

To: File
From: Rincon and Associates
Date: July 23, 2019
Re: East Bay Bus Rapid Transit Northern Layover Facility– Next Steps Under CEQA

INTRODUCTION

In December of 2018, AC Transit contracted with Rincon to work with Ramakrishna Pochiraju and his team in order to review proposed changes to the East Bay Bus Rapid Transit (BRT) project with regards to the California Environmental Quality Act (CEQA). There are three primary changes being proposed. These relatively minor changes include 1) the addition of the Northern Layover Facility, which would be located in central Oakland along the west curb of San Pablo Avenue between West Grant Avenue and 20th Street, and 2) changes to traffic controls including modification of a lane configuration and elimination of two traffic signals on segments of International Boulevard (SR-185), and elimination of a traffic signal on 12th Street.

The first proposed change would result in the termination of the BRT line at a curbside station on Broadway at 20th Street in downtown Oakland. Upon reaching this station in Oakland and prior to beginning the southbound return, Northbound BRT buses would travel approximately seven city blocks to a new Northern Layover facility located near San Pablo Avenue between West Grant Avenue and 20th Street. Under the proposed change, the Northern Layover facility, a new project feature, would provide on-street short-term space for three buses to lay over for five to fifteen minutes while operators are able to use a restroom or rest between completing their northbound and beginning their southbound revenue trips on the East Bay BRT line connecting downtown Oakland with downtown San Leandro. Two layover spaces would be located between West Grand Avenue and Castro Street; the third layover space would be located just south of Castro Street.

Construction of the Northern Layover facility would repurpose one existing southbound lane on San Pablo Avenue to create a bus-only lane with a layover area that could accommodate up to three buses. The layover area would include three bus pads and a modular, wheeled bus operator lounge facility. As part of the project, the existing bike lane on San Pablo Avenue would be shifted west out of the layover zone between the bus lane and curb to reduce potential conflicts between buses and cyclists. Pedestrian-scale lighting along the path of travel between the bus pads and the operator lounge as well as adjustments to traffic signal splits and offsets (at the intersections of San Pablo Avenue and West Grand Avenue, San Pablo Avenue and Castro Street, San Pablo Avenue and 20th Street, Martin Luther King Jr Way and West Grand Avenue, and Telegraph Avenue and West Grand Avenue) are also proposed.

The BRT project itself consists of 34 stations over a 9.5-mile route from 20th and Broadway in Oakland to the vicinity of the San Leandro BART station. The Northern Layover is proposed in order to address concerns about bus parking during operator breaks between arriving at and departing from BRT's proposed northern terminus located at Broadway and 20th Street in Oakland. Since that location is a busy intersection, the Northern Layover would provide bus parking and bathroom facilities for operators in a location that would not disrupt local traffic flow.

The second proposed change consists of the elimination of a second southbound through lane on International Boulevard between 73rd and 75th Streets and the elimination of three new traffic signals at the intersections of International Boulevard and 13th and 12th Avenues and at the

intersection of 12th Street and 13th Avenue. These changes would be accomplished by restriping International Boulevard and would result in the addition of parking/delivery lane space and Class II bike lanes. The lane elimination would not require major construction. This change was proposed in order to address concerns from stakeholders regarding the loss of on-street parking and loading zone space.

ISSUES

This office has reviewed the various reports issued concerning these changes and undertook appropriate research to answer the following questions:

- 1) Given the proposed changes to the BRT project, what, if anything, is required under CEQA?
- 2) What Board action, if any, is required?

ANSWERS

- 1) There is no requirement that a subsequent environmental impact report (EIR) or supplement to the final EIR be created. However, it is advised that this memorandum detailing the changes and their lack of impact on the environment be kept in the BRT files.
- 2) The Board should adopt a resolution receiving and approving staff report 12-083d and 2019 130c Environmental Review Reports.

DISCUSSION

Under CEQA, once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Once discretionary project approval is complete, no agency has jurisdiction to require a further EIR, a subsequent EIR under Public Resources Code section 21166 or a supplemental EIR. (14 Cal. Code Reg. section 15162(c); *Melon v. City of Madera* (2010) 183 Cal.App. 4th 41.) Information appearing after an approval does not require reopening of that approval. (*Fort Mojave Indian Tribe v. California Department of Health Services* (1995) 38 Cal.App. 4th 1437.)

Discretionary decisions for BRT have been obtained and the necessary environmental procedures have been completed and certified. The statutory time period for challenging the approved EIR passed without any challenges being filed. CEQA's goal of creating an informational document for the decision makers so they know the significant environmental consequences of the proposed project and what measures, if any, exist to mitigate them, has been completed. (Pub.Res. Code section 21061; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App. 4th 1597.)

Since BRT was approved the District has taken steps to implement the project, which include undertaking engineering of the project; continuing dialogue with the cities of Oakland and San Leandro regarding implementation of mitigation measure associated with the project; holding meetings with businesses, neighborhoods and community groups in the project area; and conducting meetings with public safety agencies and utilities to further assess and address their needs. As a result of these implementation efforts, some changes have been proposed in the project to address design issues, some of which were anticipated to occur during design and others that could not have been

known at the time of approval, as well as to address mitigation issues associated with the project. These post-NEPA Record of Decision (ROD)/CEQA Notice of Determination (NOD) changes include:

- Adding a bus layover facility that will provide bus pads for three buses and an operator lounge for their drivers as they take a break between runs. The Northern Layover is being created in order to avoid negative repercussions of using the northern terminus of the BRT route, which is located at a heavily used intersection in downtown Oakland.
- Modification of a lane configuration along International Boulevard between 73rd and 75th Streets to accommodate parking and delivery space as well as a new Class II bike lane.
- Elimination of two planned traffic signals on segments of International Boulevard and one proposed traffic signal on 12th Street. During the design process, these signals were deemed unnecessary as they would no longer be required as mitigation for the project under the new City of Oakland CEQA guidelines, which focus on vehicle miles traveled as the metric for traffic impact determinations.
- Relocation of the existing bike lane along San Pablo Avenue west of the bus layover zone. Creation of this buffered bike lane will involve eliminating one of the two general purpose traffic lanes and installation of bollards. Construction would not impact the existing median.
- Associated minor alterations such as corresponding striping and signage changes, lighting adjustments, signal optimization, and colored curb designation.

Due to these changes to the project, the question arises whether the District needs to undertake any further environmental reviews. The District has conducted 130c Reports to assess the potential environmental impacts of the proposed change and has concluded that they would not result in new significant environmental impacts or a substantial increase in the severity of any of the environmental impacts previously identified and addressed in the final EIR.

SUBSEQUENT EIR

If none of the changes listed above are exempt from CEQA, then the District, as the CEQA Lead Agency, would be required to consider whether further CEQA review is required by Cal. Pub. Res. Code section 21166. Under CCR sections 15162 and 15163, a determination whether or not to prepare a subsequent or supplemental impact report would have to be made based on substantial evidence in the whole record. “Substantial evidence” has been determined to be “relevant evidence that a reasonable mind might accept as adequate to support a conclusion, or evidence of ponderable legal significance that is reasonable, credible and solid.” (*Bowman v. City of Petaluma* (1986) 185 Cal.App. 3d 1065.)

In order for a subsequent EIR to be required, CCR section 15162 requires the following factors to be considered:

1. Substantial changes are proposed in the project which require major revisions of the previous EIR due to new significant environmental effects or substantial increase in the severity of previously identified significant effects;
2. Substantial changes to the circumstances under which the project is undertaken will require major revisions of the previous EIR due to new significant environmental effects or substantial increase in severity of previously identified significant effects; or

3. New information of substantial importance, which was unknown or with reasonable diligence could not have been known at the time of certification of the EIR that shows:
 - a. There will be one or more significant effects not previously discussed;
 - b. Previous significant effects will be substantially more severe;
 - c. Mitigation measures or alternatives previously thought to be unfeasible would be feasible and would substantially reduce one or more significant effects, but the project proponents declined to adopt either of them;
 - d. Considerably different mitigation measures or alternatives from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents declined to adopt either of them.

The provisions of sections 21166 and 15162 are not applicable to the proposed revisions identified and discussed in the Section 130c Reports because none of the conditions required in subsections 1, 2 and 3 are applicable to the proposed modifications. There is no evidence that the proposed modifications are “substantial changes” because they do not present any “new significant environmental effects or a substantial increase in the severity of previously identified significant effects,” as contemplated in subsection 1 above.

There are no substantial changes to the circumstances under which the project was undertaken by the implementation of the proposed changes, per subsection 2. As shown in the 130c Reports, some changes could improve the project’s impacts, and none would result in new significant environmental effects or substantially increase the severity of the environmental effects identified in the EIR.

Finally, no new information has been discovered that would rise to the level set forth in subsection 3.

Section 21166 was intended to provide a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved. The Appellate Court in *Bowman v. City of Petaluma* (1986) 185 Cal.App. 3d 1065, 1074, opined that “this purpose appears not only from its prohibitory language (‘no subsequent or supplemental environmental impact report...unless...’) but also from legislative context and history. Chapter 6 of CEQA, in which section 2166 appears, is entitled ‘Limitations.’[The court then cites to ‘similar procedural limits and protections that appear in that chapter and throughout the act.’] These statutes effectuate the Legislature’s expressed concern for balancing environmental considerations against the social and economic burdens of compliance.” The court went on to determine the test to be applied in reviewing the City of Petaluma’s failure to prepare a subsequent EIR to be “whether the record as a whole contains substantial evidence to support a determination that the changes in the project were not so ‘substantial’ as to require ‘major modifications to the EIR’” *Id.* at 1075.

SUPPLEMENT TO AN EIR

The pertinent provision of CCR section 15163, for purposes of this opinion, is set forth in subsection

“A Lead or Responsible Agency may choose to prepare a supplement to an EIR rather than a subsequent EIR if:

- (1) Any of the conditions described in Section 15162 would require the preparation for a subsequent EIR, and

- (2) Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.”

For the reasons discussed above under the “**SUBSEQUENT EIR**” section, since the conditions precedent to support the application of Section 15162 do not exist, there is no need to consider a supplement to the final EIR for the project.

ADDENDUM TO AN EIR

It is the opinion of this Office that the modifications described in the 130c Reports should be brought to the attention of the AC Transit Board of Directors for their information and concurrence as an agenda item in open session. One way of doing this is to treat the modifications as an addendum under 40 CCR section 15164. Since there is no justification for a subsequent or supplemental EIR, the preparation of an addendum represents a logical alternative for recognizing and authorizing the changes, with the understanding that the decision to approve the BRT has been made and not all provisions of CCR section 15164 are applicable.

There is no form required for an addendum under CEQA or its guidelines. The courts have sustained reliance on a staff report or contents of a resolution to support an agency’s decision as to whether any further environmental action is required due to project modifications. (See, *Abatti v. Imperial Irrig. Dist.* (2012) 205 Cal.App. 4th 650,654; *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App. 4th, 177.) However, the record should reflect that the Board: (1) considered whether further environmental review was needed, (2) it determined whether any of the events triggering further environmental review occurred, and (3) its decision was based on a review of the appropriate facts and of the 130c Reports, which are hereby incorporated by reference.

The above requirements can be accomplished by placing on an upcoming agenda the consideration of a resolution adopting an addendum, setting forth the justification for this procedure and incorporating by reference a staff report explaining the modifications, providing the basis for the recommendation that a subsequent or supplemental EIR is not required and attaching the Report as substantial evidence that the proposed modifications to the project do not meet the criterion for adopting either a subsequent or supplemental EIR.

CONCLUSION

Although all discretionary approvals for the project have been obtained, the EIR certified and the NOD filed, some changes to the project have been identified that should be considered under CEQA. (Similarly, under the National Environmental Protection Act, a ROD has been issued on the Environmental Impact Statement. The Federal Transit Administration is making its independent determination whether further action is required under NEPA.) Some of the changes (e.g., the movement of some stations) were recognized as further refinements to the project or the implementation of conditions of approval. Nonetheless, 130c Reports have been prepared that considered the proposed modifications and whether they create new environmental impacts or increase severity of impacts previously analyzed. The 130c Reports’ analyses did not find either the creation of new environmental impacts or an increase in the severity of the identified impacts. However, it would be the best practice to include the 130c Reports in the record of the project by

having the District adopt a resolution whereby it considers the information in the Report and approves the modifications.

cc: Denise Standridge, General Counsel