

Transportation Solutions Defense and Education Fund

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January 31, 2009
By Hand Delivery &
E-Mail

Steve Heminger, Executive Director
Metropolitan Transportation Commission
101 Eighth Street
Oakland, CA 94607

Re: 2009 RTP DEIR Comments

Dear Mr. Heminger:

The Transportation Solutions Defense and Education Fund, TRANSDEF, is an environmental non-profit dedicated to improving the regional planning of transportation, land use and air quality in the San Francisco Bay Area. We have noticed many attractive innovations in the 2009 Draft Regional Transportation Plan (Plan). However, we find the Draft Environmental Impact Report (DEIR) to be legally inadequate, due to the serious shortcomings we outline below. These shortfalls, for the most part, are the direct result of policy decisions by the Commission, and should not be attributed to the document preparation team, who undertook a monumental task and did it well.

Before getting to those shortcomings, we want to start by acknowledging that this is the first EIR in which MTC has voluntarily elected to study lower-impact alternatives to the Proposed Project. We are pleased to see this development.

Failure to Respond to the Attorney General's Scoping Comments

In October 1, 2008, comments to MTC, the Attorney General noted that many of the 2009 RTP's \$223 billion in unbuilt transportation projects "will provide additional road capacity and accommodate more vehicles," therefore "contribut[ing] cumulatively to the Bay Area's existing GHG load." (Oct. 1 letter at 4.) Of the \$191 billion¹ in "projects that were authorized in the last [2005] Transportation Plan, which MTC refers to as 'committed' projects," the Attorney General focused on the \$29 billion in projects which would *expand* rather than simply *maintain* the existing transportation system. (Id at 5.)

¹ The DEIR updates the \$223 billion and \$191 billion figures to \$226 billion and \$194 billion, respectively. (DEIR at ES-4, ES-5.)

The Attorney General urged MTC to rectify a key omission— namely, the “inclusion [of this \$29 billion subset of “committed” projects] in the new Transportation Plan without renewed evaluation of the relative need for, benefits of, or impacts of these projects vis-à-vis others, and regardless of how well they meet MTC’s identified goals and performance objectives.” (Id.) It explained that CEQA “requires consideration of an alternative that, where feasible, eliminates from the Proposed Transportation Plan so-called ‘committed’ projects that would contribute to adverse cumulative impacts on climate.” (Id.)

The Attorney General also noted that the “DEIR should discuss whether the Proposed Transportation Plan *maximizes* the use of available funds for public transit . . . and other measures that reduce VMT and/or GHG emissions.” (Id. at 4.)

In four key respects, the DEIR fails to respond adequately to the Attorney General’s comments. Specifically, (A) it fails to analyze the impacts of the new RTP as compared to 2035 environmental conditions, (B) it inadequately analyzes the “committed” projects, (C) it fails to include an alternative that maximizes the reduction in GHG emissions, and (D) its use of the term “feasibility” is inconsistent with CEQA.

A. The DEIR does not analyze potential impacts against a proper No Project Alternative, because it improperly includes planned-but-not-constructed projects carried over from the 2005 RTP in the No Project Alternative.

The Attorney General commented to MTC that CEQA requires an evaluation of the potential impacts of the “entire project, which in this case we believe represents the entire \$223 billion of authorized expenditures – not just the \$31.6 billion for projects MTC identifies as ‘discretionary,’ but also the \$191 billion for projects identified as ‘committed,’ projects included in the prior Transportation Plan but not yet constructed.” (Letter to MTC, Oct. 1, 2008, at 5.) The “entire project” must be compared to a “No Project” alternative that represents 2035 conditions without the expansion projects contained in the RTP. CEQA requires an analysis of the potential impacts of the entire project – the proposed RTP – as compared to the 2035 physical conditions in the environment.

MTC’s DEIR has not complied with this fundamental requirement of CEQA. It treats “committed” but unbuilt projects as part of the No Project Alternative, a key part of CEQA analysis. (DEIR at ES-5.) Instead of comparing the new Plan with existing conditions, it improperly compares the new Plan with the old Plan. As a result, the DEIR fails to properly examine project impacts.

CEQA Guidelines Section 15126.6(e)(3)(B) clearly distinguishes [conventional physical] projects from land use plans and regulatory plans. It is clear that an RTP is a collection of conventional projects, and bears no resemblance to a land use plan. An RTP’s No Project Alternative should be seen as a no build alternative, viewed at an analysis point decades hence:

If the project is other than a land use or regulatory plan, for example a development project on identifiable property, the "no project" alternative is the circumstance under which the project does not proceed. Here the discussion would compare the environmental effects of the property remaining in its existing state against environmental effects which would occur if the project is approved. ... In certain instances, the no project alternative means "no build" wherein the existing environmental setting is maintained. However, where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment. (Section 15126.6(e)(3)(B))

On the basis of this Guideline, the inclusion of committed expansion projects in the No Project Alternative is improper.

B. MTC's analysis of the "committed" projects is not adequate under CEQA.

The Attorney General expressly objected to the inclusion of the "committed" expansion projects "without renewed evaluation of the relative need for, benefits of, or impacts of these projects vis-à-vis others, and regardless of how well they meet MTC's identified goals and performance objectives." (Oct. 1 letter at 5.) In particular, the Attorney General noted that:

MTC staff's analysis indicates that many of the 'committed' expansion projects support only one, in some cases *none*, of the identified performance goals. If low-performing 'committed' projects were eliminated where feasible to do so, funding would be available to cover transit shortfalls, particularly for BART, Muni, and AC Transit, which together carry 80% of the transit riders in the Bay Area."

(Oct. 1 letter at 6, emphasis in original.)

Asked about this at trial in *Darensburg v. MTC*, deputy director Therese McMillan testified that the DEIR would include a "full evaluation" of all the projects, committed as well as discretionary. Tr. of Oct. 21, 2008 at 1272:25-1273:6 (the Attorney General's letter "says CEQA requires evaluation in the EIR of climate change impacts of both committed and discretionary [projects], which we will be doing as we are doing an evaluation on the entire plan in the EIR where we're looking at climate change for the whole plan. So their statement about CEQA requiring the evaluation is, in fact, true, and we will be doing a full evaluation on all the projects.")

That "full evaluation" of "committed" projects, however, was not conducted.

As discussed in Part A, above, the committed projects carried over from the last RTP were included in the No Project Alternative, contrary to CEQA. The DEIR does not analyze whether the committed projects will increase or reduce 2035 levels of carbon emissions (among other impacts), because MTC did not evaluate these projects against a valid No Project Alternative.

Additionally, the DEIR does not respond at all to the Attorney General's concern that "many of the 'committed' expansion projects support only one, in some cases *none*, of the identified performance goals." (Id. at 6.) Outside of the CEQA process, MTC conducted a cursory analysis of how many RTP goals each committed project met. Despite its conclusion that some of these projects met *none* of those goals, this analysis did not result in any changes to the list of committed projects in the Draft RTP or in the DEIR's analysis.

C. The DEIR does not include an alternative that maximizes the reduction in GHG emissions.

The Attorney General asked MTC to evaluate "at least one alternative . . . designed to maximize the reduction of greenhouse gas emissions." (DEIR at 3.1-5.) MTC has decided to not do so. "MTC considered the suggestion to shift the \$29 billion in committed funds for transit and roadway expansion included in the proposed Project for other uses, but did not carry this alternative forward for full EIR analysis because of the infeasibility of reallocating (or shifting) such funds." (DEIR at 3.1-6.) (As discussed in Part D, below, this assertion of "infeasibility" is incorrect.)

As the Attorney General noted, "MTC's own research shows that achieving reductions in GHG emissions consistent with AB 32 will be extremely difficult: this highlights the need for careful and complete evaluation of impacts on VMT and GHG emissions of *all* expenditures for road and transit expansion in the Draft RTP." (Oct. 1 letter at 5-6, emphasis in original.) The TRANSDEF Smart Growth Alternative in the EIR for Transportation 2030 (2005) eliminated all the committed projects (except for those that claimed to be for safety), and substituted a list of cost-effective rapid bus and commuter rail projects, in addition to High-Speed Rail. It performed quite well in regard to accessibility, air quality and other environmental impacts, and was especially beneficial to low-income communities.

The 2009 RTP DEIR's Environmentally Superior Alternative, known as the Heavy Maintenance/Climate Protection Emphasis Alternative with Road Pricing, includes no new expansion projects. It does, however, include the committed expansion projects from the last RTP that are concealed in the No Project Alternative. (DEIR at ES-5.) If these committed projects were excluded from this alternative, and replaced with cost-effective transit projects similar to those of the TRANSDEF Smart Growth Alternative, this alternative would function even better.

But MTC refused to study this, claiming that nothing new would be learned. “MTC found that re-evaluating the proposed TRANSDEF alternative would not produce markedly different results compared to the prior Transportation 2030 EIR and Transportation 2035 vision scenario analyses, and therefore would not provide the Commission with new or meaningful information for use in its decision-making.” (DEIR at 3-1.4.) This is not a valid reason to reject a proposed CEQA alternative. Where MTC acknowledges that some of the committed projects have the adverse impacts of increasing VMT and GHGs, CEQA requires the EIR to contain mitigation measures or alternatives that avoid the impacts.

D. The DEIR incorrectly invokes “infeasibility” in its claim that committed funds cannot be moved to other projects.

The DEIR improperly relies on “infeasibility” as the justification for its failure to analyze an alternative that shifts “committed” projects, while at the same time blurring the line between environmental review and decisions based on the merits of a project.

First, it states that it “was not feasible to shift the funds away from these projects because the projects are meritorious in providing mobility of goods, services and people and because of long-standing local and regional commitments to delivering these projects.” (DEIR at 3.1-6.) This conclusion highlights how MTC sees its central function as being a programming agency and not as a planning organization. The invocation of “infeasibility” both rests on an incorrect premise and misses the point.

It is incorrect because most of these funding sources are highly flexible, or can be swapped with other sources that are flexible.

It misses the point because the relevant CEQA inquiry is not whether it is possible to shift the funds to another project, but whether the project should be built at all. To the extent that “committed” projects rely on federal or state funding, they cannot be built unless MTC includes them in the RTP. See, e.g., 49 U.S.C. §5309(c)(1)(A) (US DOT “may not approve a grant for a project under this section unless the Secretary determines that— (A) the project is part of an approved transportation plan”); Gov’t Code § 65089.2(b) (“If [MTC] finds the program [of county projects] is inconsistent [with the RTP], it may exclude any project in the congestion management program from inclusion in the regional transportation improvement program.”). This is true whether or not it is legally possible to shift the funds for those projects to other uses.

This improper claim of infeasibility amounts to an evasion of the alternatives analysis that CEQA requires. MTC has improperly imposed its values on the acceptability of alternatives prior to conducting the alternatives analysis. The proper time for decisionmakers to choose between alternatives is at the merits stage, after all analysis has been completed. Instead of using an analysis valid under CEQA to justify its refusal to study the shifting of funds away from committed projects, the DEIR simply makes statements about the merits of the overall Project, and concludes that it is impractical to

reconsider its “committed” projects, thereby impermissibly narrowing the range of alternatives studied.

Further compounding the problem, the DEIR states:

MTC evaluated the committed transit and road expansion projects that make up the \$29 billion, and found that (1) most of the projects are in the advanced states of project development . . . ; (2) most projects are funded by local, regional, state, or federal funds that MTC has no discretion to redirect; and (3) *most projects meet one or more of the plan’s goals*.

(DEIR at 3.1-6, emphasis added.) MTC’s third bullet (“most projects meet one or more of the plan’s goals”) concedes that some of the committed projects fail to meet even one of the Plan’s goals. The Attorney General’s letter already expressed concern about this fact. (“MTC staff’s analysis indicates that many of the ‘committed’ expansion projects support only one, in some cases *none*, of the identified performance goals.” Oct. 1 letter at 6.) A decision to commit hundreds of millions or billions of dollars to projects that do not serve the plan, while plan goals are left unmet, must receive heightened scrutiny during environmental review.

Improper Analysis of GHG-Increasing Projects

The Plan’s cumulative impacts analysis makes it clear that the combination of the Plan and 2035 conditions increases GHGs by 27% above current levels. (p. 2.5-18). The only reason the Plan shows a reduction in GHGs is because of the vast reductions resulting from the implementation of the Pavley bill. Because of the corruption of the definition of the No Project Alternative (described above), it is not possible to conclude that the Project results in a 2% reduction in GHGs below 2035 conditions. (Id.) TRANSDEF believes that a proper No Project Alternative would have lower GHG emissions than the Project, because VMT would be lower.

Prior to climate change becoming such a significant driver of environmental analysis, it was unremarkable that a Plan is composed of many different projects. However, once it is recognized that GHG emissions need to be urgently reduced, the standard procedure of aggregating all projects within a Program-level EIR to evaluate their overall impacts is no longer adequate. This procedure of aggregation prevents an analysis of the Plan’s potential for GHG emissions reductions and also blocks the design of appropriate mitigations.

To enable an analysis of the maximum feasible GHG emissions reductions, the list of projects in the Plan can, and must, be divided into two parts: projects that reduce greenhouse gases (GHGs) or are neutral, and projects that increase GHGs by encouraging an increase in VMT. Note: this is not the evaluation of the individual impacts of the projects included in the scope of a Program EIR.

This is the evaluation of the environmental impacts of two disparate classes of projects. One class of projects, principally the highway capacity expansion projects, will result in

an increase in GHG emissions. As such, those impacts need to either be mitigated, or the projects be eliminated from the Plan. By studying alternatives that do not include the emissions-increasing projects, the EIR offers the possibility of a Plan with greatly reduced GHG emissions.

The Regional HOT Network Requires Its Own Alternatives Analysis

Because the Regional HOT Network is distinguishable from the previous collections of highway projects that have characterized past Plans, it is subject to its own environmental review under CEQA, a review that is not satisfied by a Program EIR. The introduction of the Regional HOT Network in this Plan represents a major turning point in the region's future, determining whether the region continues to focus its efforts and resources on supporting the single occupant vehicle, or whether that focus turns to transit. Because of this, the Regional HOT Network needs its own alternatives analysis. This is another reason why the refusal to study a maximum emissions reduction alternative makes the DEIR legally inadequate.

A thorough alternatives analysis will enable MTC to determine whether the Regional HOT Network will help or hinder the region in reducing GHGs enough to meet the State's goal of an 80% reduction in GHGs by 2050. TRANSDEF strongly suspects that the answer is no, and that only a strong program of cost-effective transit powered by renewable electricity can accomplish that. By not evaluating the impact of the HOT Network on this future goal, the DEIR commits billions of dollars to a possible policy dead-end that will not become apparent until it is too late. The fact that the Plan period ends before the year 2050 does not excuse the DEIR from planning in response to valid state-adopted criteria.

Thresholds of Significance

We are pleased about the threshold selected for significant impacts in the area of climate change: "Result in an increase in CO2 emissions from on-road mobile sources compared to existing (2006) conditions." (p. 2.5-15) Because of the 37% increase in VMT predicted in the DEIR, holding GHGs at current levels would be quite an accomplishment. The DEIR (p. 3.1-29) predicts that due to Pavley I and II, GHG levels will decrease 15.6% below 2006 levels.

On the other hand, the selection of the threshold for a significant impact in the transportation area, "A substantial increase in per capita VMT compared to existing conditions" (p. 2.1-7) is inconsistent with the threshold for GHGs, inconsistent with existing environmental conditions (which are already far too congested), inconsistent with the Plan's goals and inconsistent with regional policy. We believe the criterion should have been set to be parallel to the threshold for a significant impact to GHGs.

The Joint Policy Committee's adopted Climate Protection Program was mis-cited on DEIR page 2.5-14. The text referenced by footnote 21 was from the draft recommendations, which were later amended by the Committee. The minutes of the July 20, 2007 meeting, approved September 2007, stated:

“After discussion, it was moved and seconded and was the decision of the Committee: THAT the title for Strategy Element 4 be amended to read “Reduce Driving and Promote Alternative Modes of Transportation”” (p. 3 of 7/20/2007 JPC Minutes.)

Given this regional policy, and given the Plan Performance Objective to reduce per capita VMT by 10% (DEIR p. 1.2-13), TRANSDEF believes that, at a maximum, the threshold for a significant impact in the transportation area should have been “Result in an increase in per capita VMT compared to existing (2006) conditions.”

Because the Plan Performance Objectives were set according to rational criteria, it is arguable that the threshold could reasonably have been set at “Not result in at least a 10% decrease in per capita VMT compared to existing (2006) conditions.” However, we find it unnecessary to pursue that direction, because the Project results in a 4.4% increase in per capita VMT (p. 2.1-22).

We believe the DEIR is in error in its analysis: “As shown on Table 2.1-16, projected per capita VMT will increase slightly by 4.4 percent ... relative to existing conditions due in large part to the cumulative impact of projected regional growth in population and jobs in the Bay Area.” (p. 2.1-22). There’s no reason that per capita VMT should be affected by a large influx of new residents. It is obvious to us that the cause is not the overall growth, but the Plan’s transportation and land use patterns, which favor more driving.

Requirement to Mitigate the Transportation Impacts

TRANSDEF asserts that the Project will have a Potentially Significant Impact under a properly selected significance threshold for VMT, and thus requires mitigation. We believe the most effective mitigation to be the pricing strategies studied in the alternatives analysis, with the added steps of legislative advocacy and public outreach. As the DEIR itself concludes, “It [pricing] can be applied “immediately” and begin realizing environmental benefits sooner than land use change.” (p. 3.1-39).

Pricing is the only mitigation that can reduce emissions in the near term in response to the dangers of climate change. At the Commission’s 1/28/2009 RTP hearing, TRANSDEF cited the 1/27/2009 San Francisco Chronicle article on a recent report published in the Proceedings of the National Academy of Sciences: “Scientists familiar with the report said it emphasizes the need for immediate action to control emissions.”

The issue of the feasibility of pricing strategies can be resolved with an appropriate entry in the Statement of Overriding Considerations, indicating that MTC does not currently have the statutory authority to implement the pricing strategies, but will seek that authority from Congress and the State Legislature.

Inadequacy of Mitigations for Climate Change Impacts

Measure 2.5(b) identified on page 2.5-21 does not qualify as a mitigation measure, due to compliance with it by project sponsors being voluntary: "... project sponsors shall consider adopting appropriate measures that would minimize or eliminate cumulatively considerable environmental impacts pursuant to CEQA/NEPA." (p. 2.5-21.) To be a valid mitigation measure, MTC would have to condition the funding of projects on a demonstration of compliance with the adopted list of measures, or a demonstration that project-specific conditions prevent the implementation of certain measures. Please note that the "... "green construction" policies and best practices that encourage use of lowest emitting construction equipment and fuels..." (p. 2.5-20.) contained in Mitigation Measure 2.5(a) should have been made a component part of the list for Measure 2.5(b).

Environmentally Superior Alternative

TRANSDEF urges the Commission to adopt the Environmentally Superior Alternative. However, we believe that that Alternative would perform much better if the following changes were made:

- 1). Add the Freeway Performance Initiative. The DEIR states "Unlike the Proposed Project, this Heavy Maintenance/Climate Protection Alternative places its investment emphasis almost entirely on system maintenance and efficiency projects that support the plan goals." (p. 3.1-7). The Freeway Performance Initiative is MTC's most highly rated efficiency project. It was apparently part of the original Alternative, prior to the revision in response to the Attorney General's letter. "Original Alternative: Evaluate a Heavy Maintenance Alternative that shifts discretionary revenues to (a) cover local streets and transit maintenance shortfalls, (b) funds **system efficiency projects** such as TLC and (c) limit road/transit expansion projects (MTC Resolution 3869)" (Key Issues Raised by Attorney General, p. 28, MTC Powerpoint, October 2008, emphasis added).
- 2). Remove the unbuilt committed expansion projects that are contained in the inaccurately named No Project Alternative.
- 3). Add in the list of transit expansion projects that were studied in the 2005 RTP EIR in the TRANSDEF Smart Growth Alternative. We would consider such a composite alternative to constitute a good faith maximum effort to reduce GHG emissions from mobile sources. By replacing the extremely expensive transit expansion projects in the No Project Alternative with cost-effective projects, it will be possible to exceed the mediocre performance complained of in "Advanced Investment in Transit: Direct impacts limited--Analysis shows CO2 reductions within 2% to 4% range." (Key Issues Raised by Attorney General, p. 45, MTC Powerpoint, October 2008).
- 4). The composite would perform even better if the Land Use component of Alternative 4 were added.

Cumulative Impacts

The conclusions of the cumulative impacts analysis are incorrect, because the Project was compared to an alternative (the so-called No Project Alternative) which included unbuilt expansion projects. Only 19% of these projects are under construction now. (Key Issues Raised by Attorney General, p. 11, MTC Powerpoint, October 2008). It is therefore impossible to determine the entire Project's contribution to the cumulative impacts. We object to the finding of *Project Contribution Not Cumulatively Significant* for increased emissions of PM2.5 and PM10, and for contribution to GHG emissions.

The cumulative impacts of GHGs need to be evaluated temporally, as well. GHGs persist in the atmosphere for decades and centuries. Therefore, the timing of emissions reductions is critical. Because fleet turnover is essential in implementing the Pavley bill, it is important to estimate whether the emissions reductions are gradual over the Plan period, or whether they are achieved primarily at the end of the period. The latter scenario would result in greatly increased emissions when accumulated over the entire Plan period.

TRANSDEF disagrees with the assertion that "the transportation system itself is not inducing growth in vehicle miles travelled..." (p. 2.5-18). MTC does not have the technical capability to validly conclude that, because it does not have an integrated urban model. It is unable to properly model induced demand. That makes the following DEIR statement even more wrong: "This fact is established through a comparison of the proposed Project to No Project alternative under future conditions (2035) which indicates a decrease in VMT." (Id.) TRANSDEF asserts there is no such fact, and that the purported decrease in VMT is almost assuredly the result of incorrect modelling assumptions, coupled with an inadequate model.

TRANSDEF submits a report from its expert, Smart Mobility, Inc., which evaluated the issue of induced demand for the proposed Marin-Sonoma Narrows project. Its methodology, its conclusions and its literature references demonstrate a different approach to the issue of induced demand than MTC has taken with this DEIR. We believe the approach used in this report is consistent with current academic thinking in the field.

TRANSDEF appreciates this opportunity to comment on the Regional Transportation Plan DEIR. We would be pleased to assist MTC in the production of an adequate FEIR.

Sincerely,

/s/ DAVID SCHONBRUNN

David Schonbrunn,
President

Attachments

Attorney General's Letter to MTC
Smart Mobility Inc. Report