



San Francisco Bay Chapter
Serving the counties of Alameda, Contra Costa, Marin and San Francisco

Letter 20

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BART
MAY 09 2005
TRANSIT SYSTEM
DEVELOPMENT

May 7, 2005
Lorraine Lerman
Office of Planning and Program Development
Federal Transit Administration, Region IX
201 Mission Street, Suite 2210
San Francisco, CA 94105

BART Warm Springs Extension
Attn: Shari Adams, Group Manager
P.O. Box 12688 MS LKS-21
Oakland, CA 94604-2688

Re: Draft Warm Springs Extension EIS

Dear Ms. Lerman and Ms. Adams:

We write to correct an error made in the comments of the Sierra Club on the Draft Environmental Impact Statement (DEIS), BART Warm Springs Extension (WSX), that were submitted on April 25, 2005.

We did not correct the revenue figures in Figure 7-3 to reflect the lower anticipated ridership. As corrected, the annual WSX operating deficit becomes \$3.65 million in 2010. In 2025, it would lie between \$1.9 million and \$3.9 million, depending on how much operating costs climb with the 25% increase in number of trains operated.

In our comments we pointed out that the DEIS assumes unrealistically large numbers of passengers traveling to and from the Warm Springs station on foot and by bicycle and bus. The numbers suggested that actual WSX ridership would be 70.6% of that projected in the DEIS. We assumed that the number of new riders was overstated by the same factor.

We urge BART not to repeat the experience of its Millbrae service. Long before that line opened, critics had assailed the BART ridership predictions as unjustifiably optimistic. When ridership fell shy of expectations, so did revenues. The region is still struggling with the resulting deficits.

We submit that FTA should ensure that BART will have sufficient funds to operate WSX before committing federal funds to the project.

Respectfully,

Abby Katz

Robert R. Piper, Ph.D.

Co-Chairs, San Francisco Bay Chapter Transportation and Compact Growth Committee

2530 San Pablo Ave., Suite 1, Berkeley, CA 94702 Tel. (510) 848-0800 E-mail: san-francisco-bay.chapter@sierraclub.org ©

20-1

Response to Comment Letter 20

Sierra Club, 2nd letter

20-1: The commenter's assertion, that the net operating shortfall for the WSX Alternative in 2010 is underestimated, is based on the incorrect hand adjustments that commenter proposes in the ridership analysis; please see response to comment 19-4. The commenter's proposed adjustments are not justified using standard modeling methodology.

Letter 21

TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND

16 Monte Cimas Avenue Mill Valley, CA 94941 415-380-8600 383-0776 fax

April 25, 2005
By E-mail & U.S. mail

Lorraine Lerman
Office of Planning and Program Development
Federal Transit Administration, Region IX
201 Mission Street, Suite 2210
San Francisco, CA 94105

BART Warm Springs Extension
Attn: Shari Adams, Group Manager
P.O. Box 12688 MS LKS-21
Oakland, CA 94604-2688

Re: Draft Warm Springs Extension EIS

Dear Ms. Lerman and Ms. Adams:

The Transportation Solutions Defense and Education Fund, TRANSDEF, has been active in the Bay Area for the last ten years, advocating good regional planning and cost-effective transit. We appreciate this opportunity to offer our comments. We are disappointed that, despite its doorstep-like weight, the DEIS did nothing to resolve the areas of known controversy cited on page ES-10 that were raised by TRANSDEF's pointed comments on the DSEIR. We believe FTA would have done well to insist on more than a warmed-over DSEIR. Because our experience is that BART is unwilling/ unable to respond honestly to comments, we hope that FTA will assert its primacy as lead agency and now insist on a major re-write of the environmental document.

21-1

With all the transit projects in the United States clamoring for funding, TRANSDEF is convinced that the Warm Springs Extension must be amongst those most unworthy of federal funding. This is an enormously expensive project designed to transport only a few thousand riders, without commensurate social or environmental benefits. The deceptively written DEIS claims "To the extent that the WSX Alternative encourages transit oriented development, a beneficial effect would result...." (pages ES-8 & -9) This is not the finding of a benefit--only a possible benefit--one that is all the more dubious now that the City of Fremont has approved a Wal-Mart near the proposed project. The Warm Springs project seeks to continue BART's legacy of giant sprawl-inducing parking lots connected by a rail technology with an inappropriately high capacity for the non-existent development it proposes to serve.

TRANSDEF

April 25, 2005

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TRANSDEF is concerned that this extremely expensive project is moving along with more than two decades' momentum behind it, even while lacking the most basic reality check for cost-effectiveness or project appropriateness. The DEIS assumes that WSX will go forward. It is merely rote paperwork. At no point does common sense intrude into the DEIS in the form of the question "What would be the best use of the taxpayers' money here."

21-1
cont.

DEIS Illegally Segments WSX from SVRTC

Case in point: Attempting to argue that WSX is not "connected to" the Silicon Valley Rapid Transit Corridor project (SVRTC)¹, page 5-3 asserts that "The WSX Alternative has independent utility and would effectively achieve its purpose and need as a stand-alone project." Please justify this assertion by demonstrating that the benefits claimed for the project bear a reasonable relationship to the costs of the project, using the following:

Page 4.2-29 has a table indicating 7200 new trips/day will be carried by this project in 2025. Please name other \$700 million projects carrying passenger loads on this scale. Please identify those that were given FFGAs by FTA. Only by presenting a substantial list of such projects can the BART WSX project be taken seriously as a stand-alone project. Without such documentation, it cannot be justified as an independently operable segment, and therefore would need to be re-studied, connected to the SVRTC. While responding to these questions, please clarify how many of the projected passengers are shifting to BART from another transit mode.

21-2

Page 5-3 also asserts that "the ridership and access analyses presented in Section 4.2, *Transportation*, justify the location of the other terminus at Warm Springs." Please explain how a vacant parcel without an adopted plan for intensive development can be considered a logical terminus for a project costing \$700 million. There is no pool of transit riders on site, ready to use the service. Provide a list of examples of projects costing similar amounts that terminate in similarly vacant and unplanned parcels. Explain what it is about the conclusions of the ridership and access analyses that justifies the selection of the location at Warm Springs as a logical terminus. Prove that these analyses are anything more than *post hoc* rationalizations of an obsolete terminal selection and project concept. Demonstrate that the direction for this project given by the Legislature in 1988 is still reasonable today.

21-3

When SVRTC was proposed, changed project circumstances should have triggered the production of a joint environmental document, because the WSX could no longer be justified as having independent utility. The Alternatives Eliminated from Consideration on pages 3-35 through 3-40 were all eliminated because of impacts they would have on SVRTC, or to be compatible with SVRTC decisions made by VTA. These key project-

21-4

¹see 40 C.F.R. Section 1508.25(a) and Exhibit 2, Letter from FTA to VTA, indicating that EPA has found the two projects connected.

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determining decisions were based solely on the project's connection to SVRTC. The key statistic justifying the project on page 2-2 has nothing to do with transporting passengers from Warm Springs, and everything to do with SVRTC: "By 2025, the number of weekday automobile trips between the East Bay and Santa Clara County is expected to exceed 500,000 vehicle trips." TRANSDEF asserts that the WSX project cannot now be justified as having independent utility or logical termini, making the DEIS guilty of segmentation.

21-4
cont.

Also problematic is the conditional language in Alameda County's Measure B (See Exhibit 1-Measure B and Warm Springs.pdf) that prohibits that sales tax money from funding construction for the WSX unless a rail connection to Santa Clara County is fully funded. Obviously, this funding criterion connects the 'two' projects.

21-5

Transit Travel Times Demonstrate the Pointlessness of WSX

The EIS contains projections of future transit travel times that indicate that investing \$700 million in WSX produces no significant travel time savings. Amazingly, the EIS preparers did not notice this, or did not find it worthy of note. On the basis of this finding alone, they should have recommended that the project be killed.

2025 travel times (when compared to No Project on page 4.2-32) show:

no time savings whatsoever for the following trip pairs:

- Milpitas - Downtown SF;
- Fremont - Pacific Commons;
- Union City - San Jose Diridon Caltrain.

Travel times are somehow worse (!!!) for these pairs:

- Union City - San Jose Downtown
- Hayward - Lockheed.

21-6

The only benefits arise for these pairs:

- Milpitas - Pacific Commons [3x drive alone time]
- Irvington - NUMMI; [2x drive alone time]
- Irvington - San Jose Downtown [nearly 2x drive alone time]
- Fremont - Lockheed [possibly time competitive]

However, of these last 4 benefitted pairs, BART travel is not especially competitive with drive alone travel times for 3 of the pairs. The Milpitas trip is just too long by transit, compared to driving. NUMMI's giant free parking lot is likely to attract employees to drive alone. The San Jose Downtown trip only takes 10 minutes off an extremely long 82 minute trip, begging the question as to whether the huge investment is worth it. Only the Lockheed trip seems likely to attract new riders, even though transit is still 15 minutes longer than auto.

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Please provide the calculations and explanatory text that demonstrate how these travel time tables justify the expenditure of \$700 million. With these meager time savings, it is clear that WSX has failed miserably to speed up these trips. It would be more intelligent to figure out how to speed up just the Fremont-Lockheed trip and spend less money. The absence of significant time savings is further proof that the proposed project is not justifiable as a stand-alone project, and is, in fact, the unacknowledged first phase of a larger project.

21-6
cont.

WSX Offers No Smart Growth Benefits

Please describe Smart Growth projects that have occurred anywhere because of a BART extension. TRANSDEF is unable to identify any. Please provide examples of other TOD projects that are recognized for their Smart Growth characteristics that have surface parking lots for 2000 cars. Please indicate on a station area vicinity map where the City of Fremont approved a Wal-Mart. Please evaluate whether the City's insensitivity to Smart Growth and Transit Oriented Development demonstrated by that decision means that Transit Oriented Development is likely to be built at Warm Springs.

21-7

A 2000 car parking lot is the antithesis of pedestrian friendly mixed use Smart Growth. A careful reading of the DEIS discloses that the Smart Growth benefits of WSX are only possibilities. The DEIS does not say the project will provide definite Smart Growth benefits. A typical example: "To the extent that the WSX Alternative encourages transit oriented development, a beneficial effect would result, maximizing opportunities to foster "smart growth" in the vicinity of the proposed future station sites." (pages ES-8 & -9) Thus, the DEIS clearly indicates that the WSX project will provide no Smart Growth benefits, unless perchance events occur that are not under the control of the project sponsor. Without the mitigation measures proposed by TRANSDEF for the DSEIR², the FEIS must acknowledge that WSX offers no Smart Growth benefits.

21-8

Nothing in the EIS protects the station sites from auto-dependent uses, unless a mitigation is adopted that withholds project construction funding until city zoning is adopted that prohibits auto-dependent uses in station areas. Unless mitigated, the potential for the development of auto-dependent uses could cause the loss of the opportunity for Smart Growth at the station sites. Thus, the absence of adopted Smart Growth planning for the station sites prior to the construction of the project could lead to the inducement of further regional sprawl growth. Sprawl growth dispersed throughout the region, as compared to Smart Growth in TODs on these sites, will have significant cumulative impacts on trip generation, VMT, traffic congestion, air emissions and consumption of open lands.

²Require Fremont to adopt zoning and General Plan amendments for the station areas, with specified minimum densities, before funds for the construction of the project are released.

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Environmental Justice Discussion is Inadequate

The methodology for Analysis of Environmental Consequences starting on page 4.18-4 is incomplete, looking only at the adverse impacts on low-income communities and communities of color. The recitals of the federal policy documents were incorrect and incomplete, failing to cite the need to verify that minority populations are receiving the same benefits as other groups. For example, the Department of Transportation April 15, 1997 Order to Address Environmental Justice in Minority Populations and Low Income Populations states that:

21-9

Under Title VI, each Federal agency is required to ensure that no person, on the ground of race, color, or national origin, is excluded from participation in, **denied the benefits of**, or subjected to discrimination under any program or activity receiving Federal financial assistance.
(Emphasis added)

Verifying the equity of benefits is absent from the Environmental Justice section of the DEIS. It fails to consider the possibility of disproportionate benefits being received by majority populations, to the detriment of the health and well-being of low-income communities and communities of color. An example of this: a recently filed civil rights lawsuit claims that BART patrons receive a larger per-capita share of public funds in the form of transit subsidies than do patrons of AC Transit. (See Exhibit 3, civil rights complaint.) As part of the lawsuit, plaintiffs assert that a substantially higher percentage of AC Transit's passengers are people of color, as compared to BART's passengers.

21-10

A strong inference can be drawn from the respective subsidy figures in the National Transit Database that AC Transit's passengers are short-changed by the construction of BART extensions, because these projects tie up such a large percentage of the region's transit expansion funds. In the Alternatives section, below, it will be seen that people of color receive much more in the way of per capita benefits under an Alternative where the WSX is not built, and funds are used instead on cost-effective Rapid Bus service throughout the region. Such benefits come in the form of more frequent service, less crowded service, longer service hours, cleaner buses, better amenities such as bus stops, and more frequent replacement of old buses.

21-11

The DEIS is incomplete in its analysis of environmental justice. The review of alternatives needs to especially look at what could be done to provide better transit service in Alameda County using the surplus funds that are freed up by not building WSX, or by building a much less expensive bus alternative project. The DEIS needs to be redone, and re-circulated with the new information.

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TRANSDEF is certain that implementation of the WSX project will lead to environmental injustice, in that people of color are being disproportionately denied the benefits of a large pot of federal and other transportation funding that is planned to go into WSX. The lives of these non-BART-riding people of color could be substantially improved if the funds for WSX were shifted instead to an inexpensive alternative, and to improving urban bus service.

21-11
cont.

The Alternatives Analysis is Flawed

A series of alternatives was improperly discarded from detailed study in this EIS, either on the basis of claimed superior ridership by the WSX Alternative, or because of incompatibility with SVRTC. This is problematic, for multiple reasons: First, FTA expressed "concerns regarding (1) the travel demand model and resulting technical analysis used during the Alternatives Analysis" (see Exhibit 2--Letter from FTA to VTA) for VTA's SVRTC environmental document. Because the ridership in this DEIS is derived from VTA's model, and because VTA's projections were used in the cumulative impact analysis, the projections must be considered suspect for this DEIS as well. Why should the ridership projections in the DEIS be considered reliable, while the SVRTC projections raise "concerns?"

21-12

Second, the Bus Alternative is projected to have almost the same level of ridership as WSX, with the differences likely to be within the margin of error for the travel demand model. Because the costs of bus are certain to be dramatically lower than BART, this alternative needed to be fully studied. Because the entire DEIS rests on the assertion that WSX has independent utility, comparing VTA's Enhanced Bus Alternative's ridership to SVRTC + WSX projections must not be allowed to be primary in selecting the preferred alternative, because the Bus Alternative meets the project purpose and need, and at a much lower cost, to boot. For a stand-alone WSX DEIS to be valid, the Bus Alternative may not be discarded because of SVRTC. Either there truly are two projects here, each independent and standing alone, or there is only one project, where SVRTC considerations are primary. BART cannot have it both ways.

21-13

Third, the Commuter Rail Alternative should have been studied, using a conventional gauge commuter rail project. Eliminating such an alternative by cynically claiming that BART is commuter rail impermissibly narrows the alternatives under consideration by eliminating a reasonable alternative, especially when the unit cost of BART is so much higher. Discarding this alternative because of incompatibility with the SVRTC project is further proof that WSX is functionally only a segment of SVRTC, without independent utility.

21-14

Fourth, and most important, the DEIS should have compared the cost-effectiveness of a series of alternatives. It failed to do this. A series of alternatives with allegedly lower ridership was impermissibly discarded, prior to any comparison of cost-effectiveness. Page 3-36 claimed that double transfers would reduce LRT ridership levels below those

21-15

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of WSX. This conclusion was an inadequate analysis because it failed to consider the dramatically lower cost of light rail. Decisionmakers must be presented with the per-passenger costs of a series of alternatives.

Similarly, this statement on page 3-34 was unsubstantiated: "In addition, they [chauffeur-driven limousines from Warm Springs to Fremont] would not provide transportation services that would make efficient and effective use of financial resources." Without cost calculations, the only reliable conclusion that can be drawn is that chauffeur-driven limousines would not convey the public appearance of "mak[ing] efficient and effective use of financial resources." Please note that, at no point in the DEIS is there a demonstration that the WSX Alternative makes 'efficient and effective use of financial resources.' The DEIS cannot assume that BART is such a responsible public agency that it would always 'make efficient and effective use of financial resources.' Too much history proves the contrary.

21-15
cont.

The appropriate place to demonstrate the cost-effectiveness of WSX would be in a comparison of alternatives, including at least taxi, limousine, LRT, commuter rail, and BRT. TRANSDEF strongly suspects that each of these alternatives makes more efficient and effective use of financial resources than the WSX Alternative. To justify the WSX project, the per-passenger costs need to be analyzed.

Finally, fifth, the Bus Alternative was allegedly discarded because "it would not have been as successful as the WSX Alternative in promoting transit-oriented development or in supporting smart, efficient, and desirable growth patterns." (page 3-39) What evidence is there to demonstrate that a BART extension has ever been "successful ... in promoting transit-oriented development or in supporting smart, efficient, and desirable growth patterns"? In the absence of such evidence, the Bus Alternative must be considered to be equally effective "in supporting smart, efficient, and desirable growth patterns." The Bus Alternative must be fully analyzed.

21-16

To remedy the defective Alternatives Analysis, the DEIS must be re-written and recirculated for a new round of comment. In issuing a Revised DEIS, two new alternatives should be studied in the Cumulative Impacts analysis. The first should be the Altamont alignment for the California High Speed Rail project, using the design specifics identified as the Preferred Alternative by the High Speed Rail Commission. The second should be the Altamont alignment of High Speed Rail contained in the TRANSDEF Smart Growth Alternative, which was studied by MTC in the 2005 RTP EIR. The Alternative contained an implementation of the California High Speed Rail system via the Altamont Pass, connecting Fremont directly via rail to San Jose, San Francisco, Livermore and the Central Valley. The purpose of evaluating these alternatives is to gather an understanding of comparative costs and the right-of-way conflict between that alternative and the WSX Alternative in the proposed WSX corridor. For route information, see: Exhibit 4, TRANSDEF Smart Growth Alt. HSR, and Exhibit 5, TRANSDEF

21-17

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HSR detail. Please note that the TRANSDEF Alternative out-performed the adopted RTP at a much lower cost.

21-17
cont.

The RDEIS should also look to see if any further alternatives arise from the Regional Rail study now being conducted by MTC. Issues to evaluate would be comparative operations and capital costs, compatibility with WSX, and land use impacts.

21-18

This Project's Finances are in Grave Doubt

Given the State's financial problems, it is highly unlikely that the State Transportation Congestion Relief Program will be providing \$111 million. The funding from SamTrans is in doubt as well. The poor performance of BART's SFO extension means that no surplus is being generated from which SamTrans is expected to pay \$145 million. The terms of Measure B state that no construction funds will be released until the project is fully funded into Santa Clara County (see Exhibit 1, Measure B and Warm Springs.) Full funding for the San Jose Extension is dubious as well, with acknowledgment by VTA that at least one other sales tax is needed to be able to build and operate BART, with no assurance that the rest of the Measure A list of projects can be built.

21-19

These comments include by reference all other comments submitted by the public and by public agencies. We appreciate this opportunity to assist FTA in accessing a range of ideas and perspectives about this project.

Sincerely,

/s/ David Schonbrunn

David Schonbrunn,
President

CC: Leslie Rogers, FTA

Attachments:

- Exhibit 1, Measure B and Warm Springs
- Exhibit 2, Letter from FTA to VTA
- Exhibit 3, Civil rights complaint
- Exhibit 4, TRANSDEF Smart Growth Alt. HSR
- Exhibit 5, TRANSDEF HSR detail

Alameda County Transportation Improvement Authority
July - September 2004 Quarterly Report

**BART Extension to Warm Springs
Fremont**

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ACTIA 2

APR 23 2005



Project Sponsor:
San Francisco Bay Area Rapid Transit District (BART)

Project Coordinator:
Rebecca Kohlstrand,
510.267.6123

Detailed Project Description:
The BART Extension to Warm Springs is a 5.4-mile extension of the existing Fremont line with an optional station at Irvington.

Expenditure Plan Description:
This project funds a BART rail extension that will ultimately extend into Santa Clara County. Funds for construction of the BART rail extension to Warm Springs in Southern Fremont may not be used until full funding for the rail connection to Santa Clara County is assured. Project development, right-of-way, design, and station site development costs are eligible prior to securing full funding for the rail construction.

Project Status:
A Supplemental EIR was certified and adopted by the BART Board in June 2003. BART is proceeding with preparation of an EIS to qualify the project for federal funding. Publication of the DEIS is scheduled for late 2004 and environmental clearance is projected for Spring 2005. Preliminary engineering and right-of-way acquisition are proceeding. BART has requested additional ACTIA funding to purchase the UPRR right-of-way and up to six private parcels and a new Project Specific Funding Agreement was approved in September 2004. The Draft EIS/EIR for the Silicon Valley Rapid Transit Project (extension of transit service to Santa Clara) was released for public review in March 2004. Certification of the EIR is expected in December 2004, but the Record of Decision (ROD) for the EIS will not be issued until after the ROD for the Warm Springs Extension (WSX) is issued. Design contracts are underway for the BART to San Jose Project.

Cost Estimates (02/03):

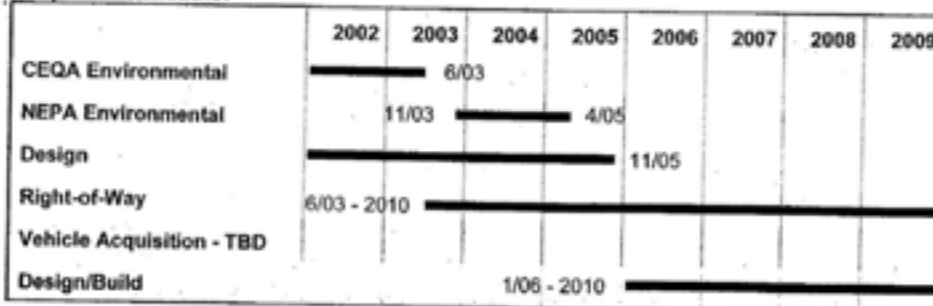
Project Development	\$29,290,000
Right-of-Way	\$86,000,000
Utilities	\$15,000,000
Construction	\$474,800,000
Vehicle Acquisition	\$90,410,000
Total	\$695,500,000

Note: Costs for Irvington Station are included only through the Environmental Phase.

Expenditure Plan (2000)

\$165,500,000

Proposed Schedule:



FTA to VTA 9 04

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U.S. Department of Transportation

Federal Transit Administration

REGION IX

Arizona, California, Hawaii, Nevada, Guam, American Samoa, Northern Mariana Islands.

201 Mission Street
Suite 2210
San Francisco, CA 94105-1839
415-744-3133
415-744-4726 (fax)

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APR 25 2005

SEP 17 2004

Mr. Peter Cipolla
General Manager
Santa Clara Valley Transportation Authority
3331 North 1st Street, Building C
San Jose, CA 95134-1906

Re: Silicon Valley Rapid Transit Corridor Project and FTA comments on the Draft Environmental Impact Statement

Dear Mr. Cipolla:

In a letter dated May 21, 2004, the Environmental Protection Agency (EPA) raised concerns about the Santa Clara Valley Transportation Authority's (VTA) Draft Environmental Impact Statement (DEIS) for the Silicon Valley Rapid Transit Corridor (SVRTC) project. Specifically, EPA noted that the SVRTC project and the Bay Area Rapid Transit District's Warm Springs Extension (WSX) are connected actions, as defined by the Council on Environmental Quality's regulations (40 CFR 1508.25) and recommended that the SVRTC project should not proceed ahead of the WSX project. FTA believes that completion of the National Environmental Policy Act (NEPA) review of the SVRTC project prior to the completion of the NEPA review of the WSX project would preclude an objective analysis of the WSX project.

To resolve this situation, FTA intends to cease Federal action on the SVRTC project until a Record of Decision has been issued on the WSX. During this suspension of Federal action, FTA will not obligate any additional grant funds for SVRTC project activities. VTA may continue to use other available resources to address issues and comments received during the recent public and interagency review of the DEIS. This suspension of Federal action does not remove the project from Preliminary Engineering (PE) status in VTA's New Starts pipeline, nor does it exempt the project from FTA's evaluation of its transportation justification and its local financial commitment for the *FY 06 Annual*

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FTA 0 V 1 A 2 0 4

Page 2 of 2

Report on New Starts.

As you are aware, FTA approved the SVRTC project into PE in September 2002, noting that concerns regarding (1) the travel demand model and resulting technical analysis used during the Alternatives Analysis, and (2) the operating financial plan and the ability of VTA to operate and maintain the existing bus and rail transit system during the construction and operation of the proposed major capital investment would have to be addressed during this phase of project development. Since that time, VTA has demonstrated very little progress in addressing these concerns, resulting in the current "Not Recommended" rating. We were disappointed that VTA did not take FTA's advice to identify a minimum operable segment, and instead chose to reduce the number of stations along the alignment. Unfortunately, this attempt to reduce project costs generated only modest savings, resulting in a proposed investment that continues to have one of the highest capital costs of any fixed-guideway project in FTA's New Starts pipeline. The situation is especially troublesome considering the poor financial condition of VTA, and the unusually high level of New Starts funding (approximately \$900 million proposed).

FTA is committed to assuring that the New Starts pipeline contains projects that demonstrate steady progress and are likely candidates for the consideration of a Full Funding Grant Agreement. Towards that end, FTA will work with you to identify several milestones within the project's development schedule that must be met as a condition for maintaining PE status for the SVRTC project. We will work with you and your staff on developing these milestones and conditions in the coming weeks.

If you have any questions about this letter please feel free to contact me, at (415) 744-3133.

Sincerely,

Leslie T. Rogers
Regional Administrator

copy to:

Lisa Rac, EPA
Tom Margro, BART
Steve Heminger, MTC

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APR 27 2005

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<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>BILL LANN LEE (State Bar No. 108452) blee@lchb.com</p> <p>NIREJ S. SEKHON (State Bar No. 213358) nsekhon@lchb.com</p> <p>LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP Embarcadero Center West 275 Battery Street, Suite 3000 San Francisco, CA 94111-3339 Telephone: (415) 956-1000 Facsimile: (415) 956-1008</p> <p>Attorneys for Plaintiffs Sylvia Darensburg, Virginia Martinez, Vivian Hain, and the Proposed Class; and Plaintiff Communities for a Better Environment</p> <p>PETER D. NUSSBAUM (State Bar No. 49682) pnussbaum@altshulerberzon.com</p> <p>DANIEL T. PURTELL (State Bar No. 147905) dpurtell@altshulerberzon.com</p> <p>LINDA LYE (State Bar No. 215584) llye@altshulerberzon.com</p> <p>ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN 177 Post Street, Suite 300 San Francisco, CA 94108 Telephone: (415) 421-7151 Facsimile: (415) 362-8064</p> <p>Attorneys for Plaintiff Amalgamated Transit Union Local 192</p> <p>(Counsel continued on next page)</p>	<p style="text-align: center;">UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA</p> <p style="text-align: center;">C</p> <p>SYLVIA DARENSBURG, VIRGINIA MARTINEZ, and VIVIAN HAIN, individuals on behalf of themselves and all others similarly situated; AMALGAMATED TRANSIT UNION, LOCAL 192; and COMMUNITIES FOR A BETTER ENVIRONMENT,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>METROPOLITAN TRANSPORTATION COMMISSION,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">05 01597</p> <p>COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 42 U.S.C. § 1983, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000d, ET SEQ., AND CAL. GOV. CODE § 11135</p> <p>[CLASS ACTION]</p>
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 U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

EDL

425427.2

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF

1	RICHARD A. MARCANTONIO (State Bar No. 139619) rmarcantonio@publicadvocates.org	WILLIAM B. ROSTOV (State Bar No. 184528) wrostov@cbeval.org
2	GUILLERMO MAYER (State Bar No. 235776) gmayer@publicadvocates.org	ADRIENNE BLOCH (State Bar No. 215471) abloch@cbeval.org
3	PUBLIC ADVOCATES, INC. 131 Steuart Street, Suite 300	COMMUNITIES FOR A BETTER
4	San Francisco, CA 94105	ENVIRONMENT
5	Telephone: (415) 431-7430	1611 Telegraph Avenue, #450
6	Facsimile: (415) 431-1048	Oakland, CA 94612
7	Attorneys for Plaintiffs Sylvia Darensburg, Virginia Martinez, Vivian Hain, and the	Telephone: (510) 302-0430
8	Proposed Class	Facsimile: (510) 302-0438
9		Attorneys for Plaintiff Communities for a Better Environment
10		
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COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF

INTRODUCTION

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2 1. This action challenges a longstanding pattern of race discrimination by Defendant
3 Metropolitan Transportation Commission ("MTC") in the funding of public transit services in the
4 San Francisco, California Bay Area. Plaintiffs Sylvia Darensburg, Virginia Martinez and Vivian
5 Hain, along with many members of the organizational plaintiffs are people of color who are riders
6 of the Alameda-Contra Costa Transit District ("AC Transit"), which operates the Bay Area's
7 largest bus-only transit system. Defendant MTC allocates significant transit funding sources to
8 each of the Bay Area's approximately twenty to thirty transit operators, including AC Transit.
9 Through its funding practices, Defendant MTC has historically engaged, and continues to engage,
10 in a policy, pattern or practice of actions and omissions that have the purpose and effect of
11 discriminating against poor transit riders of color in favor of white, suburban transit users.

12 2. AC Transit serves a ridership that is nearly 80% people of color. The Peninsula
13 Corridor Joint Powers Board ("Caltrain") and the Bay Area Rapid Transit District ("BART")
14 were from their very inception intended to serve disproportionately white suburban commuters.
15 Caltrain and BART continue to have much higher percentages of white transit riders than does
16 AC Transit.

17 3. Over many years Defendant MTC has channeled and continues to channel funds to
18 projects and programs that benefit the disproportionately white riders of Caltrain and BART, at
19 the expense of the disproportionately minority riders of AC Transit. As a result of Defendant
20 MTC's knowingly discriminatory funding practices, AC Transit bus riders receive a public
21 subsidy of \$2.78 per trip. By contrast, Caltrain riders receive \$13.79, almost five times that
22 received by AC Transit patrons, and BART riders receive \$6.14, more than double that received
23 by AC Transit riders.

24 4. These funding disparities created by Defendant MTC have a significant, adverse
25 effect on transit riders of color, who, as a result, receive a lower quality and quantity of transit
26 service from that received by riders of Caltrain and BART. In fact, at the same time that the level
27 of commuter rail service has experienced a steady increase, the level of bus services available to
28 riders of AC Transit has fallen precipitously. And the quality of that service has also fallen, while

1 suburban rail commuters have enjoyed first-rate transit service. These funding disparities also
2 adversely impact the environment and public health and safety of low-income communities of
3 color in Alameda and Contra Costa Counties.

4 5. Defendant MTC's funding preference for projects and programs that benefit
5 Caltrain and BART riders, but leave AC Transit riders behind, is not justified by any
6 transportation planning necessity. The Caltrain and BART projects and programs that Defendant
7 MTC funds and advocates for are vastly less cost-effective than the AC Transit projects and
8 programs that Defendant MTC consistently refuses to fund, or under-funds. Defendant MTC's
9 irrational funding practices undermine the basic and commonly-accepted transportation planning
10 principle of using limited transportation funds in a cost-effective manner.

11 6. Defendant MTC's funding practices harm transit riders of color who depend on
12 AC Transit to get to work or school, and to meet their daily needs, such as shopping for food and
13 clothing, getting to the doctor, and taking children to day care. Those riders suffer significant
14 adverse effects on a daily basis from Defendant MTC's funding practices. Plaintiffs file this class
15 action to bring a halt to Defendant MTC's discriminatory practices and to ensure that minority
16 bus riders share in the improvement of transit services that white suburban commuters enjoy.

17 JURISDICTION

18 7. This action arises under the Fourteenth Amendment to the United States
19 Constitution, 42 U.S.C. §1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et*
20 *seq.*, and Cal. Gov. Code §11135. Jurisdiction is conferred on this Court pursuant to 28 U.S.C.
21 §§1331, 1343, and 1367.

22 8. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C.
23 §§2201, 2202, Federal Rules of Civil Procedure 57 and 65, and the general legal and equitable
24 powers of this Court.

25 VENUE

26 9. Venue is proper under 28 U.S.C. §1391(b) because a substantial part of the events
27 or omissions giving rise to the Plaintiffs' claims occurred in this district.
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1 but to walk as many as thirty blocks to or from school. Defendants discriminate against Plaintiff
2 Martinez by providing her with lower transit subsidies than white Caltrain and BART riders and
3 by denying her equal transportation benefits.

4 13. Plaintiff Vivian Hain is a Latina resident of East Oakland, County of Alameda.
5 She has three children. Plaintiff Hain's household owns an old, polluting automobile, which is
6 inoperable for one or more weeks in an average month. During those periods, she and her family
7 depend on AC Transit buses to get to school, college classes, medical appointments, grocery
8 shopping, social services and volunteer activities. She and her family have suffered the
9 consequences of repeated AC Transit bus service cuts. As a result of those service cuts, Plaintiff
10 Hain and her family members have encountered significant obstacles in traveling to a wide
11 variety of destinations. Where previously Plaintiff Hain or her family members could ride only
12 one bus or two to get to necessary destinations, cuts in service now require two or three bus trips
13 in order to arrive at the same destinations. Plaintiff Hain's lack of access to a higher quality and
14 quantity of transit service has impeded her ability to complete her college course of study.
15 Similarly, Plaintiff Hain's 10-year-old daughter has difficulty getting to the magnet school in
16 which she is enrolled, which in turn interferes with her daughter's right to obtain a free, quality
17 public education. Defendants discriminate against Plaintiff Hain by providing her with lower
18 transit subsidies than white Caltrain and BART riders and by denying her equal transportation
19 benefits.

20 14. Plaintiff Communities for a Better Environment ("CBE") is a California
21 environmental health and justice non-profit organization that seeks to protect and enhance the
22 environment and public health. CBE has fought for cleaner air in the Bay Area for over twenty
23 years by, among other things, increasing and improving transit opportunities in the region. CBE
24 and another plaintiff organization brought successful litigation in 1989, against, *inter alia*, MTC
25 to enforce national standards for ozone and carbon monoxide to improve air quality in the Bay
26 Area. See *Communities for a Better Environment, et al. v. Deukemejian, et al.* (No. C-89-2044-
27 TEH) and *Sierra Club, et al. v. Metropolitan Transportation Commission, et al.* (No. C-89-2064-
28

1 TEH), filed June 13, 1989. Among other things, MTC was forced to adopt contingency
2 transportation control measures to improve air quality. See *id.*

3 15. Nearly twelve years later, CBE and a coalition of environmental, environmental
4 justice and community groups brought suit against MTC to improve Bay Area transit ridership to
5 improve air quality, reduce public health problems caused by air pollution, offer those residents
6 with cars a choice to use transit instead and afford those residents without vehicles a more viable
7 and affordable public transit system. See *Bayview Hunters Point Community Advocates, et al. v.*
8 *MTC, et al.* (No. C-01-0750 TEH) ("*Bayview*"), filed February 21, 2001. The suit sought to
9 compel MTC to implement a key 1982 transportation control measure that sought to ease the
10 region's air pollution woes by requiring MTC and transit operators to achieve by 1987 a 15
11 percent increase in Bay Area transit ridership from 1983 levels. The goal was to improve the
12 viability of transit as an alternative to automobile use, in order to shift people from cars onto
13 public transit and thereby reduce motor vehicle emissions. Eighteen years later, the measure had
14 yet to be implemented, and the ridership increase had never been realized. Despite a 30 percent
15 increase in population, there were roughly the same number of people riding transit in 2001 as in
16 1983. While transit ridership in the region as a whole remained roughly at 1983 levels, ridership
17 on the inner city transit systems fared much worse. AC Transit in the East Bay lost
18 approximately eight million annual boardings between 1983 and 2001. In light of the relief
19 plaintiffs in the *Bayview* action sought, *viz.*, to require MTC to achieve a 15 percent increase in
20 ridership over 1983 levels, a major area of litigation focused on MTC's power to effect an
21 increase in transit ridership. This in turn required extensive litigation over the nature and extent
22 of MTC's discretion to allocate available transportation funding for various purposes and the
23 relative cost-effectiveness of different transit projects.

24 16. CBE has members who are people of color who utilize AC Transit to serve their
25 transportation needs. CBE brings these claims in this action on behalf of itself and these
26 members, who would have standing to sue in their own right and whose personal participation in
27 this litigation is not necessary. Defendant discriminates against CBE's people of color members
28 by providing them with lower transit subsidies than white Caltrain and BART riders and by

1 denying them equal transportation benefits. Non-discriminatory funding would necessarily
2 include actions to improve public AC Transit service, which would have the effect of reducing
3 vehicle emissions.

4 17. Plaintiff Amalgamated Transit Union, Local 192 ("ATU 192") is a labor
5 organization that represents employees who live and work in the Bay Area. The objects and
6 principles of ATU 192, as set forth in the Constitution and General Laws of its International
7 Union, include: "To engage in such legislative, political, educational, cultural, social, and welfare
8 activities as will further the interests and welfare of the membership of the organization." ATU
9 192 has members who are people of color who use AC Transit to serve their transportation needs.
10 ATU 192 brings this suit on behalf of itself and these members, who would have standing to sue
11 in their own right and whose personal participation in this litigation is not necessary. Defendant
12 MTC discriminates against ATU 192's people of color members by providing them with lower
13 transit subsidies than white Caltrain and BART riders and by denying them equal transportation
14 benefits.

15 **DEFENDANT**

16 18. Defendant MTC is the transportation planning, financing and coordinating agency
17 for the Bay Area, which consists of the Counties of Alameda, Contra Costa, Marin, Napa, San
18 Mateo, Santa Clara, Solano, and Sonoma and the City and County of San Francisco.

19 19. Pursuant to state law, Defendant MTC is a local area planning agency, and not a
20 part of the executive branch of the state government. Cal. Gov. Code §66502.

21 20. Defendant MTC is the metropolitan planning organization and designated recipient
22 of federal transportation funds for the San Francisco Bay Area. 23 U.S.C. §134(b); 49 U.S.C.
23 §5303; 49 U.S.C. §5307(a)(2). Defendant MTC also receives tens of millions of dollars annually
24 in funds or financial assistance directly from the State of California by grant, contract, or
25 otherwise. It regularly employs five or more persons.

26 21. Defendant MTC makes funding decisions on a "continuous" basis. Cal. Gov.
27 Code §66513.

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COMPLAINT FOR INJUNCTIVE AND
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1 making declaratory and injunctive relief appropriate with respect to Plaintiffs Darensburg,
 2 Martinez, and Hain and the class as a whole. The members of the class are entitled to injunctive
 3 relief to end Defendant MTC's common, uniform, and unfair discriminatory personnel policies
 4 and practices.

5 **FACTUAL ALLEGATIONS**

6 29. A majority of the riders of AC Transit, Caltrain and BART, taken together, are
 7 people of color. However, the passengers of the Bay Area's largest bus-only operator, AC
 8 Transit, are disproportionately people of color, while the passengers of the two major essentially
 9 rail-only operators, Caltrain and BART, are disproportionately white. The disparity in the racial
 10 make-up of the ridership of these three operators is statistically significant.

11 30. Defendant MTC is aware that BART and Caltrain have historically served
 12 disproportionately white riders. For instance, according to a 1977 study that Defendant MTC
 13 itself commissioned, BART's "radial suburbs-to-downtown design" does not serve the "local-
 14 travel, blue-collar employment, and inner-city travel needs of minorities." The study found that
 15 "BART was designed primarily to carry long-distance suburban commuters (who are
 16 predominantly white) to downtown San Francisco and Oakland BART has not made a
 17 noticeable impact upon the mobility of ethnic minority residents. In particular, it has had very
 18 limited impact upon the mobility of low-income central city minorities." In its summary of the
 19 BART studies it commissioned in the 1970s, Defendant MTC wrote, "BART planning objectives
 20 did not place special emphasis on service to minorities"

21 31. For the same reasons, Caltrain - which like BART was designed primarily to carry
 22 long-distance suburban commuters - serves a population that is predominantly white and
 23 suburban. In fact, long before Caltrain took over operation of the Peninsula commuter lines from
 24 the state and a private company in 1992, the predecessor service was recognized, in another study
 25 commissioned by Defendant MTC, as "provid[ing] very poor service to transit dependents," a
 26 term defined by the authors of the study as "minority, elderly, handicapped or low income"
 27 persons.

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1 32. Caltrain and BART continue to serve a disproportionately white ridership. While
2 whites make up 35% of the collective ridership of AC Transit, Caltrain and BART, they account
3 for 60% of Caltrain riders and 43% of BART riders. And while African Americans have a
4 collective ridership on these three operators of 22%, they account for only 4% of Caltrain riders
5 and only 14% of BART riders. Caltrain and BART riders are also wealthier than AC Transit
6 riders. Only 13% of Caltrain riders have yearly household incomes below \$30,000. Over half
7 (52%) of all Caltrain riders have annual household incomes above \$75,000, and more than one
8 third (35%) report annual household incomes over \$100,000. Only 25% of BART's riders have
9 annual household incomes of less than \$30,000.

10 33. While 65% of transit riders on these three transit systems are people of color, AC
11 Transit, with a ridership that is nearly 80% people of color, serves a disproportionately high
12 percentage of people of color. While African Americans account for only 22% of all riders on
13 these three transit systems, they account for more than one-and-a-half times that percentage, 37%,
14 of AC Transit's riders. Moreover, AC Transit's riders are also predominantly low-income: 57%
15 have annual household incomes below \$30,000 and 72% qualify as either extremely low income
16 (up to 30% of the area median income) or very low income (31 to 50% of the area median
17 income).

18 34. Sixty-one percent of AC Transit riders rely entirely on public transit for their
19 everyday transportation needs. By contrast, only 14% of Caltrain riders and only 22% of BART
20 riders are transit dependent.

21 35. In its roles as regional transportation planning agency, federal metropolitan
22 planning organization, and designated recipient of federal transportation funds, Defendant MTC
23 is responsible for the planning, programing, and allocation of a variety of federal, state, and
24 local transportation funds, approximately \$1 billion each year, to the 20 to 30 transit operators
25 within its jurisdiction, including AC Transit, Caltrain and BART.

26 36. Defendant MTC also acts as an advocate and sometimes sponsor for funding from
27 these and other sources for specific transit projects. Often, such projects cannot receive funding
28 without Defendant MTC's action or support.

1 37. Defendant MTC also monitors the budgets of the transit operators within its
2 jurisdiction.

3 38. In overseeing and allocating transportation funds for the Bay Area, Defendant
4 MTC determines the amount of money that flows to each of these transit operators for new capital
5 projects and existing programs, including operations and maintenance of these systems. It also
6 decides which of several permissible uses of the funds it distributes will be allowable ones in the
7 Bay Area. Most recently, it is responsible for the decision to curtail AC Transit's ability to make
8 flexible use of federal "formula" funds to cover preventive maintenance costs, an allowable use of
9 those funds under federal law. Through the power of the purse strings, Defendant MTC decides
10 which transit needs, among those of the Bay Area's diverse communities, will be met and, if so,
11 the quantity and quality of service.

12 39. By virtue of its roles as regional transportation planning agency and metropolitan
13 planning organization for the Bay Area, Defendant MTC exercises significant influence, through
14 its advocacy efforts or lack thereof, before the state and federal governments, over the
15 transportation projects and programs that are selected to receive funding from state and federal
16 sources and the level at which these projects and programs are funded. Thus, even where state or
17 federal legislation earmarks transportation funds, rather than granting Defendant MTC discretion
18 to allocate the funds, Defendant MTC is often responsible for the allocation set forth in the
19 legislation. Even when opportunities have arisen for Defendant MTC to support changes in state
20 or federal law that would provide funding benefits to AC Transit passengers, Defendant MTC has
21 either been hostile to such changes or has declined to play more than a perfunctory role in
22 attempting to secure the changes.

23 40. In the case of most public transit operators, including AC Transit, Caltrain and
24 BART, the fare paid by a passenger does not support the actual cost of the trip that the passenger
25 takes. "Subsidy per passenger trip" is the most appropriate way to measure subsidization of
26 public transit systems. This figure is calculated from data contained in the National Transit
27 Database, which is maintained by the Federal Transit Administration. By exercising its
28 significant discretion over the region's transportation purse strings, Defendant MTC plays a

1 determinative role in the amount of the subsidy per passenger trip received by the riders on each
2 of the region's public transit operators.

3 41. Between 1989 and 2003, the most recent year for which data is publicly available,
4 AC Transit riders, who are disproportionately people of color, each received an average subsidy
5 per passenger trip of approximately one-fifth that received by Caltrain riders and less than half
6 that received by BART riders. The greater the white ridership of the transit operator, the greater
7 the subsidy per passenger trip. Conversely, the more the ridership is composed of people of
8 color, including African Americans, the smaller the subsidy per passenger trip.

9 42. Although Defendant MTC has long known that its funding policies have an
10 adverse impact on poor, transit dependent AC Transit riders of color, it has consistently refused
11 and continues to refuse to implement recommendations that would mitigate the harmful effects of
12 its funding decisions or to refrain from engaging in actions that exacerbate such effects. For
13 example, in 2001 a group of 39 African-American ministers wrote to Defendant MTC seeking
14 equity in the funding between AC Transit and commuter rail services. The ministers pointed out
15 that Defendant MTC ranked an AC Transit bus project in the Richmond area of western Contra
16 Costa County, with a population that is 69% minority, as the most cost-effective project
17 considered in Defendant MTC's current Regional Transportation Plan, adopted in 2001. (The
18 Plan is a long range planning document in which Defendant MTC identifies the total pool of
19 available transportation funding available over a twenty-year horizon and decides how to allocate
20 those funds.) Nevertheless, Defendant MTC devoted almost half of the discretionary funds
21 committed to transit in its 2001 Regional Transportation Plan (\$2.3 billion out of \$4.8 billion) to
22 the least cost-effective projects, two commuter rail projects – one for Caltrain and the other for
23 BART – both designed to serve disproportionately white, suburban populations, and chose not to
24 fund the extraordinarily cost-effective bus project for which the Richmond ministers had
25 advocated. The most recent example of MTC's inequitable distribution of discretionary funds is
26 occurring at this very moment. In adopting the 2004 Transportation Improvement Plan ("TIP"),
27 MTC did not distribute its full allocation of federal funds under two programs, known as the
28 CMAQ and STP programs. After adopting the TIP, and with no public process or public input of

1 any kind, MTC staff recently proposed allocating an additional \$105.5 million in CMAQ and STP
2 funds. Of the \$22.5 million in funds that staff proposed to allocate to transit operators, \$6.9
3 million was directed to BART and \$9.28 million to Caltrain. MTC proposes to allocate none of
4 this \$105 million to AC Transit, despite the fact that AC Transit has projects that could have been
5 funded under the "strategic expansion" category, to which MTC proposes to allocate \$55 million.

6 43. If Defendant MTC refrained from engaging in its discriminatory funding practices,
7 it could instead, but has repeatedly declined to, support and fund projects and programs that
8 improve transit for the transit dependent and inner-city / urban dwellers, which are an effective
9 means of improving air quality by removing some of the dirtiest vehicles from the road and by
10 substantially reducing auto vehicle miles traveled. Defendant MTC could also support and fund
11 projects and programs that would provide transit riders in low-income communities of color with
12 bus shelters, greater security, night routes, seating during peak and non-peak hours, and greater
13 access to doctors and hospitals.

14 44. While Defendant MTC is required by federal law to include the public in its
15 transportation planning process, including the process of making crucial funding decisions,
16 Defendant MTC pays little if any heed to public input, suggestions, or constructive criticism
17 designed to mitigate the harm of its funding practices on low-income communities of color. In
18 this, and other ways, Defendant MTC departs from procedural transportation planning norms.

19 45. Defendant MTC also consistently departs from and indeed undermines substantive
20 transportation planning norms. It is a central guiding principle of long-range transportation
21 planning that transportation projects should provide the greatest transportation benefits for the
22 greatest number of people, and an exceedingly important criterion used by transportation planners
23 in determining how to invest capital funds is the proposed project's cost per new rider. Under
24 this criterion, proposed expansions of and improvements to existing bus service are much more
25 cost effective than proposed expansions of and improvements to rail service. Defendant MTC
26 nevertheless consistently channels scarce transportation funds to cost-ineffective rail expansion
27 projects that benefit Caltrain and BART riders at the expense of AC Transit riders.

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COMPLAINT FOR INJUNCTIVE AND
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1 46. For example, in the 2001 Regional Transportation Plan, the potential package of
2 new bus projects considered by Defendant MTC as a whole was 750% more productive in
3 converting transit funds into new riders than the list of new rail projects. In the "Blueprint" for
4 the Regional Transportation Plan, 19 of the 20 most cost-effective projects that Defendant MTC
5 evaluated were bus projects. Despite the greater cost-effectiveness of these bus projects,
6 Defendant MTC chose to fund cost-ineffective rail projects and deny funds to cost-effective bus
7 projects. The Regional Transportation Plan's extension of BART to San Jose had a projected cost
8 per new rider of as much as \$100, while the electrification of Caltrain and its extension to
9 downtown San Francisco were projected to cost as much as \$26 per new rider. The total
10 estimated cost of the BART extension was over \$4 billion and the estimated cost of the Caltrain
11 project was approximately \$1.5 billion. While approving these enormously expensive rail
12 projects, Defendant MTC refused to fund a project for bus riders in the poor, largely African-
13 American Richmond area in Western Contra Costa County that would have cost merely \$0.75 per
14 new rider, for a total estimated project cost of only \$700,000. At about the same time, Defendant
15 MTC refused to adequately fund a pilot project designed to ensure that low-income middle-and-
16 high school students in the AC Transit service area could receive free bus passes so that they
17 could regularly access school, work, and other essential activities.

18 47. Bus programs also operate more cost effectively than rail programs. By
19 channeling disproportionate sums of new capital funds to cost-ineffective rail projects, Defendant
20 MTC creates an ever-expanding rail system with, by MTC's own admission, unsustainable and
21 ever-increasing needs for operating subsidies. This practice not only limits the pool of funds
22 available to improve bus service through new projects, but it also starves the existing bus system
23 by draining the limited pool of funds available for allocation to bus programs for operations,
24 maintenance, and related purposes.

25 48. Defendant MTC continues to engage in these and other discriminatory funding
26 practices, even though it knows they are discriminatory.

27 49. Defendant MTC ostensibly employs both subjective and objective funding criteria
28 in deciding how to allocate funds to, and in advocating for state and federal moneys for the

1 projects and programs that benefit riders of the region's transit operators. Its funding decisions
2 nevertheless reflect a subjective policy, pattern or practice of preferring projects and programs
3 that discriminatorily benefit Caltrain and BART riders over those that benefit AC Transit riders
4 for funding.

5 50. This policy, pattern or practice of discriminatory funding includes, but is not
6 limited to, the following: (1) Defendant MTC establishes funding criteria that favor projects and
7 programs that benefit rail over bus riders; (2) Defendant MTC applies its own funding criteria and
8 financial controls over transit operators inconsistently, to the disadvantage of AC Transit riders;
9 (3) Defendant MTC declines to allocate discretionary funds for the benefit of AC Transit riders in
10 a manner comparable to its allocation of discretionary funds for the benefit of Caltrain and BART
11 riders; and (4) Defendant MTC advocates with state and federal legislatures more aggressively on
12 behalf of Caltrain and BART riders than AC Transit riders, for example, by giving Caltrain and
13 BART projects a higher priority than AC Transit projects, requesting more money for projects
14 and programs that benefit Caltrain and BART riders than AC Transit riders, and advocating for
15 funds to be committed by law to projects and programs that benefit Caltrain and BART riders, but
16 not advocating for similar earmarking of funds for projects and programs that benefit AC Transit
17 riders.

18 51. Plaintiffs allege in the alternative and on information and belief that Defendant
19 MTC's policy, pattern or practice of discriminatory funding is not separable for purposes of
20 analysis.

21 52. Pursuant to Defendant MTC's pattern or practice of discriminatory funding,
22 Defendant MTC has consistently channeled and continues to channel more money and support to
23 projects and programs that benefit Caltrain and BART riders than to projects and programs that
24 benefit AC Transit riders.

25 53. The resulting subsidy disparity harms Plaintiffs, members of Plaintiffs ATU 192
26 and CBE, and plaintiff class members (hereinafter "Plaintiffs and Plaintiff Class Members").
27 Defendant MTC is aware of the subsidy disparity caused by its funding practices and the
28 continuing harms that it causes to Plaintiffs and Plaintiff Class Members.

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1 54. Defendant MTC's funding practices deny equal transit opportunities and benefits
2 to Plaintiffs and Plaintiff Class Members. For example, due to defendant's funding practices,
3 Plaintiffs and Plaintiff Class Members receive a quality and quantity of service that is inferior to
4 that received by Caltrain and BART riders. Historically, while Caltrain and BART riders have
5 enjoyed increasing service, Plaintiffs and Plaintiff Class Members have suffered service cuts,
6 including cuts to critical evening and night-time service which for many provides their only
7 means for commuting to and from work.

8 55. Moreover, service reductions fall harder on Plaintiffs and Plaintiff Class Members
9 than on Caltrain and BART riders. A majority (61%) of AC Transit riders are transit-dependent
10 (compared to only 22% of BART riders and 14% of Caltrain riders) and thus have no alternative
11 means of getting to work, school, and other essential locations. Diminished transit services thus
12 inflict other injuries on Plaintiffs and Plaintiff Class Members, such as lost job opportunities, and
13 diminished access to education and health care.

14 56. Plaintiffs and Plaintiff Class Members also experience an inferior quality of transit
15 service and fewer amenities than Caltrain or BART riders in ways that are not easily quantified.
16 For example, bus service is less reliable, waiting conditions are less safe, convenient, and pleasant
17 for Plaintiffs and Plaintiff Class Members than Caltrain or BART riders. Plaintiffs and Plaintiff
18 Class Members also ride dirtier vehicles and feel less personally secure while waiting for service
19 than Caltrain or BART riders.

20 57. Furthermore, the subsidy disparity resulting from defendant's discriminatory
21 policy, pattern or practice of discriminatory funding constitutes a harm to Plaintiffs and Plaintiff
22 Class Members in itself. For instance, defendant's discretionary funding sends the message that,
23 in the eyes of the government, they are not equal participants in the community and are worth less
24 than their white counterparts on Caltrain and BART.

25 58. Defendant MTC itself, as discussed above, has documented that both Caltrain and
26 BART were originally planned and designed to serve disproportionately white suburban
27 communities, rather than urban and inner city area in which disproportionate numbers of people
28 of color reside.

FIRST CAUSE OF ACTION

(Fourteenth Amendment and 42 U.S.C. §1983 - Equal Protection)

59. Plaintiffs incorporate paragraphs 1 to 58 by reference.

60. Defendant MTC's prior, current, and on-going policies, patterns, practices, procedures and/or customs of funding transportation projects and services on AC Transit, Caltrain and BART deprive Plaintiffs and Plaintiff Class Members of their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 because they have the purpose of discriminating against transit riders on the basis of race and national origin.

61. As a direct and proximate result of Defendant MTC's unlawful conduct, Plaintiffs and Plaintiff Class Members have suffered irreparable harm and this harm will continue absent injunctive relief.

SECOND CAUSE OF ACTION

(Title VI and 42 U.S.C. §1983 - Purposeful Discrimination)

62. Plaintiffs incorporate paragraphs 1 to 61 by reference.

63. Defendant's prior, current, and on-going policies, patterns, practices, procedures and/or customs of funding transportation projects and services on AC Transit, Caltrain and BART deprive Plaintiffs and Plaintiff Class Members of their rights under Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.* and 42 U.S.C. §1983 because they have the purpose of discriminating against transit riders on the basis of race and national origin. Defendants receive federal funds.

64. As a direct and proximate result of Defendant MTC's unlawful conduct, Plaintiffs and Plaintiff Class Members have suffered irreparable harm and this harm will continue absent injunctive relief.

THIRD CAUSE OF ACTION

(Cal. Gov. Code §11135 - Purposeful and Disparate Impact Discrimination)

65. Plaintiffs incorporate paragraphs 1 to 64 by reference.

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1 5. to permanently enjoin Defendant MTC from making any funding decision that has
 2 an unjustified disproportionately adverse impact on AC Transit riders of color, including
 3 decisions that cause an inequitable subsidy per passenger trip and/or an inequitable quantity and
 4 quality of service for AC Transit passengers as compared to Caltrain or BART passengers;

5 6. to permanently enjoin Defendant MTC from supporting the funding of or funding
 6 any improvement or expansion in service that detracts from the equitable funding of services that
 7 benefit AC Transit riders;

8 7. to award Plaintiffs their reasonable attorney's fees, costs, and expenses, pursuant
 9 to 42 U.S.C. §1988, Cal. Code Civ. Proc. §1021.5, and other applicable law; and

10 8. to grant such other and further relief as this Court should find just and proper.

11 Dated: April 19, 2005

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

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13
14 By: 

Bill Lann Lee

15 Bill Lann Lee
 16 Nirej S. Sekhon
 17 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
 18 Embarcadero Center West
 275 Battery Street, Suite 3000
 San Francisco, CA 94111-3339
 Telephone: (415) 956-1000
 Facsimile: (415) 956-1008

*Attorneys for Plaintiffs Sylvia Darensburg, Virginia
 Martinez, Vivian Hain, and the Proposed Class; and
 Communities for a Better Environment*

22 Peter D. Nussbaum
 23 Daniel T. Purtell
 Linda Lye
 24 ALTSHULER, BERZON, NUSSBAUM, RUBIN &
 DEMAIN
 177 Post Street, Suite 300
 San Francisco, CA 94108
 Telephone: (415) 421-7151
 Facsimile: (415) 362-8064

*Attorneys for Plaintiff Amalgamated Transit
 Union Local 192*

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**Richard Marcantonio
Guillermo Mayer
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, CA 94105
Telephone: (415) 431-7430
Facsimile: (415) 431-1048**

*Attorneys for Plaintiffs Sylvia Darensburg, Virginia
Martinez, Vivian Hain, and the Proposed Class*

**William B. Rostov
Adrienne Bloch
COMMUNITIES FOR A BETTER ENVIRONMENT
1611 Telegraph Avenue, #450
Oakland, CA 94612
Telephone: (510) 302-0430
Facsimile: (510) 302-0438**

*Attorneys for Plaintiff Communities for a Better
Environment*

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DECLARATORY RELIEF

Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

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Overview for Modeling

The rail network proposed for inclusion in the RTP is based on the California High Speed Rail Authority's (CHSRA) standards for headway, operations, and fares. Detailed information to back up the plan presented here are available.

Two schedules have been provided for peak and off-peak service. The schedules show all trains, as anyone could utilize any of the trains for travel.

Fares and peak schedules are based on the CHSRA's *Independent Ridership and Passenger Revenue Projections for High Speed Rail Alternatives in California*.

"At each station, 2 or 4 trains per hour service could be provided for the three-hour A.M. and P.M. peak periods.....Fares were calculated based on a \$5.00 boarding charge plus 6.2 cents per mile traveled."

The alignment is based on an optimized version of the Altamont alignment.

Direct cross-platform timed transfers to BART are assumed at the Livermore and Fremont stations, via extensions to the existing BART system. Connection with BART is also possible at the Millbrae/SFO station.

Same platform transfers with Caltrain are available at Redwood City, Millbrae/SFO, and San Francisco Transbay.

Connections to the Capitol Corridor are at Fremont.

Connections to the VTA light rail are at Milpitas and San Jose.

Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Schedules

The schedules below are based on CHSRA performance standards for the proposed HSR trains. All trains are assumed to be HSR stock and therefore of equal performance.

San Francisco / San Jose to Tracy onwards - Peak Hour

KM	Station	SAC	LAX	STN	LAX	MOD	LAX	LAX	MOD	LAX	SAC
147	San Francisco	:07		:15	:26		:37			:56	
123	SFO Airport	:21		:29			:51				
103	Redwood City	:32		:40	:47		:02		:10	:17	
86	Newark			:48					:18		
103	San Jose		:30			:50		:00			:09
97	SJC Airport		:36			:56		:07			:16
91	Milpitas					:02		:13			:22
75	Fremont		:47	:55	:00	:09		:25	:30*	:33*	
56	Livermore	:51		:04		:18	:21	:28	:34		:43
47	Vasco			:10		:24			:40		:49
20	Tracy		:04	:21		:36	:33		:51		:01

San Francisco / San Jose to Tracy onwards - Non-Peak

KM	Station	LAX	LAX	SAC	LAX
147	San Francisco	:07	:37	:56	
123	SFO Airport	:21	:51		
103	Redwood City	:32	:02	:17	
86	Newark				
103	San Jose				:09
97	SJC Airport				:16
91	Milpitas				:22
75	Fremont	:45		:30*	:33*
56	Livermore		:21		:43
47	Vasco				
20	Tracy		:33		:57

Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Fares

Fares and peak schedules are roughly based on the CHSRA's *Independent Ridership and Passenger Revenue Projections for High Speed Rail Alternatives in California*.

"Fares were calculated based on a \$5.00 boarding charge plus 6.2 cents per mile (\$0.04/km) traveled."

It is assumed that the subsidy to pass holders would be paid for with the existing subsidies to the ACE train, ... which will be discontinued.

Using Monthly Pass:

per ride (one way)	
Within any Zone:	\$3.00
Two Adjacent Zones:	\$5.00
Any Three Zones:	\$7.00
Any Four Zones:	\$11.00

Single Ride:

per ride (one way)	
Within any Zone:	\$6.00
Two Adjacent Zones:	\$9.00
Any Three Zones:	\$12.00
Any Four Zones:	\$17.00



Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Stations

San Francisco Transbay Terminal - Share with Caltrain

SFO/ Millbrae - Share with Caltrain & BART

Redwood City - Share with Caltrain

Newark - see following map

San Jose - Share with Caltrain

SJC Airport - see following map

Milpitas - see following map

Fremont - - see following map

Livermore - see following map

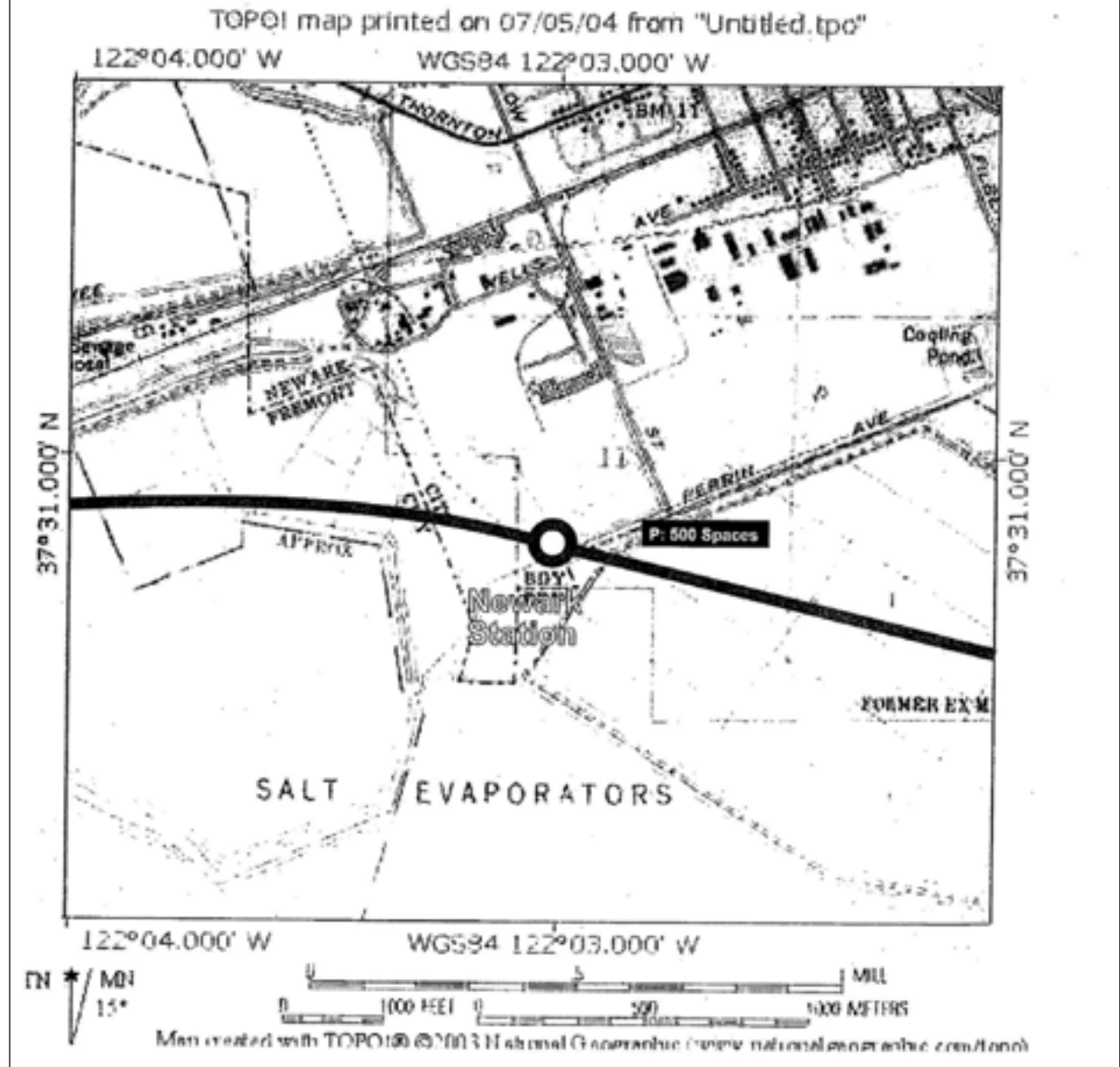
Vasco - see following map

Detailed map for entire line to Stockton and Modesto available upon request.



Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

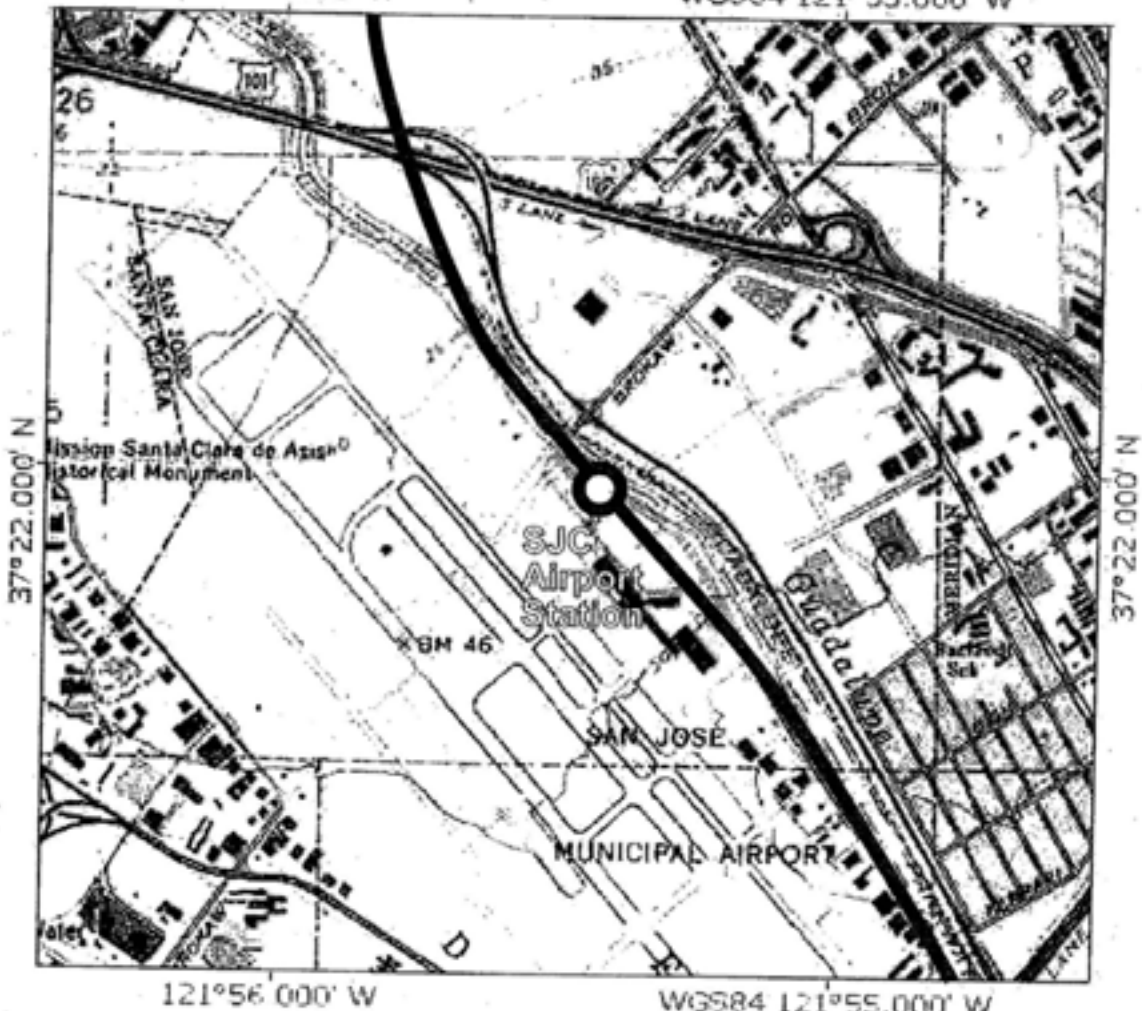
Stations - Newark



Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Stations - SJC Airport

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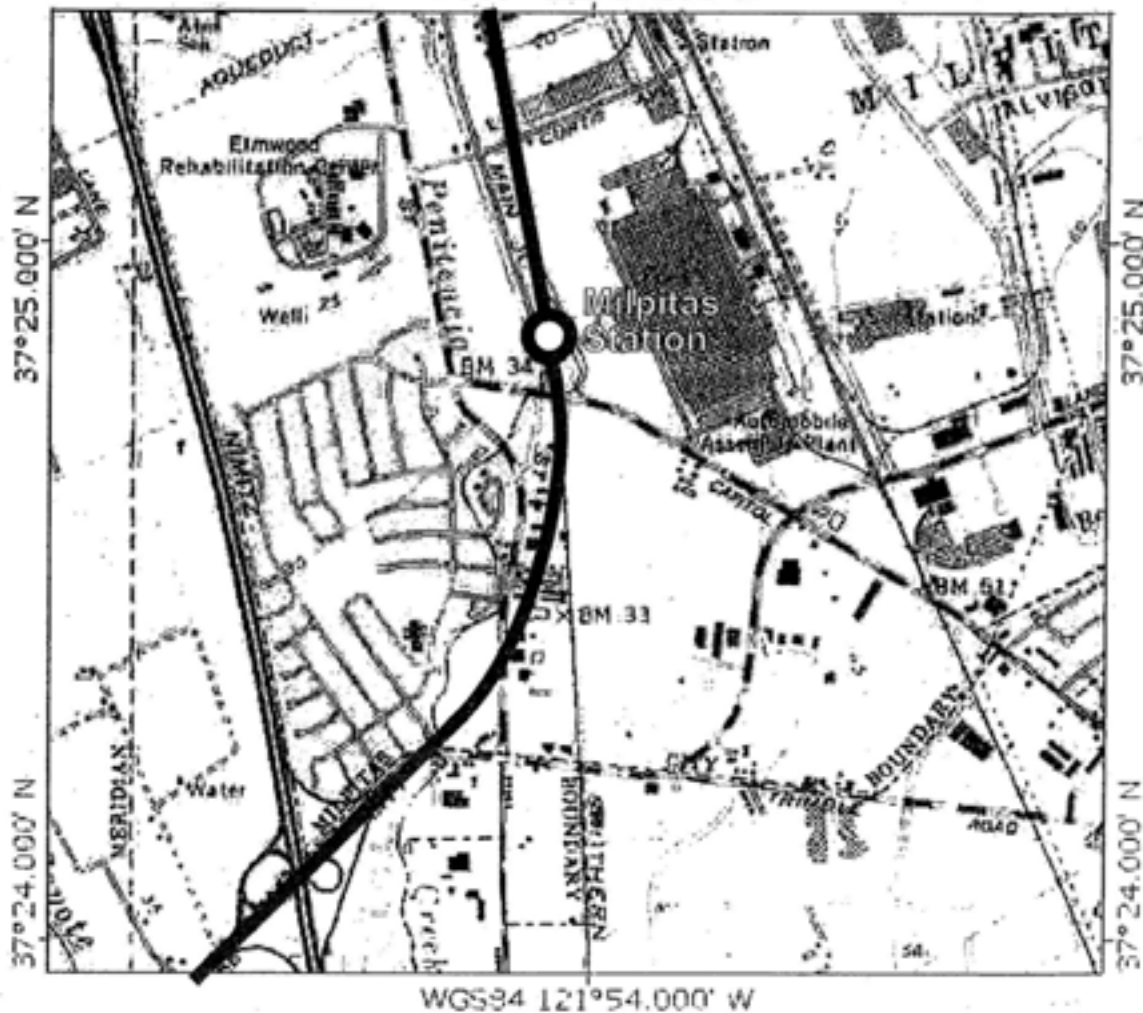
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Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Stations - Milpitas

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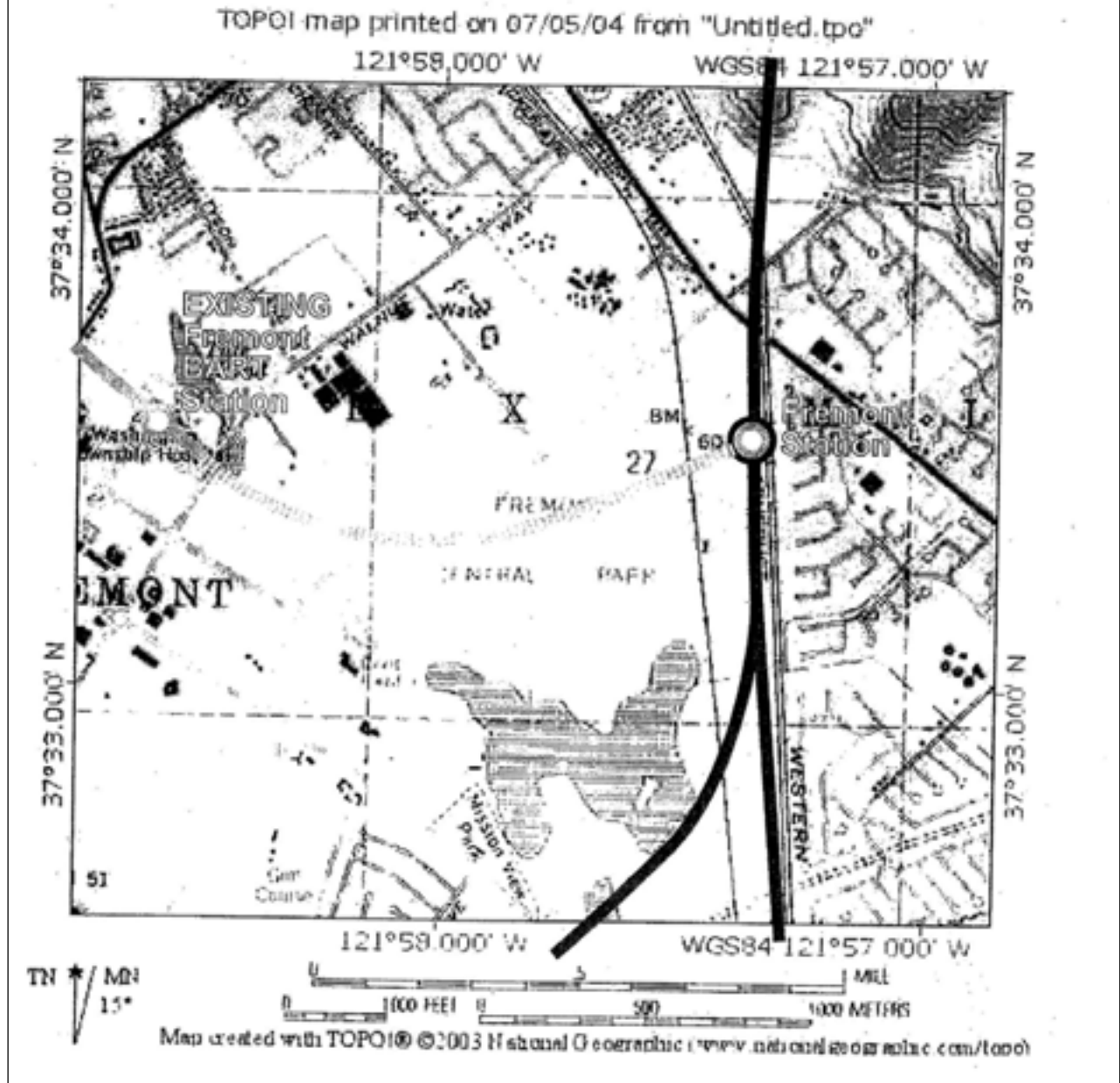
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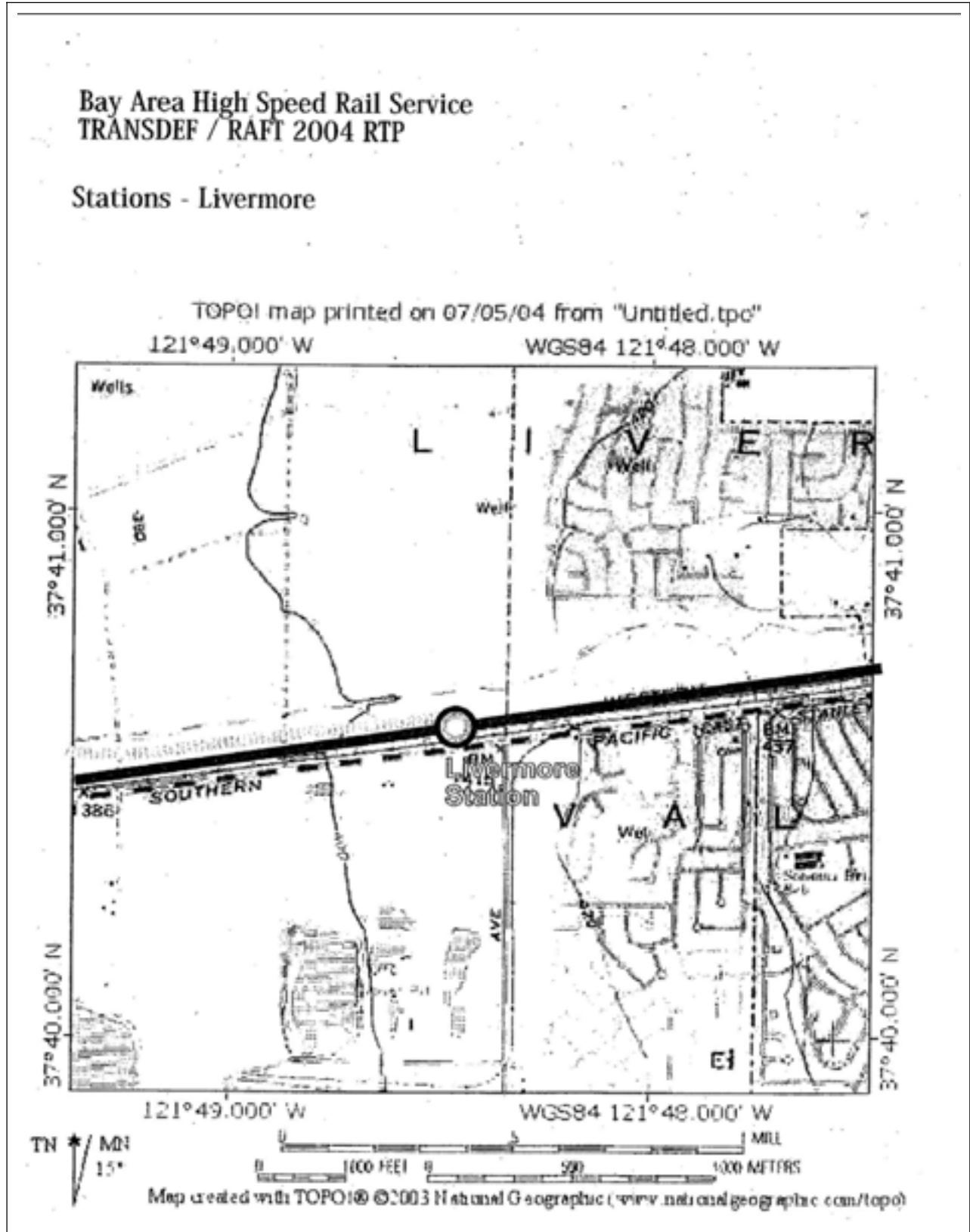
Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Stations - Fremont



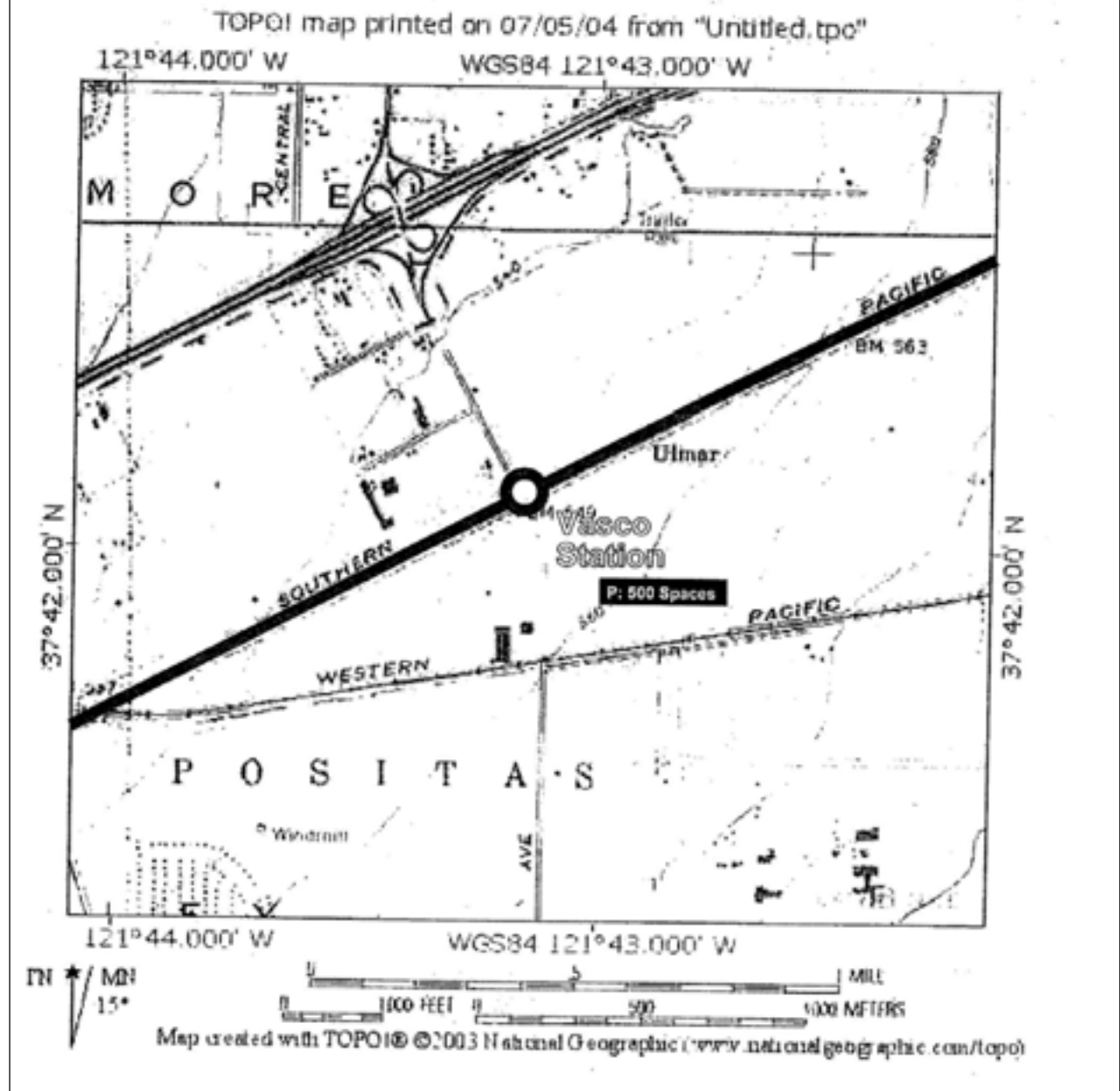
Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Stations - Livermore



Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Stations - Vasco Road



Bay Area High Speed Rail Service TRANSDEF / RAFT 2004 RTP

Fares

Fares and peak schedules are roughly based on the CHSRA's *Independent Ridership and Passenger Revenue Projections for High Speed Rail Alternatives in California*.

Fares were calculated based on a \$5.00 boarding charge plus 6.2 cents per mile (\$0.04/km) traveled.

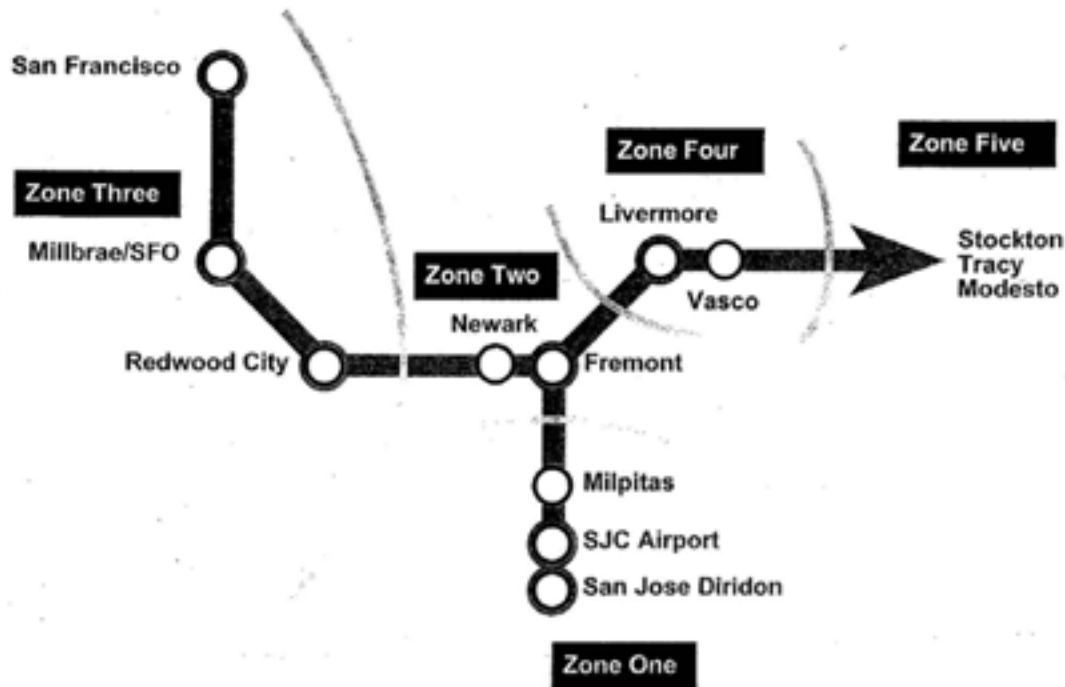
It is assumed that the subsidy to pass holders would be paid for with the existing subsidies to the ACE train, which will be discontinued.

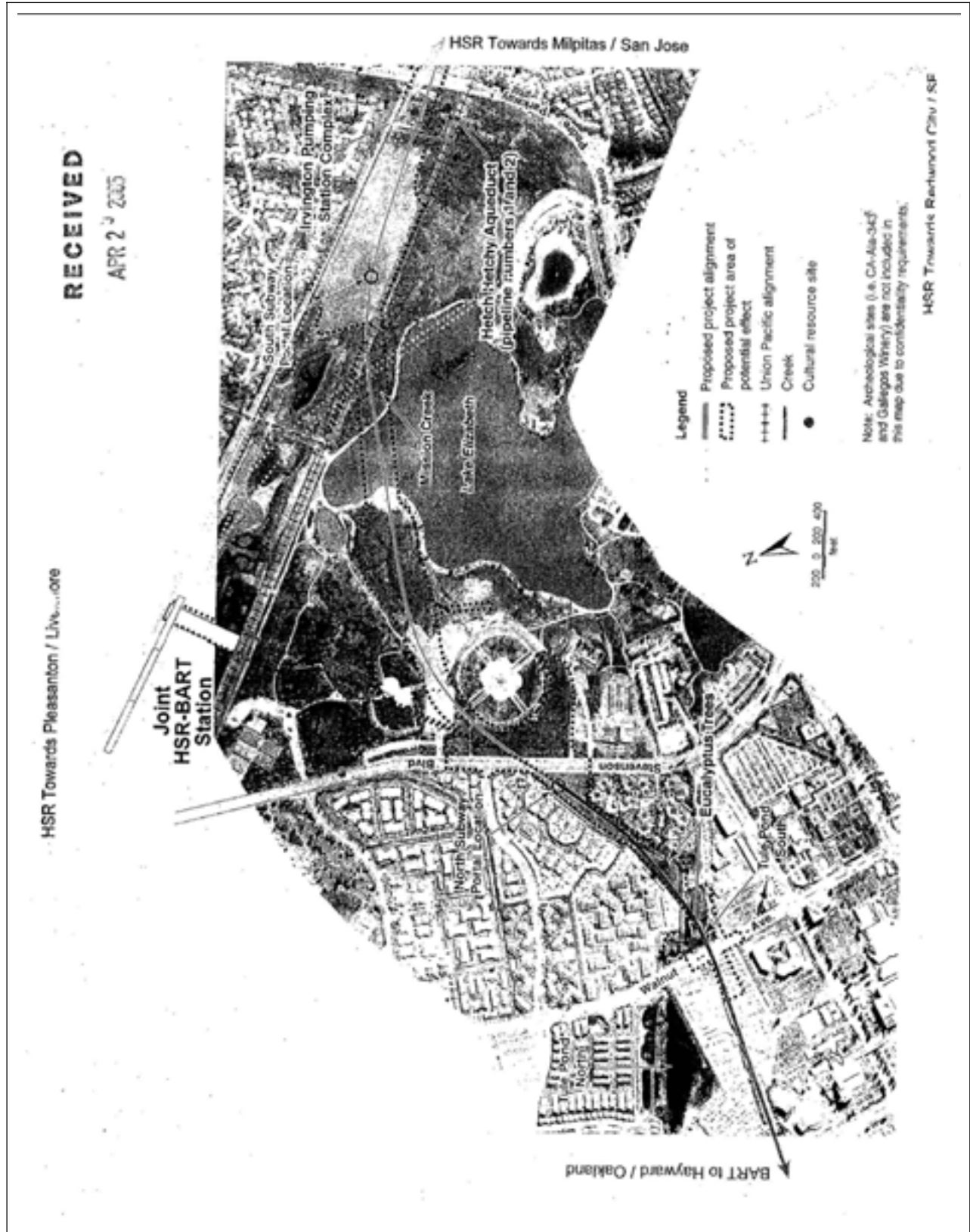
Using Monthly Pass:

per ride (one way)	
Within any Zone:	\$3.00
Two Adjacent Zones:	\$5.00
Any Three Zones:	\$7.00
Any Four Zones:	\$11.00

Single Ride:

per ride (one way)	
Within any Zone:	\$6.00
Two Adjacent Zones:	\$9.00
Any Three Zones:	\$12.00
Any Four Zones:	\$17.00





Response to Comment Letter 21

21-1: This comment generally addresses the merits of the WSX Alternative, rather than any issue with respect to the DEIS. It is not correct that the DEIS “assumes that the WSX will go forward.” The DEIS contains information and analysis concerning environmental impacts and benefits in order to inform decision-makers and the public, pursuant to the requirements of NEPA. “Areas of known controversy” are identified in the DEIS as required by NEPA. However, to the extent that this commenter’s comments are similar to those the commenter provided on the Supplemental Environmental Impact Report (SEIR), which BART prepared in 2003 under CEQA, the responses to those comments remain applicable. The DEIS demonstrates the benefits of the WSX Alternative in terms of transportation, land use, air quality and energy. (Please refer DEIS sections 4.1, “Introduction to Environmental Analysis,” 4.8, “Land Use and Planning,” 4.14, “Air Quality,” and 4.15, “Energy.”) BART’s Board of Directors will consider impacts, benefits, and costs in deciding whether to proceed with the project, as will FTA and other funding authorities in deciding whether to provide funding.

Regarding transit-oriented development (TOD), the DEIS clearly states that, while TOD is not part of the WSX Alternative itself and specific TOD projects must be developed through the City of Fremont’s planning process, creating a catalyst for future TOD opportunities is one of the purposes and the benefits of the WSX Alternative. (Please refer to DEIS pages 2-4 to 2-6, 4.8-22 to 4.8- 23, and 5-45 to 46.) The potential for TOD associated with the WSX Alternative is not “dubious” as the commenter suggests. It is well documented that private developers are likely to invest in the vicinity of fixed-rail stations. (For more information, see Michael Bernick and Robert Cervero,¹⁰ the City of Seattle,¹¹ the *Journal of Public Transportation*,¹² and White and McDaniel.¹³ While there is always some uncertainty in projections of future land uses, the City of Fremont is actively working with BART and other stakeholders to prepare a Specific Plan for the Warm Springs area, and have already proposed high-density land uses adjacent to the proposed station site. (Please see response to comment nos. 21-7 and 21-8 for additional details on TOD.)

21-2: The WSX Alternative is not illegally “segmented” from the Silicon Valley Rapid Transit Corridor (SVRTC) project proposed by the Santa Clara Valley Transportation Authority (VTA). Generally, the rule against “segmentation” is intended to prevent agencies from breaking large projects into smaller pieces in order to misleadingly reduce their environmental impacts. The commenter does not claim that any impacts were improperly disregarded in the DEIS. (As required by NEPA, the cumulative impacts of the WSX Alternative and SVRTC, as separate projects, were fully analyzed; see DEIS pages 5-3 to 5-41.) Moreover, incremental expansion of transportation systems through “connected” projects is permitted under NEPA, if each project has its own independent utility and logical termini. For reasons discussed in the DEIS (see page 5-2 to 5-3), the WSX Alternative has

¹⁰ Michael Bernick and Robert Cervero, *Transit Villages in the 21st Century*, McGraw-Hill, 1997.

¹¹ City of Seattle, *Transit-Oriented Development Case Studies-Twelve Analytical Rail Systems*, Strategic Planning Office, August 1999.

¹² “Benefits of Proximity to Rail on Housing Markets: Experiences in Santa Clara County,” *Journal of Public Transportation*, Vol. 5, No. 1, pp. 1 - 18, 2002.

¹³ S. M. White and J. B. McDaniel. “The Zoning and Real Estate Implications of Transit-Oriented Development.” *TCRP Legal Research Digest 12*. Transportation Research Board of the National Academies. 1999.

independent utility and logical termini. The Warm Springs Station site was selected as a terminus in 1992, long before the SVRTC project was proposed, based on prior analysis summarized in the DEIS (see pages 3-29 to 3-31). The possibility that the SVRTC project may be constructed does not render the Warm Springs Station location less logical as a terminus if the SVRTC is not constructed. The analyses presented throughout the DEIS demonstrate that the WSX Alternative functions as a meaningful standalone project, independent of the proposed SVRTC project. All analyses of the WSX Alternative's ridership and benefits consider the WSX Alternative by itself, except for the required analyses specifically identified as "cumulative impacts" of separate projects. While the proposed SVRTC project, if it is constructed, would further enhance the benefits provided by the WSX Alternative, that fact does not diminish the WSX Alternative's independent utility without the SVRTC in terms of traffic congestion relief, air quality improvement, reduced energy consumption, and providing a catalyst for TOD.

The comment requests documentation of comparable projects that received Full Funding Grant Agreements (FFGAs) from FTA. Please note that the WSX project is not applying for a FFGA, which is a component of FTA's New Starts funding program. In addition, NEPA does not require a cost-benefit analysis to be contained in an EIS, nor does it require the agency to document other projects with comparable costs and benefits in order to demonstrate independent utility. Nevertheless, as documented on pages 7-6 and 7-7 of the DEIS, the cost-effectiveness of the WSX Alternative utilizing FTA's New Starts cost-effectiveness measure is \$29.40 per new rider without the optional Irvington Station, or \$26.18 per new rider with the Irvington Station, both in the \$2.54 to \$48.82 range of submissions to FTA for New Starts projects in fiscal year 2000. The additional comparison the commenter requests is of limited relevance, as there are very few heavy rail projects funded by the New Starts program, in different settings, with different alignment lengths and station configurations. The North Line Extension in Atlanta, which entered into an FFGA over 10 years ago, is 2.3 miles long with two stations, at a cost of \$463.2 million, and was anticipated to carry 11,000 new riders in the year 2005. The reconstruction of the Douglas Branch in Chicago is 6.6 miles long with eleven stations, at a cost of \$482.5 million, and is expected to carry 6,000 new riders in 2020. Other New Starts projects utilize light rail technology, which typically has a lower capital cost per mile. However, one project listed as pending for federal funding is the Eastside Light Rail Transit system in Los Angeles, which is 5.9 miles long with eight stations, at a cost of \$888.3 million, and is expected to carry 7,600 new riders in 2020. (This information is from FTA's website for the New Starts Report for 2004, the most recent year available on this site.) Therefore, the 5.4 mile WSX Alternative – projected to generate 7,200 new riders per day in 2025 without the optional Irvington Station, at a cost of \$678 million, or 9,100 with the Irvington Station, at \$757 million – is within the general range of ridership and costs exhibited by these projects.

As indicated in Table 4.2-8 of the DEIS, "Daily Station Entries and Exits—2025", approximately 8,200 total new trips on BART would occur in 2025. This figure includes 7,200 new transit trips in 2025 (see Table 4.2-12, "2025 Linked Transit Trips"). The 1,000 rider difference between new BART trips and the new transit trips represents the number of riders transferring to BART from other transit systems.

- 21-3:** The ridership forecasts in the DEIS, based on the Warm Springs Station as the project terminus, were generated by a travel demand model implementing assumptions regarding population and employment projections and anticipated changes in the transportation network

(see DEIS pages 4.2-20 to 4.2-21). These results are not *post hoc* rationalizations, but the results of transportation modeling of the proposed project utilizing accepted methodology, as documented in the DEIS and supporting transportation technical report. As explained in the DEIS (pages 3-29 to 3-31), the prior analysis of alternative alignments and station configurations, including an alternative terminus, remains applicable. DOT policy encourages reliance on prior planning and analysis to select the alternatives to be evaluated in a NEPA document. See *FHWA-FTA Program Guidance on Linking the Transportation Planning and NEPA Processes* (February 22, 2005). As noted above, based on the limited comparisons available, projected ridership on the WSX Alternative is within the general range of that for other projects. The results do not depend on a pool of transit riders already being present at the Warm Springs Station site, since the ridership model conservatively did not include assumptions of land use changes (i.e., TOD) expected to be catalyzed by the WSX Alternative, which would further enhance ridership. It is not correct that, as the commenter implies, transit riders must already be present at proposed station sites in order to justify the WSX Alternative. Such a requirement would restrict opportunities for TOD to infill projects where land use density is already high. Other transit systems have a record of locating stations in vacant sites, creating transit-supportive land use policies, and building transit-oriented development that ultimately boosts ridership. The Portland Westside MAX project is a notable example of this approach.¹⁴

- 21-4:** The claim that alternatives were rejected solely based on impacts on or incompatibility with the SVRTC is incorrect. As explained in the discussion of alternatives to which the commenter refers (DEIS pages 3-35 to 3-40), those alternatives were rejected for a number of reasons including lower ridership projections, more severe environmental impacts, and the lower likelihood of attracting the type of TOD that the commenter advocates.

The anticipated growth of automobile trips between the East Bay and Santa Clara County, as described on DEIS (page 2-2), is not “the key statistic justifying the project” as the commenter suggests. Please refer to the statistics in the paragraphs immediately following that statement, which describe existing and projected traffic congestion in the project vicinity, demonstrating the need for the project (DEIS pages 2-2 to 2-3).

- 21-5:** The comment is correct that one component of funding for the WSX Alternative is conditioned on funding for a rail connection to Santa Clara County. However, the condition on use of Measure B funds does not eliminate the independent utility of the WSX Alternative. The functional ability of a transportation improvement project to deliver the desired ridership and associated environmental benefits, on a stand-alone basis without deriving additional ridership from other projects, does not depend on its sources of funding. Moreover, in the event that the proposed SVRTC project may not be funded, a different rail connection to Santa Clara County that may be proposed in the future would also satisfy the condition in Measure B. BART continues to work with funding sources to secure appropriate funds for the project.
- 21-6:** The comment singles out the travel times for some of the origin-destination pairs that were presented for illustrative purposes in the DEIS. Such isolated comparisons do not present an overall picture of project benefits. The analyses presented in DEIS sections 4.2, 4.14, and 4.15 of the benefits of the WSX Alternative as a stand-alone project, in terms of ridership,

¹⁴ G. B. Arrington, Jr. “At work in the Field of Dreams: light rail and smart growth in Portland.” September. 1998.

traffic congestion relief, air quality improvements and reduced energy consumption, take into account the travel times shown in Table 4.2-13, “2010 Transit Travel Times (minutes)” and Table 4.2-14, “2025 Transit Travel Times (minutes).”

Regarding the specific comparisons illustrated, in some cases the travel times with and without the WSX Alternative are comparable. For some trips, using transit is simply too circuitous in comparison to driving directly. However, for other origin-destination pairs, the WSX Alternative offers substantially reduced transit travel time. Moreover, similar (or even longer) travel times do not necessarily indicate that the WSX Alternative is not competitive with other alternatives, because the travel time comparison ignores other important factors that draw BART ridership— in particular trip frequency and reliability. For that reason, the transit travel time from Union City to downtown San Jose increases by 3 to 4 minutes under the WSX Alternative, as riders switch from the relatively infrequent Capitol Corridor service to more frequent BART service. More frequent, if slightly slower, service would be a benefit to riders of the WSX Alternative. For the two origin-destination pairs in which transit travel times is slightly longer under the WSX Alternative (Union City-San Jose Downtown and Hayward-Lockheed), the perceived travel time is reduced under the WSX Alternative compared to No Project conditions. The perceived travel time adds a penalty to the out-of-vehicle or waiting time, because riders prefer to be riding in a vehicle rather than waiting for the transit vehicle to arrive. The No Project Alternative for these two pairs includes more out-of-vehicle waiting time compared to the WSX Alternative. The travel demand model applies a penalty based on survey data to out-of-vehicle wait time for all alternatives.

- 21-7:** “Smart growth” is characterized by more compact and transit-oriented development compared to traditional suburban development. Land use changes and intensification at station sites often can take years to accomplish, particularly where BART station sites are surrounded by private property and owners make individual decisions regarding real estate investments. Recent BART extensions include Pittsburg-Bay Point, Dublin/Pleasanton, and San Francisco International Airport/Millbrae. In each case, the extensions serve growing communities where land uses are intensifying and smart growth opportunities are being created. For example, Contra Costa County recently adopted a Specific Plan for the Pittsburg-Bay Point Station area, and 1,500-1,800 housing units were approved for the Dublin Transit Center project near the Dublin/Pleasanton Station. A number of cities with older BART stations, including Lafayette, Walnut Creek, Pleasant Hill, Concord, and Hayward have revised local land use policies to encourage greater development around the stations. Most recently, the transit village at Fruitvale opened in 2004 as a planned smart growth development. The Fruitvale Station was initially constructed with a large surface parking lot, like that proposed for the Warm Springs Station. The parking lot property was subsequently converted to a mixed-use development project providing housing, shopping and community services, with BART parking relocated to a parking structure. As characterized in a recent study by the Transportation and Land Use Coalition (TALC), *It Takes a Transit Village*, “The Fruitvale Village is now nationally recognized as a leading Smart Growth initiative” (TALC 2004, p. 13).

As illustrated in the DEIS (see pages 4.8-22 to 4.8-23), the WSX Alternative, including the Warm Springs Station, is designed to promote and accommodate transit-oriented development (TOD) consistent with BART’s Strategic Plan and System Expansion Policy. The station is specifically designed with a flexible layout of interior “streets” providing the opportunity accommodate transit-oriented development at a future date. In particular, the

internal roadway network is designed to divide the site into a series of land use units, each approximately the size of a city block, which could later be developed with ridership-generating uses as part of a phased development. Warm Springs Boulevard, currently a two-lane road without sidewalks, will be upgraded to become a four-lane road with bicycle lanes and sidewalks (City of Fremont, Department of Traffic Engineering, 2005). Two signalized intersections with crosswalks are also planned, promoting pedestrian access along Warm Springs Boulevard and across Warm Springs Boulevard to the east. The internal design for the Warm Springs Station site includes pedestrian access on sidewalks along the internal roadway system to a central entry plaza. Eventually, the Warm Springs Station area could develop along the lines of the Fruitvale Transit Village, which is situated on the site of a former BART surface parking lot.

As discussed in the DEIS, the City is actively working with BART and other stakeholders to prepare a specific plan for the Warm Springs area. The City issued its Warm Springs BART Area Specific Plan Existing Conditions Report in June 2004, which examines three land use scenarios for the specific plan area, all of which envision transit-oriented development around the Warm Springs station. Concept 3 in the Existing Conditions Report was endorsed in the TALC report, *It Takes a Transit Village*. In addition, in July 2004 the City of Fremont adopted a Mixed-Use Development Ordinance, which is intended to encourage and promote mixed-use developments in order to encourage efficient land use and facilitate development that supports public transport. In January 2005 the City approved the Irvington Concept Plan, which envisions the optional Irvington BART station as a neighborhood station and seeks to create an intensification of land uses - both mixed use and high-density residential - adjacent to the optional station. All of these actions demonstrate that the City of Fremont is committed to utilizing smart growth opportunities.

Private developers are also participating in the Warm Springs specific plan process and have already proposed high-density land uses adjacent to the proposed station site. In particular, the Warm Springs Transit Village proposal, which has been submitted by a group of landowners to the City of Fremont for consideration, would provide for the long-term development adjacent to the Warm Springs Station site. (See comment letter 24, Warm Springs Transit Village.) The *Warm Springs Transit Village* document proposes a transit village to be developed on a combined 74.5-acre site located directly east of the proposed BART Warm Springs Station, with Warm Springs Boulevard on the west and I-680 on the east. The entire site is within the boundary of the Warm Springs BART Area Specific Plan and, except for the most southeastern tip, is within 0.5 mile of the BART station. The proposal includes two alternative mixed-use site plans. The first alternative would provide a total of 2,150 housing units, approximately 131,000 square feet of retail space, and 5.1 acres of parks and open space. The second alternative would provide 1,920 housing units, approximately 183,000 square feet of retail use, and 4.6 acres of parks and open space. The transit village property owners are active participants in the Warm Springs BART Area Specific Plan process. The Warm Springs Transit Village proposal was also endorsed in the recent TALC report, *It Takes a Transit Village*.

The Wal-Mart site is located in the project corridor, between Osgood Road on the east and the proposed BART alignment on the west, extending from approximately 300 feet south of Auto Mall Parkway toward Skyway Court. The approximate location of the Wal-Mart is illustrated on Figure 5-1, "Cumulative Projects", of the DEIS. This location is approximately one-half mile from the BART station and is on the periphery of what is

considered a reasonable distance for TOD. The Wal-Mart site is outside the area of Fremont's Warm Springs BART Area Specific Plan. The City's approval of this project does not preclude TOD on other undeveloped or underdeveloped parcels in the area.

- 21-8:** Regarding the fact that TOD is not part of the WSX Alternative itself, please see response to comment 21-1. Both the specific plan for the Warm Springs Station area and any future development projects within the specific plan area are under the jurisdiction of, and will be separately reviewed by, the City of Fremont. However, at this time, the specific land uses that will be fostered as a result of the City's planning process are speculative. For that reason, as noted in response to comment 21-2, the ridership model conservatively did not include assumptions of land use changes (i.e., TOD) expected to be catalyzed by the WSX Alternative, which would further enhance ridership. While there is always some uncertainty in projections of future land uses, the City of Fremont is actively working with BART and other stakeholders to encourage TOD associated with the WSX Alternative as described above.

The comment is incorrect in asserting that a "mitigation measure" is needed that would require the City of Fremont to adopt zoning and general plan amendments with specified minimum densities for the station areas. Mitigation measures under NEPA are intended to minimize or reduce adverse environmental impacts resulting from the project as compared to the existing environmental setting or "baseline." By contrast, the DEIS explains that one benefit of the WSX Alternative is that it is likely to attract and support TOD, in the context of the City's current planning process. If the full potential for TOD is not achieved for any reason, one anticipated benefit the WSX Alternative would be reduced – but that would not cause an "impact" in the sense of NEPA (i.e., an adverse effect compared to the baseline). BART strongly encourages smart growth in station areas and views the opportunity to catalyze potential TOD as an important benefit of the WSX Alternative. However, it must be recognized that in the event that this benefit is not fully realized, the inability to maximize a desired benefit would not be an impact and does not require mitigation.

The comment is incorrect in alleging that the WSX Alternative will cause sprawl growth. Urban sprawl is defined as suburban and exurban land development at relatively low densities that is also automobile-dependent. As discussed in the DEIS (pp. 5-42 to 5-46), the WSX Alternative is intended to accommodate planned growth and to help redistribute regional population growth in the more compact manner characteristic of Smart Growth. Generally, extension of a rail transit system such as BART into communities has the effect of concentrating growth and producing more compact development. BART agrees that TOD has the potential to reduce sprawl into outlying areas of the Bay Area. Through its System Expansion Policy, BART is committed to encouraging development at densities sufficiently high to sustain transit, and BART is specifically committed to promoting opportunities for TOD. As discussed above, BART is coordinating with the City of Fremont to encourage TOD at the Warm Springs Station through the City's planning process.

- 21-9:** The references in the DEIS to Executive Order 12898, USDOT Order 5610.2, and other documents on environmental justice are not incorrect or incomplete. These documents all expressly address "disproportionately high and adverse human health or environmental effects" on minority and low-income populations.

21-10: To the extent that denial of the benefits of a project may constitute an adverse impact, the Environmental Justice analysis presented in Section 4.18 of the DEIS demonstrates that the benefits of the WSX Alternative would not be denied to minority and low-income populations. In fact, the project's benefits would disproportionately accrue to the ethnic minority groups, which comprise the majority (62%) of the population in the project area, with Asian Americans constituting the largest of the ethnic minority groups (41%). The white population constitutes only 38% of the total. (Please refer to DEIS Table 4.18-1 "Population Characteristics – Race/Ethnicity 2000," which provides 2000 Census data. Moreover, as emphasized by another commenter in connection with environmental justice (see comment 37-14), BART is a regional rather than a local transportation system. The WSX Alternative will provide access to the southern Fremont area for riders from any station in the system. System-wide, BART riders are ethnically and economically diverse. In a 2004 survey of BART riders, 26% identified themselves as Asian or Pacific Islander, 14% as Hispanic ancestry and 12% as Black/African American. Only 44% of riders identified themselves as white. In the same survey, 13% of BART riders surveyed reported household incomes of not more than \$15,000, 25% reported not more than \$30,000, and 37% reported not more than \$45,000. See San Francisco Bay Area Rapid Transit District, *2004 BART Customer Satisfaction Survey* (pages 19 and 22). The benefits of the WSX Alternative will extend beyond the local populations to the diverse system-wide population served by BART.

The commenter attaches the complaint in a recently filed lawsuit, *Darensburg et al. v. MTC*, which claims that the Metropolitan Transportation Commission (MTC) has engaged in racial discrimination in its funding of public transportation services (including BART) that allegedly favor "white suburban commuters." The allegations in this case raise issues under constitutional and civil rights law that differ from the issues relevant to environmental justice analysis under NEPA and Executive Order 12898. (Moreover, whether or not the plaintiffs have raised valid constitutional or civil rights claims remains to be determined, as the court has not yet ruled on them.) In addition, as noted above, BART itself serves a diverse community as demonstrated by rider surveys. In connection with preparing its Regional Transportation Plan, *Transportation 2030* (which includes the WSX project), MTC conducted an equity analysis to determine whether its planning decisions could raise environmental justice issues. See *Transportation 2030 Equity Analysis Report* (November 2004). The *Equity Analysis Report* (page 6-2) concluded that minority and lower-income communities "will share equitably in the benefits of the Transportation 2030 alternatives without bearing a disproportionate share of the burdens. . . . The results suggest that, across the Transportation 2030 alternatives, transit will serve [those communities] better than the remainder of the Bay Area."

21-11: The commenter asserts that the DEIS must be revised and recirculated to consider alternatives that would avoid the alleged disproportionate benefits of the WSX Alternative for the white population and impacts on minority and low-income communities. This claim is incorrect for several reasons.

As discussed above, surveys document that BART riders are ethnically and economically diverse, and the DEIS demonstrates that whites are in the minority in the vicinity of the WSX Alternative. Accordingly it is not true that either the BART system or the WSX Alternative would disproportionately serve the white population. The comment claims that diverting resources to improving urban bus service (in particular, service by the Alameda-Contra Costa Transit District (AC Transit) would represent an improvement by providing still greater

service to a minority population. However, as discussed above in response to comment no. 21-4, under NEPA the inability to maximize a desired benefit is not an impact (i.e., an adverse effect compared to the existing setting). Executive Order 12898 and USDOT Order 5610.2 provide that environmental justice goals should be promoted through requirements of existing laws, including NEPA, but do not expand the requirements of those laws. While other laws may require separate consideration of means to improve the distribution of services to minority and low-income communities, the DEIS appropriately focused on evaluation of potential adverse impacts compared to existing conditions.

The analysis of alternatives and impacts in a DEIS is governed by a “rule of reason” which does not require consideration of overly speculative scenarios. The claim that rejection of the WSX Alternative would benefit the minority and low-income communities represents a chain of unsubstantiated speculation. The commenter suggests that rejecting the WSX Alternative would increase the total pool of transportation funding available in the Bay Area, and that funding authorities would divert an equivalent amount of resources to increasing AC Transit service that would allegedly better serve people of color. (The comment does not claim that AC Transit service better serves low-income communities.) However, there is no basis for this speculation, and in fact that outcome seems highly unlikely. There is no guarantee that any federal or state funds foregone by the WSX Alternative would be earmarked for bus service projects in the Bay Area. Moreover, many agencies and projects throughout the Bay Area compete for support in the funding allocation process, and there is no reason to expect that the outcome of project-specific funding decisions would result in additional support for the specific services that the commenter urges. (See *Transportation 2030* [MTC 2005]). Other highly ranked projects may well be given higher funding priority in future decisions, before subsidies to AC Transit operations are increased. Should additional funding be made available to AC Transit, that agency’s own priorities would not necessarily result in increased service on routes disproportionately serving minority and low-income communities. The commenter cites no particular AC Transit proposal that allegedly might benefit from the rejection of the WSX Alternative.

Moreover, there is no support for the commenter’s assertion that the WSX Alternative competes for funding with local bus service provided by AC Transit.¹⁵ Allocation of federal funds for a portion of the capital costs of constructing the WSX Alternative would not reduce those operating funds for bus service providers that come from other sources, including federal operational funding provided through the state. There is no reason to expect that capital funds foregone by the WSX Alternative would be diverted to bus operational funding; diversion to highway or other capital projects would be far more likely. BART’s own operational funding does not compete for funding with AC Transit, since the bulk of funding for BART operations derives from patron fares and sales taxes within the BART District. In fact, BART provides operating funds to AC Transit, in order to increase bus access to BART. Therefore constructing and operating the WSX Alternative would not be expected to reduce funds available for bus operations. Bus capital improvements may be funded from some of the same sources as rapid transit capital improvements. However, the commenter focuses mainly on bus operational improvements, such as more frequent service and longer service hours. While bus capital improvement projects may be less costly than fixed-rail

¹⁵ The commenter asserts that its comments on alternatives analysis (comments 21-11 to 21-18) demonstrate that people of color would receive greater benefits from a bus alternative. However, comments 21-11 to 21-18 do not address benefits to people of color.

investments, the Bus Alternative summarized in the DEIS generated lower ridership and associated benefits (e.g., air quality), as well as offering fewer opportunities for TOD which the commenter advocates. (Refer to the discussion of the Bus Alternative in the DEIS, pages 3-36 to 3-39.)

Finally, NEPA was enacted to address environmental impacts. While adverse socioeconomic consequences must be considered as indirect impacts under NEPA, such socioeconomic effects must be proximately related to a change in the physical environment. Construction of the WSX Alternative would change the environment. However, the commenter asserts that effects on minority and low-income communities would follow from an effect on available funding resources—not from the construction itself. Besides being speculative for the reasons discussed above, a change in the pool of funding resources is not a change in the physical environment.

- 21-12:** The transportation model used in the DEIS analysis was an approved metropolitan planning organization (MPO) regional transportation model, derived from MTC’s regional (nine county) transportation model with modifications jointly developed by BART and VTA. The model utilized standard methodology for analyzing transit projects and documented in the transportation technical study, which was presented as Appendix N in BART’s 2003 Supplemental Environmental Impact Report (SEIR) for the WSX project. FTA expressed concerns about estimates in the travel demand model used in the Alternatives Analysis process for the SVRTC project, resulting in ridership forecasts that appeared to be too high. Significant changes were made to the model as used for both the SVRTC EIR/EIS and the WSX EIS in order to address those FTA concerns.
- 21-13:** The cumulative consequences of the WSX Alternative and VTA’s SVRTC project, if both are constructed, are addressed in Section 5.2, “Cumulative Effects” of the DEIS. Since the SVRTC is considered a reasonably foreseeable future project, analysis of cumulative impacts is required. The cumulative impact analysis was not “primary” in selecting the preferred alternative. In comparison to the WSX Alternative by itself, the Bus Alternative was rejected as not meeting the project purpose and need, for reasons described in Section 3.5, “Alternatives Considered but Dismissed from Further Analysis” in the DEIS, including lower ridership and less likelihood of acting as an effective catalyst for future TOD. The commenter states that the difference between the ridership for WSX Alternative and the Bus Alternative is likely within the margin of error for the model. The margin of error is plus or minus 5% as shown by the validation comparison of estimated and observed daily BART ridership in 2000 transportation technical study, which was presented as Appendix N in of BART’s 2003 Supplemental Environment Impact Report (SEIR). The WSX Alternative is projected to generate 7,200 new transit trips in 2025 without the optional Irvington Station, or 9,100 new trips with the Irvington Station, compared to the Bus Alternative with 6,300 trips. Both with and without the Irvington Station, the difference between BART and bus is greater than 14%. Therefore, the difference between the ridership projections for the WSX Alternative and the Bus Alternative is greater than the margin of error for the model.

Please see responses to comment nos. 21-2 and 21-3 regarding the independent utility of the WSX Alternative.

- 21-14:** As explained in the DEIS (page 3-35), BART fulfills the definition of commuter rail service. Additionally, the DEIS did discuss standard gauge commuter rail service but dismissed it as

infeasible for a number of reasons including lower ridership, increased noise impacts, and higher opposition from residents. These reasons having nothing to do with compatibility with the SVRTC project.

- 21-15:** The effectiveness and efficiency of the WSX as a transportation investment is assessed in Section 7 of the EIS. Ridership estimates for WSX are provided in Sections 3.4.5 and 4.2.5.2 of the EIS. NEPA does not require that an EIS include detailed cost-benefit analysis for each alternative. BART's Board of Directors will take impacts, benefits, and costs into account in deciding whether to proceed with the project, as will FTA and other funding authorities in deciding whether to provide the funding.

The LRT alternative was dismissed in part because it would involve longer travel times than BART. Regarding chauffeur-driven limousine service, not only would this be an expensive substitute service, but it would fail to provide the TOD benefits recommended by the commenter. See DEIS pages 3-34 to 3-35 regarding chauffeur-driven limousine and taxi service.

- 21-16:** Regarding evidence of TOD associated with BART stations, please see response to comment 21-7. Regarding evidence that fixed-rail projects are more effective than bus stations in promoting TOD, please see response to comment 21-1.

- 21-17:** The California High-Speed Rail (HSR) proposal is a long distance inter-city rail system, offering express rail service between cities. The California High Speed Rail Authority (HSRA) is analyzing two potential routes through Fremont as part of the Oakland to San Jose portion of the alignment. The first option would extend north from San Jose along UPRR's Mulford Line, which runs west of I-880 parallel to San Francisco Bay. Near State Route 84 (Thornton Road) the HSR alignment would turn inland and cross Fremont to meet the UPRR Niles Line, where the HSR alignment would turn north toward Union City. The proposed WSX project would not affect this HSR alignment option.

The second proposed HSR alignment option extends north from San Jose parallel to I-880 on an aerial alignment. At Mission Boulevard, the alignment transitions from the I-880 corridor to the UPRR alignment. The HSR alignment would extend northward to Washington Boulevard, where the alignment would go underground beneath Fremont Central Park, Lake Elizabeth, and portions of central Fremont. The alignment would return to grade near the Alameda Flood Control Channel in Niles and then extend north to Union City.¹⁶ This alignment, known as the "Hayward Line to I-880" alignment, is the preferred alignment.¹⁷ The Hayward Line to I-880 alignment between Mission Boulevard and Washington Avenue would run in the same railroad corridor as the proposed WSX extension. However, the HSR alignment is planned to be aerial, so that the UPRR, BART WSX Alternative, and HSR could run parallel to each other in the same corridor. No right-of-way conflicts are anticipated.

The commenter requests that the WSX DEIS should analyze two other HSR alignment options. The first is the Altamont Pass alignment option, extending between the Central Valley and the Bay Area through the Altamont Pass. HSRA eliminated this option from further consideration because it would not effectively meet current and future intercity travel

¹⁶ U.S. Department of Transportation, Federal Railroad Administration/California High-Speed Rail Authority, Draft Program Environmental Impact Report/Environmental Impact Statement

¹⁷ California High Speed Rail Authority, Staff Recommendations, page 7.

demand and not adequately increase the efficiency of intercity transportation. See California High Speed Rail Draft Program EIR/EIS (HSR DPEIR/EIS), page 2-38. Following the public comment period on the HSR DPEIR/EIS, HSR staff, in consultation with the Federal Railroad Administration, determined that the available information supports identifying a broad corridor between the Central Valley and the Bay Area containing multiple route options and provided for further study. The corridor between the Bay Area and Merced would be generally bounded by (and include) the Pacheco Pass Corridor (SR-152) on the south and the Altamont pass (I-580) on the north.¹⁸ With the determination that further study is required on multiple route options, the possibility the HSRA may choose the Altamont Pass alignment option for its route must be considered speculative at this time.

The second HSR alternative suggested by the commenter is a component of the TRANSDEF Smart Growth Alternative, submitted by the commenter as an alternative for consideration in MTC's 2005 RTP EIR. MTC did consider the TRANSDEF Alternative and concluded that it is predicated on land use assumptions that cannot be realized without substantial government intervention, regulation or new incentives for housing and infrastructure improvements, and increased levels of public services and facilities.¹⁹ (Please see response to comment 22-3 for further details.) Since MTC rejected the TRANSDEF alternative, and it does not appear to be part of the HSRA's plans, the HSR alignment incorporated in the TRANSDEF Alternative must be considered even more speculative.

In any event, to the extent that the commenter's proposal is intended as an alternative to BART, high-speed rail service is complementary to, not competitive with, BART service. BART is an intra-regional rail system offering stops every few miles and providing commuter service for residents and employees in its four-county service area. High-speed rail cannot provide an alternative to BART, since by emulating BART service, it would lose the advantages that make it attractive: few stops and high speed.

21-18: A regional rail study analyzing the connections between various Bay Area rail providers is currently being conducted jointly by MTC, BART, Caltrain, and the HSRA. MTC has recently released a request for proposals to initiate this study, which is not expected to be completed until July 2007. Accordingly, any alternatives developed by this study will not be available for approximately one year.

21-19: As discussed above, the WSX project has been included in MTC's Regional Transportation Plan (RTP). Although the funding plan includes some sources that are not immediately available, BART expects to work with the project funding partners to advance some of the these sources when the project is ready to proceed. To date, the WSX project has been allocated \$38 million of an anticipated \$195 million in Measure B funds. The state committed \$111 million in Transportation Congestion Relief Program funding, of which \$54 million has already been allocated. The remaining \$57 million in anticipated state funding is expected as the state economy improves. The comment is correct that anticipated funding from SamTrans has not been forthcoming to date. BART has been working with SamTrans to maximize operating efficiencies and maximize net revenues. However, if the SamTrans funds do not become available, BART will work with its funding partners to close the

¹⁸ California High Speed Rail Authority, Draft Program EIR/EIS, Staff Recommendations on Identifying Preferred Alignment and Station Locations, pages 8-9.

¹⁹ MTC RTP DEIR, page 3.1-37

funding gap from other sources. As the commenter notes, Measure B funds may not be used for construction of the WSX Alternative until full funding for the rail connection to Santa Clara County is assured. However, the prospect of full funding for the SVRTC project is not “dubious.” VTA is developing a funding plan, which includes federal funding from FTA’s New Starts Program. In response to FTA’s request that VTA consider first completing a minimum operating segment and complete the remainder of the project at a later time, VTA has proposed to FTA a federally funded segment (FFS) of the project that consists of approximately the first half of the alignment, with the remainder of the project being funded solely with non-federal funds. FTA has accepted this approach in principle pending further analysis. VTA continues to work on addressing concerns FTA has about the SVRTC Project to gain a “Recommended” rating in the New Starts process.