ALJ/ES2/mph **PROPOSED DECISION** **Agenda ID #\_\_\_\_**

**Ratesetting**

Decision \_\_\_\_\_\_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

|  |  |
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| In the Matter of the Application of the San Francisco Bay Area Rapid Transit District (BART) for an order to construct one new grade separated crossing for the Irvington Station Project for pedestrian access to the Irvington BART Station, across and over the track of the Union Pacific Railroad Warm Springs Subdivision near Mile Post 3.06 in the City of Fremont, County of Alameda, State of California. | Application 21-08-006 |

DECISION AUTHORIZING THE SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT TO CONSTRUCT ONE NEW GRADE-SEPARATED PEDESTRIAN-RAIL CROSSING OVER THE TRACK OF UNION PACIFIC RAILROAD (MILEPOST 3.06) IN THE CITY OF FREMONT

Summary

Pursuant to Public Utilities Code §§ 1201 and 1202, this decision authorizes the San Francisco Bay Area Rapid Transit District to construct one grade-separated pedestrian-rail crossing over the track of Union Pacific Railroad’s Warm Springs Subdivision near milepost 3.06 in the City of Fremont, California. The authority granted in this decision is valid for a period of thirty-six months from the date this decision is issued.

This proceeding is closed.

# Background

On August 9, 2021, the San Francisco Bay Area Rapid Transit District (BART), a multi-county transit district and political subdivision of the State of California, filed an application (Application) for authorization to construct one grade-separated pedestrian-rail crossing over the track of Union Pacific Railroad’s (UPRR’s) Warm Springs Subdivision near milepost 3.06 in the City of Fremont, California (Proposed Crossing).[[1]](#footnote-2) The Proposed Crossing will provide pedestrian and bicycle access to the west side of the new Irvington BART Station concourse.[[2]](#footnote-3)

Irvington BART Station, which includes the Proposed Crossing, is a component of the larger BART Warm Springs Extension Project (WSX Project), a 5.4-mile extension of the BART system from south of the existing Fremont BART station.[[3]](#footnote-4) The new Irvington BART Station will be located at the intersection of Osgood Road and Washington Boulevard, in Fremont, approximately 2.5 miles from the existing BART stations in either direction. Irvington BART Station is expected to open in the Spring of 2028, and will feature an elevated two-level, side-platform design that spans across BART and UPRR tracks.[[4]](#footnote-5)

On September 7, 2021, the Commission’s Rail Safety Division (RSD) filed a response to the Application (Response). No other response or protest has been filed.

On October 8, 2021, a telephonic prehearing conference (PHC) was held to discuss the scope, schedule, need for hearing, and other matters relevant to the management of the proceeding.

 On November 3, 2021, the assigned Commissioner issued a Scoping Memo and Ruling (Scoping Memo).

# Jurisdiction

The Commission has jurisdiction over railroad crossings pursuant to California Public Utilities Code (Pub. Util. Code) §§ 1201 and 1202. Commission General Order (GO) 26-D prescribes the minimum clearance requirements for all construction of tracks or structures adjacent to tracks. Rule 3.7 of the Commission’s Rules of Practice and Procedure (Rules) governs applications to construct a public road or street across a railroad.

# Issues Before the Commission

The issues to be determined are:

1. Whether the Application meets all Commission requirements, including those in Rule 3.7 and General Order 26-D, such that the Commission should grant BART’s Application to construct the Proposed Crossing;
2. Whether the applicant has complied with the California Environmental Quality Act;
3. Whether the Application aligns with or impacts the achievement of any of the nine goals of the Commission’s Environmental and Social Justice Action Plan; and
4. Whether the Commission should grant BART a period of thirty-six months from the application approval date to complete the Proposed Crossing.

# Admitting Exhibits into Evidence and Closing Proceeding Record

The Scoping Memo provides that this proceeding will stand submitted “upon the consideration of the environmental document for the underlying project and determination that no further information or evidence is needed.”[[5]](#footnote-6) We have reviewed the filings in this proceeding and find the record is complete. The uncontested Exhibits attached to the Application (Exhibits A through H) are received into evidence. The record is closed.

# Filing, Safety, and Engineering Requirements

Applications for the construction of a public road, highway, or street across a railroad must meet the requirements of Rule 3.7, as well as the minimum clearance requirements set forth in GO 26-D.

In its Response, RSD states that it conducted a site visit of the Proposed Crossing on November 30, 2020, and upon review of A.21-08-006, found that the Application complies with the Commission’s applicable Rules and GO 26-D. RSD has no objections to the Application as proposed.[[6]](#footnote-7)

The applicable filing, safety, and engineering requirements for the Application and Proposed Crossing, as presented in the Application and RSD’s Response, are summarized below:

Rule 3.7:

* Rule 3.7(a):

|  |  |  |
| --- | --- | --- |
| 1. **Crossing Name**
 | 1. **MP**
 | 1. **Legal Location (Latitude, Longitude)**
 |
| 1. Irvington Station West Access Bridge
 | 1. 3.06
 | 1. 37.532403, -121.953979
 |

* Rule 3.7(b): The crossing identification numbers of the nearest existing public crossings located to the proposed crossing are Washington Boulevard (Department of Transportation (DOT)# 440826C/CPUC Crossing #001DA-3.00-A), MP 2.972 and Auto Mall Parkway (DOT# 748187S/CPUC Crossing #001DA-4.40-A), MP 4.519.
* Rule 3.7(c): Not applicable for a grade-separated crossing.
* Rule 3.7(d): A map in compliance with Rule 3.7(d) is included in Exhibit B.
* Rule 3.7(e): A map in compliance with Rule 3.7(e) is included in Exhibit A.
* Rule 3.7(f): Profile drawings in compliance with Rule 3.7(f) are included in Exhibit D.

GO 26-D:

* GO 26-D § 2.1: The proposed vertical clearance of 24 feet (‘) 10.75 inches (“) meets the minimum vertical clearance requirement of 22’ 6”.
* GO 26 § 3.2: The proposed side clearance of 25’ meets the minimum side clearance of 8’ 6’’.

Upon review, the Commission finds BART complied with the applicable filing requirements set forth in Rule 3.7, and that the Proposed Crossing complies with GO 26-D. We also adopt the recommended language by RSD for the Commission’s Ordering Paragraphs of this decision,[[7]](#footnote-8) to which BART did not object.

# Compliance with California Environmental Quality Act

The California Environmental Quality Act (CEQA) applies to discretionary projects to be carried out or approved by public agencies.[[8]](#footnote-9) A basic purpose of CEQA is to inform decision-makers and the public about potential significant environmental effects of a project.

Irvington BART Station and the Proposed Crossing are components of the larger WSX Project, which constitutes a project under CEQA.[[9]](#footnote-10) Under CEQA, the lead agency is either the public agency that carries out the project or has the greatest responsibility for supervising or approving the project.[[10]](#footnote-11)

For the WSX Project, BART is the lead agency under CEQA for the purposes of identifying environmental impacts associated with the project. Accordingly, the Proposed Crossing and associated environmental impacts, if any, were examined as part of the Irvington BART Station component of the WSX Project.

Under CEQA, the potential environmental impacts of the WSX Project, which includes the Proposed Crossing component, were first evaluated in the *Final Environmental Impact Report BART Warm Spring Extension Project* (Final EIR), certified by the BART Board in 1992 (State Clearinghouse No. 1989030065). As new information and funding became available, a modified WSX Project was evaluated through the *Final Supplemental Environmental Impact Report BART Warm Springs Extension* (Final SEIR), certified by the BART Board in 2003 (State Clearinghouse No. 2002032041). Following updates to the Irvington BART Station and Gallegos Winery Site components of the WSX Project, the *BART Warm Springs Extension Final Supplemental EIR Addendum 2* (Final SEIR Addendum #2) was prepared and adopted by the BART Board in August 2019. The Final SEIR Addendum #2 revisits the environmental analysis conducted in the WSX EIRs, based on proposed 2019 modifications to the Irvington Station and Gallegos Winery components of the WSX Project. The Final EIR, Final Supplemental EIR, and Final SEIR Addendum #2 are collectively referred to as the WSX EIRs.[[11]](#footnote-12)

A responsible agency under CEQA “includes all public agencies other than the lead agency which have discretionary approval power over the project.”[[12]](#footnote-13) Since the Commission must issue a discretionary decision for the project to proceed, the Commission is a responsible agency under CEQA and must consider the lead agency’s environmental documents and findings before acting on or approving this project.[[13]](#footnote-14)

As a responsible agency under CEQA, the Commission must consider the environmental impacts identified in WSX EIRs relating to the portion of the project that is before the Commission for approval, and adopt any mitigation measures within the Commission’s jurisdiction, unless the changes or alterations are infeasible for specific economic, legal, social, technological, or other considerations.[[14]](#footnote-15) The Commission must balance any unavoidable impacts against specific economic, legal, social, technical or other benefits. Finally, the Commission must file a Notice of Determination with the CEQA Clearinghouse certifying that the Commission has considered the environmental document.[[15]](#footnote-16)

The WSX EIRs considered a variety of potential environmental impacts from the WSX Project broadly, as well as from the construction and operation of Irvington BART Station, which includes the Proposed Crossing, including impacts within the following categories: aesthetics; air quality; greenhouse gas (GHG) emissions; biological resources; cultural resources; energy; soils, geology, and seismicity; hazards and hazardous materials; hydrology and water quality; land use planning; noise and vibration; population, economics, and housing; public services and utilities; and transportation.[[16]](#footnote-17)

Related to the construction and operation of Irvington BART Station, which includes the Proposed Crossing, the WSX EIRs found almost all environmental impacts could be mitigated to less than significant under CEQA. Significant effects, as defined by CEQA, remained in the category of energy, specifically concerning the contributions of Irvington BART Station and the greater WSX Project to peak-period electricity demand.[[17]](#footnote-18) However, none of the significant impacts pertain to the Proposed Crossing that is the subject of this Application.

The Final SEIR Addendum #2 and associated appendices, including the Mitigation Monitoring and Reporting Plan (MMRP), are included as Exhibit F to BART’s Application. The Commission has reviewed the Final SEIR Addendum #2 and finds it adequate for our decision-making purposes. The Commission adopts the mitigation measures detailed in the MMRP, which apply to the entire WSX Project, including the grade-separated pedestrian-rail crossing that is the subject of this Application. Upon issuance of this decision, and in compliance with 14. Cal. Code Regs. §§ 15096(h) and 15096(i), the Commission’s Energy Division will file a Notice of Determination with the CEQA Clearinghouse certifying that the Commission considered the environmental documents related to the Proposed Crossing.

# Alignment with the Commission’s Environmental and Social Justice Action Plan

In February 2019, the Commission adopted its Environmental and Social Justice (ESJ) Action Plan as a comprehensive strategy and framework for addressing ESJ issues in each proceeding.[[18]](#footnote-19)

While the Proposed Crossing is not located in an ESJ Community, as defined by the Commission’s ESJ Action Plan,[[19]](#footnote-20) the WSX EIRs considered numerous community, equity, and access impacts when selecting the preferred location and final design for Irvington BART Station, including the Proposed Crossing. BART conducted community outreach meetings, and worked with the City of Fremont and other stakeholders, to minimize relocation impacts (no residences will be displaced during the construction of Irvington BART Station)[[20]](#footnote-21) and align the station design with current and planned land uses along the station corridor.[[21]](#footnote-22) Further, Irvington BART Station will be accessible to residents via a bus transit center, with connections to nearby businesses, schools, and neighborhoods, as well as through a pedestrian/bicycle pathway that will run the entirety of Alameda County, and is expected to provide a cleaner transportation option to residents while improving ambient air quality through reductions in personal vehicle trips in the region.[[22]](#footnote-23)

Upon review of the Application and the record of this proceeding, we find the Proposed Crossing, as set forth in this Application, aligns with the Commission’s ESJ Action Plan. BART is encouraged to hire local contractors and conduct public outreach concerning temporary street closures in multiple languages when constructing the Proposed Crossing and Irvington BART Station.

# Thirty-Six Months to Construct

RSD recommends that BART be granted thirty-six months to complete construction of the Proposed Crossing.[[23]](#footnote-24) The Commission finds RSD’s recommendation to be reasonable. Accordingly, BART is authorized to construct the Proposed Crossing within thirty-six months of the date of issuance of a decision in this proceeding.

# Conclusion

The Application is complete and complies with the Commission’s Rules and General Rules for seeking authority to construct a public road or street across a railroad. Further, the Proposed Crossing is grade-separated, which the Commission prefers as a safer option to at-grade crossings.[[24]](#footnote-25) The Application and Proposed Crossing also complies with CEQA and aligns with the Commission’s ESJ Action Plan. Accordingly, we authorize BART to construct the Proposed Crossing within thirty-six months of the date of issuance of a decision in this proceeding, subject to compliance with the terms and conditions set forth in the Ordering Paragraphs.

# Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Pub. Util. Code and Rule 14.6(c)(2), the otherwise applicable 30-day period for public review and comment is waived.

# Assignment of Proceeding

Genevieve Shiroma is the assigned Commissioner and Ehren D. Seybert is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

On August 9, 2021, BART filed A.21-08-006 seeking authorization to construct one grade-separated pedestrian-rail crossing across and over the track of the Union Pacific Railroad Warm Springs Subdivision near Milepost 3.06 in the City of Fremont, California (Proposed Crossing).

The Proposed Crossing would provide elevated pedestrian and bicycle access from BART patron pick-up/drop-off and parking to the west side of Irvington BART Station.

The Proposed Crossing and Irvington BART Station are part of the larger WSX Project, a 5.4-mile extension of the BART system running south of the existing Fremont BART station.

RSD conducted a site visit of the Proposed Crossing location and filed a response in this proceeding indicating the Application and Proposed Crossing comply with Commission Rule 3.7 and GO 26-D.

The environmental impacts associated with the Proposed Crossing were examined in the WSX EIRs prepared by BART, including the Final SEIR Addendum #2, which BART included with its Application.

The Final SEIR Addendum #2 revisits the environmental analysis conducted in the WSX EIRs, based on proposed 2019 modifications to the Irvington Station and Gallegos Winery components of the WSX Project.

The WSX EIRs, including the Final SEIR Addendum #2, found that many of the environmental impacts associated with the Irvington BART Station could be mitigated and minimized to be considered less than significant under CEQA.

None of the significant impacts identified and described in the Final SEIR Addendum #2 specifically relate to the Proposed Crossing.

The Application and Final SEIR Addendum #2 provide evidence that ESJ impacts were considered, and that BART endeavored to minimize adverse impacts on ESJ communities and provided an opportunity for public comment during the planning and design of the Irvington BART Station.

There are increased public safety benefits associated with the Proposed Crossing, which is grade-separated, as compared to an at-grade crossing.

BART’s Application, and Exhibits A-H attached to the Application, are uncontested in this proceeding.

Conclusions of Law

BART should be authorized to construct the Propose Crossing (one grade-separated pedestrian-rail crossing across and over the track of the UPRR Warm Springs Subdivision near Milepost 3.06 in the City of Fremont, California).

The Proposed Crossing complies with the requirements in Commission Rule 3.7 and GO 26-D.

Exhibits A-H, including the Final SEIR Addendum #2, are adequate for Commission decision-making purposes and should be received into evidence.

The Proposed Crossing is consistent with the Commission’s ESJ Action Plan.

Upon issuance of this decision and in compliance with 14 Cal. Code Regs. §§ 15096(h) and 15096(i), the Commission’s Energy Division should file a Notice of Determination with the CEQA clearinghouse certifying that the Commission considered the environmental documents related to the Proposed Crossing.

The approval and construction authorization granted in this decision should expire if not exercised within thirty-six months (36) of the issuance of this decision, unless BART seeks an extension of time or if the conditions adopted in the Ordering Paragraphs are not satisfied.

This proceeding should be closed.

ORDER

**IT IS ORDERED** that:

1. The San Francisco Bay Area Rapid Transit District (BART) is authorized to construct one grade-separated pedestrian-rail crossing over Union Pacific Railroad track located near milepost 3.06 in the City of Fremont as part of the proposed Irvington Station component of the BART Warm Springs Extension Project.
2. The grade-separated pedestrian-rail crossing shall be identified by California Public Utilities Commission Crossing Number 001DA-3.06-AD and United States Department of Transportation Crossing Number 978226P.
3. The authorized grade-separated pedestrian-rail crossing shall have the configuration specified in Application 21-08-006 and its attachments.
4. The San Francisco Bay Area Rapid Transit District shall comply with all applicable rules, including California Public Utilities Commission General Orders and the California Manual on Uniform Traffic Control Devices.
5. The San Francisco Bay Area Rapid Transit District shall notify the California Public Utilities Commission’s Rail Crossings and Engineering Branch of the Rail Safety Division at least thirty (30) days prior to the opening of the crossing. Notification should be made by e-mail to rceb@cpuc.ca.gov.
6. Within thirty (30) days after completion of the work authorized by this Decision, the San Francisco Bay Area Rapid Transit District shall notify the California Public Utilities Commission’s Rail Crossings and Engineering Branch of the Rail Safety Division that the authorized work is complete by submitting a Commission Standard Form G, Report of Completed Changes at Rail Crossings. Form G requirements and forms can be obtained at the California Public Utilities Commission website Form G page at http://www.cpuc.ca.gov/Crossings. The completed report must be submitted via email to rceb@cpuc.ca.gov.
7. The authorization in this decision shall expire if not exercised within thirty-six (36) months of the issuance of this decision, unless time is extended or if the above conditions are not satisfied. Authorization may be revoked or modified if public convenience, necessity, or safety so require.
8. A request for an extension of the thirty-six-month (36) authorization time-period must be submitted to the California Public Utilities Commission’s Rail Crossings and Engineering Branch of the Rail Safety Division at least thirty
(30) days before the expiration of that period.
9. Exhibits A-H attached to Application 21-08-006 are received into evidence.
10. Application 21-08-006 is closed.

This order is effective today.

Dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, at Diamond Bar, California.

1. Also referred to in the Application as the Irvington Station West Access Bridge. [↑](#footnote-ref-2)
2. Application at 1-2. [↑](#footnote-ref-3)
3. Exhibit F, Final Supplemental Environmental Impact Report Addendum #2 (Final SEIR Addendum #2), Appendix A at 1-2. [↑](#footnote-ref-4)
4. Exhibit F, Final SEIR Addendum #2, Appendix D at 1-2. [↑](#footnote-ref-5)
5. Scoping Memo at 3. [↑](#footnote-ref-6)
6. RSD Response at 2. [↑](#footnote-ref-7)
7. *Id.* at 3-4. [↑](#footnote-ref-8)
8. To be eligible for federal funding, a project may also undergo federal review pursuant to the National Environmental Policy Act (NEPA). Although the Federal Transit Agency, acting as the lead agency under NEPA, published a Final Environmental Impact Statement for the WSX Project in June 2006, ultimately no federal funding was used for the project. (*See* Exhibit F, Final SEIR Addendum #2, at 1-2.) [↑](#footnote-ref-9)
9. California Public (Cal. Pub.) Resources Code § 21000 et seq.; 42 U.S.C. 4371 et seq. [↑](#footnote-ref-10)
10. CEQA Guidelines (Title 14 of the California Code of Regulations (14 Cal. Code Regs.)),
§§ 15050 and 15051. [↑](#footnote-ref-11)
11. Exhibit F, Final SEIR Addendum #2, at 1-2. Although no federal funding was used for the WSX Project, the Mitigation Monitoring and Reporting Plan for the WSX Project was revised following publication of a Final Environmental Impact Statement by the Federal Transit Agency. (*See* Exhibit F, Final SEIR Addendum #2, at 1-2.) [↑](#footnote-ref-12)
12. 14 Cal. Code Regs. § 15381. [↑](#footnote-ref-13)
13. *Id.* § 15091. [↑](#footnote-ref-14)
14. *Id.* §§ 15091(a)(2) and 15096(g). [↑](#footnote-ref-15)
15. *Id.* §§ 15096(h) and 15096(i). [↑](#footnote-ref-16)
16. Exhibit F, Final SEIR Addendum #2, at 35-56. [↑](#footnote-ref-17)
17. *Id.* at 42-43. [↑](#footnote-ref-18)
18. The Environmental and Social Justice Action plan is available on the Commission’s website at: <https://www.cpuc.ca.gov/news-and-updates/newsroom/environmental-and-social-justice-action-plan> [↑](#footnote-ref-19)
19. Exhibit H at 2. [↑](#footnote-ref-20)
20. Based on the 2019 Irvington BART Station design. (*See* Exhibit F, Final SEIR Addendum #2,
at 51.) [↑](#footnote-ref-21)
21. *Id.* at 1-3; Exhibit F, Final SEIR Addendum #2, at 51. [↑](#footnote-ref-22)
22. *Ibid.* and Exhibit F, Final SEIR Addendum #2, Appendix D at 4-6. [↑](#footnote-ref-23)
23. RSD Response at 2. [↑](#footnote-ref-24)
24. *See* GO 75-D, which states “As part of its mission to reduce hazards associated with at-grade crossings, and in support of the national goal of the Federal Railroad Administration (FRA), the Commission's policy is to reduce the number of at-grade crossings on freight or passenger railroad mainlines in California.” [↑](#footnote-ref-25)