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ENVIRONMENTAL LAW

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Re: Draft BART Warm Springs Extension DEIS

Dear Ms. Lerman and Ms. Adams:

Please accept these comments on behalf of my client, Transportation Solutions Defense and Education Fund (TRANSDEF), a non-governmental organization active in the Bay Area for the last ten years, advocating good regional planning and cost-effective transit.

Commenters believe that DOT's action will have grave adverse consequences for the Bay Area's transportation system from the inappropriate direction of a huge percentage of available discretionary transportation funding to a project that is relatively inefficient and will serve a small, elite portion of Bay Area residents. This project will deprive other more appropriate and more efficient transportation projects of funding, and thereby discriminate against transit dependant persons. In the abstract, and assuming unlimited governmental subsidies for BART, the system offers benefits to the region's connectivity and mobility. When considered in the reality of the day, where state and federal transportation funds are not growing to meet the multitude of needs present in the Bay Area, and where there are a number of other transportation needs that are not being met, this project should be carefully and closely analyzed. This is the requirement of federal law, however the DEIS fails in this purpose, and thus should be amended to more completely describe the project, fully disclose its impacts, including cumulative impacts, list and analyze the viable alternatives, and then recirculated in compliance with law. Any DOT action to approve this project in reliance upon the DEIS as circulated would be legally vulnerable and a disservice to the people of the Bay Area.

1. Purpose and Need

A stable, complete and adequate description of the project's purposes and objectives is essential for an adequate alternatives analysis. Although the generalized purpose of increasing transit

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ridership and reducing auto use and thus the need to expand roadways is stated, Chapter 2 impermissibly refines the project into a BART-only project, prejudicing any alternatives analysis and precluding adequate NEPA compliance.

Commenters believe the effect of the truncating of the project purpose and need so effectively “define[s] competing ‘reasonable alternatives’ out of consideration (and even out of existence).” *Simmons v. Army Corps of Engineers*, 120 F.3d 664 (7th Cir., 1997). Importantly, MTC has embraced a transportation/land use platform and ABAG has substantially revised its population projections within the region as urban core areas are revitalized and the benefit of robust public transit services makes these living circumstances more attractive, and the far flung area, such as Fremont, less so. The DEIS has narrowed the project purpose and description, and truncated its alternatives analysis based on land use and population projections that have since been revised. The ABAG 2003 projections are quite different from the 2002 projections relied on in the DEIS. Note that the 2003 projections are the basis for the MTC Regional Transportation Plan, each of which are hereby incorporated by reference in these comments. The DEIS fails to accurately and completely describe the project’s scope and purpose, and thereby allow a fair consideration of alternatives. The purpose must be updated to reflect the most recent population projections, and incorporate the RTP which draws a greater focus on smart growth and increased density in urban core areas, and less our I the fringes, including Fremont.

Further, the project purpose and objectives avoids any consideration of the needs of or impacts to the transit dependant community, for whom environmental justice issues are more important. The project purpose is itself prejudicial – providing transit access that meets the needs of “choice” riders by “attracting riders to transit who would otherwise use local or regional roadways.” DEIS at 2-5. The only reference to equity in the project purpose refers to providing multi-modal access, and not ensuring that the project will not discriminate against the needs of the transit dependant community that is suffering diminishing service and increasing fares.

2. Alternatives Analysis - The EIS Fails to Consider A Reasonable Range of Alternatives

The current DEIS fails to consider a reasonable range of alternatives. This project history indicates that alignment and other project features have been modified to respond to local jurisdiction objections and other considerations. A number of alternative transportation systems have also been suggested that would have lesser impacts and higher efficiencies, including bus rapid transit and high speed commuter rail.

DOT’s NEPA regulations establish the central role of an alternatives analysis in a NEPA environmental review document. 23 C.F.R. § 771.105(b). The alternatives analysis “is at the heart of the environmental impact statement.” 40 C.F.R. § 1502.14(a); *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). Rather than include consideration of alternatives, the DEIS defers instead to another document, which the DEIS purports to simply incorporate by reference.

Commenters and others have raised concerns that connecting BART to San Jose at this time will usurp virtually all discretionary transportation funds in the Bay Area for many years into the future. Commenter attaches and includes the "TRANSDEF RTP Alternative" as evidence that much greater public transportation benefits could be provided from directing these funds to other type of projects. The RTP EIR examined how changed land use assumptions and strategic transit investments provided a viable alternative to MTC's proposed RTP. Although the TRANSDEF alternative was not adopted in its entirety, and number of the concepts have been embraced by MTC, and offer a practical alternative to the connection of BART to San Jose, avoiding the extraordinary costs associated with this form of transit and offering means to address existing disproportionalities.

Specifically, the EIS must examine other projects that can achieve the project purposes with lesser environmental effect, and it is commenter's conclusion that there are many. MTC's RTP includes an intercity rail service between Oakland and San Jose that would parallel the project and BART's service to San Jose. MTC Resolution 3434; Draft RTP page 80. That service will increase to 16 trains per day. While it may not offer a stop at the proposed Warm Springs Station, it does possess the ability to provide regional commuter service from the Fremont area both north to Oakland, where transfer to BART is possible, and south to San Jose. Commenters contend that this represents a reasonable alternative that could meet the project's true purposes at considerably less cost. "The existence of reasonable but unexamined alternatives renders an EIS inadequate." *Friends of Southeast's Future, supra*, 153 F.3d at 1065, citing *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

Incorporating another environmental review document by reference fails to advise decisionmakers and the public of the facts, conclusions and rationale underlying the environmental review document and its conclusions. The public must go through a challenging process of obtaining another lengthy environmental review document, reviewing that document in total to identify the sections which DOT may be referencing and relying, consider that analysis, then correlate the two analyses to understand the DEIS. That is an unreasonable burden to place on the public, and creates enormous opportunities for error if the public relies upon different language than that which the DEIS drafters have relied upon. Language is subject to differing interpretations, and the public may make a different interpretation than the one the DEIS drafters made.

Commenters believe it is vastly preferable, and required by governing law, that DOT include the alternatives analysis language that they have relied upon in the DEIS. At a minimum, the DEIS should contain: 1) a readily available web site and physical address where the referenced document may be reviewed; 2) the specific page numbers and other citations to the precise language and analysis that the DEIS has relied upon; and 3) a summary in the DEIS of the critical facts, the analysis and the conclusions that the DEIS relies upon in its conclusions that there are no other feasible alternatives. The DEIS' mere summary of conclusions fails to apprise

the public of the analysis and allow a critical testing of the underlying facts, assumptions and conclusions.

Additionally, the EIS must identify and disclose potential adverse effects from BART's usurpation of a considerable portion of available transportation funds, and the effect that the direction of a large proportion of regional transportation funds to a single project will have on other projects that are responding to other transportation requirements but must compete with the immediate project for funds. This disclosure is important in indicating the need to more carefully examine alternatives, including alternatives that might be able to provide the basic project purposes, perhaps not in the same style, but at a fare reduced cost, liberating funds to meet the needs of the transit dependant.

3. Cumulative Impact Analysis

A. San Jose BART Service

The DEIS is devoid of analysis of the cumulative effects, both direct and indirect, of the planned extension of BART to San Jose and beyond. While the DEIS attempts to address some of the impacts from the WSX project, it must also examine the same sorts of direct and indirect impacts that will occur from the extension of BART to San Jose and beyond. These impacts result from reasonably foreseeable future actions and thus must be identified. 40 C.F.R. § 1508.7.

B. Development in the Warm Springs station region

The DEIS fails to adequately analyze a lynch-pin of this project's environmental review – its growth inducing impacts. Currently, the Warm Springs area is largely suburban. The Bay Area's Metropolitan Transportation Commission (MTC) has recognized, as have thousands of other communities and as is documented in a myriad of academic and research reports, the benefits of using "smart growth" principles in land use design. One such smart growth land use tool is "transit-oriented development." DOT has discovered this, and it is even addressed on the FTA website

http://www.fta.dot.gov/grant_programs/transportation_planning/statewide_metropolitan/planning_resources/8129_8184_ENG_HTML.htm. While the DEIS makes vague references to the use of transit-oriented development, there is no mechanism to assure it will take place or be effective. In the absence of these mechanisms, history has shown these to be false promises that are rarely brought to fruition.

Significantly, the project includes a parking garage for over 2000 cars. This element of the project will be a major indirect source of traffic and air pollution. It is apparent from the DEIS that smart growth and transit-oriented development is not being required or imposed in the WSX station region, and thus the surrounding land uses will largely remain low density suburban sprawl. Sprawling suburban land use patterns are highly inefficient – requiring greater municipal

resources to service and a higher increment of natural resources. Energy and water consumption is higher, sewage and trash generation rates are higher, auto trip generation is higher, and public infrastructure is more expensive and inefficient. See <http://www.sierraclub.org/sprawl/> generally, and <http://www.sierraclub.org/sprawl/report00/sprawl.pdf> specifically for evidence how uncontrolled sprawl imposes environmental and economic costs on communities. The DEIS must describe the likely adverse environmental consequences of its decision on the WSX station – substantial amounts of inefficient land use development in the area surrounding the station. This sprawl necessitates auto-dependant transportation patterns, including such actions as driving short distances to the BART station, which actually can increase emissions due to cold-start/hot soak phenomenon. These features impact air quality and traffic congestion. The DEIS fails to consider as either mitigation or an alternative a mandate increasing the density of housing in the immediate area surrounding the station. Each should be included in the EIS.

DOT should note that MTC's RTP "conditions Resolution 3434 discretionary funds allocations on local governments taking steps to implement the Smart Growth Vision through general plan amendments and zoning changes. This new approach both responds to the Bay Area's acute housing shortage and gets the most "bang for the buck" out of these costly rail transit extensions." Draft RTP, page 5. MTC could not so condition funds for the BART extension as they had been previously programmed, but DOT can and should employ the same strategy in conditioning its discretionary funds that are used for BART extensions. Otherwise, the weak and unenforceable recitations in the DEIS will have no mitigative effect.

C. Usurpation of Funding and Displacement of Other Necessary and Beneficial Projects

The DEIS fails to address an important indirect effect of DOT action. The Bay Area currently experiences more unmet transit needs than it has financial resources to address. RTP at 33, attached as Exhibit 1. The vast majority of the unmet transit needs are experienced in communities that have high percentages and proportions of persons of low income and/or of color that rely more extensively on public transit than more affluent and Anglo populations. Disproportional impacts to these communities implicate environmental justice issues under state and federal law. The impact of this project upon these "target" populations must be articulated and mitigated.

Current levels of public transit funding is inadequate to need the needs of target populations, leading to lawsuits, public unrest and angst among these populations. See Exhibits 2-5, RTP DEIR pages 3.1-14, 3.1-16, and 3.1-20 and the RTP Equity analysis Report, page 5-31, respectively. The BART extension involves committing upwards of \$7 billion – well over half of all transit funds identified in the Regional Transportation Plan for the next 25 years. RTP, page 35.

As articulated in the TRANSDEF alternative to the RTP, the allocated of a greater proportion of available transportation dollars to the needs of these target populations can, in fact, address may disproportionalities and provide more overall public transit to the Bay Area. See Exhibit 6-7, RTP DEIR Appendix D.1 and FEIR pages 2-17 & 2-18. In essence, BART is a very inefficient use of limited transit funds, and the commitment of funds to BART excludes the potential to fund other more efficient projects. The DEIS must address this significant adverse consequence.

Additionally, NEPA requires disclosure that this project will require the irretrievable commitment of considerable financial resources that will foreclose other transportation options and benefits. This issue must be addressed explicitly in the EIS.

These issues must also be addressed in the project's financial element, which otherwise omits critical information concerning the project's impacts.

4. Segmentation

It is folly to label the WSX alternative, and the Warm Springs termini, as possessing independent utility. The region surrounding the proposed Warm Springs termini is largely undeveloped, as reflected by the fact that much of the external infrastructure will be built at a future time. There is no independent utility from building a highly growth-inducing infrastructure in an undeveloped area. Recitation to statements of legislative intent do not create a purpose for a project, but, in this case, reflect the intense political nature of a multi-billion dollar public transit project. The only "independent utility" of WSX is to serve as a stepping stone to the San Jose BART connection – a \$6 billion plus project. The entire Fremont to San Jose BART connection is the project, and DOT has omitted a complete evaluation of this project's impacts by addressing this interconnected project in pieces.

DOT has committed a fatal error in segmenting the Fremont-WSX segment of BART extension from the WSX-San Jose segment, which coincidentally has been proceeding along a nearly perfectly parallel track, with the CEQA environmental impact report certified in December 2004, a mere 5 months prior to the date of the instant document.

DOT's environmental review regulations mandate that "[t]o the fullest extent possible, all environmental investigations, reviews and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation." 23 C.F.R. § 771.105(a).

The DEIS asserts that "[t]he courts have recognized that linked regional transportation improvements are commonly carried out incrementally in a series of projects or phases, implemented in some cases by different agencies, rather than all at once. An individual transportation project may be separately reviewed under NEPA if it has "independent utility (i.e., the project does not depend upon connection to another project for its justification and need) and

in “logical termini” (i.e., termini at locations where there is access to the project, not isolated locations that only make sense when connected to the other project.)” DEIS at 5-2 to 5-4.

The DEIS fails to cite the cases that support their assertion, and none have been found based on Commenter’s research. The WSX is far from possessing independent utility, and the projects are inextricably linked, as observed by EPA in their May 2004 comment letter. DOT is well aware that BART’s extension to San Jose has been the desire of San Jose officials for decades, and BART has worked very hard to achieve this result, in spite of extraordinary costs and very limited projected ridership. Projected ridership at WSX is very limited, particularly in comparison to San Jose. What would be the BART ridership to San Jose absent WSX? Zero. This assertion of independent utility is simply not supportable. The DEIS has a duty to disclose all relevant information, including a meaningful cumulative impacts analysis. This has been avoided in the instant document, and cannot be condoned.

5. Best Public Interest Analysis Issues

The DEIS must include a “best overall public interest” provision in its analysis. This analysis philosophically underlies all DOT transportation decisionmaking, and is codified at 23 U.S.C. § 109(h) pertaining to highway projects, however the same language and purpose is recited in DOT’s generic NEPA regulations that control here, at 23 C.F.R. § 771.105. “It is the policy of the [DOT] administration that: (a) [all environmental reviews and issues] be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation [and] (b) alternative courses of action be evaluated and decisions be made in the best overall public interest based on a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals.” 23 C.F.R. § 771.105(a) & (b).

Thus, in addition to NEPA compliance, the DEIS must contain a public interest evaluation which considers, *inter alia*, social and economic impacts. Commenters believe that the WSX project, and its correlative extension to San Jose, will have substantial and adverse social and economic effects. Specifically, the lower income communities, that are experiencing growth at the same or higher rates as the region, will experience continuing reductions in the levels of transit service over time. The financial resources necessary to remedy those social effects – increasing the number and quality of bus service – will be unavailable due to the WSX and San Jose extensions’ consumption of all available discretionary transportation dollars.

The degradation of transit service for transit dependant communities will worsen their economic vitality, increasing unemployment and under-employment as the lack of adequate transportation will reduce the size of the area that a transit dependant applicant may reasonably seek work.

Representatives of the environmental justice community have consistently asserted that MTC has improperly advanced funding for expensive choice transit systems to the detriment of transit dependant community needs. MTC's response has been to offer token grants under its Transportation for Liveable Communities program. MTC awarded grants of about \$60 million to this, while the extension of BART to San Jose will cost more than \$6 billion. As transportation funds have become less available and more competitive, it takes a higher and higher diversion of discretionary funds to keep the BART extension alive, and once the WSX leg is approved, the extension to San Jose may be viewed as a forgone conclusion. The DEIS must review and analyze this issue before allowing the irretrievable commitment of nearly \$700 million to the WSX extension.

6. Failure to Describe Federal Portions and Linked Mitigation

DOT regulation allow the use of federal funds for mitigation of those project impacts associated with the federal portion of the project. 23 C.F.R. § 771.105(d). The DEIS fails to articulate with any precision what the DOT or BART consider to be the federal elements of the project (see project description and purpose comment, above) and thus the federal mitigation requirements, and compliance, remain a mystery. Federal funding for mitigation is only available when the Administration makes an affirmative determination that: "The impacts for which the mitigation is proposed actually result from the Administration action." 23 771.105(d)(1). Significantly, the EIS for the other leg of this project, WSX to San Jose, fails to similarly articulate DOT must revisit this analysis in the instant DEIS.

For all the reasons stated above, TRANSDEF respectfully requests that FTA revise and recirculate the DEIS.

Sincerely,

/S/
Marc Chytilo

Appendix

- Exhibit 1: Transportation 2030 Draft RTP, p. 3
- Exhibit 2: Transportation 2030 DEIR, p. 3.1-14
- Exhibit 3: Transportation 2030 DEIR, p. 3.1-16
- Exhibit 4: Transportation 2030 DEIR, p. 3.1-20
- Exhibit 5: Transportation 2030 Equity Analysis Report, p. 5-31
- Exhibit 6: Transportation 2030 DEIR, Appendix D.1
- Exhibit 7: Transportation 2030 FEIR, p. 2-17 & 2-18