp-9-19-19.pdf>, at p. 46.

¹⁵ See generally CalEnviroScreen 4.0.

environmental burdens.¹⁶ A robust environmental justice element is therefore crucial to address these inequities and ensure that all County residents can benefit from a clean environment, good health, and suitable quality of life.

The County's draft Environmental Justice Element policies do not comprehensively address SB 1000's requirements. First, many of the policies are already required by state law or are so vague as to be unenforceable. For example, the draft General Plan would require development projects to incorporate mitigation for adverse environmental impacts, a basic tenet of the California Environmental Quality Act. (General Plan Policy Document at p. 2-168.) The draft General Plan would also require new projects to have bicycle racks, an existing mandate in the State Green Building Code. (*Id.* at p. 2-169.) Requiring compliance with existing law does not meet SB 1000's mandate. Vague policies that do not impose any specific restraint on County actions include the policies to "raise awareness about healthy eating habits and food choices" and "ensure that residents of disadvantaged communities are provided the opportunity to participate in decisions that may have an adverse impact to their health." (*Id.* at p. 2-169.) Due to their vagueness, it's unclear what, if any, impact these policies would have for disadvantaged communities in the County's planning area.

Second, the draft General Plan policies fail to engage with the breadth of environmental issues facing the County's disadvantaged communities. For example, to satisfy SB 1000's requirement to adopt policies that "reduce pollution exposure," the draft General Plan includes a policy encouraging new sensitive land uses "to be located an appropriate distance from freeways, major roadways, and railroad tracks." (*Id.* at p. 2-168.) Not only does this policy fail to buffer new sensitive uses from many other major sources of pollution, such as industrial facilities, it also does not prevent new sources of pollution from being sited near existing sensitive land uses. This issue is particularly acute given the County's ED-A.7 policy, which directs new industrial development toward two of the County's disadvantaged communities over community opposition.

Third, the County's draft General Plan does not "prioritize improvements and programs that address the needs of the disadvantaged communities," as SB 1000 demands. The implementation measures, which are intended to be concrete actions the County will take to implement the policies, are inadequate. As there are only five implementation measures, the Plan leaves most policies unimplemented. Additionally, while two of the implementation measures are helpful,¹⁷ the others suffer from the same flaws as many of the policies—one is required by state law (providing bicycle racks in new developments, an existing mandate in the

¹⁶ "Disadvantaged Unincorporated Communities SB 244" (2020), *Fresno County*, available at: <https://www.co.fresno.ca.us/home/showpublisheddocument/48571/637484551455500000> ("Fresno County DUC Report").

¹⁷ Those two concern working with other entities to apply for transportation grants and to maintain and/or identify new routes to healthcare facilities and shopping outlets that provide access to healthy foods. (General Plan Policy Document at p. 3-28.)

State Green Building Code), and the other two are vague and likely unenforceable. (*Id.* at p. 3-27 to -28.)

Resources for SB 1000 compliance are available on our website and from the Governor’s Office of Planning and Research.¹⁸

V. FAILURE TO ADOPT CLIMATE ADAPTATION RESILIENCY STRATEGIES

Government Code, section 65302, subdivision (g)(4), obligates the County to prepare a climate vulnerability assessment, adopt climate adaptation and resilience goals, policies, and objectives based on the vulnerability assessment, and approve implementation measures to carry out the goals, policies, and objectives. The County was required to comply with section 65302, subdivision (g)(4) by May 2018, when it last revised its hazard mitigation plan.¹⁹ (Gov. Code, § 65302, subd. (g)(4).)

The County is in violation of section 65302, subdivision (g)(4)—it has not yet prepared a vulnerability assessment or adopted climate adaptation and resilience goals, policies, objectives, or implementation measures. Nonetheless, the County appears to be taking belated steps toward compliance. On March 22, 2022, the Board of Supervisors approved funding for consultants to prepare the climate vulnerability assessment and revise the draft climate adaptation and resilience goals, policies, objectives, and implementation measures. We look forward to reviewing the product of this work once it is available. In the interim, we note that the adaptation and resilience goals, policies, objectives, and implementation measures in the draft General Plan are inadequate. Specifically, the goals, policies, and objectives must be “based on” the vulnerability assessment, which to our knowledge does not yet exist. Moreover, the draft goals, policies, and objectives themselves are strikingly vague, and the sole implementation measure leaves three of the four policies unimplemented. (General Plan Policy Document at pp. 2-154, 3-26.) The County additionally cross-references a large number of draft policies in other elements as relevant to the adaptation and resilience policies, (*id.* at pp. 2-142 to 2-144), but the County fails to “specifically show[]” how those policies meet “each requirement” of section 65302, subdivision (g)(4). (Gov. Code, § 65302, subd. (g)(4)(D)(ii).) Lastly, the County’s decision to decline a \$175,000 state grant requested by the County’s Department of Public Health to assess climate impacts on the county’s vulnerable populations is troubling, especially if the County lacks resources or funding to meet section 65302, subdivision (g)(4) or if this further delays the County’s already overdue compliance.

As the County embarks on its climate resiliency planning process, we remind the County that equity “should be treated as a critical component of all planning, including climate

¹⁸ Several resources are available at: <https://oag.ca.gov/environment/sb1000> and <http://opr.ca.gov/planning/general-plan/guidelines.html>.

¹⁹ “Fresno County Multi-Jurisdictional Hazard Mitigation Plan” (May 2018), *Fresno County*, available at: <https://www.co.fresno.ca.us/home/showpublisheddocument/35154/636958419636600000>.

adaptation planning. Equitable climate adaptation planning involves identifying persons who may be most vulnerable to climate change and ensuring that planning processes, distribution of resources, and efforts to address systemic wrongs are all conducted in an equitable manner.”²⁰ Equitable adaptation planning is especially crucial given the County’s pressing infrastructure deficiencies in many disadvantaged communities.²¹ These deficiencies result in many disadvantaged communities lacking access to clean water, healthy air, green space, shade cover, and other necessary resources. Predicted increases in events like extreme heat days and drought will only exacerbate these concerns.²² The County’s compliance delay deprives the public of section 65302, subdivision (g)(4)’s benefits and especially harms disadvantaged communities disproportionately burdened by pollution.

VI. CONCLUSION

The County’s proposed policy ED-A.7 directing industrial development to Malaga and Calwa appears to be in violation of the Fair Employment and Housing Act and is inconsistent with the Community Emissions Reduction Plan adopted by the San Joaquin Valley Air Pollution Control District. In addition, the County’s draft General Plan fails to comply with SB 1000 (Gov. Code, § 65302, subd. (h)), and requirements to adopt climate resiliency strategies (Gov. Code § 65302, subd. (g)(4)). If we can be of assistance or if you have any questions or concerns, please do not hesitate to contact us.

Sincerely,



ROBERT SWANSON
Deputy Attorney General

MARI MAYEDA
Deputy Attorney General

For ROB BONTA
Attorney General

²⁰ “California Adaptation Planning Guide” (June 2020) *California Governor’s Office of Emergency Services*, available at: <https://resilientca.org/apg/intro/#consideration>, at p. 28.

²¹ *See, e.g.*, Fresno County DUC Report (containing numerous examples, including without limitation at p. 65 (noting bottled water “[c]urrently” is being supplied to residents in two areas due to lack of safe drinking water).

²² *See, e.g.*, “Extreme Heat is One of the Deadliest Consequences of Climate Change” (October 7, 2021) *Los Angeles Times*, available at: <https://www.latimes.com/environment/story/2021-10-07/la-times-investigation-extreme-heat>.

APPENDIX: IMAGES OF MALAGA AND CALWA

