

FROM:

Mary Miles (SB #230395)  
Attorney at Law for Coalition for Adequate Review  
364 Page St., #36  
San Francisco, CA 94102

TO:

John Carroll, Clerk, and Members of  
Government Audit and Oversight Committee  
San Francisco Board of Supervisors  
Room 244, City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

BY EMAIL TO: [john.carroll@sfgov.org](mailto:john.carroll@sfgov.org)

DATE: September 30, 2021

**PUBLIC COMMENT SUPPORTING APPROVAL OF ALL GRAND JURY REPORT  
RECOMMENDATIONS AND FINDINGS ON THE 2020-2021 CIVIL GRAND JURY  
REPORT ENTITLED "VAN NESS AVENUE: WHAT LIES BENEATH"  
GOVERNMENT AUDIT AND OVERSIGHT COMMITTEE, SEPTEMBER 30, 2021,  
AGENDA ITEMS 8 AND 9**

This Comment SUPPORTS approval of all recommendations and findings of the Grand Jury's Report entitled "Van Ness Avenue: What Lies Beneath." Due to time constraints, the documents supporting this Comment are not all included, but as time permits will be submitted to the Board before its final disposition.

The Grand Jury's meticulous, fact-supported investigation has resulted in a valuable document of the errors that have resulted in the disaster of the City's Van Ness Bus Rapid Transit ("VNBRT") Project. Those errors fall squarely on the San Francisco Municipal Transportation Agency ("MTA"), which designed, contracted, and implemented the VNBRT Project that cuts through the cultural and geographic center of San Francisco, killing businesses, cultural amenities, restaurants, and quality of life for every resident, visitor and traveler on Van Ness Avenue/US Highway 101.

Incredibly, MTA, through its Director, Jeffrey Tumlin, disagrees with and refuses to adopt several of the Grand Jury's Recommendations, and, as to those he agrees with, provides no timeline for when they will be implemented.

Mr. Tumlin refuses to implement Grand Jury Recommendations R2, R4, R5, R6, and R10. This Board should assure that those Recommendations are adopted and implemented. The Board should also support and recommend adoption of the Grand Jury's Findings.

**I. THIS BOARD SHOULD APPROVE AND ORDER MTA TO IMPLEMENT ALL OF THE GRAND JURY'S RECOMMENDATIONS REGARDLESS OF MR. TUMLIN'S REFUSAL TO DO SO**

This Board should approve and order MTA to implement all of the Grand Jury's Recommendations, including those that Mr. Tumlin refuses to implement as follows.

**R2: "By June 2022, the City should adopt a policy that all capital project sponsors publish, before proceeding to their construction phase, an itemized assessment of derisking activities actually performed." (Ref. to Findings F1, F2, F3, F4, F6, F9]**

**TUMLIN RESPONSE:** "Will not be implemented...Speaking for the Agency and not the City as a whole, the SFMTA believes that such information may allow bidders to take advantage of the bid process, as it could allow contractors to unbalance bids or give them an unfair advantage in negotiations."

**PUBLIC COMMENT:** Mr. Tumlin's answer is dead wrong, and even contradicts his own answers, which blame the contractor instead of MTA for the failure to notice the risks involved in the MTA's "LPA" project. Tumlin falsely claims that MTA "gave significant consideration to the potential impacts of utility replacement during the planning process." Tumlin then blames the contractor for not doing "significant amounts of potholing 30 days in advance of any installation."

In 2013 MTA created its Locally Preferred Alternative ("LPA") of the VNBRT Project, long before it contracted for implementation of the Project. The LPA received *no* environmental review, since MTA planned it in total secrecy and announced it *after* the close of public comment on the Project EIR/EIS. (EXH. A.)

The "LPA," unlike other alternatives, planned a center-running BRT instead of a side-running BRT. The LPA thus required removing all of the utilities located in the center of Van Ness Avenue/US Highway 101, including water, sewer, and other lines that would have to be replaced because of the weight of buses running in the center of the highway. (EXH. A.)

The LPA also required removing all of the unique, 100-year-old street lamps that lined Van Ness, and installation of ugly generic poles with faux deco lamps in their place so that trolley wires could be supported to the center (instead of the sides) of Van Ness. The LPA also required removing all of the trees in the median and on the sidewalks, and nearly all of the parking on Van Ness. MTA was directly responsible for the delays caused by MTA's LPA "option," which was shoved down the public's throat by MTA and City's SFCTA with no opportunity for public comment or accountability. MTA made no effort to accurately account for the additional time and expense of its disastrous LPA BRT on Van Ness, before, during, or after the Walsh Contract, signed in 2015.

Mr. Tumlin's worry about the possibility that contractors might "take advantage of the bid process" or get "an unfair advantage in negotiations" is exactly what happened here-- *without* the Grand Jury's excellent recommendation that City agencies, including MTA should, before proceeding with construction publish "an itemized assessment of derisking activities actually performed." (R2)

Here, the Walsh Corporation took advantage of the flawed CM/GC contract to take advantage of the entire process by submitting a low bid for a first phase consisting of *no*

construction but only paper planning, assuring award of both phases of the Contract, and only after that submitting a high bid for the actual construction work with *no competitive bidding for the actual construction*, a bid that Walsh (and MTA) later claimed did not cover the full additional cost of constructing MTA's LPA VNBRT.

The fact that Walsh took advantage of MTA's inexperience at CM/GC contracts, is precisely why the Grand Jury's Recommendation R2 is important and necessary, contrary to Tumlin's claim.

This Board should protect the public from any repetition of MTA's mistakes by adopting the Grand Jury's Recommendation R2.

**R4: "The Board of Supervisors should direct all City departments to adopt a policy that all projects that involve underground work in the City's main corridors include, as part of the design process, the use of exploratory potholing, or another equivalent industry best-practice to identify unknown underground obstructions adhering to CI/ASCE 38-02 ("Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data Quality Level A. This policy should take effect for all contracts signed after January 1, 2022, and the work should be required to be performed before final construction terms or prices are agreed to." (Ref: F1, F4, F6, F7.)**

**TUMLIN RESPONSE:** "Will not be implemented because it is not warranted or is not reasonable. Speaking for the Agency, and not the Board of Supervisors, the SFMTA believes that one policy for all projects, across all departments, is impractical. Each department must make a determination on a project-by-project bases based on the risk assessment. Currently, all major City projects that involve underground work in main corridors do incorporate potholing, or other equivalent appropriate industry practices to identify unknown underground obstructions. The City also works closely with private utilities (e.g., PG&E, Comcast, ATT) during design phase of major projects to account for their utilities, whether active, deactivated, or abandoned."

**PUBLIC COMMENT:** Tumlin rejects the Grand Jury's highly reasonable and completely warranted Recommendations, which recommend that finding out where the underground utilities are must occur at the design level and precede any agreement on construction terms or prices.

The problem of *not* doing so is painfully illustrated by the saga of claimed *surprises* encountered underneath the surface of Van Ness Avenue, requiring years of delay and tens of millions to deal with, *after* Walsh had torn apart the entire surface of Van Ness. At that point neither Walsh nor MTA apparently had a clue of what lay beneath that devastated landscape. Due to MTA's LPA, that entire landscape and everything below it had to be replaced and moved so that MTA could have its LPA VNBRT Project.

Mr. Tumlin provides no justification for not adopting the protective safeguards in RF, and this Board should adopt R4 over his senseless refusal and order MTA and other City agencies to implement it to avoid another disaster like the VNBRT Project.

**R5: "By June 2022, and before entering into future CMGC relationships, the Board of Supervisors should direct all City departments to adopt, publish, and enforce all future contracts industry-standard best practices for management of CMGC projects." (Refs. F8, F10, F11, F12, F13.)**

**TUMLIN RESPONSE:** "Will not be implemented because it is not warranted or is not reasonable. 'Best practices' are a list of general recommendations based on general industry

practices. Speaking for the Agency, and not the Board of Supervisors, the SFMTA will review recommended best practices for future CM/GC projects and apply them, as applicable and appropriate. It is up to the individual department to determine the applicability of 'best practices' to their projects."

**PUBLIC COMMENT:** After blaming the Contractor for delays and expenses that were caused by adopting MTA's "LPA" without knowing or disclosing what lay beneath the surface of Van Ness Avenue, and MTA's CM/GC Contract with Walsh, Tumlin now refuses to implement the common sense R-5 Recommendation of the Grand Jury to assure best practices *before* any future CM/GC contracts.

This Board should adopt Recommendation R5 and require MTA to implement it to prevent further disastrous errors by MTA on major construction contracts.

**R10 "By June 2022, the City should adopt a policy that any public communication about planned or in-progress capital project that includes disruption of public services or right-of-way should include itemized assessments of risk to projected costs and duration." (Ref. F1, F2, F6, F9)**

**TUMLIN RESPONSE:** "Will not be implemented because it is not warranted or is not reasonable. A majority of SFMTA projects are funded by the FTA, which requires the project to assess and monitor project risks in construction on a periodic basis. The department can provide a general list of project risks in public communications, to inform the public of the project status and projected substantial completion. Publishing itemized costs association with changes risk or project duration could negatively impact the bidding or negotiation process." (*sic*)

**PUBLIC COMMENT:** Mr. Tumlin, an unelected official with zero accountability to the public, refuses to implement the Grand Jury's Recommendation R10 to make MTA accountable on this Project and other large capital projects by itemized assessments of risk to projected costs and duration. This Board should overrule Mr. Tumlin, adopt Grand Jury Recommendation R10, and order MTA to comply with it forthwith.

**SUMMARY:** The Grand Jury's excellent Report and reasoned recommendations should be taken as an accurate and constructive summation of the mess MTA has made of the Van Ness corridor, why MTA is to blame, and why the Grand Jury's recommendations should be approved and implemented as directed. This Board should reject Mr. Tumlin's refusal to implement several Grand Jury Recommendations, should adopt those recommendations, and should order MTA to implement those recommendations as directed or sooner.

## **II. MTA'S CONTENTIOUS DISAGREEMENT WITH THE GRAND JURY'S FINDINGS IS WITHOUT MERIT OR SUPPORT IN THE FACTUAL RECORD OF THE VAN NESS BRT PROJECT. THIS BOARD SHOULD ADOPT AND IMPLEMENT ALL OF THE GRAND JURY'S FINDINGS**

This Comment OBJECTS to MTA's "Finding Responses" to the Grand Jury Report. For the following reasons MTA's responses to the Grand Jury Report should be rejected, and those Findings should be adopted by this Board.

**A. MTA'S Responses Should Have Been Drafted By A Neutral Entity With Expertise, Not By The Director Of The MTA**

The contentious and argumentative "responses" of MTA Director Jeffrey Tumlin are inappropriate on their face and fail to address the documented and valid findings and recommendations of the Grand Jury.

In view of Mr. Tumlin's role in the Van Ness BRT Project that is the subject of the Grand Jury's Report, his responses conflict with his ethical obligations and the neutrality required to objectively respond to the Grand Jury's findings and they fail to serve the public.

### **1. Tumlin Has A Conflict Of Interest On The Van Ness BRT Project**

Before being appointed MTA Director in November, 2019, Mr. Tumlin was the director and principal of a private profit-making entity, Nelson\Nygaard global consulting firm that was instrumental in creating studies of transportation, traffic, transit, and parking studies under contract and/or subcontract for the City and County of San Francisco's ("City's") Planning Department on their Market-Octavia Project.

City Planning's Market-Octavia Project first proposed the Van Ness BRT Project as part of the "community benefits plan" of the Market-Octavia Project. Mr. Tumlin signed several of those Nelson\Nygaard studies. (See, e.g., *Better Neighborhoods 2002 Market/Octavia Study Area Existing Conditions Report*, August 2001.) Nelson\Nygaard also prepared the transit analyses in the *Market & Octavia Plan EIR Transportation Study*, pages 15-50. That Study recommended the VNBRT Project. (*Id.*, Appendix, Market & Octavia Neighborhood Plan Transportation Project List, page 3.)

In 2020, in his new role as Director of MTA, while riding his electric bicycle, flipping off and cursing at drivers stuck in the congested traffic there that resulted from the Market-Octavia Project, Mr. Tumlin denounced the transportation centerpiece of that Project, "Octavia Boulevard."<sup>1</sup>

### **2. Since Being Appointed MTA Director, Tumlin Has Himself Signed Contracts Extending The Time And Agreeing To Millions More Under The CM/GC Contract For The Van Ness BRT Project**

Remarkably, Mr. Tumlin, while still at the helm of the private for-profit Nelson\Nygaard consulting firm, was hired by the City in November, 2019, as Director of SFMTA at a base salary of \$342,483 per year in public money. (See MTA Board, Nov. 19, 2019, Staff Report and Res. No. 191119-44; Form 700 (Statement of Economic Interests), January 15, 2020, Jeffrey Tumlin, [showing income of more than \$100,000 from Nelson\Nygaard].)

MTA originally insisted on the flawed CM/GC Contract with a Chicago-based contractor Walsh Construction ("Walsh"). MTA had no prior experience with a CM/GC Contract for a capital Project as large as the VNBRT Project.

The CM/GC Contract was a recipe for disaster, since it issued an RFP only for its initial phase, which was to spend a year creating a paper plan for the later construction phase. The

---

<sup>1</sup> (San Francisco Chronicle, April 2, 2020: Michael Rosen, "'We screwed this one up' SFMTA director Jeffrey Tumlin weighs in on Octavia Boulevard," ['We screwed this one up': SFMTA director Jeffrey Tumlin weighs in on Octavia Boulevard \(sfgate.com\)](https://www.wired.com/story/cities-without-cars-san-francisco-jeff-tumlin/?utm_source=onsite-share&utm_medium=email&utm_campaign=onsite-share&utm_brand=wired); *Wired*, April 1, 2020: Adam Rogers, "Build Cities for Bikes, Buses, and Feet--Not Cars," [HTTPS://WWW.WIRED.COM/STORY/CITIES-WITHOUT-CARS-SAN-FRANCISCO-JEFF-TUMLIN/?UTM\\_SOURCE=ONSITE-SHARE&UTM\\_MEDIUM=EMAIL&UTM\\_CAMPAIGN=ONSITE-SHARE&UTM\\_BRAND=WIRED](https://www.wired.com/story/cities-without-cars-san-francisco-jeff-tumlin/?utm_source=onsite-share&utm_medium=email&utm_campaign=onsite-share&utm_brand=wired)

Contract would then proceed to the construction phase, for which there was *no competitive bidding*. By bidding low on the first, "planning" phase of the Contract, Walsh cleverly secured from MTA the lucrative second (construction phase) of the CM/GC Contract.

The Grand Jury recommends that MTA should not again use a CM/GC contract. Yet Tumlin now rejects that recommendation. (MTA Responses, R5, R6.)

That Contract with Walsh was awarded to the lowest bidder for an initial year-long "study," which included *no construction*. MTA then awarded Walsh the second part of the CM/GC Contract for the actual construction of the Project with *no competitive bidding* as a "modification" of the CM/GC Contract.

In the long, fantastically destructive and expensive saga of the VNBRT Project, Tumlin's status as MTA Director enabled him to sign contracts *extending the time and awarding more public money* to the Walsh Construction Corporation, long after it was clear that Walsh construction had misled MTA with the CM/GC contract. Incredibly, the Board of Directors of MTA unanimously approved all of Tumlin's actions amending the Walsh Contract. (See, "Contract Modification No. 9," February 18, 2020 [awarding Walsh another \$633,003.16]; "Contract Modification No. 10," May 19, 2020 [another \$2,187,655.23 to Walsh].)

The Walsh Contract, of course, does *not* include the *thousands* of staff hours of City's MTA, SFCTA, PUC, DPW, and City Attorneys, and it does *not* include the cost of the consultants hired to do the environmental impact report/statement ("EIR/EIS") and City attorneys. If those expenses were included, the cost of the VNBRT Project would easily exceed a half billion public dollars.

Now, Mr. Tumlin defends the delays resulting from the construction of the VNBRT Project, ignoring MTA's central role in them and the additional cost of the Project that was directly due to MTA's demand that the Project be placed in the *center* of Van Ness Avenue/US Highway 101 instead of on the sides of Van Ness. MTA's demand for a "Locally Preferred Alternative" ("LPA"), was a political decision that directly resulted in removing all of the water, sewer, and electrical infrastructure on the full two miles of the VNBRT Project, from Lombard to Mission Street.

MTA further insisted on the flawed and later botched CM/GC Contract with Walsh. That Contract with Walsh Construction was awarded to the lowest bidder on the initial part, which included *no construction*, and then awarded with *no competitive bidding* Walsh hundreds of millions for the construction work.

Mr. Tumlin should be recused from any participation in responding to the Grand Jury findings. In view of the above circumstances, he should play no role in responding to the Grand Jury's findings.

## **B. MTA'S Responses To The Grand Jury's Findings Are Inaccurate And Unsupported By the Factual Record Of The Van Ness BRT Project**

**F1 Finding:** "The delays in completion of the Van Ness BRT Project were caused primarily by avoidable setbacks in replacement of the water and sewer infrastructure.

**TUMLIN'S RESPONSE:** "Disagree partially. Many of the initial delays on the Project occurred during construction of the underground phase of the Project; however, some of these delays were avoidable and some were unavoidable."

**COMMENT: All of the delays and higher costs were clearly avoidable, since they were built into MTA's design and were disclosed long before the Walsh CM/GC Contract**

MTA was fully aware of the expense and delays, because they were disclosed both in the EIR/EIS on the VNBRT Project and in public comment on the Project in 2013-- long before the contract with Walsh in 2015. (See EXHIBIT A, Public Comment; see also SFCTA Res. No. 14-18, September 10, 2013 [adopting VNBRT Project]; MTA Board Resolution 15-108, awarding CM/GC Contract No. 1289 to Walsh on July 7, 2015.)

The BRT Project was never accurately described, but instead was promoted initially as "alternatives." *After* environmental review was closed, MTA came up with what it called a "Locally Preferred Alternative" ("LPA"), a variation with a center-running alternative devised in secrecy and never included in the Project's environmental review. (EXH. A, pp. 5-9, 13, 17, 33, 34.)

The LPA required the total wreckage of Van Ness Avenue/US Highway 101 that ensued, since it required the (otherwise unnecessary) removal of water and sewer lines running through the center of Van Ness Avenue. The EIS states that existing center infrastructure would not stand the weight of the proposed LPA in the center.

The LPA also required replacement of the electrical infrastructure, so that trolley wires could reach transit in the center instead of on the sides of Van Ness.

Thus, for MTA's LPA BRT, the graceful 100-year-old lamp posts were to be demolished and replaced with ugly generic metal posts to accommodate lines to the center instead of sides of the highway for the buses. The LPA also required removing all of the vegetation in the center medial of Van Ness, many of the trees on both sides of Van Ness, and nearly all of the parking on Van Ness.

These facts were well-known to the City's MTA (which devised the LPA), the SFCTA (the lead agency), and this Board, since public comment was submitted *before* the Project approval by both MTA and SFCTA in 2013. (See EXHIBIT A.)

The Grand Jury's Finding F1 is correct, since all of the delays caused by replacement of the water and sewer lines could have been avoided by choosing the option of a side-running BRT instead of the LPA.

The LPA was approved in 2013, *before* the flawed contract with Walsh was signed in 2015.

**TUMLIN'S RESPONSE (cont'd):** "The City and the contractor often share responsibility for delays, and some of the delays were due to third parties."

**COMMENT:** What third parties does Mr. Tumlin blame? And why? The LPA VNBRT Project was highly controversial. Indeed the City's Public Utilities Commission and Department of public Works raised serious concerns and repeatedly stated their opposition to a center median BRT. The Mayor's Office of ADA/Disability Access also raised significant concerns and opposed it. (EXH. A, p. 10.) But those were City agencies, not "third parties."

**TUMLIN'S RESPONSE (cont'd):** "Understanding the delay on this project involves looking at the contractor's initial claim for 279 days of delay and its pending claim for 344 days. As to the initial claim for 279 days, the parties agreed that 135 were compensable (City's responsibility) and 144 were noncompensable (not the City's sole responsibility). In other words, the contractor

acknowledged that it shared responsibility for more than half of the delay days. As to the pending claim for 344 days, the contractor failed to provide the required scheduling analysis; thus, the City has been required to undertake its own analysis of the delay. This analysis is *currently underway*."

**COMMENT: This Board should not approve MTA's response without receiving the complete "analysis" that is "currently underway" referred to by Tumlin.**

In fact, this Board should carefully examine the entire history of the award of the Walsh contract, which was unlike other MTA contracts that preceded it on major capital projects. Instead, the contract began as a CM/GC contract that would have two phases. In the first phase the contract recipient would bid on an initial phase to come up with its approach to the actual construction. In its bid, Walsh, unlike the other bidder, planned to tear up the entire two-mile length of Van Ness Avenue from Lombard to Mission Street for the entire duration of the construction, instead of working on block-long segments. That proposal alone should have given MTA/the City pause in awarding Walsh the contract.

Walsh slightly underbid its competitor for the first phase, with MTA awarding the *whole* CM/GC contract based solely on Walsh's low bid for the first phase. Thus, by submitting the lower of two bids or the initial paper phase, Walsh enjoyed a year of drawing pictures of Van Ness Avenue at \$800,000 in public expense, but did no actual work on the construction.

Under the CM/GC Contract, MTA then awarded Walsh the lucrative construction contract ***with no competitive bidding***. Instead, the MTA Board adopted a Resolution No. 16-110 to simply "*modify*" the CM/GC Contract to award Walsh another \$193,027,555 for the construction. (See MTA Board Resolution No. 16-110, August 16, 2016.)

Thereafter, the trashing of two miles through the center of San Francisco ensued for six long years, while businesses failed, including restaurants, movie theaters, and other businesses where no one could park or approach. MTA chose that course by designing and approving its LPA, instead of the much less impactful side-running alternative, or the No-Project alternative.

At least one knowledgeable MTA official reported on Walsh's failure to timely fulfill its contractual obligations. Incredibly, MTA paid compensation to Walsh for that failure.

This Board should *not* approve MTA's/Tumlin's response and should agree and adopt the Grand Jury's Finding F1.

**F2: Finding: "The potential impact of utility replacement on the cost and duration of the overall project was given insufficient consideration in the initial planning process."**

**TUMLIN RESPONSE:** "Disagree partially The SFMTA gave significant consideration to the potential impacts of utility replacement during the planning process."

**COMMENT: Tumlin's response is false. MTA adopted the LPA *after* the planning and environmental review process, with full knowledge of its drawbacks**

The Project's false goal was to slow vehicle traffic and cause congestion so that buses would compete in speed with the slowed vehicle transportation. (EXH. A.)

Mr. Tumlin falsely claims that the contractor participated in the design of the "Locally Preferred Alternative" ("LPA"). The LPA was the result of a collaboration in total secrecy between the MTA and SFCTA.



The LPA received *no* environmental review and was proposed and adopted *after* the close of public comment on the EIS/EIR on the Project.

The LPA was approved by SFCTA in September, 2013, which dictated the course of the construction of the Van Ness BRT Project.

The CM/GC Contract with Walsh was approved by the MTA Board on July 7, 2015. MTA though MTA had *no* experience with that type of contract on any comparably large capital project. The CM/GC contract was flawed on its face. MTA issued an RFP on the initial phase of the Project and awarded it to Walsh based not on a construction bid but on a bid for planning the construction on paper with no on-ground excavation or planning.

MTA then awarded another nearly \$200 million to Walsh for the construction phase on August 16, 2016, with *no competitive bidding*, but under the CM/GC contract, only a "modification" of the 2015 Contract. Thus, under MTA's CM/GC Contract, by submitting the lowest bid for the initial phase, the Chicago-based Walsh corporation would get the second (construction) phase regardless of costs for the second phase.

Mr. Tumlin's responses entirely ignore that MTA manufactured their "LPA," which was *not* reviewed in SFCTA's EIS/EIR, and was *not* publicly released until after public comment was closed on the EIR. Endorsed by the San Francisco Bicycle Coalition, the "LPA" demanded that four travel lanes on Van Ness Avenue (Highway 101) and the entire center median would be converted into a red-painted 4-lane expanse of pavement, the Van Ness BRT.

According to the EIS/EIR on this Project, the replacement of the pipelines located in the center of Van Ness Avenue would not have required replacement if the side-running alternatives had been adopted. By creating its LPA, MTA assured massive reconstruction and relocation of sewer and water lines, which would not have been necessary with the side-running alternatives, or the no project alternative.

This Board should approve the Grand Jury's F2 Finding and reject Mr. Tumlin's unsupported disagreements.

**F3 Finding: "The potential impact of utility replacement was known to City engineers to be a major risk, but was only considered a moderate risk and assigned no effective mitigation in the official risk register."**

**TUMLIN RESPONSE:** "Disagree partially. The Contractor, City Staff, and an independent consultant cooperated in preparing the risk register and because of the mitigation measures being taken this was classified as a moderate risk. Several mitigation measures were included in the Specifications, such as requiring potholing 30 days in advance of the work, and providing the contractor with copies of deactivated utility drawings as reference documents. The Contractor failed to perform the required potholing in a timely fashion, at times attempting to dig potholes within hours of trenching to install utilities. Contractor's inability to properly anticipate/manage/mitigate utility issues during construction was the primary contributor to added contract costs and duration."

**COMMENT:** It is true that the contractor knew the overall LPA Project design from the start, since that was the Project approved by MTA and SFCTA. The LPA Project, however, was the reason why vast infrastructure replacement was required, including relocating two miles of sewer and water lines, electrical infrastructure and streetlamps, removal of trees and irreplaceable artifacts, to place the BRT in the center of Van Ness/US Highway 101, instead of on the sides.

The LPA, unlike the side-running alternatives, also required destruction of the historic lampposts that had lined Van Ness for 100 years, to replace them with generic higher posts to support wires reaching buses in the center instead of the sides of Van Ness Avenue. Thus the delays were built into City's LPA.

That huge restructuring would not have been necessary with the side-running BRT alternatives or with the No Project alternatives. However, the City, not the contractor was responsible for that mistaken decision.

*MTA's creation of the LPA design* should itself have been preceded by specific exploration and perfect understanding of where those pipes were located. Instead of that necessary knowledge, MTA chose the LPA alternative *without* that critical knowledge, and *without* the input of City engineers, and then MTA proceeded to contract its implementation with a risky CM/GC Contract.

Even the City's Public Utilities agency ("SFPUC") and Department of Public Works expressed grave misgivings about the LPA design early in the process. (EXH. A, p. 10.) The lack of funding for the much more expensive LPA Project, was also apparent, *before* Walsh (the chosen Contractor) began its full-scale tearing up of the entire two miles of Van Ness Avenue from Lombard to Mission Street, beginning with bulldozing the entire center median.

After Walsh's immediate and rapid destruction of the entire Project area, actual construction came to a halt.

The City failed to enforce and continued to "modify" the Contract at least 10 times, it allowing delays and awarding more millions, and even funded bonds. Construction was delayed for *years* due to Walsh's disagreement about who would pay electrical and other subcontractors.

**F4 Finding: "Project timelines could not be estimated accurately because documents did not reflect the extent and location of underground utilities accurately."**

**TUMLIN:** "Disagree partially. Project timelines for projects with extensive underground utilities are often difficult to estimate because no matter how extensive the pre-construction investigation, there will always be unknowns. Contractors experienced in such work know that they must often deal with the unexpected. The project timeline prepared during pre-construction was a product of City staff, Contractor, and an independent consulting team based on the best information available."

**COMMENT:** See Comment to F1, F2, and F3, *ante*. The design of the Project that was a "product of City staff" dictated the expense, delays and "timeline" of the construction.

The CM/GC contract then contributed to the disastrous result of the City's foolish, politically motivated planning, which had nothing to do with infrastructure, but only delaying cars. There should have been no "unknowns" when City approved the LPA in 2013 and signed the Contract in 2015.

**TUMLIN:** "As construction started, the project team realized that some third party utilities, such as PG&E, provided inaccurate or incomplete information on their existing utilities. The contract contained an action plan to instruct the contractor for dealing with unknown utilities, as well as contingency for different site conditions. However, the Contractor did not take the lead in field investigation and coordination with third party utilities, although they were contractually

obligated to do so as a CM/GC...Contractor's initial construction sequence plan was also unrealistic. All these issues contributed to an inaccurate project timeline projection."

**COMMENT:** There is no excuse for Mr. Tumlin's unsubstantiated claim that MTA suddenly "realized" it had inaccurate and incomplete information before MTA created, promoted, and approved the LPA. As noted, MTA was fully aware that the LPA required total excavation and replacement of water, sewer, and electrical infrastructure on Van Ness *before* it approved the Project in 2013, and *before the City approved the CM/GC contract with Walsh* in 2015, and *before* construction began. (EXH. A, p 10.)

After MTA released the RFP for the CM/GC Contract, two bids were received, one from Ghilotti, and one from Walsh. The RFP is only for the first phase of a two-part CM/GC contract. By underbidding Ghilotti on the *first* phase, which included *no construction* but only design drawings and public relations, Walsh won the contract. The actual *construction* contract was never released for bidding but was **awarded to Walsh with no competitive bidding** under the CM/GC contract, as a contract "modification."

MTA's politically-motivated rush to begin constructing the Project and its lack of experience with CM/GC contracts directly led to the ensuing disaster on Van Ness. As the Grand Jury notes, MTA should bear the blame for getting the City into a hopeless position requiring the City (the public) to pay and pay again for 10 contract modifications.

Meanwhile restaurants and businesses, and cultural amenities, including a premier art movie theater, closed, nearly all the trees were removed, irreplaceable artifacts were demolished, and the historic streetlamps were demolished to make way for the garish 4-lane red-cement BRT expanse, with generic ugly stock fixtures marking San Francisco as permanently tasteless.

**F5 Finding:** "The evaluation rubric for preconstruction contract bids weighted cost too heavily, as compared to technical expertise, even after project-specific legislation allowed for a lower weight to be assigned for cost."

**TUMLIN:** "Agree. Such contracts should be evaluated using a best value rubric, with technical expertise weighted high. At the time, the Agency was unable to lower the points given to cost in the legislation submitted to the Board of Supervisors."

**COMMENT:** Although Tumlin agrees, as should this Board, MTA was fully aware of what it was getting into with the CM/GC contract. Indeed, public comment warned of the inevitable problem with the contract.

**F6 Finding:** "Practical work during preconstruction that could have derisked the subsequent construction phase of the project was insufficient."

**TUMLIN:** "Disagree partially. The majority of the utility conflicts that resulted in additional contract time were at intersections. Potholing within intersections typically requires the intersection to be closed in order to provide a safe barrier for the workers from traffic. Given that Van Ness Avenue is a State highway, this would have been extremely difficult to occur. Typically, this level of potholing is reserved for the construction phase when traffic can be effectively closed/diverted. Ground-penetrating radar (GPR) during the design phase had several issues with accuracy and reliability of the data. Recent improvements in GPR provide for a more reliable tool for future projects."

**COMMENT:** Tumlin's claim ignores that 1) MTA failed to do the necessary exploratory work *before approving the LPA*; and 2) Walsh had a full year under the paid CM/GC contract to do exploratory work.

After approving the Project in 2013, and after approving the Walsh Contract in 2015, with its year of public funding, Walsh held meetings in pizzerias on Van Ness with MTA's official spokesperson, Kate McCarthy,<sup>2</sup> in which Walsh's public relations flack, Jay Sims, rolled out 8-foot-long colored maps of the *surface* of Van Ness Avenue.

In those gatherings, both Walsh's representative and Ms. McCarthy refused and failed to answer any questions about the actual on-ground construction, infrastructure beneath Van Ness, timeline, expense, and funding of the Project, or Walsh's "plan" to bulldoze the entire length and every single intersection of Van Ness Avenue from Lombard to Mission Street, reducing the median strip and the entire Avenue to rubble and making it largely impassable with no turning at any intersections for the past six years.

**F7 Finding:** "Review of preconstruction deliverables did not sufficiently measure the contractor's preparedness for construction, which resulted in both inaccurate cost estimates and timelines."

**TUMLIN:** "Disagree partially. It is correct that the contractor may not have adequately prepared itself for construction during the year-long preconstruction period. The timeline for underground work provided by the contractor's subcontractor during preconstruction did not align with the timeline provided by the subcontractor who eventually performed the work. It is unclear to what extent better preparedness by the contractor would have resulted in more accurate cost estimates and timelines. In addition, other key issues listed in F4 contributed to the challenge to forecast accurate cost estimates and timeliness."

**COMMENT:** MTA entered into a CM/GC Contract with Walsh that *paid* Walsh for a full-year to prepare to construct MTA's new "LPA" Project. Both parties were aware of what that LPA Project involved vast excavation and construction of new pipelines, electrical utilities, and anti-car features such as bulbouts. MTA failed to assess Walsh's total *failure* to create an accurate estimate of the construction costs of the Project.

A timeline of at least five years was stated in the EIR on the LPA Project, and MTA was fully aware of that, even if the CM/GC Contract stated *no* time deadline. When Walsh failed to deliver, MTA then signed more 10 more Contract modifications *extending* the time and *increasing the cost*, and incredibly even paid Walsh for the delays.

This Board should approve Finding F7.

**F8 Finding:** "The effectiveness of the CMGC contract was greatly reduced because the general contractor was brought into the design process too late."

**TUMLIN:** "Disagree partially. While it would have been better to have the contractor on board earlier in the design phase, the contractor did have a year (during pre-construction) to review the

---

<sup>2</sup> Ms. McCarthy's only "transportation" experience consisted of being an officer of the San Francisco Bicycle Coalition, a private corporation advocating against motor vehicles and for bicycle riding.

construction documents, provide comments, and familiarize itself with the conditions along the corridor. The CMGC construction contract with the Guaranteed Maximum Price was issued by SFMTA with the Contractor's concerns and input addressed. Since the prime did not involve the subcontractors directly with the City in the preconstruction process the City may not have received the full benefit of the subs' technical expertise and local knowledge. Contractor did not make the best use of its subcontractors."

**COMMENT.** See Comment on F9.

**F9 Finding:** "Underspecification in technical requirements led to additional costs for work that could have been predicted and included in the original contract."

**TUMLIN:** "Disagree partially. In an effort to continually improve our contract documents, we review the project specifications, in particular with multi-agency projects where various sets of specifications are merged."

**COMMENT:** Mr. Tumlin fails to state that MTA had NO experience with CM/GC contracts, which were not the usual contract on major infrastructure projects like the Van Ness BRT LPA Project.

MTA's LPA Project was designed by MTA "engineers." That incredible expenditure of staff time, the expenditures for MTA's years of "public relations," even leasing an office on Van Ness.

The time spent by staff of MTA and SFCTA on the EIS/EIR have never been accounted for on the Project. With those expenditures, the cost is close to one billion dollars, including the millions paid to Walsh. The time/expense of the Walsh contract for the "pre-construction" phase) and for demolishing Van Ness Avenue for the BRT Project, certainly should have and still should be accurately accounted for. Further, Walsh's battle with its subcontractors should have early on led to cancellation of the contract by MTA.

**TUMLIN (cont'd):** "The Van Ness project also had the challenge of coordinating City specifications with Caltrans requirements. Specifically, in the case of the potholing and pedestrian control specifications, the contractor settled claims on these issues for less than 20% of its costs incurred, illustrating that its claims arising from purported ambiguity in the specifications had little merit. Moreover, Contractor had access to the specifications for many months during the pre-Construction period and did not request any clarification/changes at that time. Contractor raised issues with technical requirements after the construction started."

**COMMENT:** Both MTA and Walsh were or should have been well aware of Caltrans requirements. MTA actually *paid* Walsh 20% of Walsh's demands for costs, more after Walsh failed to deliver due to its disagreement with its subcontractors on costs.

This Board should adopt the Grand Jury's F9 Finding.

**F10 Finding:** "Contention over underspecified or unclear contract terms and technical requirements led to a deterioration in the relationship between the City and Walsh, the general contractor."

**TUMLIN:** "Disagree wholly. Language that was used in the contract was standard to all City contracts. The City worked diligently to enforce the contract in a fair and reasonable manner. The contractor did not raise any concerns about ambiguity or confusion during the year of pre-construction services or during negotiations. The CM/GC has the responsibility to raise and

resolve such concerns during pre-construction. What actually led to deterioration in the relationship was the contractor's concerns about the bid for the utility work being substantially higher than originally estimated and thereby reducing its profit margin."

**COMMENT:** MTA knew or should have known the estimated cost of the "utility work," *i.e.*, removing and completely replacing water, sewer and electrical utilities in the center and sides of Van Ness Avenue/US Highway 101. Instead those figures were not brought to bear because the CM/GC contract when signed contained no construction specifications, but bound MTA to Walsh doing the construction without those cost estimates and with no competitive bidding for the construction work. As a result, Walsh underbid the initial (non-construction phase), knowing the City was bound to a general total for the construction phase. Any good-faith negotiation should have had a realistic cost estimate of the construction, and there should have been competitive bidding on the construction.

**F11 Finding:** "The removal of Synergy, the underground subcontractor, from the project, partially as a result of poor cost estimates, contributed to the deterioration of the relationship between Walsh, the general contractor, and the City."

**TUMLIN:** "Disagree wholly. The City supported the contractor's decision to remove its underground utility contractor, Synergy. The relationship began to deteriorate when the contractor bid out Synergy's work and received a bid substantially more than Synergy's estimate. Over a year after Synergy was removed, Walsh filed a claim under penalty of perjury for \$11.9M arising from damages it purportedly incurred relating to Synergy's removal. That claim was resolved by the City paying Walsh nothing on this issue. The price difference was not due to poor cost estimating, but to unexpected market conditions."

**COMMENT:** The failure to make reality-based estimates of the cost of the work to be done, whether by Walsh or its subcontractors, or, as noted in F13 by the City itself, places the blame on MTA and Walsh. Whether or not Walsh delivered, as Mr. Tumlin admits (F13), the City had to pay for its own staff to deal with Walsh's failure. ("City staff had to supplement the contractor's team directly, performing contractor work") [Tumlin Response F13] Thus the taxpayer paid for the failure of both parties to make a reality-based contract.

The City with its vast experience should have been well aware of the cost of replacing water, sewer and electrical utilities to implement its LPA Van Ness BRT project, *before it approved that Project*. Indeed, under the law the City was required to obtain full funding for the Project *before approving it*, which took place in 2013, *before* the CM/GC contract with Walsh.

**F12 Finding:** "The contentious relationship between Walsh, the general contractor, and the City made it difficult to resolve problems as they arose, despite close collaboration being one of the potential advantages of the CMGC contract."

**TUMLIN:** "Disagree partially. Once the contractor realized that its guaranteed maximum price would not cover the cost of the utility work, the relationship became strained and the contractor became uncooperative. It appeared that the contractor was more focused on recovering the potential loss from the increased utility costs than performing a collaborative and successful project."

**COMMENT:** Why would a private profit-oriented contractor collaborate on a potential loss? The statement makes an absurd presumption.

**TUMLIN (cont'd):** "To illustrate this, the contractor hired additional personnel to focus on claims, and used field staff to assist with the claims process rather than devoting resources to the project. The contractor's lack of experienced field staff required the City to hire a utility coordinator and other staff to facilitate the contractor's coordination with third party utilities and to resolve basic field issues. As a CM/GC, it was the contractor's responsibility to coordinate day-to-day activities with third party utilities. In spite of the challenging situation, field staff maintained a professional relationship."

**COMMENT:** See COMMENT on F11.

**F13 Finding:** "Lack of an in-the-field point of contact between Walsh and the City during early stages of construction led to delays and increased costs on the project."

**TUMLIN:** "Disagree wholly. The City's Resident Engineer (RE) was (and is) the point of contact with the contractor. The RE, who has been on the Project from the beginning, along with the owner's construction management team, have always been co-located with the contractor's team. Notably, the high turnover of the contractor's management team made it difficult to coordinate with the contractor, and necessitated the City bringing the contractor up to speed at various times (and likely contributed to the delay and increased costs on the Project)."

**COMMENT:** Mr. Tumlin offers no names and no support for this statement. See also, Comment on F6.

**TUMLIN (cont'd.):** "The unwillingness to pothole and perform other advance investigation in a timely fashion contributed more to delays in resolving field challenges than any lack of City staff."

**COMMENT:** If Walsh was unwilling to "pothole and perform investigation" at the pre-construction stage, the City should have terminated the contract with Walsh for the construction phase of the Project.

**TUMLIN (cont'd):** "The CM/GC should lead the field fact-finding and discovery with very little owner assistance to resolve basic field issues and coordination matters." "During the construction, City staff had to supplement the contractor's team directly, performing contractor work..."

**COMMENT:** And where is the accounting of the public expense of that City staff work?

**N. F14 Finding:** "Confusion related to the contractual requirements for pedestrian monitoring contributed to the deterioration of the relationship between Walsh, the general contractor, and the City."

**TUMLIN:** "Disagree partially. The City does not believe that the contractual requirements for pedestrian monitoring and flaggers are confusing. In the interest of public safety, the City agreed to reimburse Walsh for pedestrian monitors if (1) the contractor provided the flaggers required under the contract for pedestrian control and (2) the contractor provided advance notice to the City of the need for pedestrian monitors to support the flaggers at a particular location."

**COMMENT:** Because Walsh proposed during the preconstruction phase to tear up of all of Van Ness Avenue at once for the duration of the work, instead of working block-by-block, pedestrian monitoring and flaggers were necessary for the entire length of the Project construction area, obviously increasing costs for the dangerous, ugly disaster.

The "Finding Response Text" ignores that MTA and SFCTA's LPA, which required excavation of water, sewer, and utility lines to implement its most environmentally damaging "alternative."

## **CONCLUSION**

The Grand Jury's Report on the Van Ness BRT Project presents a factual expose of many events that have gone wrong, both with failure of MTA to realistically and efficiently plan and contract for a major capital Project, and pinpoints MTA's failure to understand or even try to find out what lay beneath the surface of the once-grand Highway. The result has been years of delay, visual blight, and traffic congestion impacts that will negatively affect travel in the center of San Francisco for generations.

The Board of Supervisors and this Committee should approve all of the Grand Jury's recommendations and order MTA to implement them.

DATED: September 30, 2021

  
\_\_\_\_\_  
Mary Miles



# **EXHIBIT A**

Mary Miles, Attorney at Law (SB #230395)  
for Coalition for Adequate Review  
364 Page St., #36  
San Francisco, CA 94102  
(415) 863-2310

TO:

Maria Lombardo, Acting Director  
Erika Cheng, Clerk of the SFCTA Board  
and  
Board of the San Francisco County Transportation Authority  
1455 Market Street, 22nd Floor  
San Francisco, CA 94103

Van Ness BRT EIS/EIR  
San Francisco County Transportation Authority  
1455 Market Street, 22nd Floor  
San Francisco, CA 94103  
vannessbrt@sfcta.org

Leslie Rogers, Region IX Administrator  
Federal Transit Administration  
U.S. Department of Transportation  
201 Mission Street, Suite 1650  
San Francisco, CA 94105

**BY E-MAIL**

DATE: September 10, 2013

RE: San Francisco County Transportation Board Meeting, September 10, 2013, Agenda Item #3

**PUBLIC COMMENT ON FINAL ENVIRONMENTAL IMPACT  
STATEMENT/ENVIRONMENTAL IMPACT REPORT (FEIS/FEIR), CEQA FINDINGS,  
AND PROPOSED LEGISLATION ON VAN NESS AVENUE BUS RAPID TRANSIT  
PROJECT**

This is public comment on the Final EIS/EIR ("FEIR"), proposed "CEQA Findings," and proposed legislation on the Van Ness Avenue Bus Rapid Transit Project ("BRT") Project ("the Project"). Please assure that a copy of this comment is distributed to each member of the Board of the San Francisco County Transportation Authority ("SFCTA") in advance of the SFCTA Board Meeting of September 10, 2013 (Agenda Item 3), and place a copy of this Comment in all applicable files on the Project. Please consider this Comment before any deliberations on certifying the Project EIR and approving any findings, statement of overriding considerations, or legislation approving the Project or any part of it.

The FEIR and the proposed Project violate the California Environmental Quality Act ("CEQA") (Cal. Pub. Resources Code ["PRC"] §§21000 *et seq.*, CEQA's regulatory Guidelines (14 Cal. Code Regs. §§15000 *et seq.* ["CEQA Guidelines"]), the National Environmental Policy Act ("NEPA") (42 U.S.C. §§4371 *et seq.*), its implementing regulations and Executive Orders (e.g., 40 CFR 1500 *et seq.*, etc.), and other statutes and regulations that apply to the review, funding, and approval of the Project (e.g., 49 USC §303; 23 USC 106, 109, 138, 325, 326, 327; 23 CFR 771 *et seq.*, etc.) This commenter has also submitted Comment on the DEIS/DEIR ("DEIR"), which is incorporated by reference in this Comment. FEIR at II: Individuals, pp.106-121 (I-40).

**BROWN ACT VIOLATION:** The SFCTA failed to comply with the Brown Act, which requires posting the Agenda of this meeting at least 72 hours in advance of the meeting in "a location that is freely accessible to members of the public and on the local agency's Internet Web site." Cal. Gov. Code §54954.2(a)(1). The agency did not post the meeting Agenda 72 hours in advance of the meeting in a location that is freely accessible to the public. SFCTA's office is not "freely accessible to members of the public" and is not accessible at all on weekends. The agency did not provide by electronic mail a copy of the Agenda at least 72 hours in advance of the meeting, and only sent a notice that the meeting would take place, e-mailed on Friday, September 6, 2013, which did not include the Agenda. In any event, the Agenda had to be posted in a publicly accessible location in addition to any web site posting. Cal.Gov. Code §54954.2(a)(1). This Board therefore must continue the Item and all actions on it until after legally required public notice has been provided.

The proposed "CEQA Findings" and hundreds of pages of other "enclosures" and "addenda" were not legally noticed or publicly available before this hearing. These materials were not noticed, even to those, like this commenter, who have repeatedly requested notice of all proceedings and environmental review of this Project. They were posted as links to a link to the "agenda" that itself was not lawfully noticed—again not directly available without navigating the internet—with no web version of the agenda or links available until after business hours on September 6, 2013, giving the public less than legally adequate notice--in fact less than 48 hours of notice for this meeting scheduled on September 10, 2013 at 11:00 a.m. Although this commenter has asked for public notice and copies of all environmental documents in advance of their approval, none were provided. The documents are hundreds of pages of cross-referenced materials, precluding public access and comment on the proposed actions in violation of NEPA and CEQA. Under these circumstances, there is no requirement of exhausting administrative remedies in the event of litigation, because the materials were not timely available to the public for practical purposes. Any approval by this Board without allowing meaningful opportunity for public input and review is itself evidence of a preordained determination to adopt the Project in a fashion that precludes public input.

Due to the inadequate notice and inadequate public comment period, unavailability of materials referenced in the environmental documents, including supporting studies, unavailability of agency staff, the large volume of paper generated since the close of public comment on the DEIR, the massively revised FEIR, the addition *after* the close of comment on the DEIR of a "Locally Preferred Alternative" ["LPA"] that was *not* included in the DEIR, and thousands of pages of "technical memos," this Comment is necessarily incomplete. However, commenters do not waive further comment on this Project, including issues not addressed in this

Comment. Further, where as here public comment is curtailed by inadequate information and is futile, since a foregone conclusion of approval has already been assumed in every document and in agency actions, the public may not be held to a requirement of exhaustion of administrative remedies in future litigation, because such remedies do not exist for practical purposes.

Since the agencies have provided inadequate time and information, this comment is necessarily incomplete, does not include all issues and violations of NEPA and CEQA in the defective FEIS and the agencies' procedures, and is not organized in order of importance. This commenter, however, does not waive any issue by its absence or due to the inadequate time to fully address it in this Comment.

## **1. Introductory comments**

The Van Ness BRT ("the Project") proposes to make existing San Francisco ("Muni") bus traffic "compete" with vehicle traffic on federal and state highway, US 101, which is also an historic major street in San Francisco. The two existing Muni lines on Van Ness Avenue, Routes 47 and 49, carry 16,000 passengers per day, make 14 stops in each direction on the two-mile Project segment, with an average speed of approximately 5.2 miles per hour. FEIR, p.3-21, 24. The Project's stated "purpose and need" are to increase bus speed by slowing other modes of traffic that include 44,500 vehicles per day on the segment and more than 126,000 vehicles in the Project area corridor, which includes Gough, Franklin, Polk, Larkin, and Hyde Streets. FEIR, p.3-44, §3.3.2.2, p.3-3. According to the FEIR, within the Project area "study" corridor, the two Muni lines carry 14% of travelers, while vehicles carry 86%. FEIR, p.3-3. That figure, however, mistakenly assumes that vehicles carry only the driver, when in fact many vehicles carry more than one passenger, including the 11% of San Francisco commuters who carpool,<sup>1</sup> taxis, shuttle and tour buses, and vehicles carrying passengers.

To achieve its "purpose and need" of slowing traffic other than the two Muni lines, each of the "alternatives" for building the Project reduces traffic capacity on Van Ness Avenue by one-third by eliminating two traffic lanes from the existing six lanes that carry 44,500 vehicles per day. FEIR, p.3-44, §3.3.2.2. The FEIR admits that the vehicles now occupying six lanes on US Highway 101/Van Ness Avenue would be diverted to other streets causing significant traffic impacts, but claims without any supporting evidence that many would abandon vehicle travel and ride the two Muni lines or use bicycles. FEIR, p. 3-10.

The Project proposes slowing vehicle (meaning all non-Muni-bus) traffic to make the two Muni lines more "competitive" with other travel modes on US Highway 101/Van Ness Avenue, such as cars, trucks, taxis, and even shuttle buses ("Google" or Bauer buses), which will not be allowed in the BRT lanes. The Project proposes to achieve its combined goal by eliminating two traffic lanes, all left-turn lanes, most parking, and many right-turn lanes on US101/Van Ness Avenue to slow, obstruct, and force diverting vehicle traffic so that it is as slow as existing bus traffic.

The Project also proposes to speed up Muni Lines 47 and 49 by eliminating *half of the existing bus stops on Van Ness Avenue*, making bus stops 1,150 feet apart (nearly 1/4 mile), instead of the current 700 to 800 feet apart. FEIR, p.3-112. The FEIR observes that not having to

---

<sup>1</sup> San Francisco County Transportation Authority ("SFCTA"): *Countywide Transportation Plan* ["CWTP"], p. 41.

stop for passengers would increase the speed of the two bus lines. However, removing bus stops to speed up Muni lines does not require removing traffic lanes and parking to create BRT lanes in the middle of US Highway 101/Van Ness Avenue.

Other Project features include: *eliminating nearly all of the parking on Van Ness Avenue* and hundreds of parking spaces on cross-streets; *eliminating all left-turns*; eliminating many existing right turns; installing bulbouts at 64 intersections to obstruct right turns by vehicles, trucks and buses (FEIR, p.3-108); removing all existing mature trees and other vegetation in the median to install a paved center-median BRT; removing the existing historic streetlamps and installing generic utility posts with two glaring *faux* deco street lamps on each; installing freeway-style overhanging signs; installing large, garish bus stop areas in the median; spending millions to install otherwise unnecessary new sewer lines to accommodate the increased weight of buses traveling in the center of the avenue; painting the pavement occupying the central half of the avenue a garish red color (FEIR, pp.4.4-27,29,31); permitting buses to pass one another in the remaining traffic lanes on US Highway 101/Van Ness Avenue FEIR at p.10-5, §10.2.4.1.; and requiring additional bus traffic in the remaining traffic lanes *Id.* FEIR at p.10-5, §10.2.4.1.

These measures would not in the “near term” accomplish the Project’s “purpose” of buses “competing” with other traffic but would *slow down other modes of traffic* “resulting in a significantly reduced speed gap between modes” on Van Ness Avenue. FEIR at p.3-27-28, §3.2.2.3, Figure 3.2-6. Once past the verbiage, the Project’s actual “purpose and needs” are twofold: 1) to obstruct and slow all traffic except Muni buses on routes 47 and 49; and 2) to marginally increase the speed of Muni buses on routes 47 and 49. Without all those stops for passengers and by delaying all other traffic, the two Muni lines will supposedly increase their speed to 7 miles per hour, while other vehicles would be delayed not just on Van Ness Avenue but on cross streets and on parallel streets, particularly Franklin and Gough Streets. Thus, the Project’s improper purpose is in fact to deliberately create traffic congestion throughout the area to make the two Muni lines “competitive” with other travel modes.

The FEIR admits that the Project would cause significant impacts measured by level of service (“LOS”) in the “near term” and degrade three important intersections from satisfactory to unsatisfactory LOS: Gough/Hayes (existing LOS D 45.9 seconds delay would be degraded to LOS E, 74.6 seconds delay); Franklin/O’Farrell (existing LOS D, 39.3 seconds delay to LOS E, 55.9 seconds delay); and Franklin/Market/Page (existing LOS C, 27.2 seconds delay to LOS F, 103.7 seconds delay); and that LOS at Gough/Green would decline from existing LOS F with 76.5 seconds delay to 108.1 seconds delay with the LPA. FEIR, p.3-60, Table 3.3.9. The projected impacts in 2035 include longer delays on these intersection and delays on several other intersections. FEIR, p.3-67, Table 3.3.14.

The FEIR claims that passengers on Muni routes 47 and 49 would gain up to 1.8 minutes of bus time if they travel the entire 2-mile length of the BRT on Van Ness. The FEIR does not account for added travel time to walk twice as far to get on a bus. There is no commitment to acquire more buses to meet the needs of its claimed 40% increase in passengers. Buses would pass one another presumably occupying one of two traffic lanes remaining in each direction. FEIR at p.10-5, §10.2.4.1.

According to the FEIR, the 44,500 vehicles with an unstated number of passengers who do not take the #47 and #49 buses would experience delays in 2015 on US Highway 101/Van

Ness Avenue and on Gough, Franklin, Polk, Larkin, and Hyde Streets (combined) of 2.3 miles per hour southbound, and 1.2 miles per hour northbound. FEIR, p.3-54, Tables 3.3-5, 3.3-6. By 2035, those travelers would be delayed by 6.1 miles per hour southbound, and by 7.4 miles per hour northbound. Vehicles diverted to Franklin Street with an existing average speed of 10.5 miles would lose 4.3 miles per hour and travel at only 6.2 miles per hour.

The net human loss in traveling time in all vehicles except Muni buses would far exceed the minimal “improvement” for most passengers on Muni Lines 47 to 49, which would be less than two minutes if their origins and destinations happened to be on the Project’s 2-mile length of Van Ness Avenue. Private buses like “Google” and other “employer shuttle service” or commute buses, tour buses, medical shuttle services, and taxis would not be allowed in the BRT lanes and would continue to occupy remaining traffic lanes on Van Ness Avenue. FEIR at 3-33, §3.2.3; Vol.II: Master Response 3; I-1. The Golden Gate bus lines would continue to travel in the remaining traffic lanes or in the BRT lanes, but all but two of its stops would be eliminated on Van Ness Avenue, leaving only two stops, one at Chestnut Street, and one at Geary. FEIR, p.3-32. Thus, while up to 16,000 existing local Muni bus passengers would allegedly gain up to 1.8 minutes on Van Ness Avenue, that gain would be at the expense of significant time lost by the vast majority of travelers.

Further, much of the time gained by the 16,000 Muni passengers would be attributable to measures that could be implemented *without* the Project, such as the proposed elimination of half of the Muni bus stops on Van Ness Avenue (FEIR, p.10-31, §10.4.1.1), replacing existing buses with new buses with lower floors, new bus stops that would show real time bus arrivals (many of which have already been installed, more efficient boarding and ticket purchase, and other features unrelated to removing traffic lanes, turning pockets, and parking. However, the FEIR fails to consider and analyze alternatives that would include these features but would not include eliminating lanes, turning, and parking.

After close of public comment, the lead agency created a “locally preferred alternative” (“LPA”) that was not in the DEIR. FEIR, p.2-3-2-4, §2.1.4. The LPA was then approved by the lead agency, the San Francisco County Transportation Authority (“SFCTA”) and by the implementing agency, the San Francisco Municipal Transportation Agency (“SFMTA”), without receiving any environmental review or public comment.

The LPA, unlike any center-median “alternative” in the DEIR, will eliminate nearly all of the parking on Van Ness Avenue. That fact is hidden in a footnote that contradicts the happy-talk promotion of the LPA in other documents, all of which falsely claim that eliminating parking would be minimal with the center-median BRT proposals. The FEIR, unlike the DEIR, discloses that the LPA *would permanently remove nearly all of the parking on both sides of Van Ness Avenue*, including existing passenger loading zones, blue zones, and yellow loading zones--more than any alternative analyzed in the DEIR. FEIR at pp.4.2-13-17, fn.65, §§4.2.4.2-4, Tables 4.2-8 & 9; 10-31-32, §10.4.1.1. This change in the Project Description requires recirculating an accurate DEIR, not a final environmental document, because the public has been misled by all previous information in the DEIR and other documents.

The LPA would place the BRT in the existing median of Van Ness Avenue, occupying two existing traffic lanes plus the entire median and turning pocket areas, creating a red asphalt expanse that would otherwise equal four traffic lanes, changing the character of Van Ness

Avenue from a grand avenue that is an historic major highway and City thoroughfare to a busway. FEIR, Ch. 10. The LPA and all center BRT alternatives also remove all left turn lanes (“pockets”) on the entire length of Van Ness Avenue, and prohibit right turns at several intersections.

The LPA and other center-BRT designs require that City rebuild the sewer system on Van Ness Avenue to accommodate the weight of the vehicles in the center of the avenue, and reconstruct the existing drainage system that would also be affected by the proposed bulbouts.

The LPA requires removing the historic streetlamps lining Van Ness Avenue and replacing them with higher generic highway-style poles with two glaring lamps at different levels on each pole to accommodate OCS wires for existing electric buses that would have to be realigned to the center of the avenue. The LPA would remove nearly all of the existing mature trees and vegetation from the median, and the LPA and other “build” alternatives would install large highway-style overhanging signs along the avenue.

The LPA and other “build” alternatives also include large bulbouts obstructing right turns at many intersections by vehicles, buses, and trucks. The LPA would remove nearly all of the mature trees in the median and replace the median green with large garish visual clutter, including huge new bus stops with glaring advertisements, light fixtures, and “art” installations. The LPA would, contrary to the City’s General Plan, paint the entire expanse of the huge asphalt centerpiece a garish red in case the public was unable to locate it otherwise.

The FEIR also admits that, since the Project eliminates nearly half of the bus stops on Van Ness Avenue, that the average distance between BRT stops under the LPA “was determined to be 1,150 feet,” more than 1/5 of a mile, affecting accessibility to buses for the disabled, seniors, and others. FEIR atp.10-31, §10.4.1.1. Thus, the marginal increase in Muni speed would also come at the expense of reducing access for many people.

The FEIR admits that the Project’s reduction of one-third of traffic capacity on Van Ness Avenue would result in vehicles traveling on parallel streets causing significant impacts, but claims with *no* supporting evidence that many travelers would abandon vehicle travel entirely, would switch to traveling on the two Muni lines, travel on distant corridors, or ride bicycles to reach their destinations. See, e.g., FEIR II:80. That speculation is completely unsupported by evidence, as pointed out in several public comments. See, e.g., FEIR II:78-79, 98-99, 115. The FEIR admits that it has “revised” the “text in Section 3.1.2.2” to “include more conditional language: ‘*up to 50%* of the new transit riders could be former drivers.’” FEIR II:102, emphasis added. There is no coherent analysis or quantified data on origin to destination travel, even though the Project proposes to significantly affect travel on a major US Highway, regional, and City traffic corridor. The FEIR fails to accurately account for the significant delays to the one-third of travelers who now use the two traffic lanes on Van Ness Avenue/US Highway 101 and treats those delays and the Project’s significant impacts dismissively with no attempt at mitigation.

The FEIR contains the same defects in its analyses of impacts as the DEIR, including the failure to collect accurate data on existing conditions, selectively choosing only a few intersections for analysis, and omitting accurate baseline descriptions of the five parallel streets that are already congested where it proposes to divert traffic. The FEIR omits any accurate LOS analyses of traffic impacts on cross streets, spillover traffic, and segregates the few impacts it

finds from the obvious impacts *those* impacts will in turn cause on other intersections. These failures to accurately analyze the Project's significant impacts are defects that cannot survive judicial scrutiny under CEQA and NEPA.

The FEIR states that in order to fulfill its "purpose and need" to obstruct vehicle traffic, it "assumes" a "finding of significant and unavoidable impact under CEQA." FEIR, p.7-25. However, that assumption directly violates CEQA.

The FEIR claims that the Project would require up to 58 months (5 *years*) of construction during which time up to four lanes of traffic and bus service would be obstructed and delayed. FEIR, p. 9-6. Although the FEIR claims that only a few blocks at a time would undergo construction, those obstructions would cumulatively affect the heavy traffic on US Highway 101/Van Ness Avenue and other streets and the existing transit for the entire duration of construction.

This Project proposes eliminating more than one-third of the capacity of a major Federal highway and north-south corridor through San Francisco. Even if it were supported by the local public, and there is no evidence that it is, an allegedly "locally preferred" alternative should not, as proposed, control the analyses and outcome of this Project. NEPA and CEQA require avoiding and mitigating significant impacts, not as here deliberately creating them by slowing traffic to make vehicle travel more difficult, time-consuming, and polluting.

## **2. Public Comment Has Been Undermined by the Lead Agencies' Failure to Provide Adequate Notice and the Opportunity to Comment on Both the DEIR and the FEIR. The "CEQA Findings" Were Not Publicly Noticed or Available to the Public Before the Board's Hearing.**

NEPA requires that "high quality" information, including "[a]ccurate scientific analysis, expert agency comments, and *public scrutiny*" be available "*before* decisions are made and *before* actions are taken, and that agencies must "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 CFR 1500.1(b) (emphasis added), 1500.2(d).

The FEIR is dated "July, 2013," but in fact was not released until after a July 11, 2013 e-mailed announcement that did not contain the FEIR. A two-page "Memorandum" was in the envelope, stating at the end: "How may I comment on it? The Authority Board will consider certification of the Final EIS/EIR and project approval in early September 2013 (the final date is to be determined). The San Francisco Municipal Transportation Agency will consider project approval at their September 17, 2013 Board meeting. Following these actions, the FTA will consider issuance of a Record of Decision (ROD). Compliant with the national Environmental Policy Act, any comments submitted before August 12, 2013 will be considered by the FTA before issuance of the ROD." In short, *no* dates were provided for submitting comments to the approving agencies, except that the public had to submit a comment for future (undated) FTA consideration by August 12, 2013. This commenter asked the FTA for a 30-day time extension for public comment, receiving a 15-day extension to August 27, 2013. That time is still inadequate and arbitrary, since *no* date has been specified for issuing the ROD or the approvals that precede it.



The due date for public comment was not in the e-mailed announcement. The documents themselves are impractical for downloading due to their immense size.

Several days after the e-mailed “Update,” a CD arrived in the mail claiming to contain the FEIR, though it did not contain any of the newly added or previous studies such as the “Vehicular Traffic Analysis Technical Memorandum (CHS, 2013)” or any other supporting material, none of which were contained in the “Appendices I and J” attached to the FEIS.

The “CEQA Findings” were not publicly available and could not be viewed except by complicated internet navigation posted on the SFCTA web site under the “Agenda” item for the SFCTA Board meeting of September 10, 2013. The Agenda was not available until after hours, Friday, September 6, 2013, giving the public less than 48 hours to find and assimilate hundreds of pages of findings and other documents that were not previously available. That is not adequate notice under CEQA or other existing statutes providing for open meetings, public notice and the opportunity to be heard.

The “Findings” at “Enclosure A” of the Agenda of the Board Meeting of September 10, 2013, **falsely states** that “paper copies” of the FEIR were “sent to . . . those parties that commented on the Draft EIS/EIR and provided a physical mailing address.” “Enclosure A, September 10, 2013 [“Findings”], p. 8. This commenter commented on the DEIR/DEIS and was never provided a hard copy of the FEIR or any other document. Instead, this commenter, and presumably all others were required to separately order and pay for a hard copy of the FEIR, and for hard copies of the allegedly supporting studies.

A hard copy of the FEIR had to be separately ordered at a cost of \$97.59, precluding getting a readable document for people who could not afford it and could not visit public facilities to view it during business hours, *i.e.*, most working people. See, *e.g.*, 40 CFR 1506.6(f). A cheaper black and white copy was unavailable within the limited public comment period. A CD of the “Technical Memos,” meaning the supporting documents that should have been included in appendices, was only available on request, and the CD provided was defective, requiring more requests, more hassles and wasted review time of the defective documents. Nevertheless, the agencies still did not extend the time for public comment beyond the bare minimum required.

The Findings and other materials were not publicly noticed or available to the public in any form before the September 10, 2013 meeting of this Board. They were only available by searching and finding them on the SFCTA web site where they were posted after hours on Friday, September 6, 2013.

### **3. THE DEIR MUST BE RECIRCULATED: The FEIR Has Hundreds of Pages of Revisions and A New “Locally Preferred Alternative” That Were Not in the DEIR, Requiring Recirculation Under Both NEPA And CEQA.**

*After* the close of public comment on the DEIR on December 23, 2011, the lead agency, the San Francisco County Transportation Authority (“SFCTA”) and a “cooperating” or “responsible” or “implementing” agency, the San Francisco Municipal Transportation Agency (“SFMTA”), significantly changed the Project description, alternatives, and analyses in the DEIR by creating a new “alternative” and approving it as the “locally preferred alternative” (“LPA”).

A section is added at §10.3 in the FEIS, claiming that the lead agency SFCTA and City's MTA "proposed an LPA based on the project's purpose and need."

The FEIR claims that those "substantive" changes are "demarcated by a vertical bar in the margin" (FEIR at p.S-1, §S-2), but they are otherwise unexplained, and they occupy nearly every page of the massive FEIR, substantively changing the Project description, alternatives, baseline (existing conditions description), proposed mitigations, and all the analyses of impacts required by NEPA and CEQA.

For example, the FEIR, unlike the DEIR, discloses that the LPA *would permanently remove nearly all of the parking on both sides of Van Ness Avenue*, including existing passenger loading zones, blue zones, and yellow loading zones -- more than any alternative analyzed in the DEIR. FEIR at pp.4.2-13-17, fn.65, §§4.2.4.2-4, Tables 4.2-8 & 9; 10-31-32, §10.4.1.1. This change in the Project Description requires recirculating an accurate DEIR, not a final environmental document, because the public has been substantially misled by all previous information in the DEIR and other documents. The LPA also removes nearly all trees in the center median strip, and contains more bulbouts, turn prohibitions, and other significantly negative features than the "alternatives" described in the DEIR. The failure to coherently describe the Project requires recirculation, because the public has been misled.

Both laws require recirculation of the DEIR under these circumstances, since the public and decisionmakers have been deprived of a meaningful opportunity to understand and comment on what is actually being proposed as the Project and its significant impacts. NEPA requires that the DEIS "must fulfill and satisfy to the fullest extent possible the requirements established for final statements," and, "If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised *draft* of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives *including the proposed action*." 40 CFR 1502.9(a), emphasis added. Here, the DEIS did not include the proposed action, precluding meaningful analysis and depriving the public of the opportunity to understand what the agency actually intended and to meaningfully participate in the decisionmaking process. "NEPA procedures must insure that environmental information is available to . . . citizens before decisions are made. . . The information must be of high quality." 40 CFR 1500.1(b)

NEPA requires the agency to "assess the reasonable alternatives to *proposed actions* that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 CFR §1500.2(e), emphasis added. Here, the FEIR proposed alternatives without having a finite, stable "proposed action."

NEPA further requires that, based on the FEIR's description of the affected environment (40 CFR §1502.15), and the statement of environmental consequences (40 CFR §1502.16), the FEIR "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker *and the public*." 40 CFR §1502.14, emphasis added. The Alternatives section of the FEIR must "identify the agency's preferred alternative . . . **in the draft statement...**" 40 CFR §1502.14(e), emphasis added. The DEIR failed to comply, and the agencies must now recirculate the DEIR for a new public comment period and, after considering public comment, issue a new FEIR. *Ibid.*

CEQA also requires recirculation of the DEIR, because it failed to accurately describe the proposed Project, which is the LPA. See, e.g., PRC §21092.2; Guidelines §15088.5 [requiring recirculation when significant new information is added to the EIR including changes in the project, environmental setting, and additional data or other information, that “deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative”]. That provision clearly applies here, because the public was deprived of even knowing what the actual Project was, and because the FEIR admits throughout that substantive changes were made to the DEIR.

The DEIR misled the public to believe that there were four specifically described alternatives that did *not* include the LPA, and that the public had a voice in the analysis and choice of alternatives.

Even if the agency claims that the LPA resembles other “alternatives” (such as #3 and #4) with a center-median BRT, those alternatives were highly controversial. Indeed, the City’s Public Utilities Commission and the Department of Public Works raised serious concerns and repeatedly stated their opposition to the center median BRT. FEIR II: Agency: 28-30, 32-38, 46, 48-50, 54, 56-61, 113-114, 129-132. The Mayor’s Office of ADA/Disability Access also raised significant concerns about the center-median BRT and opposed it. FEIR II: Agency: 68-71. Several individuals also voiced opposition to the center-median “build” alternatives in the FEIR. See, e.g., FEIR II: individuals, 11, letter I-4, 24 (I-10), 32 (I-14), 34 (I-15), 36 (I-16). Many substantive comments were opposed to the entire Project and all “build” alternatives. See, e.g., FEIR II: Individuals, p.15 (I-6), 19 (I-8), 22 (I-9), 26 (I-11), 34(I-15), 36 (I-16), 45(I-20), 59 (I-25), 71-72 (I-31a), 78-79(I-32), 82 (I-33), 90-91 (I-36), 96 (I-37), 98-100 (I-38), 112-121 (I-40).

While the Project’s improper goal of slowing traffic by eliminating traffic lanes to create a large paved island for buses in the middle of the historic Van Ness Avenue corridor was proposed as an alternative in the DEIR, it was not proposed as the “*preferred alternative*” that is now described as *the* Project. The analysis remains a one-sided promotion instead of an objective analysis and is now focused on an “alternative” that was *never presented for public scrutiny* and input or properly described as the Project under review. The public was therefore deprived of meaningful participation in the decisionmaking process. 40 CFR §§1500.1(b), 1502.19, 1506.6; Cal. Pub. Res. Code [“PRC”] §21092.1; 14 Cal.Code Regs. [“CEQA Guidelines”] §15088.5(a), (g).

The DEIR here did not include the actual ***proposed project***, a violation of CEQA that deprived the public of meaningful participation in the review process. The LPA and the large number of substantive changes (vertical lines appear on nearly every page of the FEIR) require a new DEIR and recirculation to meet CEQA’s and NEPA’s requirements of informed public involvement in the review and decisionmaking process.

Additionally, and previously undisclosed, the LPA would permanently eliminate *most parking on Van Ness Avenue, a new significant impact unaddressed and unmitigated in the DEIR*. FEIR at pp.4.2-13-17, fn.65, §§4.2.4.2-4, Tables 4.2-8 & 9; 10-31-32, §10.4.1.1. In fact, the DEIR misinformed the public to believe that center-median “alternatives” would not eliminate parking.

The DEIR's omissions, misleading Project and "alternatives" descriptions and misleading analyses also require recirculating a new DEIR under NEPA, since the DEIR failed to provide accurate or "high quality" information for public scrutiny. 40 CFR §§1500.1(b), 1500.2(d); 1505.1, 1506.3(b)

The FTA and other lead agencies must recirculate a new DEIS/DEIR with all of the above contents, including an accurate description of the proposed Project and existing conditions, and the other requirements noted above that are absent from the DEIR previously circulated. Only *after* allowing a new comment period for the accurate DEIR, may the agency issue a new FEIR that addresses public comment on the DEIR. Further, the public comment period for the recirculated DEIR must be a minimum of 45 days but should be at least 90 days due to the large amount of paper generated by the agencies, the obfuscatory analyses in the documents, the unavailability of studies and staff, the fact that the public comment period on the original DEIR was improperly shortened, and the need to address at least two different bodies of environmental law.

**4. THE REVIEW IS NOT OBJECTIVE. The SFCTA (Project Sponsor And Lead Agency), and the MTA (Implementing Agency), Have Conflicts of Interest Since They Would Receive Substantial Funding From Project Approval; And The FTA Has Provided No Independent Review.**

The FEIR claims that it was prepared by the Federal Transit Administration ("FTA") and the San Francisco County Transportation Authority ("SFCTA"). FEIR inside cover page. However, the "Appendix H List of Preparers" includes SFCTA and MTA Agency staff, even though those agencies would receive and have already received part of at least \$87.6 million from the FTA to design and implement the Project (FEIR, p.1-6), and thus have a huge financial interest in the outcome of the Project, which is prohibited by NEPA. 40 CFR §1506.5(c). The SFCTA plans to allocate to itself another \$20.5 million in Proposition K funding. FEIR, p.9-2. The FEIR indicates that the FTA has already approved the Project and its funding, which violates NEPA's and CEQA's fundamental requirements of analyzing and mitigating the Project's impacts before approving it. FEIR, p.9-6.

The FTA's role is unclear in either in preparing the FEIR or about the deliberations on the Project. The Project is, on the one hand, improperly cast as a "local" or "community" Project to make bus service more competitive with vehicle transportation on a segment of Van Ness Avenue/US Highway 101, with local (San Francisco) agencies controlling its design and implementation. On the other hand, the FTA appears willing to be a conduit for the hundreds of millions required to build the Project without taking responsibility for the magnitude of its impacts on City, regional, state, and interstate traffic on US Highway 101. The muddying of agency roles in preparing an FEIR does not excuse the agencies from their responsibilities under CEQA and NEPA. The FTA must not fund this Project without assuring that its significant impacts on traffic, transit, air quality, and transportation have been identified, analyzed, and completely mitigated. The FEIR admits that it has *not* fulfilled that mandatory duty. See, *e.g.*, FEIR, p.7-25 (CITE)

Further, CEQA requires objective decisionmaking that is precluded when a lead agency acts as the Project sponsor, EIR preparer, *and* unelected decisionmaker. There is *no* oversight of SFCTA by any elected decisionmaking body, and the SFCTA Board is not elected. There is no

way for the public to appeal its decisions at the administrative level. There is no way for the public to object to its conflicting roles as a relentless booster of the Project and as a decisionmaking body.

**5. THE FEIR'S STATED "PURPOSE AND NEED" ARE IMPROPER: The Claimed "Purpose And Need" of Competing with Vehicle Speed by Slowing and Obstructing Vehicle Traffic Are Not Legitimate, Have No Federal Mandate, Are Contrary to the Mandates of CEQA and NEPA, And Unlawfully Constrain the Alternatives Analysis.**

The FEIR states that the Projects "need" is to "provide a competitive transit alternative to auto travel" by decreasing the speed of all vehicles other than Muni bus lines #47 and 49. (FEIR, p.1-8, §1.3.2) However, competing with vehicles, the mode choice of the vast majority of travelers, by removing more than one-third of traffic capacity on a major United States Highway is not a legitimate goal, since it significantly and adversely affects local, regional, state, and interstate travel and the greater human environment in violation of NEPA and CEQA.

In response to a public comment on the Project's significant impacts by slowing traffic, the FEIR admits that the Project *will* have significant impacts that it claims are "unavoidable" on Franklin and Gough Streets, stating, "The proposed project is not intended to increase vehicle traveling rate on Van Ness Avenue," but rather to "balance vehicle circulation with...project objectives." FEIR II: Individuals, p.97.

The Project proposes making buses "competitive" by making car, taxi, and freight traffic on Van Ness Avenue and cross streets much slower, *so* slow that between now and 2035, buses and private bicycles will overtake vehicles while they sit idling in gridlocked traffic, unable to turn or to efficiently reach a destination. FEIR, p.3-72, Table 3.3-15. However, that goal does not serve the public, and it is contrary to the mandates of NEPA and CEQA to protect the entire environment, not just the environment of a relatively small segment of the public. Under NEPA, agencies must "identify and assess the reasonable alternatives *to the proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment,*" and must "[u]se all practicable means . . . to "restore and enhance the quality of the human environment and *avoid or minimize any possible adverse effects of their actions.*" 40 CFR 1500.2(e), (f), emphasis added.

Here, the Project proposes *not* to improve the human environment but to deliberately degrade it for the vast majority of travelers. CEQA requires that an EIR "shall be considered by every public agency prior to its approval or disapproval of a project," and its purpose is to provide agencies and the public with information about a project's possible impacts, and to "list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." PRC §21061. CEQA's mandate is to maintain a "quality environment" for all the people of California, not just some. PRC §21001(a),(d). CEQA prohibits approving any project where an EIR has identified significant impacts without proposing effective mitigation or alternatives to the project, and specifically requires such information in EIRs and separately in findings. See, *e.g.*, PRC §21002.1, 21081, 21081.5; CEQA Guidelines §§15091 – 15093; 15120-15130. The FEIR fails to satisfy those requirements.

The FEIR complains that, "Transit speeds are currently not competitive with automobiles on Van Ness Avenue. Buses now travel at half the speed of cars (only 5 miles per hour) in the

Project area.” FEIR, p.S-3, §S.5.2. The document claims that with the Project buses would increase bus speed to up to 7 miles per hour and substantially decrease vehicle speed on Van Ness Avenue *and* parallel streets from the current 10.5 miles per hour, “resulting in a significantly reduced speed gap between modes” on Van Ness Avenue. FEIR at p.3-27-28, §3.2.2.3, Figure 3.2-6. That alleged gain of 1.8 miles per hour of speed for Muni lines #47 and #49 on the 2-mile Project length, however, comes at the expense of delaying hundreds of thousands of people, while doubling the distance between bus stops. FEIR, p. 3-72, Table 3.3-15.

Although it is not analyzed in the FEIR, much of the Muni gain in speed would be due to removing half the bus stops and other measures unrelated to eliminating traffic lanes and parking. By failing to describe such alternatives, the FEIR falsely implies that the “purpose and need” can only be met by creating the significant impacts and expense of a median-strip BRT. The FEIR further misleads by claiming without evidence that more people would travel by bus, but makes no commitment to acquire new buses to meet even the existing peak hour need, and without accounting for passengers who would give up on bus travel because of the increased (doubling of the) distance between bus stops. See, *e.g.*, *Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 980-981 (9th Cir.2002) [failure to support purpose and need with scientific evidence and to consider contrary opinion violates NEPA].

The Project’s toll on the vast majority travelers is distorted by the FEIR’s relentless promotion of the Project and its underlying negative purpose of significantly affecting traffic and parking in central San Francisco. The FEIR says that the segment of U.S. Highway 101/Van Ness Avenue where the Project would eliminate two traffic lanes, all turning lanes, and hundreds of parking spaces, carries a total of 16,000 passengers on the two Muni bus lines #47 and 49. However, the few marginal gains in speed for people who might travel on Muni lines #47 and #49 are disproportionate to the Project’s significant adverse impacts on the vast majority of travelers and on the entire human environment.

At the same time, the Project and the LPA require significantly degrading the visual and historic character of Van Ness Avenue by removing the mature trees and vegetation adorning the avenue, and the unique, historic, graceful old streetlamps that line that avenue and contribute to its character. The entire median would be replaced by a huge, asphalt expanse in the center of Van Ness Avenue, with bus stops (euphemistically called “stations”), flashing advertising signs, and the historic streetlamps by higher, ugly, generic light poles with two glaring lights that will significantly alter and degrade the visual and historic character of the entire corridor. There is no alternative that would rehabilitate the historic poles, and the agency has rejected the alternative that would save the median strip.

The FEIR claims that its “purpose and need” is supported by the lead agency’s (SFCTA) own 2004 Countywide Transportation Plan (“CWTP”). FEIR, p.1-7, §1.3.1. The FEIR makes no other claim of federal authority for the “purpose and need” of the Project.<sup>2</sup> Again, the insular multiple roles here of a Project sponsor and booster that is the lead agency, the preparer of the environmental document, and the unelected decisionmaking body, leads to a predictable result

---

<sup>2</sup> The FEIR claims that the regional Metropolitan Transportation Commission and/or Caltrans have supported the Project are unsupported. There is no evidence of funding by either, and Caltrans wrote a letter opposing the Project.

and egregious lack of objectivity that fails to accurately inform the public, producing instead a massive document in support of a *fait accompli*.

Since the Project's "purpose and needs" is unreasonable and contrary to the law and will necessarily have significant adverse impacts on the environment that are not effectively mitigated, and since they have no basis in federal authority, they do not satisfy NEPA.

The FEIR's "purpose and needs" also improperly constrain the analysis of alternatives under NEPA by mandating the Project in some form. 40 CFR §1502.2(f) ["Agencies shall not commit resources prejudicing selection of alternatives before making a final decision"], and (g) ["Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."]; §1502.14, 1502.13; §1502.16(d); and see, e.g., *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U. S. Forest Service* 689 F.3d 1060, 1069-1070. For example, no alternatives are discussed (except "no project") that would avoid or minimize the Project's adverse impacts, such as alternatives that might include removing half the bus stops, improved boarding capabilities, real-time displays at existing bus stops, and all the other parts of the Project that do not cause significant impacts on traffic and parking.

The significant effects on traffic that necessarily result from the FEIR's "purpose and needs" are contrary to the mandates of NEPA and CEQA to protect the environment, not to deliberately degrade it. See, e.g., 40 CFR §1500.1, 1500.2(f) [requiring federal agencies to "Use all practicable means. . . to enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."]; and see, e.g., PRC §§21001 [California policy requires long-term protection of the environment of every Californian]; 21002 [public agencies should not approve projects if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects; §21002.1(a) [purpose of EIR is to identify the Project's significant effects on the environment, and to "indicate the manner in which those significant effects can be mitigated or avoided; CEQA Guidelines §15126.6 [alternatives must avoid or substantially lessen significant impacts, even if these alternatives would impede to some degree the attainment of the Project objectives.]

Deliberately causing traffic congestion throughout the area to "provide a competitive transit alternative to auto travel in major corridors" to gain speed on two Muni lines does not serve these mandates.

The FEIR's "purpose and needs" also misleads the public by masking the Project's significant impacts in feel-good verbiage, such as its claim that the Project's purpose is to "Contribute to the urban design, identity, and livability of the BRT corridors." FEIR, p.1-7, §1.3.1. In fact, as noted by many commenters, the Project will significantly degrade the environment on Van Ness Avenue by removing all mature median trees and creating a huge asphalt expanse, by removing parking, by removing streetlamps, and by creating traffic congestion in the entire area.

## **6. The FEIR's Claim That Vehicles Will Disappear Or Find Some Other Way to Get Around Is Unsupported Speculation.**

The FEIR, like the DEIR, states that the one-third of travelers who formerly occupied those traffic lanes will find some other way to get around, speculating without any evidence that drivers will convert to bus travel, bicycles, or travel on foot.<sup>3</sup> FEIR, p.3-10. One third of the vehicle traffic on Van Ness would be 12,000 to 15,000 vehicles. No evidence is provided for the speculative mode shift, and there is no analysis of the impacts.

The FEIR has no coherent discussion of origin/destination or the *purpose* of vehicle travel, or of the origin/destination of other “modes,” such as pedestrian travel and travel by bicycle. If those factors are considered, the FEIR’s happy fantasy of vehicle abandonment evaporates. By omitting this critical information and by its false and unsupported speculation, the FEIR is misleading and fails in its informational purpose.

For example, the FEIR claims that “the number of trips made by transit would increase significantly” on Van Ness Avenue but fails to note that vehicle traffic would also increase significantly on parallel streets where there is already a large volume of traffic. FEIR, p.3-12. Similarly, the FEIR disingenuously claims that a higher *proportion* of travelers on US Highway 101/Van Ness Avenue would use transit, but fails to note the forced diversion of other vehicles by eliminating one-third of the highway’s capacity. *Id.* The FEIR observes that each bus on would carry more passengers than a car. FEIR, p.3-13.

However, all of those happy numbers are irrelevant, since, even with its many defects and omissions, the FEIR admits that the Project will have significant adverse impacts on traffic on Gough and Franklin Streets that will worsen over time, while failing completely to analyze the Project’s impacts on cross traffic and transit. The FEIR fails to propose any effective mitigation measures even for those impacts it identifies, plainly violating both CEQA and NEPA.

The FEIR admits that a large volume of vehicles already travel on parallel streets and that the Project would cause significant adverse impacts on those heavily-traveled corridors, but even that admission is couched in misleading promotional verbiage while the FEIR continues to irresponsibly promote the Project.

For example, the FEIR admits that the Project’s decrease of roadway capacity by one-third “would cause motorists to divert from Van Ness Avenue to avoid delays.” FEIR, p.3-52. The FEIR explains that “the reduction in overall vehicle capacity, as well as the reduction in left turns on Van Ness Avenue may make the accessibility of parallel streets relatively more attractive for local drivers in comparison [to the BRT], even at similar speeds.” FEIR, p.3-10.

---

<sup>3</sup> The FEIR claims without any supporting evidence that “Pedestrian and bicycle trips comprise approximately 25 percent of trips to, from, or within the neighborhoods surrounding Van Ness Avenue.” (FEIR, p.3-12, §3.1.3) Thus, of the “55,000” travelers on Van Ness Avenue, the FEIR implausibly claims that 13,750 travel by private bicycle or on foot. (*Id.*) Since a “pedestrian” may be walking 20 feet to a bus or a vehicle, and since the document admits that there are few bicycles traveling on Van Ness Avenue, that claim is misleading and irrelevant to the impacts analysis. At p. 3-91, the FEIR contradicts itself by stating that pedestrian trips are 26% of the total “nonmotorized transportation in the Van Ness Avenue corridor,” but admits that “these figures” do *not* account for “walking to reach transit,” and “every transit trip begins and ends as a pedestrian trip.” FEIR, p.3-91, §3.4.2. The FEIR admits that “there is no accurate accounting” of private bicycle trips in the Project area, but includes it in the merged 25% or 26% of “nonmotorized” trips. FEIR, p.3-100, §3.4.2.2.



Incredibly, the FEIR does not attribute that mass diversion of traffic to the *delays* caused by the Project, which are significant adverse impacts under CEQA and NEPA.

Continuing to pretend that parallel streets could accommodate the diversion, the FEIR nevertheless claims that “Less than half of travelers in private vehicles on Van Ness Avenue under existing conditions have an origin or destination in neighborhoods surrounding Van Ness Avenue, meaning many of them could divert to streets throughout San Francisco rather than use Van Ness Avenue or streets immediately parallel.” FEIR, p.3-12.

The FEIR says that with the Project, “an average of 19 to 32 percent of traffic on Van Ness Avenue (depending on the location) would change their travel patterns, including driving on other streets, shifting the trip to other times of day, or shifting to other modes such as transit, walking, and bicycling.” FEIR, p.3-52. With no supporting evidence, the FEIR claims that those 19 to 32 percent of travelers who now use Van Ness Avenue “would change their tripmaking in a number of different ways,” with half either using one of the five parallel streets (Gough, Franklin, Polk, Larkin, or Hyde), and claiming that the other half would use transit, walk or bike, change the time of day of their trip, forego the trip, or to “use a route through another part of the city.” FEIR, p.3-10. With no supporting evidence, the FEIR claims that “more than half of all trips that start *and* end in the Van Ness Avenue neighborhoods . . . are walk or bike trips.” FEIR, p.3-6.

The FEIR admits that Franklin and Gough Streets already carry 59,000 daily automobile person trips. FEIR, p.3-3. The FEIR finally admits that both “near term” and “long term” impacts would lead to significant traffic impacts on Gough and Franklin Streets. See, *e.g.*, FEIR, p.3-60, Table 3.3-9, p.3-72, Table 3.3-15. The FEIR, however, considers those impacts in a vacuum, without considering how the queuing and back-up will affect other intersections and cross traffic. The FEIR proposes to inflict more impacts on drivers as “*mitigation*” for those impacts, *i.e.*, to eliminate more parking, and to eliminate more turn pockets. FEIR, p.3-81.

The FEIR claims without evidence that the BRT would increase transit trips to “an average” of 40 to 44 percent, and that at “select locations, transit trips would comprise more than 50 percent of motorized trips,” (FEIR, p.3-12) and that “the number of trips made by transit would increase significantly.” FEIR, p.3-13. That claim is mistaken, unsupported, and misleading, since vehicles and their passengers would obviously be diverted to other streets causing increased congestion. There is *no* evidence that vehicle passengers would abandon cars to take Muni lines 47 and 49 to their destinations. Like the DEIR, the FEIR fails to accurately state that the Project provides *no* new buses to accommodate the claimed increase in use of transit.<sup>4</sup> The pretense is that Van Ness is a neighborhood street, like Polk Street. But Van Ness is a major US Highway carrying through the City, region and state. However, the FEIR admits that “Less than half of travelers in private vehicles on Van Ness Avenue under existing conditions have an origin or destination in neighborhoods surrounding Van Ness Avenue,

---

<sup>4</sup> The FEIR vaguely speculates that, “Future services investments would increase person-throughput without additional traffic operations impacts” (FEIR, p.3-13), and that MTA might buy one new bus. FEIR, p.3-37.

meaning many of them could divert to streets throughout San Francisco rather than use Van Ness Avenue or streets immediately parallel.” FEIR, p.3-12.

The FEIR’s lack of objectivity and the failure to support the speculation that thousands of vehicles will simply disappear or switch to buses or bicycles to reach their destinations and its improper promotion of the Project in spite of its significant adverse impacts violate NEPA and CEQA’s fundamental requirements to provide accurate, high-quality information and objective analysis. 40 CFR §§1500.1(b), 1500.2(d), 1505.1, 1506.3(b).

Further, since it proposes to obstruct and delay traffic on a major U.S. and California Highway, the Project will clearly affect interstate commerce and travel, implicating constitutional provisions that require equitable allocation of revenues for such funding, not special or local interests. United States Constitution, amendment XIV (1). To the extent that revenues for building, maintenance, and operating costs of the Project are proposed to be taken from state fuel taxes, they must first be specifically approved in an election and must be used “in a manner which gives equal consideration to the transportation needs of all areas of the State and all segments of the population.” California Constitution article XIX (1) (3) and (4). The FEIR claims that the funding of Project construction would be partially from FTA “small starts” program, based on a “high” rating, and partially from “Proposition K,” revenues. However, the Project provides no funding of new buses.

#### **7. PROJECT DESCRIPTION: The FEIR’s Project Description Is Not Stable, Finite, and Accurate.**

The DEIR described the Project as “three build alternatives,” with two “options” for “Build Alternative 3,” and a “no Build alternative,” (DEIR at pp.S-4 to S-6) instead of an accurate, finite description, and therefore did not comply with CEQA. *County of Inyo v. City of Los Angeles* (1977) 72 Cal.App.3d 185, 193.

Months after the close of public comment, the SFCTA and SFMTA collaborated on designing and approving a “local preferred alternative” (“LPA”) that was *not included in the DEIR*. FEIR, p.2-3-2-4, §2.1.4. The LPA proposes removing the existing median, two traffic lanes, nearly all parking on Van Ness Avenue, removing nearly all of the mature trees and vegetation in the median of Van Ness Avenue, and other features causing significant impacts that were not described or analyzed the DEIR. And see discussion at Item 3, *ante*.

The DEIR was required to include and describe *the Project*, not only alternatives to it. For example, NEPA requires the agency to “assess the reasonable alternatives to *proposed actions* that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 CFR §1500.2 (e), emphasis added. Here, the FEIR proposed alternatives without having a finite “proposed action.” NEPA further requires that, based on the FEIR’s description of the affected environment (40 CFR §1502.15), and the statement of environmental consequences (40 CFR §1502.16), the FEIR “should present the environmental impacts of the proposal *and* the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker *and the public*.” 40 CFR §1502.14, emphasis added. The Alternatives section of the FEIR must “identify the agency’s preferred alternative . . . in the *draft statement*...” 40 CFR §1502.14(e). The DEIR failed to identify the preferred alternative in the DEIR, and the agencies must now recirculate the DEIR for a new public comment period and, after considering public comment, issue a new FEIR. *Ibid*.

NEPA explicitly requires that the analysis of the Project's impacts should *not* duplicate the discussion of alternatives. 40 CFR §1502.16. By simply discussing alternatives and *not* discussing the Project itself, which is the LPA, both the DEIR and the FEIR fail to comply with NEPA.

Under NEPA, the analysis of alternatives to the Project is clearly distinct from the analysis of the Project's impacts.

CEQA also requires a Project description that is distinct from the analysis of alternatives. CEQA Guidelines §15125, *cf.* §15126.6. Under CEQA, the failure to include an accurate Project description is an abuse of discretion that makes it impossible to assess the Project's direct, indirect, and cumulative impacts. See, *e.g.*, *Communities for a Better Environment v. Richmond*, 184 Cal.App.4th 70, 88-89 [holding abuse of discretion where agency did not disclose accurate project description until after close of public comment, as "too little, and certainly too late, to satisfy CEQA's requirements" for informing the public.].

In any event, as noted, recirculation is required because the necessary information was not given to the public in the DEIR as required, and the public was deprived of meaningful participation in the review and decisionmaking process, violating both CEQA and NEPA. See discussion, Item 3, *ante*. The public had no way of knowing what was actually being proposed on Van Ness Avenue from the misleading DEIR, and had no opportunity to comment on the actual Project and its significant impacts.

**8. BASELINE DEFECTS: The FEIR'S Description of Existing Conditions Is False, Distorted, and Incomplete, Precluding Accurate Analysis of the Project's Impacts: There Is NO Accurate Description of Existing Traffic Conditions on Van Ness Avenue and on the Parallel and Surrounding Streets.**

As discussed previously (FEIR II: Individuals, p.114-121; I-40), but not coherently addressed in agency response, under CEQA an EIR must include an accurate description of the actual existing physical conditions in the Project area. The FEIR here contains no such description.

An analysis of the Project's impacts must begin with an accurate description of the existing conditions in the Project area. 40 CFR 1502.15; CEQA Guidelines §15125. An accurate baseline is necessary for determining the Project's impacts existing conditions.

Under NEPA, baseline data must be accurate, reliable, and based on scientific evidence. *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067, 1083 (9th Cir. 2011). Baseline data must be gathered and analyzed before implementation of a project, because "[O]nce a project begins, the pre-project environment' becomes a thing of the past' and evaluation of the project's effect becomes 'simply impossible.'" *Id.* "[W]ithout this data, an agency cannot carefully consider information about significant environmental impacts," resulting in an arbitrary and capricious decision. *Id.* at 1085. Collecting the necessary data cannot be deferred to a future date, because "the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process." *Id.*; and, *e.g.*, 40 CFR 1502.24

CEQA also requires that the baseline must be supported by substantial evidence in the administrative record. See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal.4th 310, 328 (2010); *County of Amador v. El Dorado County Water Agency* 76 Cal.App.4th 931, 954 (1999) [inadequate baseline held an abuse of discretion]; *Communities for a Better Environment v. Richmond, supra*, 184 Cal.App.4th at 89 [omission of baseline information fails CEQA's informational purpose].

Here, as described in our Comment on the DEIR, the traffic baseline is incomplete, inaccurate, and unsupported. FEIR, Appendix I, Individuals, p.114-121 (I-40).

The FEIR, like the DEIR, errs in omitting critical baseline information and by focusing only on intersections already "operating at LOS E and F." FEIR, p.3-41, §3.3.1. The FEIR only conducted actual traffic counts in 2007 at five intersections on Van Ness Avenue, on one intersection of Gough Street, and one intersection on Franklin Street. FEIR, p.3-44. Those counts, however, were not used to analyze traffic impacts. Instead, traffic counts were "developed" by a computer model called "Synchro" (FEIR, p.3-40), based on growth factors from another computer model called "CHAMP," and other data. FEIR p.3-39-41, §3.3.1. The FEIR "uses a Synchro traffic operations model to assess intersection LOS impacts" caused by the Project's "build alternatives" on Van Ness Avenue and the "five parallel north-south streets east and west of Van Ness Avenue." FEIR, p.3-41. The computer model evaluates intersections "based on the approach with the highest delay." FEIR, p.3-41. Although the study area includes 139 intersections, "Due to the large number of intersections in the traffic study area, the discussion of existing and future intersection approach LOS focuses . . . on intersections . . . operating at LOS E or F." FEIR, p.3-41.

However, by only analyzing intersections that *already* operate unsatisfactorily, the Project's impacts are necessarily minimized. Significance is assessed by degradation of the Level of Service ("LOS") from level "A," indicating "negligible delays" of less than 10 seconds per vehicle to LOS level "F," indicating delays of more than 80 seconds at signalized intersections "with queuing that may block upstream intersections" and more than 50 seconds for unsignalized approaches. FEIR, p.3-41. LOS "D" indicates delays of 35 to 55 seconds, and LOS "E" indicates delays of 55 to 80 seconds at signalized intersections. *Id.* Therefore, the impacts are much greater if LOS declines from "A" to "F" (losing more than 70 seconds), or from "A" to "D" (losing 25 to 45 seconds), than if it declines from "E" to "F" (losing one to 15 seconds). The omission of baseline information violates NEPA and CEQA. *County of Amador v. El Dorado County Water Agency, supra*, 76 Cal.App.4th at 954; *Communities for a Better Environment v. Richmond, supra*, 184 Cal.App.4th at 89.

Further, the FEIR fails to analyze the queuing that it admits may block upstream traffic when LOS is degraded to "F," and considers the few intersections that it does analyze that operate at LOS E or F in isolation. FEIR, p. 3-60. The FEIR's Synchro output thus projects significant traffic impacts in the "near term," meaning for the year 2015, at only five intersections, with some experiencing delays of over 100 seconds. FEIR, p.3-60, Table 3.3-9. However, the FEIR fails to analyze how those delays will affect intersections "upstream." There is no LOS analysis of the impacts on cross traffic.

In the year 2035 projection, those significant effects worsen, and ten intersections operate at LOS E or F, some intersections with delays of more than two minutes per vehicle.

FEIR, p.3-67, Table 3.3-14. And again, the FEIR fails to analyze the inevitable queuing and backup of traffic at other intersections upstream.

Even if the FEIR's defective baseline could be considered adequate on US Highway 101/Van Ness Avenue, the FEIR contains *no accurate baseline description of existing conditions on Gough, Franklin, and other parallel streets where the FEIR says traffic will be diverted, and no analysis of intersecting streets affected by the Project.*

**a. GOUGH STREET: The FEIR Fails to Describe Existing Conditions on Gough Street, which Cannot Accommodate Any Overflow from US Highway 101/Van Ness Avenue.**

Gough Street is a two-way, two-lane street from Lombard Street to Sacramento Street, with unsignalized intersections, many Stop signs, and a steep grade. It is not a major arterial street, and it does not merge into Highway 101 southbound. FEIR, p.3-40. Gough turns into a one-way street south of Sacramento Street. Gough Street does not go through to Highway 101 or any freeway turnoff. FEIR, p.3-40 Figure 3.3-1.

Unstated in the FEIR are the plain facts that Gough Street between Sacramento and Market Streets is backed up for several intersections during peak hours, and can accommodate no more traffic without extreme delays. The FEIR claims that it measured 27,007 cars at Ellis and Gough Streets some time in 2007, but contains *no* actual on-ground measurement of existing traffic at or near the Civic Center and Market Street or at any other intersection from Ellis to Lombard Streets. FEIR, p.3-44. The FEIR admits that *no* trucks will travel on Gough Street. FEIR, p. 3-12 [“it is unlikely that most trucks would divert from Van Ness Avenue to parallel streets due to the increased grade/slope on parallel streets (trucks are currently prohibited on Franklin Street north of California Street and are also prohibited on Gough Street north of Sacramento Street . . . and because they are either traveling regionally on US 101 or making deliveries on Van Ness Avenue.”]. However, the FEIR fails to analyze the inevitable delays to those vehicles and other traffic from eliminating a traffic lane on US 101.

In fact, there is *no major arterial street* carrying southbound traffic in the Project area other than US Highway 101/Van Ness Avenue. That critical information is omitted from the FEIR. The FEIR ignores that egregious defect, and only analyzes *one* intersection where existing LOS is already at “F” at Gough/Green. FEIR, p.3-55. The FEIR claims that is the *only* intersection on Gough Street that will be affected by diverting thousands of cars from US Highway 101/Van Ness Avenue in the “near term.” FEIR, p.3-55. That conclusion cannot survive judicial scrutiny under CEQA or NEPA, since the omission of accurate baseline conditions makes the impacts analysis impossible. *Northern Plains Resource Council v. Surface Transportation Board*, *supra*, 668 F.3d 1067 at 1085; *Communities for a Better Environment v. South Coast Air Quality Management District*, *supra*, 48 Cal.4th at 328; *County of Amador v. El Dorado County Water Agency* 76 Cal.App.4th 931, 954 (1999) [inadequate baseline held an abuse of discretion]; *Communities for a Better Environment v. Richmond*, *supra*, 184 Cal.App.4th at 89 [omission of baseline information fails CEQA's informational purpose].

However, the FEIR contains *no* accurate description of existing conditions on the five parallel streets where the FEIR claims that the vehicle traffic will go after the Project eliminates one-third of the road capacity on US Highway 101/Van Ness Avenue. FEIR, p.3-42-43.

**b. FRANKLIN STREET**

The FEIR claims that SFCTA measured 30,901 vehicles at Franklin and Post Streets in 2007, but there is no accurate statement of existing conditions on Franklin Street. FEIR, p.3-44. Therefore, no evidence supports the FEIR's conclusion that there will be no traffic impacts on Franklin Street from diverting thousands of vehicles from Van Ness Avenue.

**c. POLK STREET**

The FEIR contains *no* measurement of existing traffic, and no accurate description of existing conditions on Polk Street, an often-congested, two-lane, two-way street between Grove Street and Lombard Streets that is not a major arterial. FEIR, p.3-42. Polk Street is a busy neighborhood commercial street. The FEIR also fails to state that City's MTA and the San Francisco Bicycle Coalition have proposed a plan to remove most or all of the parking on Polk Street, to create "parklets," bulbouts, and a wide, separated bicycle lane, and to otherwise obstruct vehicle traffic and turning on Polk Street. These existing conditions make the EIR's speculation that thousands of vehicles from US Highway 101/Van Ness Avenue will be diverted to Polk Street a ludicrous, unsupported, and unrealistic theory, not substantial evidence.

**d. LARKIN STREET**

The FEIR contains *no* actual traffic counts and no accurate statement of existing traffic conditions on Larkin Street, which is described as a "one-way NB street with three lanes from Market to California streets, and a two-way street north of California Street and between McAllister and Grove Streets." FEIR, p.3-42. The FEIR's claim that this street could accommodate *any* diverted traffic from US Highway 101/Van Ness Avenue is entirely unsupported.

**e. HYDE STREET**

The FEIR contains *no* actual traffic counts and no accurate statement of existing traffic conditions on Hyde Street, which is described as "a one-way street with three SB lanes between California and Market streets, and a two-way street with one lane in each direction between Jefferson and California streets," which "shares the ROW with cable cars between Beach and Washington Streets." FEIR, p.3-43. That description does not accurately describe the baseline traffic conditions on Hyde Street, and there is no way that traffic impacts on Hyde Street can be analyzed from that description.

**f. EAST-WEST STREETS: There Is No Accurate Description of cross traffic, cross transit and parking on cross-streets. Broadway, Pine, Bush, Geary, O'Farrell, Hayes, Fell, Market, and Mission Streets.**

The FEIR contains *no* accurate description of existing conditions on major east-west cross streets, many of which carry heavy traffic and more transit passengers than Muni lines 47 and 49 on Van Ness Avenue. The FEIR admits that it has not analyzed traffic, transit, parking, emergency services, and land use impacts on these and other cross streets, most of which the FEIR does not even bother to list, much less to describe and analyze. The FEIR lists some cross streets (FEIR, p.3-43) but contains no information on traffic volumes, existing congestion, transit, and parking on those and other cross streets that are certain to be affected by the Project's traffic diversions, turning restrictions, and parking removal. The FEIR fails to analyze those impacts.

The FEIR also fails to accurately describe existing cross-transit. The FEIR lists the Muni lines that cross Van Ness with average weekday ridership, which exceeds 400,000 per day on these lines, with several individual Muni lines crossing Van Ness exceeding the 16,000 combined ridership on lines 47 and 49, FEIR, p.3-17,18, Table 3.2-2. However, the FEIR does not show existing stops and speeds on those cross streets and has *no analysis* of how they will be affected by the increased congestion caused by the Project's traffic diversion, turning restrictions, and parking removal.

Similarly, the FEIR mentions Muni route 19, carrying 9,200 passengers on Polk Street, but fails to show its existing speed and stops, thus making any analysis of the Project's impacts impossible.

The Project area is improperly defined as only Van Ness Avenue and five parallel streets, implying that other areas will be unaffected by the Project's impacts. In fact, the transportation environment affected by the Project includes existing traffic, transit, and parking conditions on the cross streets.

**g. There Is No Accurate Count of Trucks, Taxis, Shuttle and Tour Buses in the Project Area and No Analysis of Impacts on Them.**

The FEIR has no accurate count of trucks, taxis, shuttle, and tour buses, on Van Ness Avenue and other streets in the Project area. These types of vehicles are instead merged with "private" automobiles that the FEIR dismissively claims will find some other way to get to their destination with the Project's lane elimination.

The FEIR dismisses the impacts on trucks and traffic with the cavalier observation that "it is unlikely that most trucks would divert from Van Ness Avenue to parallel streets due to the increased grade/slope on parallel streets (trucks are currently prohibited on Franklin Street north of California Street and are also prohibited on Gough Street north of Sacramento Street . . . and because they are either traveling regionally on US 101 to making deliveries on Van Ness Avenue." FEIR, p. 3-12.

Similarly, the FEIR contains no accurate information on taxis that carry passengers throughout the area and region, dismissing the Project's significant impacts on taxis, instead merging them with "mixed-flow traffic." FEIR, Appendix I, Individuals, p. 101. The FEIR dismisses the evidence presented by a 26-year taxi driver by again reciting the dubious rhetoric in the DEIR and FEIR, while noting that it has revised the former claim that drivers would convert to bus travel to "include more conditional language: '*up to 50% of the new transit riders could be former drivers.*'" *Id.* at 102. That speculation, again, is not substantial evidence or an accurate assessment of the Project's impacts on travel in the Project area.

The FEIR contains *no* accurate information on the large number of shuttle buses carrying passengers to and from jobs, medical shuttles, and the large number of tour buses traveling throughout the Project area to tourist attractions and to and from Civic Center attractions. Those large vehicles are again merged with cars in the FEIR, the cars that the document claims will go elsewhere, on transit, or on bicycles.

**h. Computer-generated Simulations and Projections Are Not a Substitute for Accurate Baseline Descriptions, or for the FEIR's Omissions.**

The FEIR admits that actual traffic counts were conducted at only five intersections. The remaining “existing” conditions were created by computer projections and not by evidence of actual physical conditions.

The FEIR refers to a traffic study consisting of thousands of pages of computer-generated print-outs from its “CHAMP,” “Synchro,” and “Vissim” databases. CHS Consulting Group: “*Final Van Ness Corridor Bus Rapid Transit Traffic Analysis Vehicular Traffic Analysis Technical Memorandum*,” July 7, 2013 [“*Final Technical Memo*”]<sup>5</sup>.

However, that massive document does not provide an accurate measure of the traffic on U.S. Highway 101/Van Ness Avenue, or on the parallel and cross streets affected by the Project. The agency has *no* accurate data on the origin and destination of the traffic on these streets, *no* accurate traffic count data for cross streets, and *no* accurate data on turning on Van Ness Avenue and other affected streets. Without that data, the FEIR cannot accurately analyze transportation impacts.

The FEIR notes a large number of changes in its Transportation Analysis, noted by vertical lines in the document. The FEIR states that computer “travel demand projections” are “the basis for the operations models” described in the FEIR and “provide several measures of performance of the build alternatives.” FEIR, p.3-2, §3.1. The FEIR states that its “existing travel patterns” section uses “CHAMP”-generated data to describe existing and future travel patterns: travel demand, regional versus local travel patterns, divertibility of trips, and mode splits” FEIR, p.3-2, §3.1.1.

The *Final Technical Memo* states that “SF-CHAMP” was used as the primary technical modeling tool to predict changes in travel patterns for private vehicles with the implementation of BRT in both the near term (2015) and horizon year (2035),” and “takes into account the ‘attractiveness’ (i.e., relative capacity, driving travel time, left turn opportunities, etc.) of streets relative to each other, as well as the relative ‘attractiveness of other modes (e.g., cost, travel time, frequency, etc.) when determining the changes in traveler behavior with the implementation of the BRT.” *Final Technical Memo*, p.7.

After all that, the *Final Technical Memo* reaches the unsurprising conclusion that “Van Ness Avenue would be less attractive to drivers when compared with the No Build Alternative and BRT service on Van Ness Avenue would be slightly more attractive than the 47/49 service under the No Build Alternative.” *Final Technical Memo*, p.7.

The *Final Technical Memo* also states that it uses a “macro-simulation traffic model” called “Synchro” that used some “field counts conducted in 2008 by SFCTA” and that “Synchro default values were assumed for all other locations.” *Final Technical Memo*, p.7.

However, the FEIR admits that actual traffic counts were conducted by SFCTA only in March 2007 at five locations along Van Ness Avenue and 1 location each along Franklin and Gough streets “to determine the peak hour traffic.” FEIR, p.3-2, §3.1.1, fn.18; and see FEIR,

---

<sup>5</sup> The *Final Technical Memo* apparently augments or supersedes the earlier *Technical Memo* referred to in the DEIR. The FEIR refers to the *Final Technical Memo*, but it is not made available as an appendix to the FEIR and must be specially ordered from the SFCTA. FEIR, p.3-1.



Appendix I, Individuals, p.114. The FEIR claims that “traffic turning movement counts were taken at 91 intersections and were a separate effort.” *Ibid.* However, those elusive “field counts” and “traffic turning movement counts” are not included in the FEIR or the *Final Technical Memo*, even though they are required to be included in the FEIR by the San Francisco Planning Department’s *Transportation Impact Analysis Guidelines for Environmental Review*, which requires on-ground traffic counts to establish existing conditions, including “the date that the counts were actually taken,” “[c]opies of all counts used in the analysis,” and “[t]he LOS calculation sheets need to include the data . . . used in the calculation was actually collected.” San Francisco Planning Department: *Transportation Impact Analysis Guidelines for Environmental Review*, Appendix B, 1, 2.<sup>6</sup> Nor does any document define or explain what the “Synchro default values” are or how the “existing” traffic volumes were created by “Synchro.”

The *Final Technical Memo* states that it also used “VISSIM,” which it says is “a multi-modal micro-simulation model” that is “capable of simulating transit, automobile, and pedestrian operations, parking operations,” and was selected to “model VN BRT transit operations due to its ability to model bus operations in exclusive bus lanes” and was “primarily utilized to compare the relative travel time and speed difference between autos and buses, differences in speeds and delays between the BRT alternatives, and bus reliability.” *Final Technical Memo*, p.8.

The *Final Technical Memo* states that, even though it used other computer programs, “only Synchro results were used to assess vehicular traffic impacts based on intersection Levels of Service (LOS) impacts along Van Ness Avenue and the five parallel north-south streets.” *Final Technical Memo*, p.8. Since LOS is the methodology used by the FEIR to measure the Project’s traffic impacts, the lengthy elaborations in the FEIR and the *Technical Memo* on “CHAMP” and “VISSIM” are largely pointless, except perhaps to promote the Project’s dubious “purpose and need” of a busway that “competes” by impeding other traffic. The *Final Technical Memo* also admits that its data “volume to capacity ratio” and “average vehicular travel speed” is useless for identifying the Project’s impacts. *Final Technical Memo*, pp.8-9.

The *Final Technical Memo*, like the previous Technical Memo, states: “The VN BRT Project traffic study area includes a total of 139 intersections. . . Due to the large number of intersections analyzed in the traffic study area, the discussion of existing (and future) intersection LOS focuses only on those operating at LOS E and F.” *Final Technical Memo*, p.8. However, as noted, that analysis necessarily minimizes impacts.

The FEIR’s description of “existing” conditions on selected streets is largely a computer-generated statistical exercise that removes those conditions from the real environment and human experience, while the reality of the Project’s impacts on that real environment remains unaddressed.

Without an accurate description of the existing and historic *purpose and use* of US Highway 101, Van Ness Avenue, the context of the Project’s significant impacts cannot be analyzed. Under NEPA, “Context” means that “*the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected*

---

<sup>6</sup> This Commenter requested pursuant to the California Public Records Act *all* traffic counts, and was not provided “turning movement counts” at “91 intersections” or any “field counts conducted in 2008 by SFCTA” that the *Final Technical Memo* claims were the basis for its “existing conditions.”

*interests, and the locality,” and both short- and long-term effects.* 40 CFR 1508.27(a), emphasis added. That required description is not in the FEIR.

Under CEQA, the analysis of impacts is impossible without an accurate baseline, and the failure to accurately describe existing conditions is a failure to meet informational requirements and an abuse of discretion. See, e.g., *County of Amador v. El Dorado County Water Agency*, *supra*, 76 Cal.App.4th at 954; *Communities for a Better Environment v. Richmond*, *supra*, 184 Cal.App.4th at 89 [omission of baseline information fails CEQA’s informational purpose].

The visual character and history of Van Ness Avenue as a grand boulevard is also part of the context that is absent in the FEIR, precluding a coherent analysis of the Project’s destruction and alteration of that context and character. Pieces of that context are divorced from its whole, such as the median strip, the historic poles, and the layout of the avenue to provide the That loss is irretrievable and yet made invisible by the FEIR’s omissions and failure to provide a coherent description of the existing environment.

## **9. IMPACTS: The FEIR Fails to Identify and Analyze the Project’s Impacts**

NEPA and CEQA require that the FEIR identify the impacts of the Project. See, e.g., 42 USC §4332(C)(i); PRC §21002.1; and see, e.g., 40 CFR §§1502.16, 1508.7, 1508.8, 1508.27. The FEIR fails to satisfy those requirements. Its flaws include failing to accurately state the existing environment, and context, meaning “society as a whole (human, national), the affected region, the affected interests, and the locality (40 CFR §1508.27(a)); failing to include a factually and legally adequate analysis of the Project’s cumulative impacts on traffic, parking, and visual and historic resources; omitting impacts analysis from backed-up traffic on parallel streets, cross-traffic and transit, parking, emergency services, and air quality; failing to accurately describe the Project; and failing to support its conclusory statements with evidence and quality analyses. Due to lack of time, this Comment can only give a few examples, in addition to the comments already submitted by the public and agencies. FEIR, Appendix I.

### **a. TRAFFIC: The FEIR Violates CEQA and NEPA by Failing to Identify and Analyze the Project’s Impacts on Traffic.**

This commenter and many others have already submitted comment on the Project’s inevitable impacts on traffic. See FEIR, Appendix I generally, and Individuals, p.114-121. The FEIR still fails address many impacts.

Even though the FEIR analyzes “near-term” and “long-term” impacts, its analysis is selective and improperly relies on causing significant impacts on traffic on parallel streets by traffic diverted by the Project’s removing one-third of the traffic capacity on US Highway 101/Van Ness Avenue. One third of the vehicle traffic on Van Ness would be 12,000 to 15,000 vehicles. The FEIR admits that “approximately 105 to 450 total vehicles in both directions could divert away from Van Ness Avenue and make their trip on a parallel street” during the PM peak, and “any given segment of Polk, Franklin, or Gough streets could experience an additional 50 to 250 vehicles per hour. . .during the PM peak. FEIR, p.3-10 -3-11. And the “approximately” widely ranging figures fall far short of the high quality data required for a legally adequate analysis of the Project’s impacts and fail to inform the public of the intensity of the Project’s severe consequences on traffic. 40 CFR §1508.27(b); §1500.1(b); PRC §21002.1.

The FEIR fails to analyze or even acknowledge the Project's inevitable impacts on cross traffic. As noted, the FEIR's analysis of existing conditions omits conditions on cross streets, making such analysis impossible. Those omissions are an informational failure and an abuse of discretion under CEQA, and also fail to comply with NEPA.

While the FEIR finds impacts in the "near term" at five intersections, it fails to analyze how those delays will affect traffic at intersections upstream and on cross streets. Thus, the defective analysis misleads decisionmakers and the public to believe those impacts are isolated and occur in a vacuum, minimizing their effect. This is not the high quality information required by NEPA, and does not satisfy CEQA, and misleads the public and decisionmakers.

The FEIR contains *no information* on how the Project's turning prohibitions will affect traffic on Van Ness Avenue and on cross streets, even though the FEIR admits that "approximately 105 to 450 total vehicles in both directions could divert away from Van Ness Avenue and make their trip on a parallel street" during the PM peak, and "any given segment of Polk, Franklin, or Gough streets could experience an additional 50 to 250 vehicles per hour . . . during the PM peak. FEIR, p.3-10 -3-11.

There is no accurate description or count of existing traffic turning left from Van Ness Avenue intersections with which to begin the impacts analysis of how the left-turn prohibitions will affect traffic on cross and parallel streets. Nor is there any coherent analysis of the impacts of increased right turns, or of the impacts of prohibiting right turns on many intersections, inevitably leading to significant traffic congestion where turns may be permitted.

The FEIR contains *no* information on how removing parking on Van Ness Avenue, will affect traffic on the avenue and on parallel and cross streets, even though vehicles will clearly have to circle and search for parking after the Project removes nearly all of the parking on Van Ness.

The FEIR contains *no* coherent analysis of bus crowding, even though it predicts more passengers. And see, FEIR, Appendix I, Individuals, p.114-118.

The FEIR contains *no* information on impacts on trucks, taxis, shuttle buses, and tour buses. FEIR, p. 3-11-12. There is no accurate description or counts of trucks on Van Ness Avenue, even though the FEIR admits that "it is unlikely that most trucks would divert from Van Ness Avenue to parallel streets due to the increased grade/slope on parallel streets (trucks are currently prohibited on Franklin Street north of California Street and are also prohibited on Gough Street north of Sacramento Street . . . and because they are either traveling regionally on US 101 or making deliveries on Van Ness Avenue." FEIR, p. 3-12.

Further, the FEIR's analysis of cumulative impacts on traffic does not comply with the requirements of NEPA and CEQA. The analysis must identify impacts that result from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. 40 CFR §1508.7. Under CEQA, the analysis must include a discussion past, present, and probable future projects that could have similar impacts or that when combined with other impacts could cause an incremental impact to become significant. PRC §21083( b)(2), CEQA Guidelines §15130(b)(1), 15065. The FEIR's "cumulative impacts" section on traffic simply repeats the data from its section on "transportation impacts." That analysis, however, does not take into account past, present, and probably future projects that will add to the

Project's impacts on traffic, transit, and parking. Instead, that analysis only contains a computer-projection of the *direct* impacts of the Project from 2015 to 2035. That is not a legally adequate cumulative impacts analysis under CEQA or NEPA, and is an abuse of discretion under CEQA. See, e.g., CEQA Guidelines §15130; *San Franciscans for Reasonable Growth*, 151 Cal.App.3d 61, 73-76, 80 (1984); *Environmental Protection Information Center v. Johnson*, 170 Cal.App.3d 604, 624-625 (1985).

**b. PARKING: The FEIR's Failure to Accurately Identify and Analyze Parking Impacts Violates NEPA and CEQA.**

The FEIR contains *no accurate information* on parking impacts, since its information is inconsistent throughout as to how much parking will permanently be eliminated. For example, the FEIR claims that due to a more "refined analysis" it has discovered that, contrary to conflicting information elsewhere in the FEIR and in the DEIR, the LPA would remove nearly all of the parking on Van Ness Avenue, at least 105 spaces, not including the spaces permanently removed by construction and bulbouts. FEIR, p.3-122-123; 4.2-13-17

The FEIR repeats the City and County of San Francisco's mistaken notion that parking is not a part of the physical environment, that removing parking is not a significant impact under the law, and that it need not analyze and mitigate parking impacts. FEIR, p.3-118, 3-125, §3.5.3. That notion is factually incorrect and legally spurious. See, e.g., *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District*, 214 Cal.App.4th 1013, 1050, 1053-54 (2013) [holding that parking is part of the environment and that a project's impacts on parking may be significant impacts on the environment and on humans, requiring analysis and mitigation in an EIR].

The FEIR fails to analyze parking impacts under NEPA, even though such analysis is clearly required.

Further, as noted, the DEIR misled the public to believe that parking would not be removed under the alternatives describing center-median projects. Instead, the FEIR now contradicts that conclusion, admitting that the LPA and other alternatives would all remove most of the parking on Van Ness Avenue. However, even more misleading, the FEIR's response to public comment claims that "parking and loading would be largely retained." FEIR II, Individuals, p.101. (I-38-3)

In contrast, the FEIR admits that at least 105 parking spaces would be permanently removed on both sides of Van Ness, and that the LPA would provide "fewer spaces" than any other alternative, and would completely remove parking on many blocks of Van Ness, including between Market and Mission Streets, Vallejo and Broadway Streets, Green and Vallejo streets, and Lombard and Greenwich Streets, and would be completely removed on both sides of Van Ness Avenue between O'Farrell and Geary Streets, Broadway and Vallejo Streets, Vallejo and Green Streets. FEIR, p. 3-125 A more detailed description shows that nearly *all* parking on many more segments would be removed, including, for example, all spaces west side from Market St. to Golden Gate Avenue, all spaces east side between Market and Fell Streets, all but one space on both sides from Fulton to McAllister Streets, 10 of 12 spaces west side from McAllister to Golden Gate Ave., 9 of 11 spaces between Golden Gate Ave. and Turk Streets, 6 of 8 spaces on east side from Turk to Eddy Street, all 5 spaces west side from O'Farrell to Geary, 4 of 5 spaces on east side and 8 of 9 spaces on west side between Sutter and Bush streets, 10 of

11 spaces east side and 4 of 5 spaces west side from Sacramento to Clay, all 5 spaces on east side from Jackson to Pacific, 7 of 11 spaces on east side from Pacific to Broadway, all spaces between Broadway and Vallejo, all spaces from Vallejo to Green, all spaces east side between Green and Union, --and all spaces west side from Greenwich to Lombard. FEIR, p.4.2-13-17, fn.63, Table 4.2-8.

The FEIR notes that the Project would also remove passenger-loading spaces, green short-term spaces, truck-loading spaces FEIR, 4.2-16, Table 4.2-9

The FEIR fails to account for the two to three parking spaces removed for each of the 64 to 70 bulbouts it proposes to construct, removing 200 more parking spaces.

The FEIR has no legally adequate analysis of cumulative impacts on parking. For example, the FEIR fails to note that the City's Market-Octavia Plan will increase population in the Project area by 10,000, while requiring no parking.

The FEIR fails to analyze the impacts of proposed "mitigation" of the Project's traffic impacts on Van Ness Avenue and parallel streets, which call for removing *more* parking.

The FEIR ignores and fails to comply with the requirement of one parking space per residential unit in the San Francisco General Plan's Van Ness Avenue Area Plan and Civic Center Area Plan. Instead the FEIR falsely claims the Project is "consistent" with those parts of the General Plan. FEIR, p.4.1-8,9, 4.1-12

The FEIR finally concludes that there would be *no parking impacts*, even though most of the parking would be removed on Van Ness, and other parking spaces would be permanently removed for bulbouts, and an unstated amount of parking would be removed to "mitigate" the Project's impacts on other streets. FEIR, p.5-18, 5-21.

Even though it concludes that parking is not an impact and/or that there are no parking impacts, the FEIR claims that the following are "mitigation measures under NEPA" and "an improvement measure under CEQA": "coordinate with" businesses affected by removal of "colored parking spaces...to confirm the need for truck and/or passenger loading spaces," and "apply parking management tools . . . including adjustment of residential permits in the residential community north of Broadway Street" or to "manage parking occupancy and turnover through pricing [by SFPark]" FEIR, p.4.2-17, §4.2.5.

There is no coherent analysis of cumulative parking impacts affecting residents and businesses, or of the impacts on cross streets and parallel streets from removing parking, which include spillover traffic, circling, and double-parking. Again, the FEIR fails in its purpose to inform the public and decisionmakers.

### **c. AESTHETIC AND HISTORIC RESOURCES IMPACTS**

#### **1. The FEIR Fails to Accurately Analyze the Direct and Cumulative Impacts of Removing the Historic Lamp Posts on Van Ness Avenue.**

The FEIR admits that the Project's replacement of the historic streetlights lining Van Ness Avenue is "one of the most noteworthy changes to the visual context at each key viewpoint" that it presents, and that "Impacts resulting from changes to the OCS support poles/streetlights network would be experienced by all viewer groups, including sensitive viewer groups (i.e., residents, commuters, and tourists.)" FEIR, p.4.4-34. The poles are nearly 100

years old and bear historic markings and irreplaceable features that define the character of Van Ness Avenue. FEIR, p.4-4-12, 14, Figures 4.4-3, 4. The FEIR fails to state that the unique square bases and poles, their height and spacing, and the size and shape of the lamps, are part of their value to those viewpoints. Instead, the FEIR claims that the generic, higher poles each with unevenly spaced faux decorative lamps measure up to the graceful old streetlight system. Even the few depictions for comparison in the FEIR plainly show that the newer lamps bear no resemblance to the historic ones, are intrusive, and contrary to the FEIR are plainly out of scale by comparison. FEIR, p.4-4-29, 31, 4.4-34. The FEIR incredibly concludes that, contrary to the plain evidence, the Project's removal and replacement with incompatible poles would have "no significant visual or aesthetic effect." FEIR, p.4.4-35.

Further, the FEIR fails to describe an alternative that would restore and rehabilitate, rather than replace, the historic poles. The old lamp posts are part of the context of Van Ness Avenue that merits restoration not destruction regardless of the Project.

## **2. The FEIR Fails to Accurately Analyze the Direct and Cumulative Impacts of Killing and Eliminating the Mature Trees and Green Median on Van Ness.**

The FEIR admits that the "landscaped median and tree canopy are one of the most noteworthy impacts on the visual setting" and "are one of the most important visual features in the corridor." FEIR, p. 4.4-35. The FEIR acknowledges that the Project's killing and removal of those trees would affect all viewers, and that "Many comments regarding concern for tree loss were submitted by agencies and the public during circulation of the [DEIR]." FEIR, p.4.4-35-36. The FEIR admits that the Project's removal of 90 of 102 mature trees and nearly all the "existing healthy and mature median trees in the corridor" would result in a "notable, adverse change in the visual quality of the project corridor until new tree plantings mature." FEIR, p.4.4-44.

That misleading statement implies that a similar median might result from replanting, but that is plainly false, since the LPA would replace the median with a red asphalt expanse with glaring plastic bus stops and advertising where the mature trees now stand. That misleading information and the false claim that the removal of the trees would be "mitigated" by the BRT violate NEPA and CEQA.

## **3. The FEIR Fails to Describe and Analyze the Impacts of the BRT, the Barren Red Asphalt Expanse, and Visual Clutter on the Median Strip and the Context of Van Ness Avenue.**

There is no accurate description of the Project's changes to the visual context on Van Ness Avenue consisting of mature streets separating, defining, and structuring the broad Avenue. That context will be destroyed and replaced with a 2-mile red asphalt strip dominating the entire avenue with glaring bus stops lined with advertisements and visual clutter. The failure to analyze those impacts is a failure to comply with NEPA and CEQA.

No reason is given to paint the huge four-lane expanse of the Proposed bus lanes red in violation of the General Plan, and there is no illustration or coherent description of the resulting bus stops, glaring advertising, intrusive lighting, "art" installations, and pointless whirling wind turbines and other visual clutter proposed for the middle of the avenue, and even claims that would be "mitigation" for removing the trees. See, *e.g.*, FEIR, p. 4.4-31, 4.4-52

**d. TRANSIT: The FEIR Fails to Identify, Analyze and Mitigate the Project's Impacts on Transit.**

There is no coherent analysis of the Project's impacts on transit crowding. There is no analysis of the Project's impacts on the more than 400,000 passengers on buses that cross Van Ness Avenue, ignoring the inevitable impacts of congestion on the cross streets from the Project's diversion and turning impacts.

**e. AIR QUALITY AND NOISE IMPACTS: The FEIR's Air Quality and Noise Impacts Analyses Fail to Accurately Describe and Propose Mitigation of the Project's Impact.**

**f. IMPACTS OF BULBOUTS**

The FEIR fails to analyze the impacts of removing hundreds of parking spaces and obstructing turning by installing 64 bulbouts on Van Ness Avenue. FEIR, p.3-108, and see simulation at FEIR, p.4.4-27. Bulbouts protrude into the street, obstructing right turns, backing up traffic trying to turn right and blocking through traffic, and they remove two to five parking spaces per bulbout. The FEIR claims that pedestrians would gain a negligible average of 1.7 feet of crossing distance, but fails to analyze their significant impacts on parking and traffic.

**g. EMERGENCY AND COMMUNITY SERVICES**

There is no accurate analysis of the Project's impacts on emergency services (fire, ambulance) from the Project's traffic impacts on Van Ness, on cross streets, and on parallel streets.

The analysis of traffic impacts on cultural events and community services is inadequate, with the unsupported conclusion that although traffic delays are forecast during the PM peak period; the project effects on traffic circulation would be less at other times of day and night when shopping, eating out, entertainment, and other commercial activities often occur." 4.2-13.

There is no analysis of traffic to and from cultural events at the Civic Center.

The FEIR acknowledges that the loss of parking could affect residents and businesses, but dismisses those significant impacts, claiming with no supporting evidence that "it can be anticipated that private vehicles users would have more incentive to shift their mode of travel to public transit," and that the Project "would benefit the transit-dependent population at large and would result in a transportation mode shift from automobiles to public transit." FEIR, p. 5-22. That unsupported and irrelevant conclusion does not comply with NEPA or CEQA. See, e.g., 40 CFR 1508.27(a); PRC §21002.1.

**h. The FEIR Fails to Identify and Analyze the Project's Impacts on Accessibility for Disabled and Seniors.**

The FEIR fails to accurately analyze the Project's impacts on accessibility to transit for disabled and seniors from removing half the bus stops on Van Ness. There is no analysis of impacts on parking for seniors and the disabled.

**10. THE FEIR FAILS TO IDENTIFY AND DISCUSS FEASIBLE MITIGATION MEASURES FOR EACH OF THE PROJECT'S IMPACTS**

Under NEPA, mitigation includes: “(a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. . .” 40 CFR §1508.20. CEQA includes similar provisions. CEQA Guidelines §15370. Mitigation measures must be described in the FEIR. *Ibid.*, and, *e.g.*, CEQA Guidelines §15126.4.

Under CEQA, mitigation measures must be analyzed for each identified and must be effective for each significant impact identified in the EIR. CEQA Guidelines §15126.4. The FEIR fails to comply with this requirement. It provides no feasible mitigation measures for *each* of the “near-term” and “long-term” traffic impacts, and no mitigation measures for the many impacts that it fails to identify. The mitigation measures described are ineffective, generalized, and are themselves negative measures that will cause more significant impacts, such as removing more parking. If a mitigation measure will itself cause impacts, it must also be analyzed in the EIR, which the FEIR fails to do. CEQA Guidelines §15126.4(a)(1)(D). The FEIR improperly “assumes” that it may propose a Project that has “significant and unavoidable” impacts. FEIR, p.7-25. That assumption violates CEQA.

**a. The FEIR Describes NO Effective Mitigation Measures for the Project’s Traffic Impacts.**

The FEIR fails to address each traffic impact it has identified, plainly violating CEQA’s requirements. Even though it omits many required impacts in its defective and selective analyses, the FEIR identifies many impacts on intersections for each “build” alternative. FEIR, pp.3-55, Table 3.3-7; 3-57 – 3-61, Tables 3.3-8;3.3-9 [describing selected “near-term” impacts at Gough/Green, Gough/Hayes, Franklin/O’Farrell, Franklin/Market/Page, Otis/Mission/S. Van Ness, and Duboce/Mission/Otis/US101 Off-Ramp]. The FEIR describes selected “long-term” (meaning some time between 2015 and 2035) significant traffic impacts at Gough/Green, Gough/Clay, Gough/Hayes, Franklin/Pine, Franklin/O’Farrell, Franklin/Eddy, Franklin/McAllister, Van Ness/Pine, Otis/Mission/S. Van Ness, and Duboce/Mission/Otis/US101 Off-Ramp. FEIR pp.3-67-79, Tables 3.3-14, 3.3-15, 3.3-16.

However, instead of proposing feasible and effective mitigation measures for each of those identified impacts as required, the FEIR proposes self-defeating suggestions for each and then concludes that if the SFCTA finds them “infeasible,” the impacts would be “significant and unavoidable,” and therefore exempt from mitigation. FEIR, p.3-82 -3-87. That does not meet CEQA’s requirement to propose effective mitigation, including “Avoiding the impact altogether by not taking a certain action or parts of an action” and “Minimizing impacts by limiting the degree or magnitude of the action and its implementation.” CEQA Guidelines, §15370. Further, deferring a determination of the feasibility of mitigation is a failure to proceed under CEQA’s requirements. CEQA Guidelines §15126.4(a)(1)(B).

Further, the FEIR’s “mitigation” measures would cause worsened impacts, by removing more parking or removing more “turn pockets.” FEIR, p.3-81. Those measures, however, are not “mitigation” within the meaning of CEQA and NEPA. Further, the FEIR fails to analyze the impacts of those proposed “mitigation” measures. Other examples of the FEIR’s failure to describe mitigation of the Project’s impacts include but are not limited to the following.

**PARKING**



The FEIR claims that there would be no parking impacts even though most of the parking would be removed on Van Ness, and other parking spaces would be permanently removed for bulbouts and for “mitigation” of other impacts. FEIR, p.5-18.

The FEIR claims that even though there are no parking impacts, it would try to “mitigate” parking impacts by retaining colored loading zones and blue disabled parking zones, where “feasible.” FEIR, p.5-21. That does not meet CEQA’s requirements for mitigation.

**LAMP POSTS: The FEIR Misstates that Demolishing the Historic Lampposts Can Be Mitigated by Installing Completely Different Generic-style Posts.**

The FEIR is mistaken in claiming that replacing the historic lampposts on Van Ness Avenue with new, taller, ugly, generic posts with two unevenly spaced fixtures on each is “mitigation.” The standards required by the Secretary of the Interior require that the existing historic lampposts be rehabilitated and restored.

**MEDIAN TREES: The FEIR Misstates that Planting Vegetation on the Sidewalks Can Mitigate Killing and Removing the Mature Trees on the Van Ness Median.**

The FEIR is plainly incorrect in claiming that removing nearly all of the mature trees on the Van Ness median can be mitigated by planting other tree varieties on sidewalk (where there are already trees) or in other places, and waiting for them to reach maturity.

**CONSTRUCTION**

As to the impacts of 5-years of construction, the FEIR acknowledges that, “traffic congestion, travel delay, and access restriction . . . within the general vicinity could be expected during the entire construction period.” FEIR, p.5-14. But the FEIR says that “Early and well-publicized announcements and outreach will help to minimize the confusion and traffic congestion at the start of construction.” FEIR, p.5-15. The FEIR says that other “mitigation,” such as removing parking, detours, and forced turning that “could” minimize the five years of disruption, may or may not be “feasible.” FEIR, 5-15. That does not comply with CEQA, since it does not mitigate or propose feasible mitigation for the Project’s impacts from five years of construction.

**11. THE FEIR FAILS TO CONSIDER ALTERNATIVES THAT WOULD AVOID THE PROJECT’S SIGNIFICANT IMPACTS ON TRAFFIC, TRANSIT, PARKING, AIR QUALITY, AND NOISE, AND IS IMPROPERLY NARROWED BY THE CLAIMED “PURPOSE AND NEED.”**

The FEIR’s “alternatives” analysis does not comply with CEQA or NEPA, which requires that the EIR set forth a full range of alternatives that are capable of “avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” CEQA Guidelines §15126.6(b); PRC §21002.1. An alternative is not eliminated unless it cannot meet “most of the basic project objectives. CEQA Guidelines §15126.6(c); and see 40 CFR §1502.14 [requiring the FEIR to “Rigorously explore and objectively evaluate all reasonable alternatives.”]

The analysis must also consider alternative locations for the Project, and if there are none, must explain why. CEQA Guidelines §15126.6(f)(2).

The FEIR here describes no alternatives that meet these requirements, even though many alternatives could accomplish most of the Project's objectives without removing traffic lanes on Van Ness Avenue and causing severe traffic congestion and parking loss throughout the area.

The alternatives are not a random list of variations on the Project as here, but must be alternatives to the proposed Project for the purpose of eliminating its impacts. CEQA Guidelines §15126.6(b).

Further, the FEIR errs in claiming that the "No Build" or "No Project" alternative is the "environmentally superior" alternative. FEIR, p.7-27, §7.6. If the FEIR identifies No Project as the environmentally superior alternative, it must also identify another environmentally superior alternative. CEQA Guidelines §15126.6(e)(2); and see, *e.g.*, *Watsonville Pilots Ass'n v. City of Watsonville*, 183 Cal.App.4th 1059, 1089 (2010). Here, the FEIR identifies "Build Alternative 2" as the "environmentally superior" alternative but admits that it would have similar impacts to all of the other alternatives in the FEIR. FEIR, p.7-28.

The FEIR fails to analyze other possible alternatives that would not eliminate traffic lanes and parking on Van Ness Avenue but would still achieve *most* of the Project's objectives, including that of speeding up Muni Lines 47 and 49.

For example, no alternative(s) are proposed that would eliminate half the Muni lines 47 and 49 bus stops, would improve bus stops with real-time information (most of which has already been done), would get the already-procured low-boarding buses, and other improvements that do not require removing traffic lanes and parking on Van Ness Avenue, would not destroy the historic streetlamps, would not require building a new sewer and drainage system, would not require removing the mature trees that give character and beauty to the entire corridor, would not cost hundreds of millions of dollars, would not cause congestion, air pollution and noise, would not obstruct and degrade aesthetic views in the corridor, and would not remove the beautiful historic streetlamps, which could be restored instead of being demolished. Instead, the FEIR analyzes *only* "alternatives" that would cause all of these significant impacts to achieve a dubious goal or "purpose and need" of increased speed that could be accomplished without the impacts caused by all of the listed alternatives.

The FEIR claims that it initiated a "feasibility study" of a Van Ness Avenue BRT in 2004 that "defined BRT in San Francisco" as "general elements" of "Dedicated lane, Transit signal priority, High-quality stations, Distinctive vehicles, [and] Level or near level/all-door boarding(or proof-of-payment)." FEIR, p.1-6, §1.2.1. All of these "elements" except the "dedicated lane" can be met without the Project. The FEIR admits that other Project features such as pedestrian countdown signals would be implemented anyway, without the Project. FEIR, p. 3-90

In considering a superior alternative that would avoid the Project's impacts, the FEIR was required to "rigorously explore and objectively evaluate *all* reasonable alternatives." 40 CFR §1502.14(a). That analysis has not taken place here.

Instead, the agency has manufactured a more damaging preferred alternative to deliberately cause impacts on vehicle traffic and parking under an improper claim of "purpose and need" for the Project. The LPA, for example has more traffic impacts, more turning restrictions, more parking removal, more air quality degradation, removal of more median trees

(i.e., all of them), more expense, more sewer replacement, more relocation of curbs for bulbouts, more difficulty and strain for pedestrians to reach bus stops, more impacts on aesthetic and visual resources, and more construction time. (FEIR, p.10-16, 17,23,31,33, 36, 37) It is not even an alternative under CEQA, since it improperly creates impacts rather than eliminating and avoiding them.

The FEIR attempts to justify its violation of NEPA and CEQA in failing to consider reasonable alternatives to the Project that would achieve some of its objectives. For example, the FEIR rejects the idea of eliminating bus stops but not eliminating traffic lanes and parking by claiming that “the percentage of households in the Van Ness corridor that do not own cars is 17 percent higher than the citywide average.” FEIR, p.7-31. That claim is irrelevant and unsubstantiated, since the use of US Highway 101/Van Ness Avenue is of regional, statewide, and nationwide importance, and the number of travelers on that federal Highway vastly exceeds the number of “households” that do not own cars on Van Ness Avenue.

The FEIR’s claim that Muni lines #47 and #49 would “experience reliability impacts” without the “Build” alternatives is unproven and without merit. FEIR, p.7-32. In considering a superior alternative that would avoid the Project’s impacts, the FEIR is required to support its conclusions with rigorous analysis and substantial evidence that is entirely lacking.

Further, NEPA forbids an alternatives analysis that is narrowly limited by manufacturing a “purpose and needs” statement, which is exactly what the FEIR does here. And see discussion at Item 5, *ante*. The improper “purpose and need” to deliberately obstruct and slow traffic and cause congestion for vehicle traffic results in a done-deal analysis that only considers “alternatives” that accomplish that improper goal. Instead of analyzing alternatives that eliminate the Project’s significant impacts, the FEIR blanketly rejects such alternatives claiming they “contained a ‘fatal flaw’” in “meeting the project purpose and need.” FEIR, p.7-32.

Further, with the LPA, the agency has improperly already decided on building the Project, which violates both CEQA and NEPA. See, e.g., 40 CFR §1502.2(f), (g); e.g., *Laurel Heights Improvement Assn. v. Regents of the University of California*, 47 Cal.3d 376, 394.

## **12. THE “CEQA FINDINGS” WERE NOT PUBLICLY AVAILABLE AND DO NOT COMPLY WITH CEQA.**

As noted, the public was not given adequate notice of the SFCTA’s CEQA Findings [“Findings”] and the “Mitigation Monitoring & Reporting Program” [“MMRP”], which were unavailable until only one business day before this hearing to adopt them. That is not legal notice under any provision of CEQA, NEPA, the Government Code, and the California or United States Constitutions. This meeting must be postponed until such notice and the opportunity for meaningful public participation in the proceedings is provided.

This Comment cannot possibly comment on the hundreds of pages of “Findings” and other materials that were neither provided on request of this commenter nor timely made available for public review. Therefore, this Comment does not waive any issue on the inadequacy of the FEIR or SFCTA’s Findings and other materials in its packet. The Findings document is incoherent and largely inscrutable, with encoded conclusory statements, consideration of “construction” impacts in lieu of or listed along with “operation” findings, whatever that means.

Even a cursory glance at the Findings shows many legal and factual flaws. The Findings contain factual falsehoods, such as the claim that hard copies of the FEIR were distributed to those with a street address who had commented on the DEIR. (Findings, p.8.) In fact, as noted, such copies were unavailable, and were only provided by request and a time-consuming trip to the not readily accessible SFCTA offices, where this Commenter, for example, was charged nearly \$100 for a hard copy of the FEIR, and was not timely provided on request with any accurate or hard copies of the “studies” referred to in that document.

Due to the lack of notice and time for comment, there is no time to give a comprehensive view of examples of the false and unsupported “factual” statements in the Findings, and only a few can be provided here.

Due to the FEIR’s failure to identify and analyze the Project’s significant impacts, the Findings are necessarily legally inadequate. The Findings thus evade the necessity to set forth mitigation measures, for example, on the Project’s parking impacts, impacts on land use, air quality, noise, and traffic, because the FEIR fails to properly identify those impacts. The Findings repeats the false claim that the LPA will not remove parking. Findings, p.23. The Findings repeat the mistaken legal conclusion that the impacts of removing parking do not require analysis and mitigation. *Id.* at 23-25.

The Findings discloses for the first time (it is nowhere else in the record) that the agencies propose to also remove parking on other streets, including Franklin, Gough, and other parallel streets as “mitigation” for the Project’s turning impacts. Findings, e.g., pp.37-39. The FEIR was required but failed to analyze the impacts caused by that proposed “mitigation.” CEQA Guidelines, §15126.4(a)(1)(D). The Findings admits that its previously undisclosed plan to remove parking on Gough and Franklin Streets will *not* mitigate the Project’s significant traffic impacts on those streets, and therefore is not effective mitigation as required within the meaning of CEQA or NEPA. Findings, pp.40-42. The Findings admits that removing parking would cause impacts on pedestrian conditions, since parking spaces provide a buffer insulating pedestrians from moving traffic, and that removing parking conflicts with its General Plan. *Id.* p.42-43.

As to the significant impacts on traffic identified in the FEIR, the Findings admits that the FEIR’s proposed “Traffic Management ‘Toolbox’ Strategies,” such as “Driver Way Finding and Signage,” “Public Awareness Campaign and TMP during Project Construction,” and “Pedestrian Amenities at Additional Corridor Locations” will not effectively mitigate the Project’s impacts: “These strategies. . . cannot be readily represented in conventional traffic operations models; therefore, their potential effect on minimizing traffic delay impacts has not been quantified and the traffic impacts...would remain significant and unavoidable.” Findings, p.42. Thus, the “Toolbox Strategies” are a pointless paper-generating exercise, not mitigation.

The Findings conclude without any support or citation to evidence that there is no feasible mitigation for any of the Project’s traffic impacts identified in the FEIR. Findings, pp.43-44. There is no feasibility analysis in the Findings or in the record.

The Findings fail to properly, objectively, and accurately analyze feasible alternatives that would eliminate or mitigate the significant impacts identified in the FEIR. Instead, the Findings simply repeat the SFCTA’s reason for developing the LPA, which is not an “alternative” to the Project, but is the Project itself, which was neither described nor analyzed in

the DEIR, precluding public input. The Findings fails to support any of its conclusions with substantial evidence.

Even with the inadequate and truncated impacts “analysis” in the FEIR, the Findings fails to discuss *each* significant impact identified in the EIR as required by CEQA. *E.g.*, PRC §21081(a); 21081.5. The Findings (and the FEIR to which they defer) also fail as required to set forth *effective* mitigation measures for each of the Project’s significant impacts. Such effectiveness must be supported by substantial evidence in the administrative record. There is no such discussion in either the Findings or the FEIR.

Nor may the agency “incorporate by reference” as “findings” the conclusions in the FEIR. Findings, p.16. The Findings must itself be a legally adequate document supported by substantial evidence that complies with CEQA’s requirement that “no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur: (a) The public agency makes one or more of the following findings with respect to each significant effect: (1) Changes or alterations have been required in...the project which mitigate or avoid the significant effects...(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency; (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.” PRC §21081(a). The Findings do not comply with these requirements.

After rotely rejecting all mitigation of the Project’s impacts, the Findings set forth a two and one-half page “Statement of Overriding Considerations” [“SOC”] that fails to comply with CEQA’s requirements. Findings, pp.53-55. The Findings fails to first find mitigation of the Project’s identified significant impacts truly infeasible, since it contains no feasibility study. The SOC then fails to include a factual statement weighing the Project’s impacts on all travelers versus its benefits to all travelers, and to support that analysis with substantial evidence. Instead, the SOC only describes the alleged benefits of the Project to users of Muni lines 47 and 49, and the unsupported, unattributed, and subjective rhetoric that Project would, *e.g.*, “help transform the street into a vibrant pedestrian promenade,” “would provide a greater sense of permanence than existing bus facilities,” or would help “to stimulate further transit-oriented development,” with *no* discussion or weighing of the Project’s significant impacts on traffic, parking, air quality, noise, and aesthetic and historic resources.

The SOC does not comply with CEQA, which requires first that the Findings prove that mitigation is truly infeasible with substantial evidence, and only after that rigorous examination may an agency consider an SOC. The Findings do not meet that requirement here. Only after meeting that requirement may the agency consider an SOC, which must be a factual, not rhetorical, statement supported by substantial evidence in the record that “specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant impacts.” PRC §21081(b); CEQA Guidelines §15093. Those requirements are not met by the SOC.

The Project may not lawfully proceed without legally adequate Findings.

## **CONCLUSION**

The FEIR and Findings do not comply with the law and must not be approved and/or certified. Approving the Project and funding it would therefore be an abuse of discretion and a failure to proceed as required by law.

DATED: September 10, 2013

SIGNED: \_\_\_\_\_  
Mary Miles