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13 PROGRAM, TRANSFORM AND GENESIS

14 BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION  
15 FEDERAL TRANSIT ADMINISTRATION

16 URBAN HABITAT PROGRAM, a nonprofit  
17 corporation; TRANSFORM, a nonprofit  
18 corporation; GENESIS, an unincorporated  
19 association,

20 Complainants,

21 v.

22 BAY AREA RAPID TRANSIT DISTRICT,

23 Respondent.

24 **COMPLAINT UNDER TITLE VI OF**  
25 **THE CIVIL RIGHTS ACT OF 1964**  
26 **AND EXECUTIVE ORDER 12898**

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1           **I.       INTRODUCTION**

2           Three San Francisco Bay Area organizations bring this complaint against the Bay Area Rapid  
3 Transit District (“BART”) under Title VI of the Civil Rights Act of 1964, Executive Order 12898, and  
4 related provisions, in connection with BART’s proposed Oakland Airport Connector (“OAC”). The  
5 OAC project is a new rail link that would run the 3.2 miles to the Oakland International Airport from  
6 BART’s Coliseum Station. Its capital cost is currently projected to exceed \$500 million, and it would  
7 charge a one-way fare of up to \$6. The rail project would replace an existing bus link with a fare of  
8 \$3.

9           As a recipient of Federal Transit Administration (“FTA”) assistance, including funding under  
10 the American Recovery and Reinvestment Act of 2009 (“ARRA”), BART is subject to federal  
11 requirements that require it to analyze the equity impacts of the service and fare changes and  
12 improvements associated with the project and its alternatives, including any discriminatory impacts on  
13 minority populations and low-income populations. It has not met these requirements. BART relies,  
14 instead, on a grossly outdated Environmental Impact Statement/Environmental Impact Report that it  
15 adopted in 2002, when the project’s capital cost was estimated at \$229.6 million, and included two  
16 intermediate stops and a fare of \$2, and on its 2007 Title VI Triennial Report, which contains no  
17 evaluation of this particular project at all.

18           Situated in an East Oakland community with a very high minority and low-income population,  
19 the OAC will traverse a corridor with many low-wage jobs that employ local residents, yet it will  
20 apparently be built without any intermediate stops. Even if such stops were added in the future, its  
21 extremely high fare will exclude low-income riders from the delayed benefits of the new service.

22           Despite numerous requests from community members, BART has refused even to study a  
23 proposed Bus Rapid Transit alternative that would cost only \$60 million to build, would include an  
24 intermediate stop, and would be free, or low-cost, to riders.

25           More than just a procedural shortcoming, BART’s failure to evaluate the equity impacts of the  
26 OAC project, and weigh appropriate alternatives to find a less discriminatory one, is likely to have  
27 disparate impacts on Environmental Justice populations in East Oakland, low-income and minority  
28

1 BART riders, and the many low-wage workers with jobs at the Airport and along the Hegenberger  
2 corridor in which the OAC project would operate. Those populations either rely on the existing bus  
3 connection or would benefit from a low-fare transit option with stops at the Airport and along the way.  
4 Of equal concern to these populations is the massive capital cost of the OAC project, which will drain  
5 scarce funds from local, state and federal sources that could otherwise provide operating and capital  
6 assistance for low-cost transit on which East Oakland residents rely very heavily to access  
7 employment, education and other essential opportunities.

## 8 9 **II. FACTUAL BACKGROUND**

### 10 **A. The Project**

#### 11 **1. Bay Area Rapid Transit District**

12 BART provides heavy rail service within the San Francisco-Oakland Urbanized Area – an area  
13 with a population of over 3 million.<sup>1</sup> BART has a ridership of about 100 million, almost half of whom  
14 (46%) are white and fewer than 13% have incomes below \$25,000.<sup>2</sup> It serves four counties (Alameda,  
15 Contra Costa, San Mateo, and San Francisco).<sup>3</sup>

16 BART offers connecting bus service (“AirBART”) between the Coliseum station and the  
17 Oakland International Airport (“the Airport” or “OIA”) at a one-way fare of \$3. (Ex. A at 16.)<sup>4</sup>

#### 18 **2. The Oakland International Airport**

19 The Airport serves over 11 million passengers annually and employs approximately 8,000  
20 workers, including an estimated 1,620 low-wage employees.<sup>5</sup> Primary roadway access to the Airport  
21

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22 <sup>1</sup> National Transit Data Base (hereafter “NTDB”), *2000 Census Primary/Secondary UZA’s*. Accessed August  
23 2009 at <http://204.68.195.57/ntdprogram/reference.htm>.

24 <sup>2</sup> See <http://www.bart.gov/docs/barttimes/BTimes0707.pdf> (accessed August 2009); see also Metropolitan  
25 Transportation Commission (hereafter “MTC”), *2006 Transit Passenger Demographic Survey* (hereafter “2006  
26 Demographic Survey”), at 4.4-18 – 4.4-19. Accessed August 2009 at  
[http://www.mtc.ca.gov/maps\\_and\\_data/datamart/survey/](http://www.mtc.ca.gov/maps_and_data/datamart/survey/).

27 <sup>3</sup> See generally <http://www.bart.gov/index.aspx> (accessed August 2009).

28 <sup>4</sup> See [http://www.bart.gov/guide/airport/inbound\\_oak.aspx](http://www.bart.gov/guide/airport/inbound_oak.aspx) (accessed August 2009).

<sup>5</sup> See [http://www.oaklandairport.com/airport\\_stats\\_yearend\\_stats.shtml](http://www.oaklandairport.com/airport_stats_yearend_stats.shtml) (accessed August 2009); see also  
[http://www.oaklandAirport.com/Airport\\_stats\\_facilities.shtml](http://www.oaklandAirport.com/Airport_stats_facilities.shtml) (accessed August 2009); see also East Bay  
Alliance for a Sustainable Economy, *Living Wage Implementation at the Port of Oakland: One Year Status*

1 is provided via Hegenberger Road and 98<sup>th</sup> Avenue, both of which intersect Highway 880 and connect  
2 to Airport Drive. (Ex. B at S-13.) The Airport's two terminals are located adjacent to Airport Drive.  
3 (*Id.*)

4 Since 2002, when BART certified the final EIR/EIS for the OAC project, the Airport and the  
5 surrounding area have undergone substantial renovation and redevelopment.<sup>6</sup> A \$300 million  
6 improvement program has improved traffic flow to the Airport by making a series of roadway and  
7 terminal improvements on Airport property designed to reduce congestion.<sup>7</sup> In addition, major  
8 redevelopment projects along the Hegenberger corridor have resulted in new and expanded  
9 commercial development, including new hotels and a Wal-Mart near the I-880/Hegenberger Road  
10 interchange. (Ex. D at 3-43-3-44.)<sup>8</sup> This development has brought an increased concentration of low-  
11 wage jobs to the area.<sup>9</sup>

12 In addition to AirBART, public bus service to the Airport is provided by AC Transit (Line 50).  
13 (Ex. A at 16.)<sup>10</sup> Nearly 80 percent of AC Transit's local riders are people of color and more than a  
14 third of all AC Transit riders have household incomes below \$25,000.<sup>11</sup> The adult cash fare for AC  
15 Transit is \$2, and the daily ridership on Line 50 is 7,847.<sup>12</sup> AC Transit is considering reducing service  
16  
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19 *Report*. July 2003 at page 3. Accessed on August 2009 at  
20 <http://www.workingeastbay.org/article.php?list=type&type=15>.

21 <sup>6</sup> Oakland Community and Economic Development Agency, *Key Development Areas: I-880/Hegenberger*  
22 *Corridor*. Accessed on August 2009 at  
23 <http://www.business2oakland.com/main/i880corridordevelopmentarea.htm>.

24 <sup>7</sup> See [http://www.flyoakland.com/press\\_releases\\_detail.cfm?ID=281](http://www.flyoakland.com/press_releases_detail.cfm?ID=281) (hereafter "OIA Press Release") (accessed  
25 August 2009).

26 <sup>8</sup> Goll, David. "Hot Hegenberger roars with new activity." *San Francisco Business Times*, May 26, 2006.  
27 Accessed on August 2006 at <http://eastbay.bizjournals.com/eastbay/stories/2006/05/29/story2.html>.

28 <sup>9</sup> Johnson, Chip. "Sometimes, Wal-Mart can be a good thing." *San Francisco Chronicle*. September 19, 2005.  
Accessed on August 2009 at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/09/19/BAG8REPTJ81.DTL>

<sup>10</sup> See Alameda Contra Costa Transit District (hereafter "AC Transit"), *Frequently Asked Questions*. Accessed  
on August 2009 at <http://www2.actransit.org/faq/>

<sup>11</sup> See 2006 Demographic Survey, *supra* at 4.1-18 – 4.1-19.

<sup>12</sup> See <http://www2.actransit.org/riderinfo/busfares.wu> (accessed August 2009). See also AC Transit GM  
Memo 09-161 (hereafter "GM Memo 09-161") at page 2, Attachment 2 at 2. Accessed August 2009 at  
<http://www.actransit.org/aboutac/bod/memos/5098e0.pdf?PHPSESSID=91a26f577e03c7aef39418dfdd197bd7>



1 on Line 50 by up to 71.5% in January 2010, as a result of a fiscal emergency that is expected to result  
2 in the elimination of 15 percent of its total bus service.<sup>13</sup>

3 3. The Oakland Airport Connector

4 The OAC would provide an aerial guideway connection from BART's Coliseum station to the  
5 Airport using Automated Guideway Transit ("ATG") technology. (Ex. B at S1.)<sup>14</sup> The new rail  
6 service provided by the project is intended to impact the entire BART system. In addition to providing  
7 "reliable scheduled service between BART and OIA," an explicit objective of the project is to  
8 "maximize" overall BART ridership. (Ex. B at 1.3-2.) As discussed *infra*, the OAC project was  
9 selected by the region's MPO as "a project of region-wide significance . . . ."<sup>15</sup>

10 The project, as originally configured, came before the Alameda County voters in November  
11 2000, in connection with a request for approximately \$90 million in local sales tax funds ("Measure  
12 B"). (*Id.* at S7-S8.)<sup>16</sup> The voters were told that the project had a total capital cost of \$130 million.  
13 (Ex. C at 1.) To increase ridership and "support [] economic development in the area and . . . link[]  
14 transportation facilities with recreation uses, job centers and commercial nodes" (Ex. D at 3-12), two  
15 intermediate stops were included in the project's route: one near the intersection of Hegenberger Road  
16 and Edgewater Road and the other at the Hegenberger Road/Doolittle Avenue intersection. (Exs. B at  
17 2.2-14, D at 1-2.) The City of Oakland selected and supported the inclusion of the two intermediate  
18 stops to "stimulate transit-oriented development and job creation within their immediate vicinity."  
19 (Ex. U.) "[U]se of the OAC by employees and visitors to the businesses around the intermediate  
20 stations" was projected to add 880,750 passengers annually. (Ex. B at 2.2-14.) If in place today, these  
21 stations would give OAC passengers walking distance access to the new Wal-Mart, Airport hotels, and  
22 other businesses along Hegenberger Road. (Exs. E-F.)

23  
24 <sup>13</sup> GM Memo 09-161, *supra*, Att. 2 at 2.

25 <sup>14</sup> The 3.2-mile project corridor runs from the Coliseum station along San Leandro Street, then south along  
Hegenberger Road, and finally along Airport Drive to the Airport. (Ex. B at 3.15-2, n.1.)

26 <sup>15</sup> See MTC Memorandum, July 16, 2009, Attachment A at page 4. Accessed on August 2009 at  
[http://apps.mtc.ca.gov/meeting\\_packet\\_documents/agenda\\_1325/6c\\_OACMemo\\_Attachment\\_A.pdf](http://apps.mtc.ca.gov/meeting_packet_documents/agenda_1325/6c_OACMemo_Attachment_A.pdf).

27 <sup>16</sup> See Alameda County Transportation Improvement Authority, *Monthly Report BART Oakland Airport*  
28 *Connector*. July 2009, at page 2.

1 In 2001, BART issued a Draft Environmental Impact Report/Draft Environmental Impact  
2 Statement (“Draft EIR/EIS”) in which it evaluated three project alternatives: (1) a No-Action  
3 alternative that continued the existing AirBART service between the Coliseum station and the Airport  
4 at a capital cost of \$400,000; (2) a Quality Bus (“QB”) alternative intended to provide more frequent  
5 connecting service than AirBART through shorter headways and signal prioritization technology at a  
6 capital cost of \$30.2 million; and (3) the preferred alternative – an elevated Automated Guideway  
7 Transit (“ATG”) connection at a capital cost of \$203.9 million.<sup>17</sup> (Ex. G at 2.1-1 - 2.6-6.) All three  
8 alternatives assumed a fare of \$2. (*Id.* at 2.2-3, 2.2-8, 2.3-12, and 2.4-11.)

9 Among several factors, the project selection criteria evaluated each alternative’s ability to  
10 “[c]omplete trips between the OIA and the Coliseum BART Station at least as quickly as motorists  
11 during off-peak weekday traffic,” “[p]rovide flexibility to serve intermediate stops,” “be constructed  
12 and operated within reasonable costs,” and [s]upport increased transit service for targeted  
13 redevelopment and revitalization areas to facility economic growth.” (Ex. B at 1.3-2.)

14 The Quality Bus alternative was found to be “the most cost effective alternative.” (Ex. B at  
15 2.3-14) BART nonetheless selected the ATG in its adoption of the Final Environmental Impact  
16 Report/Environmental Impact Statement in 2002 (“Final EIR/EIS”). Among the proffered reasons  
17 were: (1) the exclusive guideway allowed the ATG to achieve on-time performance that was “more  
18 difficult to emulate with the No Action or QB alternatives” (*id.*); (2) the AGT provided travel time  
19 savings compared to the other alternatives and to driving; (3) the AGT was projected to generate the  
20 highest ridership, and the “greatest increase in BART ridership” (*id.*); (4) the “intermediate stations  
21 would further the economic development in the Hegenberger corridor . . . , a specific goal of the  
22 Oakland General Plan, and would be consistent with BART’s expansion policies . . . (*id.* 2.3-15).”

23  
24 The selection of the AGT alternative took place in 2002, before the completion of the Airport  
25 roadway access and terminal improvements described above. Since then, many of the road and traffic  
26 conditions on Hegenberger Road, 98th Avenue, Airport Drive, and the terminals, which reduced the

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27 <sup>17</sup> Of the three alignment options available for the AGT, Option A was selected. (See Ex. B at 2.32-2.3-9.)  
28

1 service speed of the Quality Bus alternative, have been eliminated.<sup>18</sup> Moreover, the Quality Bus  
2 alternative did not include the key components often present in a Bus Rapid Transit alternative, such  
3 as exclusive right-of-ways or “jump lanes” to bypass traffic congestion.” (Ex. H. at 8.) Finally,  
4 although the EIR/EIS stated that an objective of the OAC project was to “provid[e] flexibility to  
5 accommodate potential intermediate stops to support local economic growth,” only the ATG  
6 alternative included such intermediate stops, providing it with a built-in advantage over the other  
7 alternatives. (Ex. H at 8.) This advantage was emphasized in AC Transit’s comments on the Draft  
8 EIR/EIS:

9  
10 Because the project description of the bus alternative does not include a dedicated or exclusive  
11 right-of-way, the bus alternative cannot compete in terms of providing service . . . The bus  
12 alternative must be equipped with the same competitive features of the AGT Alternative  
13 (exclusive right-of-way, intermediate stops) in order for the public and decision-makers to have  
14 an opportunity to consider all feasible alternatives. A revised DEIR/EIS must be completed for  
15 this reason alone.

16 (Ex. H at 3.)

17 Since Alameda County voters first approved local funding for the OAC project in November  
18 2000, the cost of the OAC project has ballooned while its benefits have been significantly scaled back.  
19 When Measure B was adopted, the total capital cost of the project was \$130 million. (Ex. C at 1.) By  
20 the time the Final EIR/EIS was adopted in 2002, the project cost had increased to \$229.6 million. (Ex.  
21 B at 2.3-10.) To contain what would otherwise have been an even greater cost increase, BART  
22 substantially modified the project at that time, by reducing the minimum travel speed of the ATG  
23 vehicles (from 45 mph to 30 mph) (Ex. C at 12), increasing walking times by removing the direct  
24 connection to the Airport terminal (*id.* C at 1), increasing the one-way fare threefold (from \$2 to as  
25 much as \$6)<sup>19</sup> (*id.* at 12), and eliminating the two intermediate stops (Ex. D at ES-2). While BART’s  
26 OAC project maps still display a site for a “Future Doolittle Station,” (see Ex. I at 2) Complainants  
27 have reason to believe that the funding to construct the Doolittle station has been left out of the current  
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<sup>18</sup> OIA Press Release, *supra*.

<sup>19</sup> The \$6 fare would be charged on top the BART base-fare paid by passengers that ride BART to the Coliseum station from other stations in the system.

1 project. (See Ex. B at S-32.) (“financing for the AGT and intermediate stations” listed as  
2 “[u]nresolved.”) Moreover, while the 2002 EIR/EIS estimated that the AGT alternative would  
3 generate 13,540 new riders per day, more recent estimates indicate that the ridership will be as low as  
4 3,890. (Ex. C at 3-4.) These now-reduced benefits were instrumental in giving the ATG the necessary  
5 advantages over the No-Action and Quality Bus alternatives.

6 Even with these cost-saving alterations, the capital cost of the OAC project now stands at an  
7 estimated \$522 to \$552 million. (Ex. I at 5.) BART has not conducted a new or supplemental  
8 EIR/EIS to evaluate the significantly-modified ATG alternative compared to the No-Action or QB  
9 alternatives.<sup>20</sup>

10 4. The Project Area’s Environmental Justice Communities

11 The OAC project will be located within a half mile of communities that are predominately  
12 minority and low-income. (Ex. B at 3.15-2-3.) The Final EIR/EIS identified two Environmental  
13 Justice communities within a half mile of the OAC project study area: North of BART and Columbia  
14 Gardens. (*Id.*) Both communities have higher minority and poverty rates than the City of Oakland  
15 and Alameda County as a whole. (*Id.*) (The City of Oakland itself has far higher minority and poverty  
16 rates than the County.) (*Id.*) The EIR/EIS found that the racial and income demographics in these two  
17 communities are as follows:

18

<b>EJ Community</b>	<b>% Minority</b>	<b>% Low-Income</b>
North of BART	98%	33.4%
Columbia Gardens	97%	25.1%

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20  
21  
22

23 <sup>20</sup> BART adopted an addendum to its Final EIR/EIS in November 2006, which took account of the  
24 elimination of the intermediate stop near the intersection of Hegenberger Road and Edgewater Road,  
25 as well as the improvements to the Airport terminals and roadway access. (Ex. D at ES-2, 3-1, 3-9.)  
26 The addendum, however, did not update the No-Action and QB alternatives, nor did it re-evaluate  
27 these alternatives in comparison to the modified ATG alternative. It also did not analyze the reduced  
28 minimum speed, the increased walking times, the removal of the Hegenberger Rd./Doolittle Ave.  
intermediate stop, the three-fold increase in the fare, or the reduced ridership projections for the ATG  
alternative.

1 (*Id.* at 3.15-3-4.) Combined, both communities had racial minority and low-income status that were at  
2 least 10 percentage points higher than for the City of Oakland and Alameda County. (*Id.* at 3.15-6.)  
3 More recent data reveals similar racial and income demographics. (Exs. J and K.)

#### 4 5. TransForm’s RapidBART Alternative

5 In May 2009, TransForm proposed a Bus Rapid Transit (“BRT”) alternative to the AGT, called  
6 “RapidBART.” (See Ex. C.) This alternative would provide similar service to the AGT preferred  
7 alternative, at a free or low-cost fare to riders, and with a total estimated capital cost of \$45 to \$60  
8 million. (*Id.* at 11-12.) RapidBART would also include one intermediate stop to provide passengers  
9 with access to the many businesses and employment opportunities along the route. (*Id.*) Unlike the  
10 Quality Bus alternative studied in the 2001 Draft EIR/EIS, RapidBART would benefit from the  
11 significant improvements in roadway access to the Airport, as well from “queue jump lanes” to bypass  
12 vehicular traffic at key intersections. (*Id.* at 6-7, 11, 13-14.) It also has the potential to generate  
13 greater ridership than the proposed OAC, while freeing up hundreds of millions of flexible  
14 transportation dollars that could be used for desperately needed transit operations, maintenance and  
15 capital improvements in East Oakland and throughout the Bay Area. (*Id.* at 1, 10, 12-14.) (For  
16 instance, a portion of nearly \$100 million in Alameda County sales tax could be redirected to East  
17 Oakland bus service.)

18 On May 7, 2009, TransForm submitted its RapidBART proposal to BART’s General Manager.  
19 Emphasizing that “a number of [BART] Board members [had] requested more information about the  
20 potential for a surface transit project” at the their last board meeting, TransForm requested that BART  
21 assign staff and consultants to analyze the proposal, in collaboration with “community and public  
22 interest groups,” before the agency proceeded with the approval of the project’s Full Funding Plan at  
23 its May 14, 2009 meeting. (Ex. N at 1.) Rather than conduct such an analysis, BART staff  
24 immediately sought to discredit the RapidBART alternative. (*Id.* at 2-3.) TransForm obtained  
25 documents from BART under California’s freedom of information law, the Public Records Act; these  
26 documents included an e-mail dated May 8, 2009, in which Thomas Dunscombe, the OAC project  
27 manager, urged four separate BART consultants to provide any information “to put holes in” and  
28

1 “discredit this ‘paper’,” stating that “another delay from the [BART] Board and we are practically  
2 dead.” (*Id.* at 3.)

3 Despite the active efforts by BART staff to undermine the RapidBART alternative before it  
4 was considered by the BART Board (the “Board”), TransForm’s proposal received strong community  
5 support. At the May 14, 2009 Board meeting, dozens of Oakland residents and representatives from  
6 community-based organizations, including Complainants, submitted oral and written testimony against  
7 the OAC project and in support of studying the RapidBART alternative before proceeding further with  
8 the connector.<sup>21</sup> Concerns were raised over the reduced benefits in proposed OAC project for low-  
9 income and minority residents of Oakland.<sup>22</sup> In particular, they expressed concern over the  
10 elimination of the intermediate stops and the prohibitive impact a \$6 fare would have on low-income  
11 residents and low-wage Airport workers.<sup>23</sup> Many testified in favor of the free or reduced fares under  
12 the RapidBART alternative, its significantly lower capital cost, and the potential of reinvesting the  
13 millions of dollars in project savings, including ARRA funds, to help stem future transit service cuts,  
14 fare hikes and employee layoffs in East Oakland and throughout the Bay Area.<sup>24</sup> Similar public  
15 testimony was also given by dozens of community members before meetings of the Metropolitan  
16 Transportation Commission, the Oakland Port Authority, Alameda County Transportation  
17 Improvement Authority, and the Oakland City Council.<sup>25</sup>

18 BART proceeded to adopt the Full Funding Plan for the OAC project on May 14, 2009,  
19 without studying the RapidBART alternative. (Ex. M at 3.)

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20 <sup>21</sup> Audio tape recordings of BART Board of Directors Meetings of May 14, 2009. Available upon request.

21 <sup>22</sup> *Id.*

22 <sup>23</sup> *Id.*

23 <sup>24</sup> *Id.*

24 <sup>25</sup> See Metropolitan Transportation Commission Programming and Allocations Committee (hereafter “PAC”) Minutes, February 11, 2009 at page 1-2 of 4. Accessed on August 2009 at  
25 <http://apps.mtc.ca.gov/events/agendaView.akt?p=1229>; see also Audio Recording of MTC Meeting, February  
26 25, 2009. Accessed on August 2009 at <http://mtc.ca.gov/meetings/archive/index.htm>; see also MTC Meeting  
27 Minutes, February 25, 2009. Accessed on August 2009 at  
28 <http://apps.mtc.ca.gov/events/agendaView.akt?p=1250>; see also PAC Minutes, July 8, 2009 at 3-5 of 5.  
Accessed on August 2008 at <http://mtc.ca.gov/meetings/archive/index.htm>; see also Audio Recording of PAC  
Meeting, July 8, 2009. Accessed on August 2009 at <http://mtc.ca.gov/meetings/archive/index.htm>; see also  
Audio Recording of MTC Meeting, July 22, 2009. Accessed on August 2009 at  
<http://mtc.ca.gov/meetings/archive/index.htm>.

1                   6. MTC’s Regional Transit Expansion Program

2                   The OAC project is included in the list of priority regional transit expansion projects adopted  
3 by the region’s MPO, the Metropolitan Transportation Commission (“MTC”). MTC’s regional transit  
4 expansion program is embodied in MTC Resolution 3434 (“Res. 3434”).<sup>26</sup> Res. 3434 embodies  
5 MTC’s “coordinated regional priorities for transit investment,” and a key criterion for inclusion of a  
6 project in Res. 3434’s project list was that MTC believed it important to closing regional gaps in the  
7 connectivity of the Bay Area’s transit system.<sup>27</sup> As amended in November 2008, Res. 3434 includes  
8 the OAC project in its “tier 2” for “projects needing more scope/cost refinement.”<sup>28</sup> Res. 3434 shows  
9 a capital cost of \$459 million for the project, and the following sources of funds:

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Source	Amount
County sales tax	\$99 million
Regional Transportation Improvement Program	\$21 million
Regional Measure 1	\$31 million
Regional Measure 2	\$68 million
Interregional Transportation Improvement Program	\$10 million
Port of Oakland funds	\$31.5 million
Federal Public/Private Pilot Program	\$25 million
Private financing	\$174 million

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17 Res. 3434 lists the project’s capital shortfall as “to be determined.”<sup>29</sup> Since 2008, over a third of the  
18 anticipated funding failed to materialize, including the \$174 million in private financing.

19                   To fill part of the OAC project’s capital shortfall, on March 25, 2009, MTC approved \$70  
20 million in federal stimulus funds for the project under ARRA. (Ex. L at 4 of 10.) That action was  
21 highly controversial, as MTC received several hours of public comment from community members  
22 asking that it instead use those funds to preserve existing transit service, including AC Transit bus

23 \_\_\_\_\_  
24 <sup>26</sup> The federal district court in *Darensburg v. MTC* found after trial that “MTC’s practice with respect to  
25 Resolution 3434 caused disparate impact” on minority riders of AC Transit. (Findings of Fact and Conclusions  
26 of Law, Dkt. No. 392, at p. 65, filed Mar. 25, 2009.) Plaintiffs’ appeal of the district court’s ruling that this  
27 disparate impact was adequately justified is pending before the U.S. Court of Appeals for the Ninth Circuit.

<sup>27</sup> Res. 3434 (rev. 2008). Accessed on August 2009 at <http://mtc.ca.gov/planning/rtep/pdf/RES-3434.pdf>.

<sup>28</sup> *Id.* at Attachment C page 1 of 4.

<sup>29</sup> *Id.*

1 service.<sup>30</sup> MTC conditioned the \$70 million in ARRA funds on BART's ability to prepare a financing  
2 plan for the OAC project by June 30 2009; otherwise the funds would be redistributed for immediate  
3 use among various Bay Area transit operators, including BART (\$17 million), AC Transit (\$6.6  
4 million), San Francisco Metropolitan Transit Authority (\$17.4 million) and others. (Ex. L at 8 of 10-  
5 10 of 10 and Attachment C-2 page 1.)

6 On July 22, MTC accepted BART's Full Funding Plan and gave final approval to the  
7 allocation of \$70 million in ARRA funds to the OAC project; it also redirected an additional \$70  
8 million in state and regional funds to complete the project's Full Funding Plan.<sup>31</sup> Prior to the  
9 Commission's vote authorizing these controversial allocations, Commissioner Steve Kinsey stated his  
10 concerns about the OAC project:

11 There [have] been pretty well-documented reduction[s] in community benefits, whether it be  
12 the economic development opportunities, the slower service, the lack of connectivity, and that  
13 the fares favor higher income residents over lower-income residents. Those are all troubling  
14 issues.<sup>32</sup>

15 Commissioner Dave Cortese expressed additional concerns:

16 [T]he greatest . . . fear I have . . . is that the people who came out and spoke on the grassroots  
17 level about the growing gap that you see happening between . . . the haves and have-nots in  
18 terms of public transportation, what's happening with this project, versus what's happening as  
19 you pick up the paper and read about bus service and basic transportation service being cut . . .  
20 so that a swing-shift worker can get to his job or her job [but] can't get home because there's  
21 no route back. The graveyard shift worker probably can't get in either direction . . . on a  
22 regular basis. That kind of treatment to blue-collar workers, especially who are doing what we  
23 want them to . . . do – use public transportation – is something that we need to address  
24 [inaudible] in the future, not just at this level but at the local level with our local transit  
25 agencies . . . and having served at that level for a number of years . . . I appreciate the fact that  
26 people have come out today to help to continue to awaken us to that situation. And I hope you

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23 <sup>30</sup> See Audio recording of MTC Meeting, March 25, 2009. Accessed August 2009 at  
24 <http://mtc.ca.gov/meetings/archive/index.htm>. See also Letter from Public Advocates to MTC, dated February  
25 24, 2009. Accessed on August 2009 at  
26 <http://www.publicadvocates.org/docs/GenesisandUHlettertoMTCComms2-24-09FINAL.pdf>.

27 <sup>31</sup> See MTC Commission Meeting Agenda, July 22, 2009. Accessed on August 2009 at  
28 <http://apps.mtc.ca.gov/events/agendaView.akt?p=1325>. See also Audio Recording of MTC Commission  
Meeting, July 22, 2009. Accessed on August 2009 at <http://mtc.ca.gov/meetings/archive/index.htm>.

<sup>32</sup> See Audio Recording of MTC Commission Meeting, July 22, 2009 at 2:26:09-2:26:23. Accessed on August  
2009 at <http://mtc.ca.gov/meetings/archive/index.htm>.



1 won't give up. This project wasn't going to end that gap or close that gap one way or the other,  
2 but we can't continue having public transportation riders feel like second class citizens . . . .<sup>33</sup>

3 **B. Service and Fare Equity Analyses**

4 In response to questions from the public about its compliance with federal provisions requiring  
5 it to evaluate whether the service and fare changes and improvements associated with the OAC project  
6 have a discriminatory impact on people of color and low-income populations, BART has at different  
7 times offered two different documents: first, a short excerpt from the project's 2002 Final EIR/EIS,  
8 and later its 2007 Title VI Triennial Report.

9 On June 12, 2009, Public Advocates submitted a request to BART under the Public Records  
10 Act, asking for any evaluation that BART prepared with respect to the project pursuant to FTA  
11 Circular 4702.1A.<sup>34</sup> (Ex. O.)<sup>35</sup> In response, BART provided Public Advocates with a 7-page excerpt  
12 of the project's Final EIR/EIS entitled, "Section 3.15 Environmental Justice." (Ex. P.) The contents  
13 of this document include a description of the requirements under Executive Order No. 12898, the  
14 community participation process followed to solicit public comments on the Draft EIR/EIS, a  
15 summary of the environmental conditions associated with the OAC project, race and income data on  
16 the two environmental justice communities identified within the project study area (the North of  
17 BART and Columbia Gardens neighborhoods), and a summary of the methodology and steps used in  
18 the Final EIR/EIS (based on guidance by the Environmental Protection Agency, Council on  
19 Environmental Quality Environmental Justice, and the Federal Highway Administration) to  
20 "determine if the preferred alternative would result in impacts on racial minorities and low-income

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21 <sup>33</sup> *Id.* at 2:28:44- 2:30:12.

22 <sup>34</sup> Public Advocates' request read:

23 FTA Circular 4702.1A requires, in part that 'recipients . . . shall evaluate significant system-wide  
24 service and fare changes and proposed improvements at the planning and programming stages to  
25 determine whether those changes have a discriminatory impact.'

26 Pursuant to the Public Records Act, California Government Code § 6250 *et seq.*, please provide us with  
27 a copy of any evaluation that was prepared by or on behalf of the Bay Area Rapid Transit District  
28 ("BART") with respect to the Oakland airport Connector (OAC) project *pursuant to FTA Circular*  
*4702.1A.*

1 populations.” (*Id.* at 3.15-1-7.) The document concluded that EJ populations would suffer no adverse  
2 environmental effects from the OAC project, but did not consider whether they would share equally in  
3 its benefits:

4           Operation of the preferred alternative would not affect either the North of BART or Columbian  
5 Gardens residential areas. Both of these communities are physically separated from the  
6 corridor in which both alternatives would operate. Intervening land uses between the North of  
7 BART and Columbian Garden communities, mostly commercial and industrial uses, would act  
8 as effective buffers between the Connector operations and residents of these communities. The  
9 intervening land uses would provide an effective shield from potential operational effects such  
10 as increased noise, visual disruption, or any other operations-related effect. As a result, neither  
11 the North of BART nor Columbia Gardens communities would experience an adverse effect  
12 from the operations of the preferred alternative. (NI)

13 . . . .

14           Since the preferred alternative would not have any affect on environmental justice  
15 communities, they would not contribute to potential cumulative effects resulting from other  
16 foreseeable development projects in the Connector project corridor. As a result, there would  
17 be no cumulative effects with the preferred alternative to environmental justice.

18 (*Id.* at 3.15-6-7.)

19           On July 8, 2009, MTC held a hearing on a proposal to transfer \$37 million in Regional  
20 Measure 2 funds from BART’s Seismic Retrofit project to the OAC project.<sup>36</sup> In public comment at  
21 that hearing, Robert Allen of Urban Habitat notified BART and MTC staff of BART’s failure to  
22 produce the required equity analyses for the project. (Ex. Q at 4 of 5.) (“Bob Allen, Urban Habitat,  
23 was in opposition of the OAC project, stating that a proper analysis needs to be completed by BART  
24 for the OAC project and that the current project does not comply with Title VI requirements.”) Mr.  
25 Allen sent a follow-up letter to MTC, dated July 8, 2009, alerting the MPO that the information  
26 provide by BART to Public Advocates in response to the June 12, 2009 public records request did not  
27 meet the requirements of FTA Circular 4702.1A. (Ex. R.) The letter requested that MTC  
28 “immediately require BART to complete the necessary Title VI Analysis as outlined in FTA Circular

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<sup>36</sup> See MTC Program and Allocations Committee Minutes, July 8, 2009. Accessed on August 2008 at <http://mtc.ca.gov/meetings/archive/index.htm>.

1 No. FTA C 4702.1A before making any decision on the allocation of federal funds for the OAC  
2 project.” (*Id.* at 3.)

3 In response to Mr. Allen’s letter, BART attorney Byron K. Toma wrote a letter to MTC’s  
4 general counsel, dated July 14, 2009, stating:

5 While the public records act request made earlier this month by Public Advocates was not  
6 understood to be requesting the Title VI report, I am pleased to advise you that BART has  
7 prepared the necessary Title VI Triennial Report (2007) in compliance with FTA Circular  
8 4702.1A. The next Triennial Report (2010) will be completed later this year and will  
encompass proposed fare and service changes in the entire system.

9 BART has a policy in place for the evaluation of fare and service changes that has been  
10 approved by the FTA through every Triennial audit. At this stage in the OAC Project, a  
separate report would appear unwarranted under our procedures.

11 (Ex. S.) BART’s 2007 Title VI Triennial Report includes no discussion of the OAC project, much less  
12 an analysis of the service change, fare structure, or improvements associated with the project. (Ex. A  
13 at 17-18.)

14 Other than these two documents, BART has not publicly released any other document that  
15 purports to analyze the equity impacts of the service and fare changes and improvements associated  
16 with the OAC project.

### 18 **III. JURISDICTIONAL FACTS**

#### 19 **A. Complainants**

20 Urban Habitat is a nonprofit environmental justice organization based in Oakland, California,  
21 with a mission to build power in low-income communities and communities of color by combining  
22 education, advocacy, research and coalition-building to advance environmental and social justice in  
23 the San Francisco Bay Area (the “Bay Area”). Since at least 1998, Urban Habitat has advocated for  
24 just transit opportunities for environmental justice communities in Oakland, and the Bay Area. In  
25 particular, Urban Habitat is deeply concerned that minority and low-income Oakland residents,  
26 workers and patrons of BART, will be denied equitable benefits under the proposed OAC project,  
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1 including the denial of access to enhanced transit services, affordable fares and improved access to the  
2 Airport as well as to destinations along the project route.

3 TransForm (formerly known as the Transportation and Land Use Coalition), also based in  
4 Oakland, California, is a public transit advocacy and policy organization that works to create world-  
5 class public transportation and walkable communities in the Bay Area and beyond. TransForm's  
6 coalition of more than 100 organizations represents social justice, environmental, smart growth,  
7 affordable housing, transit, bicycle and pedestrian, and open space advocates. TransForm has a  
8 mission of influencing policy and developing innovating programs to improve the lives of all people  
9 and protect the environment. Since its founding in 1997, TransForm has advocated for increased  
10 funding to support public transportation choices in the Bay Area.

11 Genesis is a regional faith- and values-based organization in the San Francisco Bay Area. It is  
12 an affiliate of the national Gamaliel Foundation and a member of the Transportation Equity Network.  
13 Genesis' member institutions are congregations, associations, union locals and other non-profit  
14 community organizations, whose constituents include many low-income people and people of color  
15 who depend on affordable public transportation service. Genesis strongly opposes the use of ARRA  
16 funds for the OAC project because it is concerned that it will have little benefit to its members since  
17 the project will serve almost exclusively passengers that can afford airplane tickets, while many  
18 Genesis members struggle to afford bus tickets. Genesis is concerned that East Oakland residents will  
19 not benefit from the OAC project and that funding for the connector has come at the expense of  
20 desperately needed capital and operating assistance needed to run local bus service. It does not believe  
21 that BART or MTC have been responsive to the growing community outcry against the project.

22 Members and staff of Urban Habitat, TransForm and Genesis have participated in public  
23 hearings relating to the OAC project in an effort to have their concerns addressed, including BART  
24 hearings on April 23, 2009, May 14, 2009, and MTC hearings on March 25, 2009, July 8, 2009, and  
25 July 22, 2009.  
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1 **B. Federal Financial Assistance**

2 BART is a recipient of Section 5307 Urbanized Area Formula grants, including most recently  
3 over \$135 million in ARRA funds awarded to it by MTC Resolution 3885. (Ex. L at Attachment A at  
4 4, Attachment B-2 at 1.)<sup>37</sup> BART has applied, or intends to apply, for a Transportation Infrastructure  
5 Finance and Innovation Act (“TIFIA”) loan of up to \$150 million to finance the OAC project. (Ex. M  
6 at 3.) BART provides service in an urbanized area (the San Francisco-Oakland UZA) with a  
7 population of 200,000 or more.<sup>38</sup>

8 **C. Timeliness**

9 BART’s Board of Directors took two recent actions to approve the final components of the Full  
10 Funding Plan for the OAC project, identifying the multiple sources of regional, state and federal  
11 funding that will be used to finance the half-a-billion dollar connector. On April 23, 2009, the Board  
12 adopted two resolutions in support of the project’s Full Funding Plan, incorporating into the plan \$70  
13 million in ARRA funds and \$50 million in reassigned Regional Measure 2 funds. (Ex. T at 2.) On  
14 May 14, 2009, the Board completed the Full Funding Plan by including in it an anticipated TIFIA loan  
15 of up to \$150 million. (Ex. M at 3.)

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OAC FULL FUNDING PLAN	
Source	Amount
FTA P5	\$25 million
Alameda County Transportation Improvement Agency	\$89 million
Port of Oakland (escalated)	\$44 million
STIP (State Transportation Improvement Program)	\$21 million
Regional Measure 1 & 2 (Bridge Toll)	\$109 million
ARRA	\$70 million
MTC reallocated RM2 funds (BART Seismic Retrofit Project)	\$50 million
MTC State & Local Partnership Plan Funds (SLPP)	\$20 million

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26 <sup>37</sup> See BART, *FY 2009 Operating Budget*, at Attachment 1. Accessed on August 2009 at  
<http://bart.gov/about/financials/index.aspx>; see also BART, *FY 2008 Audited Financial Report*, at 5, 17.  
27 Accessed on August 2009 at <http://bart.gov/about/financials/index.aspx>.

28 <sup>38</sup> See NTDB, *supra*.

TIFIA Loan	\$150 million
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(Ex. I at 5, M at 3.)

BART expects to receive contract proposals for the OAC project as early as September 10, 2009 and to award a contract as early as November 2009. (Ex. V at 11.) It has already prequalified four teams for the Design-Build/Build Operate and Maintain contract for the OAC project.<sup>39 40</sup> BART officials have made clear that they do not intend to prepare the required service and fare equity analyses in the future. (Ex. S.)

**IV. BART HAS FAILED TO COMPLY WITH TITLE VI AND ENVIRONMENTAL JUSTICE REQUIREMENTS IN CONNECTION WITH THE OAC PROJECT**

**A. Title VI and Environmental Justice Requirements**

Environmental Justice communities enjoy two-fold protection against unlawful discrimination in federally-funded transportation activities and programs. Intentional discrimination against minority populations is prohibited under Title VI of the Civil Rights Act of 1964, which provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.

42 U.S.C. § 2000d. The Department of Transportation’s Title VI regulations (49 CFR part 21) further prohibit actions by recipients of DOT financial assistance that have an impermissible discriminatory impact on minority populations. Specifically, DOT regulations provide:

A recipient, in determining the types of services . . . or other benefits . . . which will be provided under any such program, or the class of persons to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program . . . may not, directly or through contractual or other arrangements, utilize criteria or

<sup>39</sup> See <http://bart.gov/about/projects/oac/index.aspx> (accessed on August 2009).

<sup>40</sup> MTC is requiring BART to secure a Design-Build/Build Operate and Maintain contract for the OAC project by December 2009 as a condition of using the \$70 million in ARRA funds. However, this deadline is malleable because the region is not at risk of losing the federal stimulus funds since it has already obligated the vast majority of its ARRA funds. Should MTC not modify the deadline and BART fail to secure a contract, the \$70 million in ARRA funds would be distributed to the region’s transit operators according to Res. 3885. (See Ex. L, Att. C.) See also MTC Memorandum, February 18, 2009, at Att. A page 10 of 10 (accessed on August 2009 at [http://apps.mtc.ca.gov/meeting\\_packet\\_documents/agenda\\_1229/7a\\_tmp-3885\\_rev022309\\_ma.pdf](http://apps.mtc.ca.gov/meeting_packet_documents/agenda_1229/7a_tmp-3885_rev022309_ma.pdf)).

1 methods of administration *which have the effect*, of subjecting persons to discrimination  
2 because of their race, color, or national origin, or *have the effect* of defeating or substantially  
3 impairing accomplishment of the objectives of the program with respect to individuals of a  
4 particular race, color, or national origin.

5 49 CFR 21.5(b)(2)(i), (iv)(emphasis added). In addition, Executive Order 12898, “Federal Actions to  
6 Address Environmental Justice in Minority Populations and Low-Income Populations,” provides:

7 To the greatest extent practicable and permitted by law, . . . each Federal agency shall make  
8 achieving environmental justice part of its mission by identifying and addressing, as  
9 appropriate, disproportionately high and adverse human health or environmental effects of its  
10 programs, policies, and activities on minority populations and low-income populations in the  
11 United States . . . .

12 59 F.R. 7626.

13 FTA Circular 4702.1A provides recipients of FTA financial assistance with “guidance and  
14 instructions necessary to carry out the U.S. Department of Transportation’s . . . Title VI regulations . . .  
15 and to integrate into their programs and activities considerations expressed in the Department’s Order  
16 on Environmental Justice (Order 5610.2) . . . .” FTA C 4702.1A at 1. The purposes of these  
17 requirements and guidance include helping FTA recipients and subrecipients to:

- 18 a. Ensure that the level and quality of transportation services is provided without  
19 regard to race, color, or national origin;
- 20 b. Identify and address, as appropriate, disproportionately high and adverse human  
21 health and environmental effects, including the social and economic effect of programs  
22 and activities on minority populations and low-income populations;
- 23 c. Promote the full and fair participation of all affected populations in transportation  
24 decision making;
- 25 d. Prevent the denial, reduction, or delay in benefits related to programs and activities  
26 that benefit minority populations or low-income populations;
- 27 e. Ensure meaningful access to programs and activities by persons with limited English  
28 proficiency.

FTA C 4702.1A at II-1. Chapter V of the Circular provides program-specific requirements and  
guidelines for recipients serving large urbanized areas (defined as populations of 200,000 persons or  
greater). Specifically, it requires that such recipients “shall evaluate significant system-wide service

1 and fare changes and proposed improvements at the planning and programming stages to determine  
2 whether those changes have a discriminatory impact” on minority populations and low-income  
3 populations. FTA C 4702.1A at V-5. To comply with this requirement, the FTA recommends that  
4 recipients follow one of two options.

5 Option A prescribes a comprehensive four-step analysis. The recipient first assesses “the  
6 effect of the proposed fare or service change on minority and low income populations,” with a focus  
7 on community and transit ridership demographics. *Id.* When evaluating major service changes, the  
8 recipient “should produce maps of the routes that would be eliminated, reduced, added, or expanded,  
9 overlaid on a demographic map of the service area, that highlights those Census tracts or traffic  
10 analysis zones where the total minority and low-income population is greater than the service  
11 average.” *Id.* For “changes that would increase or decrease in fares on certain modes,” recipients  
12 should “analyze any available information generated from ridership surveys indicating whether  
13 minority and low-income riders are more likely to use the mode of service . . . that would be subject to  
14 the fare increase.” *Id.*

15 Second, the recipient conducts a comparative assessment of “the alternatives available for  
16 people affected by the fare increase or major service change.” *Id.* “For proposed service changes, the  
17 recipient should analyze what, if any, modes of transit or transit routes are available for the people  
18 affected by the service expansions or reductions,” including a comparison of “the travel time and cost  
19 of the current route with the travel time and cost to the rider of the alternatives.” *Id.* For proposed fare  
20 changes, the recipient “should analyze what, if any, alternative modes, fare payment types, or fare  
21 payment media are available fore people affected by the fare change,” including a comparison of “the  
22 fares paid under the change with fares that would be paid through available alternatives.”

23 Third, the recipient describes “the actions the agency proposes to minimize, mitigate, or offset  
24 any adverse effects of proposed fare and service changes on minority and low-income populations.”

25 Finally, the recipient determines “which, if any, of the proposals under consideration would  
26 have a disproportionately high adverse effect on minority and low-income riders.” *Id.* Tracking the  
27 requirements of Title VI disparate impact law (*see Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir.



1 1986)), the Circular specifies that “implementation of fare increase or a major service reduction that  
2 would have disproportionately high and adverse effects” is only permitted if “the recipient  
3 demonstrates that the action meets a substantial need that is in the public interest and that alternatives  
4 would have more severe adverse effects than the preferred alternative.” *Id.* at V-6-7.

5 Option B allows recipients to modify this four-step analysis, or use “their own procedures to  
6 evaluate significant system-wide service and fare changes and proposed improvements at the planning  
7 and programming stages to determine whether those changes have a discriminatory impact.” *Id.* at 7.  
8 Locally-developed procedures “shall include a description of the methodology used to determine the  
9 impact of the service and fare change, a determination as to whether the proposed change would have  
10 discriminatory impacts, and a description of what, if any, action was taken by the agency in response  
11 to the analysis conducted. *Id.* at V-7.

12 Finally, the Circular requires all recipients to submit to the FTA a Triennial Title VI Report,  
13 containing specified information. *Id.* at II-2. The Triennial Report is not a substitute for the required  
14 evaluation of service and fare changes and improvements, which must be performed separately. FTA  
15 recipients serving large urbanized areas must include in the Triennial Report “[a] copy of the equity  
16 evaluation of any significant service changes and fare changes implemented since the last  
17 submission.” *Id.* at V-9.

18 **B. BART Has Failed to Prepare the Required Service and Fare Equity Analyses**

19 BART is required to “evaluate significant system-wide service and fare changes and proposed  
20 improvements at the planning and programming stages to determine whether those changes have a  
21 discriminatory impact” on minority populations and low-income populations. FTA C 4702.1A at V-5.  
22 The construction and operation of the OAC project is a proposed improvement. It will, moreover,  
23 constitute a significant change in system-wide BART service, as recognized both by BART’s  
24 objective to increase overall system ridership by means of this project, and by MTC’s inclusion of this  
25 project in its priority list of Regional Transit Expansion projects to close key gaps in the region’s  
26 transit system. Finally, the project’s likely \$6 fare amounts to a significant fare change, contrary to  
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1 BART's distance-based fare structure, subject to the requirements of Section 4 of Chapter IV of the  
2 Circular.

3 BART has failed to evaluate whether these aspects of the OAC will have a disproportionate  
4 impact on minority populations and low-income populations. It claims to have complied with these  
5 requirements, first by way of its now-outdated 2002 Final EIR/EIS, and then by way of its 2007 Title  
6 VI Triennial Report. Neither one of these documents, however, include the required evaluations.<sup>41</sup>

7 BART's failure to conduct the required analyses of disproportionate adverse impacts on  
8 minority and low-income populations has resulted in an even more significant failure, as it has not  
9 taken the necessary action to "minimize, mitigate, or offset any adverse effects of proposed fare and  
10 service changes on minority and low-income populations." Nor has BART weighed the costs and  
11 benefits of the alternatives, and determined whether a less-discriminatory alternative can provide the  
12 needed benefits at the same or lesser cost.

13 BART's failure to prepare the required evaluation of the OAC project, and to mitigate  
14 discriminatory impacts by selecting the less discriminatory alternative violates the Circular, and  
15 exposes low-income and minority communities to an unjustified risk of discrimination, in violation of  
16 Title VI. BART's omission denies the public, including the affected community residents, transit  
17 riders, Airport workers, and other project beneficiaries, of the critical information they need to  
18 determine whether people of color and/or low-income persons will be denied equitable benefits under  
19 the project, or suffer disproportionate harm. It also denies governmental agencies and transportation

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20 <sup>41</sup> Moreover, the 2002 EIR/EIS is grossly outdated, failing to take into account significant changes in the project  
21 scope. Federal NEPA regulations (40 CFR 1502.9(c)(1)(ii)) provide that "Agencies ... shall prepare  
22 supplements to either draft or final [EISs] if ... there are significant new circumstances or information relevant  
23 to environmental concerns and bearing on the proposed action or its impacts." *See also* Question 32 of Forty  
24 Most Asked Questions Concerning CEQ's NEPA Regulations (46 Fed.Reg. 18026 (Mar. 23, 1981), amended 51  
25 Fed.Reg. 15618 (Apr. 25, 1986)) (the "40 Questions Guidance") addresses supplements to old EISs. ("As a rule  
26 of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that  
27 are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel  
28 preparation of an EIS supplement. If an agency has made a substantial change in a proposed action that is  
relevant to environmental concerns, or if there are significant new circumstances or information relevant to  
environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared  
for an old EIS so that the agency has the best possible information to make any necessary substantive changes  
in its decisions regarding the proposal." (citing Section 1502.9(c).)

1 decision-makers the information they need to ensure that no person, on the ground of race, color,  
2 national origin, or income be excluded from participation in, denied the benefits of, or be subjected to,  
3 discrimination under this federally-funded project.

4 Moreover, the intentional efforts by BART staff to “discredit” and “put holes” in the  
5 RapidBART alternative violates the intent of FTA Circular 4702.1A to “promote the full and fair  
6 participation of all affected populations in transportation decision making.”

7 Had BART conducted the equity analyses required under the Circular, it would have at a  
8 minimum: (1) collected more recent demographic data of the populations affected by the OAC project,  
9 including community residents near the project area, Airport workers, employees of the new  
10 businesses along the Hegenberger corridor, and the existing ridership of AirBART and AC Transit  
11 Line 50; (2) analyzed that data to determine whether minority and low-income riders are more likely  
12 to use the ATG alternative (as modified) over existing AirBART and AC Transit service or the  
13 RapidBART alternative; (3) reassessed the travel time, affordability, and cost efficiency of the  
14 modified AGT alternative, with that of AirBART, AC Transit service, as well as the proposed  
15 RapidBART alternative, particularly in light of the significant improvements in roadway access to the  
16 Airport and the proposed \$6 fare; (4) assessed whether the replacement of the existing AirBART  
17 service would harm low-income and minority riders; (5) assessed whether the removal of the  
18 intermediate stop near the Hegenberger Road/Edgewater Road intersection constitutes a denial of  
19 “benefits related to programs and activities that benefit minority populations or low-income  
20 populations;” and (6) assessed whether the removal or delay of the intermediate stop near the  
21 Hegenberger Road/Doolittle Avenue intersection constitutes a denial or delay of “benefits related to  
22 programs and activities that benefit minority or low-income populations.” BART would also have  
23 described any proposed actions to “minimize, mitigate, or offset any adverse effects” of the proposed  
24 fare and service changes and improvements associated with the OAC project “on minority and low-  
25 income populations,” including area residents, transit riders, and Airport workers. Finally, BART  
26 would have determined which, if any, of the available alternatives would have a high and adverse  
27 effect on minority and low-income persons, and which of the alternatives provided more equitable  
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1 benefits to minority populations and low-income populations. BART took none of these steps – not in  
2 its Final EIR/EIS in 2002, and not in its Title VI Triennial Report in 2007.

## 3 4 **V. REMEDIES**

5 FTA may use any means authorized by law to obtain a recipient’s compliance with Title VI.  
6 (49 C.F.R. § 21.13(a).) Among those means, it may require BART, as a condition of continuing to  
7 provide federal financial assistance, to take “affirmative steps to assure that no person is excluded  
8 from participation in or denied benefits of the program or activity on the grounds of race, color, or  
9 national origin,” or on the basis of income. (49 C.F.R. § 21.5(b)(7).)

10 Complainants request that FTA investigate these violations, and require BART to prepare for  
11 the OAC project the equity analyses required by FTA Circular 4702.1A, including a comparative  
12 analysis of the proposed OAC project and the RapidBART alternative proposed by TransForm. FTA  
13 should further require BART to mitigate discriminatory impacts of the project, and to select a less  
14 discriminatory alternative that meets the need for the project at a lower cost to taxpayers. FTA should  
15 place a hold on the provision of federal funds to BART for the OAC project, including the \$70 million  
16 in ARRA funds programmed for the OAC project by the Metropolitan Transportation Commission,  
17 and if appropriate, loaned funds under TIFIA, pending the satisfactory completion of the required  
18 evaluation, mitigation and review of alternatives.

19 Complainants respectfully request that they be provided with copies of all correspondence to or  
20 from BART throughout the course of the investigation, deliberation and disposition of this Complaint.

## 21 22 **VI. CONCLUSION**

23 The OAC project is likely to have significant and unjustified discriminatory impacts on low-  
24 income and minority populations. BART’s failure to prepare the required evaluation of the equity  
25 impacts of the OAC project and to select a feasible less-discriminatory alternative violates the  
26 Circular, as well as Title VI and Executive Order 12898. That violation is not merely technical, but  
27 rather deprives Environmental Justice communities and the public at large of critical information  
28

1 necessary to participate in the decision-making process in connection with this important decision.  
2 Most importantly, that violation means that BART has failed to take the steps required by Title VI to  
3 select less discriminatory alternatives, or mitigate the OAC project's discriminatory impacts.  
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6 DATE: September 1, 2009

7 Respectfully submitted,  
8 Public Advocates, Inc.  
9 Richard A. Marcantonio  
10 Guillermo Mayer

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12 by: Guillermo Mayer  
13 Attorneys for Complainants  
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