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9 URBAN HABITAT PROGRAM and GENESIS

10 BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
11 FEDERAL TRANSIT ADMINISTRATION
12 OFFICE OF CIVIL RIGHTS
13

14 URBAN HABITAT PROGRAM, a
15 nonprofit corporation; GENESIS, an
16 unincorporated association,

17 Complainants,

18 vs.

19 METROPOLITAN TRANSPORTATION
20 COMMISSION (San Francisco Bay Area),

21 Respondent.

CASE NO.

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

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Exhibit C	Letter from Cheryl Hershey, Director, FTA Office of Civil Rights, to MTC Executive Director Steve Heminger, dated Feb. 3, 2010.
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Exhibit E	Public Records Act Request from Public Advocates, Inc., to MTC Public Information Officer Pamela Grove, dated Feb. 16, 2010.
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Exhibit G	MTC Resolution No.3434 (2008).
Exhibit H	Memorandum from MTC Executive Director Steve Heminger to MTC Planning and Operations Committee re Resolution 3434: Regional Transit Expansion Program of Projects, dated Dec. 7, 2001.
Exhibit I	Letter from Bob Allen, Urban Habitat, to MTC Programming and Allocation Committee, dated Jul. 8, 2009.
Exhibit J	MTC Certification of BART OAC Project under Section 1511 of the American Reinvestment and Recovery Act, dated Aug. 25, 2009.
Exhibit K	Comments of BART Chair James Fang to MTC re "Oakland Airport Connector Project," dated Jan. 27, 2010.
Exhibit L	Minutes of Jan. 27, 2010, MTC meeting.
Exhibit M	Minutes of Mar. 24, 2010, MTC meeting.
Exhibit N	Letter of Cheryl Hershey, Director of FTA Office of Civil Rights, to BART General Manager Dorothy Dugger, re BART's Title VI Corrective Action Plan, dated Apr. 13, 2010.
Exhibit O	MTC Resolution No. 3532 (2008).
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- Exhibit Q Letter from Michael Winter, Director of FTA Office of Civil Rights to MTC Executive Director Steve Heminger, dated Apr. 14, 2003.
- Exhibit R Memorandum from MTC Deputy Director Therese McMillan to FTA Title VI Review Team, dated May 14, 2003.
- Exhibit S MTC Resolution No. 3885 (rev. Feb.25, 2009) (TIP amendment)
- Exhibit T Memorandum from MTC Executive Director to MTC Legislation Committee re MTC and Environmental Justice, dated Jan. 7, 2005.
- Exhibit U Letter from Richard Marcantonio, Public Advocates to Chair Dodd and Commissioners, Metropolitan Transportation Commission, dated Feb. 24, 2009.
- Exhibit V Memorandum from MTC Deputy Director Ann Flemer to Commission re BART Oakland Airport Connector – Additional Information, date Jul. 16, 2009.
- Exhibit W Letter from MTC Deputy Director Therese McMillan to Muhaned Aljabiry, CalTrans Division of Transportation Programming re TIP Amendment, dated Feb. 25, 2009.
- Exhibit X Letter from BART Attorney Byron K. Toma to MTC General Counsel Francis Chin, re Urban Habitat Complaint regarding OAC Project, dated July 14, 2009.
- Exhibit Y Final Report, Title VI/Environmental Justice Compliance Review of the Metropolitan Transportation Commission (Mar. 2004).
- Exhibit Z Letter from MALDEF to MTC Chair Scott Haggerty re Proposed Elimination of MCAC, dated Nov. 17, 2009.
- Exhibit AA Letter from Public Advocates to MTC Chair Scott Haggerty re Proposed Elimination of MCAC, dated Nov. 16, 2009.
- Exhibit BB Memorandum from Catalina Alvarado, MCAC Staff Liaison, to Minority Citizens Advisory Committee, re Update on Proposed Environmental Justice (EJ) Principles, dated Apr. 4, 2006.

1 **I. INTRODUCTION**

2 On February 12, 2010, FTA Administrator Peter Rogoff withdrew \$70 million in federal
3 stimulus funds from BART's Oakland Airport Connector project on the basis of BART's failure
4 to conduct a service and fare equity analysis of that project. (Exhs. A, B.) The Metropolitan
5 Transportation Commission – the metropolitan planning organization (MPO) charged with
6 overseeing BART and the rest of the San Francisco Bay Area region – played a critical role in
7 BART's failure. In fact, MTC's abandonment of its oversight role with respect to BART is not
8 isolated, but pervasive, harming minority and low-income populations throughout the region.
9 MTC now not only admits that it does not monitor the Title VI compliance of BART, or any other
10 Bay Area transit operator, but – remarkably – takes the position that monitoring Title VI
11 compliance in its region is not its job. (Exhs. D, F.)

12 MTC is wrong. It is charged by law with playing two distinct roles with respect to the
13 civil rights compliance of transit operators in its region. As the region's MPO, it is obliged to
14 “certify . . . that the metropolitan transportation planning process is being carried out in
15 accordance with . . . Title VI of the Civil Rights Act of 1964.” (23 C.F.R. § 450.334 (a) (3).)
16 This duty encompasses the obligation to monitor the region's transit operators, including BART,
17 to ensure they conduct their regionally-significant planning activities in compliance with Title VI.

18 Separately, MTC has the duty, as a recipient of federal funds that passes those funds
19 through to subrecipients like BART, to ensure Title VI compliance by those subrecipients.

20 MTC has breached its duties both as MPO and as federal recipient. FTA's recent agency-
21 wide Title VI inquiry of BART uncovered numerous shortcomings in BART's compliance, both
22 with Title VI and with the U.S. DOT order implementing Executive Order 12898 on
23 Environmental Justice. These shortcomings begin with, but go well beyond, BART's failure to
24 conduct an equity analysis with respect to the Oakland Airport Connector (OAC) project. MTC
25 played a significant role in promoting that project in the face of BART's non-compliance, and a
26 significant role in allowing BART to fall astray of its Title VI obligations more broadly. This
27 complaint seeks redress for MTC's failure to meet its duties: both its failure to monitor the Title
28

1 VI and EJ compliance of transit operators within its region and its failure to comply with respect
2 to its own actions.

3 As a result of inadequate monitoring procedures and practices, MTC breached its
4 monitoring duty at numerous points, both with respect to BART and across the region. In August
5 of 2009, MTC certified that the OAC project “ha[d] received the full review and vetting required
6 by law.” (Exh. J, at p. 3.) That certification was knowingly false. In fact, MTC made that
7 certification in full knowledge that BART had conducted no equity analysis of the OAC project.
8 (Exhs. I, V, X.) Learning of this omission, MTC took no action to require BART to conduct the
9 equity analysis.

10 FTA’s Title VI inquiry of BART found many other areas of fundamental noncompliance,
11 going well beyond the OAC project. Indeed, in the aftermath of that inquiry, it has come to light
12 that MTC’s failures with respect to BART were not isolated instances, but the predictable
13 outcomes of a systematically flawed approach to Title VI monitoring in the San Francisco Bay
14 Area. After Administrator Rogoff put MTC on formal notice of BART’s wide-ranging
15 compliance shortcomings (Exh. A), MTC took no appropriate steps to investigate its failures in
16 regard to BART and its OAC project or to ensure against the recurrence of those failures. It
17 failed to declare BART in breach of its contractual obligations as a subrecipient. In fact, more
18 than a month after Administrator Rogoff announced BART’s Title VI violations and the
19 withdrawal of stimulus funds (Exh. B), MTC had not only failed to take appropriate responsive
20 action, but continued “business as usual” by awarding funding to BART for at least one other
21 expansion project, without requiring an equity analysis. (Exh. M, at p. 3.)

22 MTC’s failures of oversight with respect to BART are not isolated instances. MTC
23 guidelines for transit operator ten-year plans (known as Short Range Transit Plans, or SRTPs) fail
24 to require compliance in a meaningful way with Title VI requirements, and fail to even ask
25 operators to confirm whether they have complied. Moreover, MTC has recently disclosed that its
26 failure to ensure that BART prepared an equity analysis of its Oakland Airport Connector project
27 was but one example of a pervasive failure to ensure that the sponsors of other projects in MTC’s
28 “Regional Transit Expansion Program” (known as MTC Resolution No. 3434), analyzed the

equity of those projects. MTC now admits that it does not possess an equity analysis of any of those projects. (Exh. F, at p. 1.)

In addition to its duty to monitor the Title VI compliance of other agencies in its region, MTC has also breached its own direct duties under Title VI and the Executive Order, by failing to the “identify and address” (Exec. Order 12898, § 1-101) the program-level equity impacts of its Resolution No. 3434.

As an MPO, MTC was required to “establish and manage a fair and impartial setting for effective regional decision-making in the metropolitan area.”¹ It has, instead, set an example and a tone throughout its region of disregard for the requirements of Title VI and Environmental Justice. Indeed, it has fostered a setting in which BART could fail to comply with basic Title VI requirements in numerous respects.

The Federal Transit Administration’s Office of Civil Rights (TCR) should investigate the full scope of MTC’s Title VI and Environmental Justice shortcomings and require broad corrective action. That action is necessary to ensure that MTC will acknowledge and carry out its responsibilities, so that failures like that which led MTC to overlook numerous longstanding Title VI shortcomings at BART will be cured and will not recur in the future.

II. FACTUAL BACKGROUND

A. MTC’s “Regional Transit Expansion Program” Includes the BART OAC Project and other Projects Dependent on Over \$1.7 Billion in Federal Funding

MTC’s “Regional Transit Expansion Program,” also known as Resolution No. 3434, is MTC’s “strategic financial plan” for funding transit expansion projects of not merely local, but regional significance – what MTC refers to as “the next generation of major regional transit expansion projects.” (Exh. G, at p. 2 of 13.) MTC stated that the planning for these projects was intimately connected with “MTC’s long range planning process, including the Regional Transportation Plan.” (Id.)

¹ <http://www.fhwa.dot.gov/HEP/pel/whatplanning.htm>.

1 Resolution 3434 is not simply a “program of projects, [but] is accompanied by a
2 comprehensive funding strategy of local, regional, state and federal funding sources.” (Id., at p. 3
3 of 13.) By selecting a project for inclusion in Resolution 3434, MTC conferred on it a long-range
4 financial commitment, including both “regional discretionary funding commitments” of existing
5 funds over which MTC had discretion and MTC’s commitment to undertake “advocacy with state
6 and federal legislatures and the electorate.” (Id., at p. 3 of 13; see Exh. H, at p. 3 [promising
7 “significant advocacy efforts in both Washington and Sacramento” for new funding].) Those
8 twin financial commitments are reflected in a specific funding strategy incorporated in the
9 Resolution. (Exh. G, Attachment C.)

10 Nothing in Resolution 3434 conditions MTC’s funding commitments on the satisfaction
11 by project sponsors of their obligations under Title VI. In particular, Resolution 3434 does not
12 require project sponsors to conduct an equity analysis or to address and mitigate inequities
13 pursuant to FTA Circular 4702.1A as a condition of receiving project funding.

14 As readopted in 2008, Resolution 3434 includes 22 projects with a total projected capital
15 cost of \$17.7 billion. MTC’s funding plan for these projects relies on over \$1.7 billion from
16 federal sources, including \$1.5 billion in New Starts, \$156 million in Small Starts, \$50 million in
17 Section 5309 Fixed Guideway Modernization, and \$92 million in federal earmarks. (Exh. G,
18 Attachment C.) All told, at least 13, and as many as 18,² of the 22 projects include federal
19 funding.

20 BART’s Oakland Airport Connector project is on the Resolution 3434 list, together with
21 four other BART expansion projects. The OAC project is a new rail link that would run the 3.2
22 miles to the Oakland International Airport from BART’s Coliseum Station. Two communities
23 within a half mile of the project area have populations that are over 95% minority (North of
24 BART, 98%; Columbia Gardens, 97%) and are also 25-33% low-income. The project, which

25 ² The funding plan includes \$385 million in RTIP (Regional Transportation Improvement
26 Program) funds, which include significant federal funding that is passed through to the region by
27 the State of California. Five of the projects that do not otherwise include federal funds include a
28 component of RTIP funding. (Exh. G, Attachment C.) If these RTIP funds are included, the
program relies on as much as \$2 billion in federal funds.

1 would replace an existing bus link with a fare of \$3, has a projected capital cost of nearly \$500
2 million, and would charge a one-way fare of up to \$6.

3 As of 2008, MTC listed the OAC project in “Tier 2” of Resolution 3434, among those
4 “Projects Needing More Scope/Cost Refinement.” (Exh. G, Attachment C, at p. 1.) However,
5 with the passage of the American Recovery and Reinvestment Act (ARRA), MTC suddenly
6 infused life into the project with its decision to award BART \$70 million in Section 5307
7 stimulus funds in February 2009. MTC did so in violation of its own policy for allocating Section
8 5307 funds.³ BART proceeded to award a construction contract late in 2009.

9 **B. MTC’s Response to FTA’s Title VI Investigation of BART.**

10 Public Advocates determined by means of a June 12, 2009, request to BART under the
11 California Public Records Act that BART had failed to conduct the required service and fare
12 equity analysis with respect to the OAC project. In the following weeks, this failure was brought
13 to the attention not only of BART, but also of MTC. In particular, on July 9, 2009, Urban Habitat
14 brought that noncompliance to MTC’s attention, both orally and in writing.⁴ (Exh. I, at p. 2.)

15 Despite its knowledge of BART’s failure to conduct any equity analysis, on July 22, 2009,
16 MTC approved a “full funding plan” for the BART Project and, on August 25, 2009, MTC
17 executive director Heminger formally certified to FTA pursuant to the American Recovery and
18 Reinvestment Act that the project “has received the full review and vetting required by law.”⁵

19 ³ MTC’s so-called “fix it first” policy, embodied in Resolution No. 3688, governs its
20 allocation of FTA formula funds under Sections 5307 and 5309. That policy accords the lowest
21 priority to expansion projects, like the OAC project. This departure from normal policy was
brought to MTC’s attention before it acted, in February 2009. (Exh. U, at pp. 2-8.)

22 ⁴ MTC’s deputy director responded to Urban Habitat’s oral comments on July 16 by
23 accepting the word of BART that it “has prepared the documentation required to satisfy FTA
24 requirements.” (Exh. X.) Had MTC made any effort to confirm BART’s statement, it would
have readily seen that BART was referring not to an equity analysis of the OAC project, but to its
2007 Title VI Triennial Report, which contained no evaluation of this particular project at all.

25 ⁵ Section 1511 provides:

26 “With respect to covered funds made available to State or local governments for
27 infrastructure investments, the Governor, mayor, or other chief executive, as appropriate,
28 shall certify that the infrastructure investment has received the full review and vetting
required by law and that the chief executive accepts responsibility that the infrastructure
investment is an appropriate use of taxpayer dollars. Such certification shall include a

1 (Exh. J, at p. 3.) (MTC initially posted that certification on its website, but appears to have
2 removed it in the last several months.)

3 In September 2009, Urban Habitat, Transform and Genesis filed FTA Office of Civil
4 Rights Complaint No. 2009-0382, based on BART's failure to conduct an equity analysis of the
5 Oakland Airport Connector project. In part on the basis of that complaint, TCR launched an
6 agency-wide Title VI review of BART. Following FTA's on-site compliance review,
7 Administrator Peter Rogoff wrote to the heads of MTC and BART on January 15, 2010, "to
8 inform you of [FTA's] serious concerns regarding [MTC's] and [BART's] pursuit of federal
9 assistance for the Oakland Airport Connection Project." (Exh. A, at p. 1.) During the review, he
10 explained,

11 BART's staff acknowledged it failed to integrate Title VI into BART's service planning
12 and monitoring activities for the Project. BART also admitted that it did not conduct an
equity evaluation of its service changes. . . .

13 (Exh. A at p. 1.) Administrator Rogoff emphasized the grave risk that \$70 million in ARRA
14 funds could be de-obligated and lost to the region altogether if MTC did not promptly reprogram
15 those funds, or if BART could not very quickly provide an acceptable plan of corrective action.
16 He further emphasized that, even if BART could provide an acceptable plan of action,

17 *If BART were to fail in any respect to make progress or to meet its deadline as*
18 *established in the action plan, FTA would have to de-obligate the ARRA funds for*
19 *the Project and would be prohibited by law from re-obligating those funds to*
alternative projects in the San Francisco Bay Area.

20 (Id. at p. 2, emphasis in original.) The risk was all the more immediate, given the fact that FTA
21 had already reviewed and rejected BART's first attempt at a plan of corrective action, noting that
22 it was "insufficient to meet the [Title VI] Circular's requirements on many fronts." (Id.)

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25 description of the investment, the estimated total cost, and the amount of covered funds to
26 be used, and shall be posted on a website and linked to the website established by section
27 1526. A State or local agency may not receive infrastructure investment funding from
funds made available in this Act unless this certification is made and posted."

28 Public Law 111-5 (accessed at <http://thomas.loc.gov/cgi-bin/query/F?c111:8:/temp/~c111QZdgCj:e546453:>).

1 As of January 15, MTC was on formal notice of BART's non-compliance. It was also
2 aware that high-level BART officials, including the president of its board, were treating FTA's
3 findings of noncompliance as matters of little substance. BART Board President James Fang, for
4 instance, speaking at the meeting of MTC Commissioners on January 27, 2010, referred to FTA's
5 findings of noncompliance as "technicalities" and asserted that he found "sarcasm and
6 insincerity" in the complaint that resulted in those findings. (Exh. K, at p. 1.)

7 In response, MTC undertook no public investigation into the causes of BART's
8 noncompliance, which ranged far beyond the lack of an equity analysis for the Oakland Airport
9 Connector project. Nor did it take any steps to adopt and implement procedures to ensure that
10 BART, and other operators in the region, would be more closely monitored for their civil rights
11 and Environmental Justice compliance in the future. Indeed, it did not even withdraw the ARRA
12 funds from the BART project and reprogram them in accordance with the Tier 2 "backup" plan it
13 had adopted a year earlier. Instead, it voted to give BART three additional weeks – until
14 February 17 – to achieve FTA approval of a plan of corrective action. (Exh. L at p. 3.) MTC
15 extended that time to BART despite the strong language of Administrator Rogoff's letter, and
16 despite the serious risk that it would not allow sufficient time to reprogram the funds to transit
17 operators who needed those funds to preserve existing service. MTC apparently took this action
18 in the belief that the compliance issues were minor ones that could be quickly resolved.

19 At no time since learning of BART's Title VI compliance shortcomings has MTC
20 declared BART in breach of the terms of its subrecipient agreement with respect to New Freedom
21 funds.⁶ Indeed, during the period in which it was on formal notice from FTA of BART's agency-
22 wide compliance shortcomings, MTC continued to award funds to at least one other Resolution
23 3434 BART expansion project without probing whether it was in compliance with Title VI

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26 ⁶ MTC's 2008 Program Management Plan with respect to JARC and New Freedom funds
27 ([http://www.mtc.ca.gov/funding/FTA/downloads/PMP_5316-JARC_and_5317-
28 New_Freedom.pdf](http://www.mtc.ca.gov/funding/FTA/downloads/PMP_5316-JARC_and_5317-New_Freedom.pdf)) states, "MTC specifically requires in all third party contracts and grant
agreements that the subrecipient/contractor at any tier complies with all requirements of Title VI.
Failure to do so is considered to be a breach of contract" (emphasis added.)

1 requirements: On March 24, 2010, the Commission approved Resolution 3914, allocating \$13
2 million “towards the construction of eBART median structures.” (Exh. M, Att. A at p. 1 of 5.)

3 On February 12, when MTC had failed to take appropriate action and BART had not yet
4 proposed an adequate plan of corrective action, Administrator Rogoff wrote again to BART and
5 MTC, stating:

6 I am required to reject your plan...Given the fact that the initial Title VI complaint
7 against BART was well founded, I am not in a position to award the ARRA funds
to BART while the agency remains out of compliance.

8 (Exh. B, at p. 2.) He further noted that “It is imperative that BART, as a recipient of FTA funds,
9 come fully into compliance with Title VI as soon as possible.” (Id. at p. 2.) Ultimately, it took
10 BART until April 13, 2010, to obtain FTA’s approval to its plan of corrective action. (Exh. N.)
11 That plan addressed BART’s noncompliance with respect to the OAC project, as well as
12 numerous other compliance issues: (a) the failure to conduct the required fare equity analysis for
13 2008 and 2009 fare increases; (b) the lack of an inclusive public participation plan; (c) the failure
14 to adopt and implement a Limited English Proficiency (LEP) policy; (d) the lack of a “major
15 service change” threshold; and (e) the lack of a fare change policy.

16 To this day, MTC has undertaken no public effort to investigate its role in BART’s
17 compliance failure, and has taken no steps to help prevent such failures in the future. To the
18 contrary, as discussed in the next section, it has told the FTA Office of Civil Rights that it has no
19 responsibility for operator Title VI compliance in its region.

20 **C. MTC’s Response to TCR’s Letter Initiating a Title VI Investigation into**
21 **MTC’s Role in BART’s Noncompliance.**

22 By letter of February 3, 2010, FTA’s Office of Civil Rights initiated a review of MTC in
23 connection with the Title VI Complaint against BART. TCR’s February 3 letter noted that
24 “BART is a subrecipient of the MTC” and that “MTC is responsible for ensuring its subrecipients
25 comply with Title VI, the DOT Title VI regulations, and FTA Circular 4702.1A.” (Exh. C, at p.
26 2.) The letter further noted that MTC “is responsible for documenting a process that ensures that
27 all MTC subrecipients are in compliance with the reporting requirements of FTA C 4702.1A.”
28 (Id.)

1 Concerned that MTC's failure to ensure BART's compliance with respect to the OAC
2 project might indicate "that your agency does not have procedures in place to monitor its
3 subrecipients," TCR's letter requested that MTC provide within 30 days (1) a list of all MTC
4 subrecipients and (2) MTC's procedures for monitoring Title VI compliance of its subrecipients.
5 (Id.)

6 In its March 5 response (Exh. D), MTC director Steve Heminger asserted that MTC has
7 subrecipients under only two FTA grant programs, JARC and New Freedom. He specified that
8 MTC's subrecipients under these grant programs comprise twelve of its 24 transit operators,
9 among them, BART.⁷ Mr. Heminger contended that, with respect to all other FTA programs,
10 MTC "is relieved of the responsibility of ensuring compliance with FTA grant requirements,
11 which are fully assumed by the grant recipient." (Id. at pp. 1-2.)

12 Even as to BART and the eleven other subrecipients of JARC and New Freedom funds,
13 moreover, Mr. Heminger argued that it would be "unnecessary and duplicative" for MTC to
14 monitor the compliance of its subrecipients, because "[t]hese FTA fund sources constitute about
15 1% of all Federal transit funds that MTC administered in FY 2008-09." (Id at 2.)

16 **D. MTC Passes Through Metropolitan Planning Funds to Nearly Every**
17 **Operator for its Short Range Transit Planning.**

18 Mr. Heminger's March 5 response to TCR failed to mention other sources of FTA funds,
19 far larger than JARC and New Freedom, that MTC provides to subrecipients and grantees.
20 Among the sources MTC fails to mention are Metropolitan Planning Program funds under
21 Section 5303. Elsewhere, MTC admits that it passes through Section 5303 funds to transit
22 operators. "MTC annually allocates a portion of its FTA Section 5303 planning funds for SRTP
23
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25 ⁷ The others include four large operators (Alameda-Contra Costa Transit District, San
26 Mateo County Transit District, Santa Clara Valley Transportation Authority, and San Francisco
27 Municipal Transportation Agency) and a number of small ones (Livermore Amador Valley
28 Transit Authority, Central Contra Costa Transit Authority, Benicia Breeze, Eastern Contra Costa
County Transit Authority, Marin Transit, Santa Rosa City Bus, and Western Contra Costa Transit
Authority).

[Short Range Transit Plan] development, preparation, and publication.” (Exh. O, at pdf p. 1 of 20.) Specifically,

“SRTPs are funded in part by FTA Section 5303 funds for which MTC is the grantee. MTC in turn makes these funds available to eligible transit operators through a funding agreement between MTC and the individual operator.”

(Id., Att. A at p. 1 of 16.) MTC passes through Metropolitan Planning Program funds under Section 5303 to BART and all of its other major transit operators. In fact, complainants believe that all but two of MTC’s transit operators (Union City and Alameda Ferry) receive subgrants of these funds from MTC. This is a significant source of funding, comprising nearly 5% of the FTA funds that MTC administers. Totals for the San Francisco-Oakland, San Jose, Antioch, Concord, Santa Rosa, Gilroy-Morgan Hill, Livermore and Vallejo Urbanized Areas for FY 2008-09 were as follows:

§ 5303	\$17,783,910	4.81%
§ 5304	\$2,977,450	0.81%
§ 5307	\$211,985,362	57.34%
§ 5309 Fixed Guideway	\$132,240,508	35.77%
§ 5316 (JARC)	\$2,684,301	0.73%
§ 5317 (New Freedom)	\$2,007,394	0.54%
Total	\$369,678,925	100.00%

(Source: 74 Fed. Reg. pp. 20,019-94, Apr. 30, 2009.)⁸

These suballocated Section 5303 funds are significant not only in their amount, but in the purpose for which MTC passes them through: They are the very funds MTC provides to

⁸ MTC’s March 5 response to TCR also failed to mention that “MTC is the designated recipient of the Federal Transit Administration (FTA) Section 5307 and 5309 Fixed Guideway funds for the large urbanized areas of San Francisco-Oakland, San Jose, Concord, Antioch, and Santa Rosa and ha[s] been authorized by the California Department of Transportation (Caltrans) as the representative for the Governor of the State of California to program the FTA Section 5307 small urbanized area funds of Vallejo, Fairfield, Vacaville, Napa, Livermore, Gilroy-Morgan Hill, and Petaluma in MTC’s 2005 Federal Transportation Improvement Program.” (Exh. P, at p. 2 of 11.) As the “designated recipient” for these UZAs, MTC is deemed by Congress to “receive and apportion” those funds to subrecipients. (See 49 U.S.C. 5307(a)(2)(A)-(B); see also 23 C.F.R. § 450.104, Definition of “Designated Recipient.”)

1 operators in order to conduct what it calls “a constituent part” of the metropolitan planning
2 process.

3 **E. SRTPs Play a “Constituent Part” in MTC’s Metropolitan Planning Process,**
4 **Yet Are Inadequate to Ensure Title VI Compliance.**

5 As the metropolitan planning organization for the nine-county Bay Area region, MTC is
6 responsible to certify that the region’s metropolitan planning process complies with Title VI. (23
7 C.F.R. § 450.334 (a) (3).⁹) The long-range Regional Transportation Plan, and the short-range
8 Transportation Improvement Program (TIP) are statutory components of the metropolitan
9 planning process. (See 49 U.S.C. § 5303.) “In order to effectively execute these planning and
10 fund programming responsibilities,” MTC requires each transit operator in its region to prepare a
11 Short Range Transit Plan (SRTP). (Exh. O, Attachment A, at p. 1 of 16.) Indeed, MTC
12 acknowledges that these SRTPs are “[a] constituent part of [MTC’s] ongoing metropolitan
13 planning.” (Exh. O, pdf at p. 2 of 20.) Specifically, the operator’s SRTP serves “as a means of
14 annually providing . . . MTC with information necessary to meet regional fund programming and
15 planning requirements,” and to “regularly provide MTC with information on . . . funding and
16 scheduling of expansion projects included in MTC Resolution No. 3434,” among other things.
17 (Id., Att. A at p. 1 of 16.)

18 In order to provide MTC with the operator planning that comprises an integral component
19 of MTC’s metropolitan planning responsibilities, it has issued SRTP Guidelines with which each
20 operator must comply, incorporated in MTC Resolution No. 3532. (Exh. O.) Last updated in
21 2008, MTC’s SRTP Guidelines set forth in detail the purposes, contents and other requirements
22 for transit operator SRTPs. Among other things, MTC requires each operator to include in its
23 SRTP a description of fixed route service and other service, fare structure, revenue fleet and other
24 existing facilities; a statement of the operator’s goals and objectives, together with quantified
25 performance standards; an evaluation of “route-level and systemwide performance against current

26 ⁹ Section 450.334 (a) (3) provides that “the MPO shall certify at least every four years that
27 the metropolitan transportation planning process is being carried out in accordance with all
28 applicable requirements including: . . . (3) Title VI of the Civil Rights Act of 1964, as amended
(42 U.S.C. 2000d–1) and 49 CFR part 21.”

1 service standards”; an operations plan and multi-year operating budget; and a description of the
2 operator’s capital program and capital replacement needs. (Id., Att. A at p. 3 of 16 through 13 of
3 16.)

4 In 2003, MTC not only acknowledged to FTA its obligation to monitor the Title VI
5 compliance of Bay Area transit operators, but asserted that MTC’s SRTP Guidelines for, and
6 review of, operator SRTPs played a central role in MTC’s process for doing so.¹⁰ The
7 Guidelines, however, make no mention whatsoever of the requirement for an equity evaluation of
8 significant service changes and fare changes, or other specific actions required by FTA’s 2007
9 Title VI Circular. As a result, MTC failed to identify, much less address, the serious Title VI
10 compliance issues that FTA recently uncovered at BART.

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15 ¹⁰ On April 14, 2003, FTA notified Mr. Heminger that it “periodically conducts
16 discretionary reviews” of its grant recipients’ compliance with Title VI and Executive Order
17 12898, and that FTA had “determined that a Title VI/Environmental Justice (EJ) Compliance
18 Review of [MTC] is necessary.” (Exh. Q, at p. 1.) In the course of that on-site compliance visit,
19 MTC provided the FTA Title VI Compliance Review Team with a memorandum in which it
20 discussed, among other things, MTC’s “Process to Monitor the Title VI Activities of Local
21 Transit Systems.” (Exh. R.) MTC acknowledged there that, in its role as an MPO, it was
22 required to “[m]onitor the Title VI activities and/or programs of local transit systems.” (Id., Att.
23 D, at p. 12 of 20.) It went on to state that it did, in fact, “fulfill[] this requirement in part by
24 reviewing Short Range Transit Plans (SRTPs) that transit operators develop in accordance with
25 guidelines adopted by the Commission.” (Id.) MTC explained that it required operators to
prepare these SRTPs so that MTC could “effectively execute [its] planning and fund
programming responsibilities,” including the periodic update of its long-range Regional
Transportation Plan (RTP) and its Transportation Improvement Program (TIP). (Id.) It then
stated:

26 “MTC monitors the Title VI activities of its transit operators primarily through its review
27 of each operator’s SRTP. It ensures that the transit planning conducted by the operators
28 addresses topics relevant to Title VI requirements by adopting SRTP guidelines that
specify coverage of those topics.” (Id., emphasis added.)

It went on to state that the “purpose of the SRTP” was to “regularly provide MTC with
information on projects and programs of regional significance, which include: . . . compliance
with federal Title VI reporting requirements; Environmental Justice outreach and public
participation.” (Id.)

1 1. **MTC’s SRTP Guidelines Address Equity in only a cursory fashion.**

2 Despite the high level of detail they require in most other respects, MTC’s 2008 SRTP
3 Guidelines require operators only to “generally describe the process used [by each operator] for
4 complying with FTA Circular C4702.1.” (Id., Att. A at p. 6 of 16, emphasis added.)

5 Nothing in the SRTP Guidelines specifically asks whether an operator has adopted a
6 Limited English Proficiency (LEP) policy (see 70 Fed. Reg. 74,087, Dec. 14, 2005), an inclusive
7 public participation plan (see DOT Order 5610.2, 62 Fed. Reg. 18,377, 18380, Apr. 15, 1997, and
8 FHWA Order 6640.23, Dec. 2, 1998), a “major service change” threshold (see Circular 4702.1A,
9 ch. V, § 4), or a fare change policy (see id.). Nor do MTC’s Guidelines make any mention of
10 required equity analyses for major service or fare changes.

11 MTC includes a specific set of additional requirements for operators with “projects
12 included in MTC Resolution 3434” – among those projects, the Oakland Airport Connector
13 project. For operators with projects in Resolution 3434’s program of projects, the SRTP must
14 discuss for each such project the capital cost, secured and anticipated funding, project schedule,
15 operating expense and revenue projections, and any other “current or anticipated policy, planning,
16 funding or operating issues associated with the project.” (Id., Att. A at 14 of 16.) There is no
17 requirement, however, to conduct an equity analysis of Resolution 3434 projects, or to comply
18 with any other requirements of Circular 4702.1A with respect to those projects.

19 2. **Because MTC Did Not Require BART to Meet its Title VI Obligations,
20 BART’s SRTP is Silent on the Very Issues on which FTA Found
 BART to be in Pervasive Noncompliance.**

21 As BART’s most recent SRTP makes clear, MTC allowed BART’s agency-wide
22 noncompliance to go unnoticed and uncorrected by failing to include specific Title VI
23 requirements in the Guidelines and failing to review the SRTP for Title VI compliance. BART’s
24 134-page document notes that a 2001 analysis found that 33 of BART’s then-39 stations were
25 located in “communities of concern,” defined as having high proportions of minority and/or low-
26 income residents. Yet the document includes no discussion of civil rights or environmental
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1 justice,¹¹ and makes no mention whatsoever of Title VI, equity, equity analysis, public
2 participation, minority or person of color. It makes only one passing reference to low-income.
3 (BART SRTP at p. 2-8.)¹²

4 The SRTP discusses each of BART's Resolution 3434 projects, as MTC directed in its
5 SRTP Guidelines. MTC did not require the preparation of an equity analysis for any of these
6 projects, however, and BART did not conduct one for any of them. MTC did not require BART
7 to have a procedure in place for analyzing the equity of fare increases, and BART did not have
8 one. MTC did not ask about major service change thresholds, LEP policies or inclusive public
9 participation plans, and BART did not ensure that any of these were in place.

10 **F. MTC Admits That It Does Not Possess A Project-Level Equity Analysis, Not**
11 **Just for the OAC Project, But For Any Project on its Resolution 3434 List.**

12 On February 16, 2010, Public Advocates served a request on MTC under the California
13 Public Records Act (Exh. E), requesting among other things:

14 A copy of each equity analysis, evaluation or assessment that was prepared,
15 drafted or adopted pursuant to Title VI of the Civil Rights Act of 1964, Executive
16 Order 12898 or implementing orders, FTA Circular 4702.1 (1988), or FTA
17 Circular 4702.1A (2007), by or on behalf of any Project Sponsor with respect to
18 any of the Resolution No. 3434 Projects.

19 (Exh. E at p. 3.) MTC responded on March 12:

20 Project sponsors for Resolution 3434 projects are direct recipients, assuming all
21 responsibilities under their FTA grants, including Title VI compliance. MTC does
22 not possess any such documents.

23 (Exh. F at p. 1, emphasis added.)

24 Asked for documents reflecting any fare equity analysis for the BART fare increase to San
25 Francisco International Airport, MTC further responded "we do not have in our possession a Title
26 VI equity analysis, evaluation or assessment of the fare surcharge." (Id. at p. 1.)

27 ¹¹ The only mention of "civil rights" is in the organizational chart (p. 2-4), and the only
28 mention of "Environmental Justice" is in a paragraph discussing the award of a Caltrans
Environmental Justice grant in 2001. (p. 2-8.)

¹² The 2008 SRTP, in searchable pdf format, is available at
http://www.bart.gov/docs/FINAL_FY08_SRTP_CIP.pdf.

1 Asked to provide “[a]ll Records that include any MTC policies, guidelines or procedures
2 for monitoring Title VI compliance of any of its subrecipients” (Exh. E at p. 3), MTC responded,
3 in part, that “the FTA Circular does not require MTC to monitor [its subrecipients of JARC or
4 New Freedom grants].” (Exh. F at p. 2.)

5 Finally, MTC was asked to provide:

6 All communications since January 1, 2000, between MTC and any of its
7 subrecipients relating to MTC’s oversight of a subrecipient’s compliance or non-
8 compliance with any obligation under Title VI of the Civil Rights Act of 1964,
Executive Order 12898 or implementing orders, FTA Circular 4702.1 (1988), or
FTA Circular 4702.1A (2007).

9 (Exh. E at p. 3, emphasis added.) In response, it identified no relevant communications
10 whatsoever. (Exh. F, at p. 2.) Instead, MTC cited its response to Request No. 7, which contained
11 a copy of Mr. Heminger’s March 5, 2010 letter to the Office of Civil Rights. In this letter, Mr.
12 Heminger denied that MTC monitored any of its subrecipients, and he denied that MTC even had
13 any duty to monitor these subrecipients. Nothing attached to this letter, however, constituted a
14 communication between MTC and an operator relating to MTC’s oversight of operator
15 compliance. In short, MTC has evidently not sent any operator so much as an e-mail about its
16 Title VI compliance in nearly a decade.

17 **G. MTC Has Not Identified and Addressed *Program-Level* Inequities in**
18 **Resolution 3434.**

19 In addition to failing to ensure that any operator conducted an equity analysis of its
20 Resolution 3434 project at the project level, MTC itself has also failed to conduct such an
21 analysis at the overall program level. MTC all but admits in its response to the Office of Civil
22 Rights that it conducted no such analysis of Resolution 3434. Attached to that March 5, 2010
23 letter is Appendix A, entitled “Summary of MTC Programs Supporting Equity in Transportation.”
24 While that summary does mention Resolution 3434, it omits any mention that MTC ever
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1 conducted an analysis of the program-level impacts of Resolution 3434 on low-income and
2 minority populations.¹³

3 Had MTC appropriately conducted such an analysis, it would have reached the conclusion
4 that Resolution 3434 has a disparate impact on minority bus riders.¹⁴

5 **III. JURISDICTIONAL FACTS**

6 **A. Complainants**

7 Urban Habitat is a nonprofit Environmental Justice organization based in Oakland,
8 California, with a mission to build power in low-income communities and communities of color
9 by combining education, advocacy, research and coalition-building to advance environmental and
10 social justice in the San Francisco Bay Area. Since at least 1998, Urban Habitat has advocated
11 for just transit opportunities for Environmental Justice communities in Oakland, and the Bay
12 Area. In particular, Urban Habitat is deeply concerned that MTC's policies and practices have
13 denied, and continue to deny, a fair share of transportation benefits and funding to low-income
14 and minority bus riders.

15 Genesis is a regional faith- and values-based organization in the San Francisco Bay Area.
16 It is an affiliate of the national Gamaliel Foundation and a member of the Transportation Equity
17 Network. Genesis' member institutions are congregations, associations, union locals and other
18 non-profit community organizations, whose constituents include many low-income people and
19 people of color who depend on affordable public transportation service. Genesis strongly

21 ¹³ The only mention of Resolution 3434 comes in the unrelated contexts of station area
22 planning grants and a Transit Oriented Development (TOD) fund. (Exh. D, App. A, Items 10 and
11, at p. 7.)

23 While MTC notes that it issued an Environmental Justice report in connection with its
24 2001 Regional Transportation Plan, that report did not address the equity impacts of MTC's
25 project selection in Resolution 3434. In fact, since only a subset of Resolution 3434 projects are
included in the fiscally-constrained Regional Transportation Plan, the RTP equity analysis did not
address Resolution 3434 as a program of projects.

26 ¹⁴ A federal district court found after trial that "MTC's practice with respect to Resolution
27 3434 caused disparate impact" on minority bus riders of AC Transit. *Darensburg v. Metropolitan*
28 *Transportation Commission*, 611 F. Supp. 2d 994, 1044 (N.D. Cal. 2009). Plaintiffs' appeal of
the district court's ruling that this disparate impact was adequately justified is pending before the
U.S. Court of Appeals for the Ninth Circuit.

1 opposed MTC's decision to expend ARRA formula funds on the OAC project in early 2009, and
2 advocated that MTC should use those funds instead to sustain existing bus service for low-income
3 and minority riders.

4 Both Urban Habitat and Genesis were parties to FTA Office of Civil Rights Complaint
5 No. 2009-0382 against BART.

6 **B. Federal Financial Assistance**

7 As described above, MTC received nearly \$370 million in FTA grants during fiscal year
8 2008-09. Among other sources, it passed through \$17.8 million in Metropolitan Planning
9 Program funds that year and "received and apportioned" \$212 million in FTA formula funds
10 under Section 5307. See Part II.D, above.

11 **C. Timeliness**

12 This complaint is timely brought within 180 days of MTC's failure to make appropriate
13 inquiry and take appropriate action after being notified, by Administrator Rogoff's letter of
14 January 15, 2010, of BART's serious Title VI noncompliance issues. In particular, at no time
15 since learning of BART's Title VI compliance shortcomings has MTC declared BART in breach
16 of the terms of its subrecipient agreement with respect to New Freedom funds. Instead, during
17 this period, MTC continued "business as usual" with respect to awarding funds to projects with
18 no equity analysis, such as its on March 24, 2010, award of \$13 million to the eBART project,
19 another Resolution 3434 project with no equity analysis. (Exh. M.)

20 In addition, this complaint is timely under the "date of discovery" rule¹⁵ because it is
21 brought within 180 days of (a) TCR's letter to MTC, dated February 3, 2010, in which TCR
22 initiated a Title VI review of MTC in order to determine, in light of MTC's role in the

23 ¹⁵ The discovery rule holds that the time to file a complaint runs from the date on which the
24 unlawful practice was first discovered. (E.g., *Connors v. Hallmark & Son Coal Co.*, 935 F.2d
25 336, 342 (D.C. Cir. 1991) (Ruth B. Ginsburg, J) ("the discovery rule is to be applied in all federal
26 question cases 'in the absence of a contrary directive from Congress'"); *Mangum v. Action*
27 *Collection Serv., Inc.*, 575 F.3d 935, 940 (9th Cir. 2009) ("the general federal rule is that a
28 limitations period begins to run when the plaintiff knows or has reason to know of the injury
which is the basis of the action)). The rule governs the timeliness of federal administrative
complaints. E.g., *Sprint Communications Co., L.P. v. F.C.C.*, 76 F.3d 1221, 1228 (D.C. Cir.
1996); *Bartleson v. United States*, 96 F.3d 1270, 1276 (9th Cir. 1996) (administrative complaint
under Federal Tort Claims Act).

1 certification of BART's OAC project for federal funding, whether MTC has "procedures in place
2 to monitor its subrecipients"; (b) MTC's response, dated March 5, 2010, in which MTC disclosed
3 publicly, for the first time, its position that it has no obligation to monitor the Title VI compliance
4 of Bay Area transit operators, including its federal subrecipients, because it would be
5 "unnecessary and duplicative" for MTC to do so; and (c) MTC's response to the request by
6 Public Advocates, under the California Public Records Act, dated March 12, 2010, in which MTC
7 acknowledged publicly, for the first time, that it "does not possess any" equity analysis for any of
8 the Resolution No. 3434 projects.

9 **IV. MTC'S ADMITTED VIOLATIONS OF ITS RESPONSIBILITIES UNDER TITLE**
10 **VI AND EXECUTIVE ORDER 12898 REQUIRE EXTENSIVE REMEDIATION**

11 **A. MTC's Duty to Monitor the Title VI Compliance of its Transit Operators**
12 **Arises Both from its Role as an MPO Responsible for the Metropolitan**
13 **Planning Process, and from its Separate Role as a Recipient that Provides**
14 **Federal Funds to Subrecipients.**

15 MTC's obligation to monitor BART's Title VI compliance is rooted in two distinct
16 sources of law. One is the obligation of a recipient of federal funds that passes those funds
17 through to operators to monitor the Title VI compliance of its subrecipients. But an independent
18 source of this obligation is the duty of a metropolitan planning organization, as a part of its
19 responsibility for metropolitan transportation planning process, to monitor and certify the Title VI
20 compliance of that process throughout its region. We begin with the latter, a robust duty that
21 MTC appears to ignore.

22 **1. MTC Has Broad Title VI Monitoring Duties in its Capacity as an**
23 **MPO.**

24 The duty of an MPO to monitor the Title VI compliance of its region's transit operators is
25 rooted in the very nature of the metropolitan transportation planning process. Federal law
26 governing MPOs explicitly requires each of them to ensure that the metropolitan planning process
27 in its region meets all requirements of the Title VI statute and regulations:

28 the MPO shall certify at least every four years that the metropolitan transportation
planning process is being carried out in accordance with all applicable requirements
including: . . . (3) Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d-
1) and 49 CFR part 21.

(23 C.F.R. § 450.334 (a) (3).) This certification requirement in the Secretary’s regulations implements the statutory requirements of 49 U.S.C. § 5303 (k) (5).¹⁶ The statute and regulation make it a fundamental part of MTC’s role as an MPO to ensure and certify that federal dollars are planned for and expended in an appropriate and non-discriminatory manner in the region that it supervises. Compliance with this statute and regulation requires MPOs not simply to certify, but to ground their certification with respect to Title VI by undertaking an appropriate analysis of the compliance of the region’s planning process: They must “have an analytic basis in place for certifying their compliance with Title VI.” (FTA Circular 4702.1A at p. VII-1.) In short, they must monitor compliance.

¹⁶ Subdivision (k) (5) provides:

(5) Certification.—

(A) In general.— The Secretary shall—

(i) ensure that the metropolitan planning process of a metropolitan planning organization serving a transportation management area is being carried out in accordance with applicable provisions of Federal law; and

(ii) subject to subparagraph (B), certify, not less often than once every 4 years, that the requirements of this paragraph are met with respect to the metropolitan planning process.

(B) Requirements for certification.— The Secretary may make the certification under subparagraph (A) if—

(i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law; and

(ii) there is a TIP for the metropolitan planning area that has been approved by the metropolitan planning organization and the Governor.

(C) Effect of failure to certify.—

(i) **Withholding of project funds.—** If a metropolitan planning process of a metropolitan planning organization serving a transportation management area is not certified, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the metropolitan planning organization for projects funded under this chapter and title 23.

(ii) **Restoration of withheld funds.—** The withheld funds shall be restored to the metropolitan planning area at such time as the metropolitan planning process is certified by the Secretary.

(D) Review of certification.— In making certification determinations under this paragraph, the Secretary shall provide for public involvement appropriate to the metropolitan area under review.

1 It is with good reason, then, that FTA explicitly includes “Environmental Justice/Title VI”
2 among the “major policy and planning issues” that come within the purview of “Metropolitan &
3 Statewide Planning.”¹⁷ Congress itself imposed this requirement.

4 In order to meet its obligation to certify “that the metropolitan transportation planning
5 process is being carried out in accordance with . . . Title VI” under 23 C.F.R. § 450.334 (a) (3)
6 and 49 U.S.C. § 5303 (k) (5), an MPO must ensure that its fundamental function of metropolitan
7 transportation planning complies with Title VI across the board. As FHWA has noted, creating
8 the environment in which fair and impartial decision-making can take place throughout the region
9 is one of the five “core planning functions” of an MPO:

10 An MPO has five core planning functions: 1. *Establish a setting*: Establish and
11 manage a fair and impartial setting for effective regional decision-making in the
metropolitan area.¹⁸

12 The MPO, in other words, must not only certify and ensure Title VI compliance throughout the
13 region, but must affirmatively set the tone that ensures that Title VI compliance permeates the
14 entire region’s planning efforts.

15 MTC’s affirmative duty to establish a setting for fair and impartial metropolitan planning
16 and to monitor and certify the Title VI compliance of those who play key roles in the process
17 extends to all of its transit operators, at least to the extent that their actions are linked to the
18 regional planning process. Stated differently, MTC may not incorporate into its metropolitan
19 planning process the discriminatory or inequitable planning of its transit operators, much less may
20 it disavow responsibility for monitoring those planning decisions for inequities. MTC itself
21 acknowledges that the planning steps that its transit operators must carry out in connection with
22 their SRTPs – including ten-year planning of their routes, fares, operations, budgets, capital plans
23 and system expansion (including projects in Resolution 3434) – are “[a] constituent part of
24 MTC’s ongoing metropolitan planning.” (Exh. O [4], at p. 2 of 20.) Operator SRTPs serve “as a
25 means of annually providing . . . MTC with information necessary to meet regional fund
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27 ¹⁷ See http://www.fta.dot.gov/planning/metro/planning_environment_212.html.

28 ¹⁸ Accessed at <http://www.fhwa.dot.gov/HEP/pel/whatplanning.htm> (archived April 2009).

1 programming and planning requirements.” (Id., Att. A at p. 1 of 16.) In other words, those ten-
2 year planning scenarios feed directly into MTC’s long-range Regional Transportation Plan. As
3 MTC told the FTA monitoring team in 2003, the “purpose of the SRTP” is to “regularly provide
4 MTC with information on projects and programs of regional significance, which include: . . .
5 compliance with federal Title VI reporting requirements; Environmental Justice outreach and
6 public participation.” (Exh. R, Att. D, at p. 12 of 20.) If medium-range operator planning is, as
7 MTC admits, a constituent part of its metropolitan planning process, then MTC has a duty to
8 monitor it for Title VI compliance.

9 This aspect of the MPO role is well-established. It is the reason that U.S. DOT recently
10 determined in the context of Section 1511 certification requirement under the American Recovery
11 and Reinvestment Act that transit operator grantees need not individually certify that their
12 proposed use of ARRA funds has been properly vetted and is an appropriate use of taxpayer
13 dollars:

14 the FHWA/FTA joint planning requirements provide a robust process to ensure
15 that projects have been properly reviewed and vetted and are an appropriate use of
taxpayer dollars.¹⁹

16 U.S. DOT has placed its faith in the MPO planning process to ensure the “robust” vetting of
17 ARRA projects for compliance with federal law because that has been a core statutory role of the
18 MPO planning process for many years.

19 This core function is also the basis for FTA’s former (1988) guidance on the “Program-
20 Specific Requirements for MPOs” with respect to Title VI, which specified very clearly the
21 requirement that MPOs are to

22 ¹⁹ See Question C.2., “ARRA Information,” accessed at
23 http://www.fta.dot.gov/index_9440_9325.html#Section:

24 **Question: Must MPOs and/or Urbanized Areas direct grantees to execute a Section
1511 certification before FTA can award an ARRA grant?**

25 **Answer:** No. DOT has determined that the FHWA/FTA joint planning requirements
26 provide a robust process to ensure that projects have been properly reviewed and vetted
27 and are an appropriate use of taxpayer dollars. Therefore, the Governor or his/her
28 designee’s signature on the Section 1511 certification covers all highway and transit
projects in a State under certain conditions. Similarly, a signature by the Chairman of the
MPO on the Section 1511 certification covers all highway and transit projects in an
urbanized area under certain conditions.

1 Monitor the Title VI activities and/or programs of local transit system. In
2 particular, the MPO is requested to provide documentation describing efforts to:

3 (a) Identify minority communities that will be affected by proposed service
4 changes, such as route modifications, additions, deletions, or extensions
5 under consideration by local transit providers; and

6 (b) Provide technical assistance or guidance to local transportation
7 providers in updating and developing Title VI information.

8 Circular 4702.1 (1988) at p. III-8 (emphasis added). While FTA's current (2007) Title VI
9 circular does not include this language, it continues to make it clear that MPOs must "have an
10 analytic basis in place for certifying their compliance with Title VI." (Id. at p. VII-1.) This
11 analytic basis must "identif[y] the benefits and burdens of metropolitan transportation system
12 investments for different socioeconomic groups" – in other words, investments made in transit
13 systems within the MPO's region. (Id.) Importantly, these monitoring duties must be met by
14 MPOs independent of whether they are also recipients who pass through federal funds to
15 subrecipients and grantees – these duties attach to an MPO regardless of whether it is also an
16 applicant, recipient or subrecipient. (Id., at p. III-7.)

17 In sum, because it is an MPO, MTC must monitor to ensure that it can certify the Title VI
18 compliance of the entire metropolitan planning process, employing "[a]n analytical process that
19 identifies the benefits and burdens of metropolitan transportation system investments for different
20 socioeconomic groups," and "identifying imbalances and responding to the analyses produced."
21 (Circular 4702.1A at p. VII-1.) This duty extends not just to those components of that process
22 that MTC conducts directly, but also to the components that operators conduct as part of their
23 Short Range Transit Planning. And this obligation is a core part of MTC's role as an MPO,
24 whether or not operators are its subrecipients of the funds they use to engage in that planning.

25 **2. MTC Has an Independent Duty to Monitor the Title VI Compliance of**
26 **its Subrecipients of Federal Funds.**

27 MTC is responsible for monitoring BART's Title VI compliance on a second and
28 independent basis: BART, as MTC admits, is its subrecipient of New Freedom funds. (Exh. D,
at p. 2.) BART is also MTC's subrecipient and grantee of other FTA funds that MTC ignores in

1 its recent response to the Office of Civil Rights; in particular, it is MTC's subrecipient of the very
2 Metropolitan Planning Program grant that funds BART's comprehensive ten-year planning
3 activities that are a "constituent part of MTC's ongoing metropolitan planning." (Exh. O, pdf at
4 p. 2 of 20.)

5 FTA's Title VI guidance notes that, "[s]ince 1972, FTA has required applicants for and
6 recipients and subrecipients of Federal assistance to certify compliance with the requirements of
7 Title VI as part of the grant approval process." (Circular 4702.1A, at p. 2.) FTA defines
8 "subrecipient" to mean "any entity that receives FTA financial assistance as a pass-through from
9 another entity." (Id., § II (6) (aa).)²⁰ MTC presumably claims that it has no subrecipients under
10 the Metropolitan Planning Program because it is the subrecipient of the State of California with
11 respect to those funds. The transit operators that receive federal funds from an MPO that is itself
12 a subrecipient of those funds, however, are plainly "subrecipients" under FTA's definition. First,
13 the funds remain "FTA financial assistance" when transferred to MTC's hands, and second,
14 transit operators receive these funds "as a pass-through" from MTC. MTC itself concedes that, as
15 the "grantee" of Section 5303 metropolitan planning program funds (id. at p. 1 of 16), it "annually
16 allocates a portion . . . for SRTP development, preparation, and publication" (id. at pdf p. 1 of
17 20), by means of "a funding agreement between MTC and the individual operator" (id., Att. A at
18 p. 1 of 16), including one with BART. (See Part II.D., above.)

19 Recipients are required to "collect Title VI assurances from subrecipients prior to passing
20 through FTA funds. (These Title VI assurances must be submitted as part of a standard list of
21 assurances provided by subrecipients to their direct recipient(s))." (Circular 4702.1A, § IV (1).)
22 The duty to "collect" those assurances is not a hollow duty, but a meaningful one: it requires not
23 just paper compliance, but actual efforts to ensure that assurances are being honored – that is,
24 subrecipient monitoring.

25
26
27 ²⁰ See FTA Circular 8100.1C, at p. I-4 ("Subrecipient: Any entity that receives FTA
28 financial assistance as a pass-through from another entity, e.g., an MPO receiving MPP assistance
directly from the State.")).

1 The duty set forth in Chapter IV of the current Circular is explicitly independent of the
2 duty that a recipient like MTC has in its separate capacity as an MPO. Chapter IV, indeed, begins
3 with the statement that:

4 This chapter describes requirements that all Federal Transit Administration (FTA)
5 recipients and subrecipients shall follow to ensure that their programs, policies,
6 and activities comply with the Department of Transportation (DOT) Title VI
7 regulations

8 (Id. at p. IV-1, emphasis added.) Nothing in Chapter IV limits, or could limit, the statutory duties
9 of MPOs implemented by DOT regulation, as described in the previous section.

10 MTC asserts that the small amount of the funds, and FTA's overall oversight role, both
11 excuse it from these duties to monitor subrecipient compliance. Those arguments are wrong both
12 factually and legally. As a factual matter, MTC ignores its role with respect to FTA funds under
13 Section 5303, a substantially larger program than JARC or New Freedom. As a legal matter,
14 moreover, neither the absolute dollar amount nor the percentage of FTA funds is material to
15 MTC's duty to monitor subrecipient compliance.²¹

16 More importantly, even if MTC could validly argue that it was excused from subrecipient
17 monitoring, that would not excuse MTC's failure to meet its independent duty as an MPO to
18 ensure and certify Title VI compliance in the region's transportation planning, as discussed in
19 Part IV.A.1., above. DOT regulations expressly establish that duty in MPOs, without regard to
20 the overall national role that FTA itself plays in Title VI compliance.

21 ²¹ Notably, MTC does not claim that its responsibility to monitor the Title VI compliance of
22 its subrecipients extends solely to that portion of its subrecipients' activities that are federally
23 funded, nor does it claim that its monitoring responsibility extends solely to those particular
24 subrecipient "programs and activities" that are federally funded. Such an argument would
25 contravene clear law under Title VI, which holds that those responsibilities extend not just to
26 specific "programs and activities" for which it passes through federal funding, but to the entirety
27 of the "operations" of the subrecipient. See 42 U.S.C. § 2000d-4a. (defining the terms "program
28 or activity" and "program" broadly as "all of the operations of [. . .] a department, agency, special
purpose district, or other instrumentality of a State or of a local government [. . .] any part of
which is extended Federal financial assistance."); accord 49 C.F.R. § 21.23(e)

Even if MTC were to make such an argument, the broad scope of the purposes for which
it passes through Metropolitan Planning Program funds to the Bay Area transit operators
encompasses virtually all significant planning, budgeting, operating and capital aspects of each
operator's business. (See Exh. O.) In particular, it includes planning for Resolution 3434
expansion projects.

1 **B. MTC Has Repeatedly Breached its Title VI Responsibilities.**

2 1. **MTC Admits that it Does not Monitor the Title VI Compliance of its**
3 **Subrecipients and Operators.**

4 MTC violated its duty to monitor Bay Area transit agencies including BART, both as that
5 duty arises from MTC's role as the region's MPO and, independently, as it arises from MTC's
6 relationship with those operators as its subrecipients. BART, along with eleven other Bay Area
7 transit operators, is MTC's subrecipient of New Freedom and/or JARC funds. BART, along with
8 22 other Bay Area operators, is also MTC's recipient of Metropolitan Planning Program funds.

9 MTC admits in its March 5 response to TCR that it does not monitor the Title VI
10 compliance of any of these operators because doing so would be "unnecessary and duplicative."
11 By contrast, in 2003 in recognition of its broad responsibilities as an MPO, MTC previously
12 asserted to FTA's Title VI compliance team that it

13 monitors the Title VI activities of its transit operators primarily through its review
14 of each operator's SRTP. It ensures that the transit planning conducted by the
15 operators addresses topics relevant to Title VI requirements by adopting SRTP
 guidelines that specify coverage of those topics.

16 (Exh. R, at p. 10.) Today, on the other hand, MTC admits that it no longer undertakes even that
17 inadequate level of monitoring of its transit operators. (Exh. D, at p. 2.)

18 Despite TCR's direct request, MTC was unable to provide it with any subrecipient
19 monitoring procedures. (See Exh. C.) In fact, MTC's response to the February 16, 2010, request
20 that Public Advocates served on it under the California Public Records Act makes it clear that,
21 contrary to its previous assertions, including those that it made to FTA's Title VI monitoring team
22 in 2003, it has no documentation that reflects even a single communication since January 1, 2000,
23 "between MTC and any of its subrecipients relating to MTC's oversight of a subrecipient's
24 compliance or non-compliance with any obligation under Title VI of the Civil Rights Act of
25 1964, Executive Order 12898 or implementing orders, FTA Circular 4702.1 (1988), or FTA
26 Circular 4702.1A (2007)." (Exh. F, at p. 3.) Since none of the documentation that would
27 demonstrate an active monitoring role at any time since 2000 appears to exist in MTC's files,
28 there is now good reason to believe that MTC's representation may have been untrue even at the

1 time it was made in 2003. In short, for many years MTC has neither put in place nor actively
2 implemented procedures to monitor operator Title VI compliance.

3 MTC's failure to adopt and implement Title VI monitoring procedures has had predictable
4 results with respect to BART: Because MTC did not require BART to comply with its Title VI
5 obligations, BART did not do so. Specifically, MTC did not require BART to (a) conduct the
6 required fare equity analysis for its 2008 and 2009 fare increases; (b) conduct the required service
7 and fare equity analysis of the OAC project; (c) prepare and implement an inclusive public
8 participation plan; (d) adopt and implement a Limited English Proficiency (LEP) policy; (e) set a
9 "major service change" threshold; and (f) set a fare change policy. In short, where MTC should
10 have prevented each of these acts of noncompliance on BART's part, it instead, by its lax
11 oversight, set a tone that tolerated and even rewarded that noncompliance. Its actions have
12 gravely injured minority and low-income populations across the Bay Area by excluding them
13 from a voice in decision making and from a fair share of the benefits of projects and programs
14 funded with federal dollars. Those are harms that MTC's active monitoring would have
15 remediated in a timely fashion, or averted altogether.

16 **2. MTC Affirmatively Overlooked BART's Non-Compliance, Falsely**
17 **Certified that MTC Had Played its "Vetting" Role, and Failed to**
18 **Respond Appropriately when the Administrator Notified it of BART's**
Noncompliance.

19 MTC did not simply fail to monitor BART's compliance; it demonstrated a willful
20 disregard of its obligations in three separate acts and omissions. First, it amended its
21 Transportation Improvement Program (TIP) to program \$70 million in ARRA funds to the BART
22 OAC project (Exh. W) – an act that directly implicated the metropolitan planning process and that
23 breached MTC's ability to meet its obligation to certify under 23 C.F.R. § 450.334 (a) (3) that its
24 "metropolitan transportation planning process is being carried out in accordance with" Title VI.
25 Second, MTC certified under Section 1511 that BART's project "ha[d] received the full review
26 and vetting required by law." (Exh. J, at p. 3.) That certification was knowingly false, as MTC
27 was already aware that BART had conducted no equity analysis of the project. (Exhs. I, X.)
28

1 Third, and perhaps most egregious, is MTC's conduct when Administrator Rogoff
2 formally notified it of BART's far-ranging noncompliance (see Exh. A): It took no action at all.
3 It undertook no public investigation to determine what had gone wrong and how to prevent a
4 future recurrence; and it took no steps to put in place a set of strong procedures to address the
5 problem. It did not adopt operator Title VI monitoring procedures; did not adopt requirements to
6 ensure that operators and subrecipients adopted and implemented internal procedures to comply
7 with Title VI and Environmental Justice requirements; and did not put in place reporting and
8 evaluation systems to ensure that its procedures were being implemented and were effective in
9 meeting their objectives. Indeed, it did not even notify BART that it was in breach of its
10 obligations as a subrecipient of federal funds passed through by MTC.²²

11 Instead, MTC responded to TCR that monitoring the Title VI compliance of BART, its
12 subrecipient, is none of its concern. (Exh. D.)

13 It then proceeded with business as usual, awarding additional funds to BART expansion
14 projects, such as \$13 million on March 24 to eBART, another Resolution 3434 project, knowing
15 that no equity analysis had been done for those projects. (Exh. M.)

16 **3. MTC Admits It Has Not Required Project Sponsors to Conduct an**
17 **Equity Analysis of Any of the Resolution 3434 Projects.**

18 The impacts of MTC's failure extend well beyond BART and its OAC project. The lack
19 of an equity analysis for the OAC project was not a fluke, but just a piece of a much larger
20 pattern. MTC's SRTP Guidelines did not require project sponsors to conduct such analyses, nor
21 did Resolution 3434 itself condition MTC's provision of funding on compliance with Title VI
22 requirements. In fact, MTC now admits that it does not have an equity analysis for even one of
23 the Resolution 3434 transit expansion projects. (Exh. F.)

24 The requirement of an equity analysis is fundamental to the protection of the civil rights of
25 minority and low-income populations. MPOs and transit operators are not simply prohibited
26 from discriminating, but must affirmatively "identify" potential disparate impacts on low-income
27

28 ²² See page 7, footnote 6, above.

1 and minority populations, and then “address” those impacts. President Clinton’s 1994 Executive
2 Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations
3 and Low-Income Populations,” requires that:

4 To the greatest extent practicable and permitted by law, and consistent with the
5 principles set forth in the report on the National Performance Review, each Federal
6 agency shall make achieving environmental justice part of its mission by
7 identifying and addressing, as appropriate, disproportionately high and adverse
human health or environmental effects of its programs, policies, and activities on
minority populations and low-income populations.

8 (59 Fed. Reg. 7626, § 1-101, emphasis added.) The adverse impacts that the Executive Order
9 speaks of include “the denial of, reduction in, or significant delay in the receipt of, benefits of
10 DOT programs, policies, or activities.” (DOT Order, 62 Fed. Reg. at 18381, emphasis added.)

11 The requirement to “identify” adverse impacts is a broad one. It does not permit just any
12 analysis, but requires one tailored to successfully “identify” the inequities in the situation under
13 study. And it extends not only to actual inequities, but to the risk of discrimination. (DOT Order
14 5610.2, 62 Fed. Reg. at p. 18,380 [“These requirements will be administered so as to identify,
15 early in the development of the program, policy or activity, the very risk of discrimination so that
16 positive corrective action can be taken”] [emphasis added].)

17 This broad requirement is reflected in FTA guidance, which applies to both transit
18 operators and MPOs. Transit operators must conduct an “equity analysis” of major service and
19 fare changes. (Circular 4702.1A at p. V-5.) MPOs, meanwhile, must “have an analytic basis in
20 place for certifying their compliance with Title VI.” (Id. at p. VII-1.) The MPO requirement,
21 hearkening back to the duty of MPOs to certify that the entire metropolitan planning process
22 complies with Title VI (23 C.F.R. § 450.334 (a) (3)), extends beyond the direct actions of the
23 MPO to sweep in all “metropolitan transportation system investments.” (Circular 4702.1A at p.
24 VII-1.) Thus, MPOs must develop “[a]n analytical process that identifies the benefits and
25 burdens of metropolitan transportation system investments for different socioeconomic groups,”
26 including investments that expand the service of particular transit operators, and must “identif[y]
27 imbalances and respon[d] to the analyses produced.” (Id.; see also Memo of FHWA
28 Administrator Kenneth R. Wykle and FTA Administrator Gordon J. Linton, re Implementing

1 Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), Att. 1, Sec. 2
2 (“Service Equity”).²³

3 MTC was well aware of these requirements. Its own Minority Citizens Advisory
4 Committee (MCAC), in 2005, adopted Environmental Justice Principles that included these two
5 key requirements of “identifying” and “addressing” or “responding to” inequities and
6 imbalances.²⁴ MCAC’s Principles required MTC to identify inequities by “[c]ollect[ing] accurate
7 and current data essential to understanding the presence and extent of inequities in transportation
8 funding based on race and income” (Principle #2), and to address the inequities it identified by
9 “chang[ing] its investment decisions as necessary to mitigate identified inequities.” (Principle
10 #3.) (MTC adopted Principle #2, but declined to adopt Principle #3. Exh. BB.)

11
12 ²³ “Does the planning process have an analytical process in place for assessing the regional
13 benefits and burdens of transportation system investments for different socio-economic groups?
14 Does it have a data collection process to support the analysis effort? Does this analytical process
15 seek to assess the benefit and impact distributions of the investments included in the plan and TIP
16 (or STIP)? [¶] How does the planning process respond to the analyses produced? Imbalances
17 identified?” (accessed at <http://www.fhwa.dot.gov/environment/ejustice/ej-10-7.htm#attach.>)
18 See also FHWA and FTA, The Transportation Planning Process: Key Issues. A Briefing Book
19 for Transportation Decisionmakers, Officials, and Staff (Publication Number FHWA-HEP-07-
20 039, updated Sept. 2007), at p. 55 (accessed at
21 http://www.planning.dot.gov/documents/briefingbook/bbook_07.pdf)

22 ²⁴ The full EJ Principles as adopted by MCAC read:

23 Opening Statement: To ensure that Environmental Justice is effectively incorporated into
24 all of the Metropolitan Transportation Commission’s planning, decision-making, funding
25 and operations, the Minority Citizens Advisory Committee urges the Metropolitan
26 Transportation Commission to adopt and implement the following principles.

27 Principle #1 – Create an open and transparent public participation process that empowers
28 low-income communities and communities of color to participate in decision making that
affects them.

Principle #2 – Collect accurate and current data essential to understanding the presence
and extent of inequities in transportation funding based on race and income.

Principle #3 – MTC should change its investment decisions as necessary to mitigate
identified inequities. These changes would apply both to the financing of already existing
projects as well as to the financing of proposed or future projects.

Principle #4 – Ensure that disproportionate project impacts on low-income and/or
minority communities are addressed and mitigated prior to MTC project or funding
approval.

1 The clear mandates of both federal law and of the EJ Principles proposed by MTC's now-
2 defunct minority advisory committee,²⁵ required MTC, at a minimum, to ensure that project
3 sponsors in its region identify the risk of inequities at the project level for expansion projects of
4 regional significance, such as those included on the Resolution 3434 project list. MTC, however,
5 now admits that it "does not possess any . . . documents" that reflect an equity analysis "by or on
6 behalf of any Project Sponsor with respect to any of the Resolution No. 3434 Projects." (Exh. E,
7 at p. 3; Exh. F, at p. 1.) Nor does MTC possess any fare equity analysis for the BART fare
8 increase to San Francisco International Airport. (Exh. F, at p. 1.) In short, MTC's failure to
9 ensure BART's preparation of an equity analysis for the OAC Project is no fluke, but is MTC's
10 standard operating procedure with respect to its civil rights and environmental justice obligations,
11 both as an MPO and as a recipient that passes funds through to others. As its SRTP Guidelines
12 demonstrate, MTC takes a very active interest in every aspect of the progress of transit expansion
13 projects in Resolution 3434 except the compliance of those projects with civil rights and
14 Environmental Justice requirements.²⁶ Nor does MTC condition its funding of Resolution 3434
15 projects on the completion by sponsors of an appropriate equity analysis. (See Exh. G.)

17 ²⁵ While MTC highlights its Minority Citizens' Advisory Committee in its March 5 response
18 to TCR (Exh. D, at App. A, p. 3), it fails to mention that in late 2009 it disbanded MCAC and
19 consolidated it with other advisory committees. (MTC Resolution No. 3931.) Whereas MCAC
20 was comprised of 26 diverse members, only nine of the total of twenty-seven seats on the new
21 policy advisory committee are affirmatively set aside to represent Environmental Justice
22 constituencies. FTA's Office of Civil Rights noted in its March 2004 Title VI compliance report
23 that "MTC utilizes the MCAC and the MTC website continually to engage its low-income and
24 minority populations" (Exh. Y, at 30) and that "[t]o ensure that mechanisms are in place to ensure
25 that issues and concerns raised by low-income and minority populations are appropriately
26 considered, MTC has the Minority Citizens Advisory Committee (MCAC) to focus on the issues
27 and concerns of Title VI/Environmental Justice." (Id. at 31.) Yet MTC disbanded MCAC
28 without taking the basic steps of reviewing a range of possible alternatives to determine the social
equity and other impacts (positive and negative) of each. (See Exhs. AA & BB.)

²⁶ Even MTC's now-abandoned position, which it articulated to TCR in 2003,
acknowledging its monitoring responsibility and claiming that responsibility was met by way of
its review of operator SRTPs, is inadequate. MTC's SRTP Guidelines require operators only to
"generally describe the process used [by each operator] for complying with FTA Circular
C4702.1." (Exh. O, Att. A at p. 6 of 16.) Nothing in the SRTP Guidelines specifically asks
whether an operator has adopted an LEP policy, an inclusive public participation plan, a "major
service change" threshold, or a fare change policy. Nor do the Guidelines ask sponsors of Res.

1 4. **MTC Has Not Conducted a *Program-Level* Equity Analysis of**
2 **Resolution 3434, Its Transit Expansion Program.**

3 MTC's disregard of the civil rights of low-income and minority communities does not end
4 with its refusal to monitor the compliance of its subrecipient transit operators, but extends to its
5 own direct compliance obligations, as well. Like transit operators, MTC, too, has an obligation to
6 "identify and address" the disproportionately high and adverse effects of its own programs,
7 policies, and activities on minority populations and low-income populations. (Exec. Order
8 12898, 59 Fed. Reg. 7626, § 1-101.) And it must "have an analytic basis in place for certifying
9 [its] compliance with Title VI," by both developing "[a]n analytical process that identifies the
10 benefits and burdens of metropolitan transportation system investments for different
11 socioeconomic groups," and "identifying imbalances and responding to the analyses produced."
12 (Circular 4702.1A at p. VII-1.)

13 MTC has failed to meet that obligation with respect to Resolution 3434, the "Regional
14 Transit Expansion Program" that it first adopted in 2001 and re-adopted in 2008. In addition to
15 its failure to require that any of the Resolution's projects, including the OAC project, was
16 analyzed for its individual equity impacts, MTC has failed to conduct any program-level analysis
17 of the equity impacts of Resolution 3434 as a whole. Had MTC conducted that analysis, it would
18 have reached the same conclusion that the District Court reached in the *Darensburg* case: While
19 bus riders are disproportionately people of color, and rail riders are disproportionately white, 94%
20 of the capital funding in the Resolution 3434 funding strategy is devoted to rail expansion, with
21 less than 5% devoted to bus expansion. And the selection rate for rail project funding was 100%,
22 compared to a 20% selection rate from among the proposed bus projects. Even a year after the
23 District Court reached its conclusion that MTC's program had a discriminatory adverse impact on
24 minority bus riders, MTC still has given no indication that it has any intention to conduct its own
25 analysis.

26
27
28 3434 expansion projects whether they have conducted a service equity analysis for those
expansion projects.

1 In sum, MTC has violated both its Title VI monitoring duties with respect to its transit
2 operators, and its own direct obligation to ensure Title VI compliance in its own programs.

3 **C. MTC Must Take Affirmative Corrective Action to Ensure That Its Unlawful**
4 **Actions and Omissions with Respect to BART and its OAC Project are not**
5 **Repeated in the Future.**

6 MTC presents a particularly troubling matrix of civil rights and Environmental Justice
7 failures that calls out for broad remediation. It ignores its role as an MPO responsible to ensure
8 and certify Title VI compliance in the metropolitan planning process, and excuses itself with the
9 extraordinary claim that it is not responsible for the Title VI compliance even of its subrecipient
10 transit operators. It took no appropriate action upon learning of the results of FTA's Title VI
11 compliance review of BART. And its lack of so much as a procedure, much less a practice, for
12 monitoring operator Title VI compliance has adverse impacts that go far beyond BART and its
13 OAC project. It would be no exaggeration to conclude that MTC itself set the tone with respect
14 to the low priority of Title VI and Environmental Justice compliance in the Bay Area that may
15 well have contributed to BART's lack of seriousness and its resulting need for a far-reaching
16 program of corrective action. MTC was required, of course, to do the contrary – to “establish and
17 manage a fair and impartial setting for effective regional decision-making in the metropolitan
18 area.”²⁷

18 FTA is fully empowered to meet this compelling need for corrective action.

19 First, Title VI provides FTA with broad remedial powers in the event of non-compliance.
20 (42 U.S.C. § 2001d-1.) At the stage of corrective action, the Department's Title VI implementing
21 regulations expressly require “affirmative action,” providing that:

22 Where prior discriminatory practice or usage tends, on the grounds of race, color,
23 or national origin to exclude individuals from participation in, to deny them the
24 benefits of, or to subject them to discrimination under any program or activity to
25 which this part applies, the applicant or recipient must take affirmative action to
26 remove or overcome the effects of the prior discriminatory practice or usage.

25 (49 C.F.R. § 21.5 (b) (7), emphasis added.) In other words, a corrective action plan for
26 remediating this violation must not only address the specific failure that brought the situation to

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28 ²⁷ <http://www.fhwa.dot.gov/HEP/pel/whatplanning.htm> (archived 2009).

1 light, but must now also affirmatively “overcome the effects of [MTC’s] prior discriminatory
2 practice” and ensure that it will not be repeated in the future.

3 Moreover, the grant assurances that MTC has executed provide FTA with broad remedial
4 powers, promising that the recipient of federal financial assistance

5 will make any changes in its Title VI implementing procedures as U.S. DOT or
6 FTA may request to achieve compliance with the requirements imposed by or
issued pursuant to 49 U.S.C. 5332, 42 U.S.C. 2000d, and 49 CFR part 21.

7 (74 Fed. Reg. 53544, 53550, Oct. 19, 2009.)

8 The corrective action required of MTC must extend beyond the particular BART project,
9 to ensure against similar failures by MTC with respect to other BART expansion projects, and
10 with respect to the actions of all of MTC’s subrecipients more generally. It must also extend to
11 MTC’s own programs and activities, including its failure to conduct an equity analysis of
12 Resolution 3434. As MTC’s response to TCR’s February 3 inquiry makes clear, MTC has no
13 meaningful procedures in place to ensure Title VI compliance in the Bay Area, and does not
14 believe it is even required to adopt such procedures, much less to implement them in an
15 affirmative and robust manner.

16 The void in MTC’s current program of monitoring Title VI compliance left not only the
17 OAC project, but every single one of its sister projects in MTC’s Resolution No. 3434 without
18 any equity analysis. It left BART with no implementing policies to meet its inclusive public
19 participation, LEP and other crucial obligations. And it led to a District Court finding that MTC’s
20 Resolution 3434 had a discriminatory impact on minorities. The scope of the corrective action
21 plan should reflect and redress the scope of these shortcomings.

22 **V. REMEDY**

23 Complainants request that FTA investigate this broad pattern of violations by undertaking
24 a discretionary Title VI compliance review of the Metropolitan Transportation Commission, and
25 require MTC to prepare, adopt and implement an appropriately broad and robust plan of
26 corrective action. With respect to its monitoring of operator compliance, that plan of corrective
27 action should include:

28

- Adoption of an official Commission-level policy acknowledging MTC’s Title VI and Environmental Justice oversight and monitoring obligations with respect to transit operators in its region;
- Adoption of effective procedures for accomplishing those oversight and monitoring obligations;
- A plan to ensure robust implementation of those procedures; and
- A plan to evaluate and report on the successes and shortcomings of that implementation, including the appropriate use of an advisory committee process that adequately represents the voices of low-income and minority populations.

More specifically, MTC’s plan of corrective action should require it to ensure that Bay Area transit operators adopt all policies and procedures required of them under applicable federal Title VI and Environmental Justice provisions, including

- An inclusive public participation plan, and procedures for its implementation;
- Policies that set a “major service change” threshold;
- Procedures for conducting an equity analysis of proposed major service changes;
- Procedures for conducting fare equity analyses; and
- A Limited English Proficiency (LEP) policy.

MTC’s plan should also commit it to ensuring that transit operators conduct an equity analysis of major transit expansion projects, including those selected for the project list in Resolution 3434. And the plan should require MTC to adopt its own procedures and standards for assuring that all of these operator policies and procedures are adopted in compliance with all federal requirements.

With respect to MTC’s direct Title VI noncompliance, the plan of corrective action should require it to identify and address any program-level inequities in Resolution 3434 as a whole, including its overwhelming emphasis on projects that benefits rail riders over bus riders. The plan should also ensure that MTC conditions any award of funds on the satisfactory completion of a project-level equity analysis and the taking of appropriate steps to address any potential inequities in the project.

The affected public, and particularly low-income and minority populations, should be given the opportunity to participate in the crafting of MTC’s plan of corrective action.

1 Finally, Complainants respectfully request that they be provided with copies of all
2 correspondence to or from MTC throughout the course of the investigation, deliberation and
3 disposition of this Complaint.

4 **VI. CONCLUSION**

5 MTC's outright denial of responsibility for overseeing Title VI and Environmental Justice
6 compliance in its region runs contrary to its duties, both as an MPO and as a recipient that passes
7 through federal funds. MTC took no action to ensure BART's compliance with respect to the
8 OAC project, but instead affirmatively promoted, funded and certified that project in the
9 knowledge that it did not comply with federal requirements. Now, MTC acknowledges that it has
10 no procedures in place to ensure that significant Title VI violations by Bay Area transit operators
11 will not recur, and in fact that other projects it is promoting like the OAC project have also not
12 been analyzed for equity. Nor has MTC analyzed Resolution 3434 for equity at the overall
13 program level.

14 For all these reasons, the Office of Civil Rights should initiate a complete agency review
15 of MTC's Title VI and Environmental Justice program, and require broad corrective action.

16
17 DATED: June 10, 2010

PUBLIC ADVOCATES, INC.

18
19 By: 

20 RICHARD A. MARCANTONIO

21 Attorneys for Complainants
22 URBAN HABITAT PROGRAM and GENESIS
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