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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BAYVIEW HUNTERS POINT COMMUNITY ADVOCATES, COMMUNITIES FOR A BETTER ENVIRONMENT, LATINO ISSUES FORUM, OUR CHILDREN'S EARTH FOUNDATION, SIERRA CLUB, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, and URBAN HABITAT PROGRAM, a project of the TIDES CENTER, Plaintiffs, vs. METROPOLITAN TRANSPORTATION COMMISSION, SAN FRANCISCO MUNICIPAL RAILWAY, and ALAMEDA-CONTRA COSTA TRANSIT DISTRICT, Defendants.	Case No. C-01-0750 TEH MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION AND DECLARATORY RELIEF RE: CIVIL PENALTIES Hearing: May 20, 2002 Time: 10:00 a.m. Judge: Hon. Thelton E. Henderson

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INTRODUCTION

This Clean Air Act citizen enforcement suit was filed on February 21, 2001, by a coalition of San Francisco Bay Area conservation, environmental justice and community groups (collectively "Bayview Advocates"). Tired of breathing air that does not meet the most minimal health-based standards for ozone pollution and equally tired of inadequate public transit, particularly in the urban centers of San Francisco and the East Bay, Bayview Advocates seek an injunction to require implementation of Transportation Control Measure 2 ("TCM 2" or "measure") – a measure now fifteen years overdue. TCM 2 has been a key component of the Bay Area's strategy for controlling ozone pollution from mobile sources since it was first adopted by Defendants Metropolitan Transportation Commission ("MTC") and San Francisco Municipal Railway ("MUNI") in the 1982 Bay Area Air Quality Plan ("1982 Plan" or "SIP").[1] Aimed at reducing ozone pollution from vehicles by moving people from their cars and trucks onto public transit, the goal of TCM 2 is all the more important today, as the Bay Area's population and the "vehicle miles traveled" by Bay Area residents continue to increase dramatically.

TCM 2 specifies that regional transit ridership be increased by 15 percent over 1983 levels and sets forth specific implementation steps by which MTC, MUNI and the other five major transit operators are to accomplish that increase. *See* TCM 2, 1982 Plan, Liab. Ex. C at B-3 (appended hereto for the Court's convenience as Attachment 2). While the 15 percent increase was to have been realized by 1987, in fact it has never been achieved. Today, twenty years after TCM 2 was first adopted, and despite a 30 percent population increase, transit ridership in the Bay Area has increased by less than one percent. This represents a ***per capita decrease*** in transit ridership of ***more than 21 percent***.[2]

On November 9, 2001, after extensive litigation over whether MTC and MUNI are obligated

[1] The Bay Area's air quality plan is part of the State Implementation Plan for achieving the U.S. Environmental Protection Agency's national standard for ozone; as such, the 1982 Plan and its successors are also frequently referenced as the "SIP."

[2] *See* MTC's *Final Transportation Air Quality Conformity Analysis for the 2001 RTP and TIP,* Ex. B-1 at 12. Current transit ridership information provided in this Memorandum is based on the most recent numbers reported in the National Transit Database maintained by the Federal Transit Administration ("FTA"). *See* Declaration of Kirsten Tobey at ¶¶ 12-14 and Tables 1-5. Even using MTC's ridership numbers for 2000/01, which, contrary to its assertion, have neither been approved by the FTA nor included in the National Transit Database, ridership has increased by only 6 percent since 1982. *Id.* at Table 2 and ¶¶ 13-14.

under TCM 2 to actually increase ridership, or solely to undertake the measure's implementation steps, this Court held that "TCM 2 requires the achievement of a 15% increase in regional transit ridership over 1982-83 levels." *Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission*, 177 F. Supp. 2d 1011, 1031 (N.D. Cal. 2001) (*"Bayview Hunters Point")*. The Court rejected Defendants' argument that their obligations under TCM 2 ended when the 1987 deadline for attaining the increase passed. Instead, it emphasized that the obligations of MTC and MUNI under TCM 2 are ongoing and continuous – *i.e.*, MTC and MUNI must achieve and maintain the 15 percent increase for as long as the measure remains in the SIP. *See, e.g.,* 177 F. Supp. 2d at 1024 ("A state is obligated to comply ***continuously*** with the provisions of a SIP until removal or revision of those provisions is approved by the EPA") (emphasis in original).[3] The Court further determined that, "while MTC bears the greatest responsibility in ensuring that the region achieves the target increase, the region's six major transit operators also share collective responsibility under TCM 2." *Id.* at 1029.

Finally, concluding that "the evidence more than amply demonstrates that a 15% ridership increase was never achieved," the Court held "both Defendants liable for failing to achieve the increase in transit ridership required under TCM 2." *Id.* at 1032.

The Court declined, however, "to declare a scheme for injunctive relief at this time," instead referring the parties to a magistrate judge "for a mandatory settlement conference on a suitable remedy for Defendants' failure to comply with TCM 2." *Id.* at 1032-33. Unfortunately, settlement efforts failed, and Bayview Advocates return to the Court for an order requiring MTC and MUNI finally to implement TCM 2 and to determine the maximum exposure of Defendants to the assessment of civil penalties under the Clean Air Act for their violation of this SIP measure.[4]

In the four months since the Court issued its liability ruling, evidence that Bay Area residents are forced to breathe air that endangers their health has been mounting. In that short time, four new studies have emerged, demonstrating that:

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[3] *See also id.* at 1021 ("states are obligated to comply with all provisions of a SIP until such provisions are removed"); 1022 (referencing "EPA . . . guidance specifically stating that implementation of transportation control measures must continue permanently until they are either substituted or removed from the SIP"); 1022 ("it is clear that SIP compliance ***must*** be continuous") (emphasis in original).

- Ozone not only exacerbates, but actually ***causes*** asthma in children playing outdoors;

- Inhaling smog (ozone and fine particles emitted from vehicles) can have an immediate adverse effect on the hearts of even healthy people, and breathing during rush hour in urban areas can trigger heart attacks in persons with cardiovascular disease;

- Fine particles (emitted directly and/or formed from other pollutants emitted from vehicles) can actually ***cause*** heart attacks after even a few hours of exposure; and

- Long-term exposure to fine particles accelerates death from both cardiopulmonary disease and lung cancer, with the impact of air pollution on mortality roughly equivalent to that of breathing second-hand smoke.

Exs. B-2 through B-5. *See also* Tobey Dec. at ¶7.[5]

In the meantime, MUNI published "A Vision for Rapid Transit in San Francisco," identifying an array of transit improvements, many of which could substantially increase ridership in a very short time. Cohen Dec. at ¶14. However, the transit operator has done little to incorporate these projects into its operating plan, nor has it sought funding to get this array of projects underway quickly. Even more disturbing is MTC's adoption in December 2001 of a 25-year Regional Transportation Plan ("RTP"), literally the month after this Court advised MTC of its responsibilities under TCM 2. Not only does the RTP fail even to discuss implementation of TCM 2, but it promises to increase "vehicle miles traveled" in the Bay Area by ***50 percent*** over current levels – more than double the estimated rate of population growth. Ex. B-6 at 2-6 and 2-148. Four days ago, MTC found the RTP and the 2001 Transportation Improvement Plan (and an amendment to that Plan) to be in "conformity" with the Clean Air Act, in direct conflict with the Act's requirement that "conforming" plans must demonstrate "timely implementation" of all TCMs. 42 U.S.C. § 7506(c)(2)(B). *See also* MTC Resolution 3432 (Ex. B-7). In addition to violating the Clean Air Act as well as transportation funding regulations, this action clears the way for MTC to begin approving funding for new highway projects, whether or not they will interfere with MTC's eventual implementation of TCM 2.

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[4] The parties have agreed to reserve the amount of penalties to be assessed, if any, for later litigation.

[5] Declarations submitted herewith are referenced by the last name of the declarant; declarations and other exhibits submitted in support of Bayview Advocates' motion for summary judgment on liability are referenced as "Liab. Dec" or "Liab. Ex." Plaintiffs' liability briefs are referenced as Liab. Memo (opening brief), Opp. and Reply; where such citations refer to Defendants' briefs, they so note.

Something is wrong with this picture. As this Court observed back in 1990: "There is little more basic in life than the air we breathe." *Citizens for a Better Env't v. Deukmejian*, 731 F. Supp. 1448, 1451 (N.D. Cal. 1990) ("*CBE I*"). It is beyond the pale that MTC and MUNI continue to resist complying with this simple yet profound measure to improve public transit over a 20 year period sufficiently to attract a mere 15 percent more transit riders, particularly with the population increasing at twice that rate. Bay Area residents deserve a viable alternative to driving their cars; they deserve an alternative to contributing to the pollution that makes people sick and cloaks our spectacular skylines.

As one important step toward providing those alternatives, this Court should order MTC and MUNI to achieve the TCM 2 ridership increase by a reasonable deadline and in accordance with an implementation schedule that offers the Court, Bayview Advocates, and the public the assurance they obviously need and certainly deserve that MTC and MUNI will indeed finally comply with this measure.

ARGUMENT

I. NOW THAT LIABILITY HAS BEEN ESTABLISHED, A PERMANENT INJUCTION IS THE ONLY APPROPRIATE REMEDY.

This Court has already determined that "it has the authority to enforce both the implementation strategies and the 15% ridership increase" required by TCM 2. *Bayview Hunters Point*, 177 F. Supp. 2d at 1026. As the Court has noted, "transportation control measures are clearly included under the CAA's definition of 'emission standard or limitation.'" *Id.* at 1021. The Clean Air Act explicitly provides that "[t]he district courts shall have jurisdiction . . . to enforce such an emission standard or limitation." 42 U.S.C. §7604(a).

In *Friends of the Earth v. Carey*, the court held that "[o]nce a citizen suit to enforce an EPA-approved state implementation plan has been properly commenced, the district court is *obligated*, upon a showing that the state has violated the plan, to issue appropriate order for its enforcement." 535 F.2d 165, 173 (2d Cir. 1976) (emphasis added). Courts have consistently issued mandatory injunctions requiring compliance with the Act. *See Natural Resources Defense Council v. New York State Dept. of Env. Cons.*, 668 F. Supp. 848, 854-55 (S.D.N.Y. 1987) (the court has "the authority and indeed the responsibility to enforce the provisions of New York's SIP," and "[t]he SIP must be enforced as its stands now.") ("*NRDC v. New York*"); *Amer. Lung Ass'n v. Kean*, No. 87-288, 1987 U.S. Dist. LEXIS

15158, 26 ERC 1865 (D.N.J. Nov. 19, 1987), *aff'd*, 871 F.2d 319 (3d Cir. 1989) (injunction to compel compliance with SIP) ("*Amer. Lung Ass'n*"); *Citizens for a Better Env't v. Deukmejian,* 746 F. Supp. 976, 985 (N.D. Cal. 1990) ("*CBE II"*) ("courts must require that overdue SIP commitments be satisfied without delay and without rebalancing costs and benefits already balanced").

As this Court emphasized in previous litigation to enforce the Bay Area's 1982 Plan, the Clean Air Act specifies that "SIP strategies are mandatory and enforceable," and upon finding a violation of a SIP, courts must "issue appropriate orders for its enforcement." *CBE I* at 1455. *CBE II*, 746 F. Supp. at 982. Accordingly, in its liability ruling on TCM 2, this Court explicitly stated that "Defendants' only alternative, besides compliance, is to petition the EPA for removal of TCM 2 from the SIP." *Bayview Hunters Point*, 177 F. Supp. 2d at 1028. *See also Coalition for Clean Air v. SCAQMD*, No. CV97-HLH, 1999 U.S. Dist. LEXIS 16106, at *13 (C.D. Cal. Aug. 27, 1999) ("the Court's duty is to enforce [the SIP] unless modification from EPA is approved").

Even if it were appropriate to consider equitable factors, they clearly require issuance of a permanent injunction in this case. The Supreme Court has articulated the test for granting injunctive relief:

> [T]he bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 542 (1987) ("*Amoco*"). The showings necessary to supporting injunctive relief are easily satisfied here.

A. Bayview Advocates and the Breathing Public Are Suffering Irreparable Harm as a Result of Defendants' Failure to Comply with TCM 2.

After succeeding on the merits of its claim, "a party is entitled to relief as a matter of law irrespective of the amount of irreparable injury which may be shown." *Continental Airlines v. Intra Brokers,* 24 F.3d 1099, 1104 (9th Cir. 1994) (citing *Western Systems v. Ulloa,* 958 F.2d 864, 872 (9th Cir. 1992)). "Irreparable injury is not an independent requirement for obtaining a permanent [as opposed to preliminary] injunction; it is only one basis for showing the inadequacy of the legal remedy." *Id.*, (citing Wright & Miller, *Federal Practice and Procedure* § 2944 at 401 (1973)).

In any event, the Ninth Circuit long ago concluded: "There is no doubt [that the public] will suffer injury if compelled to breath air less pure than mandated by the Clean Air Act." *Natural Resources Defense Council v. EPA,* 507 F.2d 905, 910 (9th Cir. 1974). The Northern District agreed that "pollution which violates standards approved by the EPA pursuant to its authority under the [Clean Air] Act is, by definition, presumptively significant and irreparably harmful to health and welfare." *People ex rel. State Air Res. Bd. v. Dep't of Navy*, 431 F. Supp. 1271, 1294 (N.D. Cal. 1977), *aff'd*, 624 F. 2d 885 (9th Cir. 1980). *See also Coalition for Clean Air,* 1999 U.S. Dist. LEXIS 16106 at *9 ("irreparable injury . . . is shown by the level of air pollution in the . . . Air Basin . . . in violation of federal quality standards"); *United States v. City of Painesville, Ohio*, 644 F.2d 1186, 1194 (6th Cir. 1981) (irreparable harm is presumed for violations of the Clean Air Act), cert. denied 454 U.S. 894 (1981).

The San Francisco Bay Area, as this Court is well aware, has never once met a deadline for attaining the minimum national health-based standard for ozone and is not presently in attainment with that standard. Alarmingly, in 1997, the EPA found the current ozone standard inadequate to protect public health and adopted a new, much tougher standard.[6] While that standard is not yet in place, the Bay Area Air Quality Management District ("Air District") has recorded 67 occasions on which the Bay Area has exceeded those standards, just since 1995. *See* Liab. Exs. R-1 at Table 1 and B-1-8.

Moreover, emissions of nitrogen oxides ("NOx") – the pollutant that combines with volatile organic compounds in sunlight to produce ozone – from vehicles and other sources in the Bay Area are transported downwind to the Sacramento and San Joaquin air basins, where ozone pollution is even worse. *See* Liab. Reply at 4-5 (*e.g.* in 1997 alone, Sacramento County exceeded the current ozone standard on 28 days and the new standard on 109 days – nearly one-third of the year!). In fact, as the Air District has pointed out, when expressing its "heightened concerns" over the ozone pollution in Central Valley, there is even a State law that "requires the [Bay Area] to reduce NOx in order to mitigate transport to impacted, neighboring air basins." Liab. Ex. S-2 at 4. Indeed, one Central Valley air district has just resorted to that law, filing suit last month to force the Bay Area to reduce its emissions of NOx

[6] The 1997 standard – which neither the Bay Area nor the Central Valley comes close to meeting – was last year upheld by the Supreme Court in *Whitman v. American Trucking Ass'ns,* 531 U.S. 457 (2001),

and VOC, including specifically emissions from cars and trucks, through reasonably available measures such as the more stringent Smog Check II program. *See San Joaquin Valley Unified Air Pollution Control District v. State of California Air Resources Board,* No. 02CS00270 (Sac. Sup. Ct., filed Feb. 19, 2002). The litigation underscores the extent to which Bay Area motor vehicle emissions are adversely affecting the health and economy of Central Valley residents, as well as hampering those regions' efforts to attain the national health-based standard for ozone.

Such "heightened concerns" are well founded. EPA emphasized just last year that the human health and associated societal costs from ozone pollution are extreme:

> A large body of evidence shows that ozone can cause harmful respiratory effects, including chest pain, coughing, and shortness of breath, which affect people with compromised respiratory systems most severely. When inhaled, ozone can cause acute respiratory problems; aggravate asthma; cause significant temporary decreases in lung function of 15 to over 20 percent in some healthy adults; cause inflammation of lung tissue; produce changes in lung tissue and structure; may increase hospital admissions and emergency room visits; and impair the body's immune system defenses, making people more susceptible to respiratory illnesses.

66 Fed. Reg. 5002, 5012 (Jan. 18, 2001). EPA has found "strong and convincing evidence that exposure to ozone is associated with exacerbation of asthma-related symptoms." *Id*. Now, as a result of a study published just last month, authored in part by the California Air Resources Board, we know that ozone not only exacerbates but also actually ***causes*** asthma, at least in children who play outdoors.[7]

As EPA observes, the impacts of ozone on "asthmatics are of special concern particularly in light of the growing asthma problem in the United States and the increased rates of asthma-related mortality and hospitalizations, especially among children in general and black children in particular." 62 Fed. Reg. 38856, 38864 (July 18, 1997). In fact:

> Asthma is one of the most common and costly diseases in the United States. . . . Today, more than 5 percent of the US population has asthma. On average, ***15 people died every day*** from asthma in 1995. . . . In 1998, the cost of asthma to the U.S. economy was estimated to be $11.3 billion, with hospitalizations accounting for the largest single portion of the cost.

66 Fed. Reg. at 5012 (emphasis added) (footnotes omitted).[8]

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and is currently on remand to EPA and the D.C. Circuit.

[7]Rob McConnell et al., *Asthma in Exercising Children Exposed to Ozone: A Cohort Study,* 359 *Lancet* 386 (February 2, 2002) (Ex. B-2)

[8]Lest this recitation seem academic, members of plaintiff organizations have described the health problems they personally experience as a result of breathing in the Bay Area. *See, e.g.,* Liab.

The health and societal costs of asthma are wreaking havoc here in California. There are currently 2.2 million Californians suffering from asthma.[9] In 1997 alone, nearly 56,413 residents, including 16,705 children, required hospitalization because their asthma attacks were so severe. Shockingly, asthma is now the leading cause of hospital admissions of young children in California. *Id.* at 1. In the Bay Area, children, and particularly African-American children, pay the highest price for the region's failure to control ozone pollution. Whereas the statewide asthma hospital discharge rate is an already unacceptably high 216 per 100,000 children, the rates for African-American children in the four most populous counties served by MTC – Santa Clara, Contra Costa, San Francisco and Alameda counties – soar to 352, 530, 664 and ***935*** per 100,000 children, respectively. *Id.* at 10. With asthma health complications a leading cause of school absenteeism,[10] the same children struggling with a life-long health affliction are also being denied the educational opportunities enjoyed by healthy children.

We know the contribution of cars and trucks to our ozone problem is significant. Despite ever-cleaner car technologies, since 1979, cars and trucks have remained consistently responsible for approximately 45-50 percent and 40-45 percent, respectively, of the total emissions of "NOx" and volatile organic compounds in the Bay Area. 1982 Plan, Liab. Ex. C at 53; 1999 Plan, Liab. Ex. D-3 at 12.

Shifting more people from their cars onto public transit by providing better transit choices can produce dramatic air quality and public health benefits, including reduced asthma hospitalization rates. A study of the City of Atlanta during the 1996 Olympics provided a dramatic illustration of this. When Atlanta temporarily unclogged its streets by increasing public transit and implementing other measures

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Declarations of John Gamboa (a diagnosed asthmatic who "experience[s] severe shortness of breath and respiratory distress that require medical attention" when ozone levels are high); Richard Mlynarik (a bicyclist who has had abnormal difficulty on routine bicycle rides on smoggy summer days); Robert Baltzer (who "suffer[s] from a serious lung disease that is exacerbated by the breathing of polluted air . . . on dozens of instances per year" and is "forced to curtail many activities [he] once enjoyed, including bicycling, walking, and yard work"); and Olin Webb (who fears his "health and general well-being are significantly harmed on a daily basis by poor air quality in the [Bayview Hunters Point] neighborhood where I live and work"). Liab. Exs. B-1, 2, 3, and 4, respectively.

[9] Calif. Dep't of Health Servs., *California County Asthma Hospitalization Chart Book* 1 (2000) (Liab. Ex. E-1).

[10] President's Task Force on Envtl. Health Risks & Safety Risks to Children, *Asthma and the Environment: A Strategy to Protect Children* at 5 (Jan. 28, 1999) (revised May 2000) (Liab. Ex. E-2) (some 10 million school days are missed annually due to asthma).

to reduce private automobile use, the U.S. Centers for Disease Control and Prevention found that asthma-related hospitalizations and emergency room visits among children in the region's various hospitals decreased by ***11 to 44 percent*** from prior levels.[11]

TCM 2 is one method of grappling with the serious public health hazards posed to residents of the Bay Area and the Central Valley by ozone pollution generated in the Bay Area. There is no question that as a matter of law, the residents of the Bay Area are suffering irreparable harm by being forced to breathe air that fails to meet federal standards. Nor can there be any question that this harm is due at least in part to the failure of MTC and MUNI to meet their obligations under TCM 2 to increase transit ridership. Certainly TCM 2 – or any single ozone control measure, mobile or stationary – is not going to do the job by itself. But after 30 years of failure to attain and maintain even the existing ozone standard, the Bay Area cannot afford to ignore any measure that will reduce ozone pollution.

B. There are No Adequate Legal Remedies to Address Defendants' Failure to Implement TCM 2.

In determining whether to grant injunctive relief, the Court must determine whether there are legal remedies available to address the injury to the public health resulting from MTC's and MUNI's refusals to implement TCM 2. The Supreme Court, however, has noted that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable" *Amoco,* 480 U.S. at 545. *See also Sierra Club v. United States Forest Service,* 843 F.2d 1190, 1195 (9th Cir. 1988). MTC and MUNI could not begin to quantify, let alone compensate, the costs in health care alone resulting from ozone pollution in the Bay Area and Central Valley. Even if the agencies could quantify their economic costs of compliance, the courts have held that "[t]he District Court has no jurisdiction to consider issues of feasibility, general practicality, political objections or cost factors in ordering the implementation of a SIP." *Coalition for Clean Air*, 1999 U.S. Dist. Lexis 16106, at *10; *see also, Earth Island Inst. v. Mosbacher*, 746 F. Supp 964, 975 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) ("purely economic harm . . . is outweighed by" harm to the environment). The bottom line is that human suffering and premature death as a result of air

[11] Michael S. Friedman et al., *Impact of Changes in Transportation and Commuting Behaviors During the 1996 Summer Olympic Games in Atlanta on Air Quality and Childhood Asthma*, 285 JAMA 897, 903 (2001) (Liab. Ex. E-3).

pollution exceeding national standards is unacceptable and irreparable, and it must be remedied through the issuance of a permanent injunction.

C. The Balance of Harms and the Public Interest Compel the Issuance of a Permanent Injunction in this Case.

Despite Bayview Advocates' earlier briefing on injunctive relief, MTC and MUNI did not and cannot offer a single example of how they would be harmed by a Court order directing them finally to implement TCM 2, let alone an injury that could conceivably counterbalance the public health impacts of non-compliance with SIP control measures.

In any event, the "balancing of harms" required to support injunctive relief is ***not*** a balancing of the respective harms of ordering or not ordering compliance with the law, but a balancing of the respective harms of alternative remedies. As the Supreme Court has recently explained:

> Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. [Citation omitted.] ***Their choice*** (unless there is statutory language to the contrary) ***is simply whether a particular means of enforcing the statute should be chosen over another permissible means***; their choice is not whether enforcement is preferable to no enforcement at all. . . . To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497-8 (2001) (emphasis added).

The Supreme Court has also held that due to the irreparable nature of environmental injury "[i]f such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco,* 480 U.S. at 545. The Ninth Circuit has echoed that general principle. *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988).

As for the public interest, this Court has emphasized, again in its TCM 2 liability ruling, that "[t]he public has a strong interest in the vigilant enforcement of the Clean Air Act." *Bayview Hunters Point,* 177 F. Supp. 2d. at 1024. As the Northern District has emphasized: "Where an administrative agency fails to comply with a statute, this invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *High Sierra Hikers v. Powell,* No. C-00-01239-EDL, 2001 U.S. Dist. LEXIS 2871, at *10 (N.D. Cal. Jan. 9, 2001) (citing *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991)).

An injunction requiring compliance with the Act is both in the public interest and in accordance with the balance struck by Congress.

II. THE COURT'S ORDER SHOULD REQUIRE MTC AND MUNI TO FOLLOW THE FIVE-STEP IMPLEMENTATION SCHEME OF TCM 2 WITHIN THE FIVE YEARS ORIGINALLY PROVIDED BY THE MEASURE.

In finding MTC and MUNI liable for failing to implement TCM 2, this Court recognized that "it does have the power to enforce implementation of TCM 2 itself," and that "[s]uch implementation requires both completion of the four-step 'implementation schedule' listed in the Plan . . . as well as a 15% increase in regional transit ridership." *Bayview Hunters Point*, 177 F. Supp. 2d at 1026. Pursuant to the Court's determination that the obligations imposed by a SIP measure such as TCM 2 are continuous as long as the measure remains in the SIP, the Court should order MTC and MUNI not only to achieve the ridership increase by a date certain, but also to complete each of the implementation steps, as is obviously necessary if the increase is to be attained and maintained.

The courts have required that agencies remedy their SIP defaults "as expeditiously as practicable." *CBE II,* 746 F. Supp. at 984, citing *Amer. Lung Ass'n*, 1987 U.S. Dist. LEXIS 15158, at *5. Courts uniformly have demanded that agencies comply with their SIP obligations in less time than originally provided by the SIP. For example, in *CBE I*, this Court ordered the agencies to adopt regulations for commercial bakeries in 10 days, despite the three-year timetable provided by the original SIP provision, and ordered implementation of another overdue SIP provision, relating to consumer solvents, for which the SIP had provided two years, within only 8½ months. *CBE I,* 731 F. Supp. at 1461. In *Amer. Lung Ass'n*, 1987 U.S. Dist. LEXIS 15158, at *5-6, the court approved an "expeditious" schedule allowing the agency only 8 months to implement an overdue rule which was to have been implemented in 24 months under the SIP. *See also NRDC v. New York*, 668 F. Supp. 848 (S.D.N.Y. 1987) (agency allowed 4 months to implement overdue SIP measure for automobile refinishers that was to have been implemented over a period of 30 months pursuant to the SIP).

In this case, Bayview Advocates are requesting a much more generous schedule than imposed in the above-cited cases. The proposed schedule allows the agencies almost the full five years to implement TCM 2 that they were originally allowed under the SIP. There can be no dispute as to the reasonableness of this proposal.

A. MTC and MUNI Should be Ordered to Achieve the TCM 2 Ridership Increase No Later than November 9, 2006.

When TCM 2 was originally adopted in 1982, the Defendants were required to achieve the 15 percent increase in transit ridership by 1987 – five years later. It is now twenty years later, and the TCM 2 goal remains merely words on paper. Although the ridership increase is long overdue, and compliance is required as "expeditiously as practicable" (*CBE II,* 746 F. Supp. at 985), Bayview Advocates propose that MTC and MUNI be allowed ***another five years*** to achieve the 15 percent increase. Bayview Advocates hope that a reasonable timetable, accompanied by specific direction from the Court as requested below, will encourage these agencies to develop a thoughtful and sound strategy by which the TCM 2 increase can be both attained and then maintained for as long as TCM 2 remains in the SIP. However, the five years should run from the date on which this Court found MTC and MUNI liable for failing to comply with TCM 2 and specified with precision their obligations under that measure. Defendants surely should not benefit from their decisions to do nothing to implement TCM 2 until ordered to do so. This Court should not reward "the footdragging efforts of a delinquent agency." *Natural Resources Defense Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974).

Accordingly, Bayview Advocates seek an order directing MTC and MUNI to increase Bay Area transit ridership to 15 percent above 1983 levels by no later than November 9, 2006 – ***twenty-four years*** after MTC and MUNI adopted TCM 2 and more than ***nineteen years*** after the ridership increase was to have been achieved. The fairness and reasonableness of this position is beyond question. These agencies themselves came up with the five-year timetable. If MTC and MUNI believed they and the other transit operators could increase ridership by 15 percent within five years back in 1982, then these same agencies can certainly reach that same target within that same timeframe today. Surely, with a 30 percent increase in population – double that of the required TCM 2 ridership increase – many more potential riders now reside in the region.[12]

[12]Indeed, without EPA approval of a SIP revision by MTC and MUNI that either deletes TCM 2 or sets a more extended timetable for compliance with that measure, the five years provided by the current SIP must be presumed to be reasonable. *See Bayview Hunters Point*, 177 F. Supp. 2d at 1028 (once approved by EPA, SIP measures are binding and federally enforceable unless and until they are revised with EPA approval).

Moreover, MUNI and AC Transit, which together carry over 58 percent of Bay Area transit riders today (Tobey Dec at Table 3), have both recently identified numerous projects by which they could substantially increase their ridership by 2006. In response to its prompt settlement of Bayview Advocates' claims against it, AC Transit (the East Bay operator) has completed a new chapter to its operating plan entitled "Strategic Vision." The chapter includes measures that, if allocated funding by MTC, could increase AC Transit's ridership by nearly 19 million annual boardings by 2006, a 14 percent increase over its 1983 ridership and a 27 percent increase over its current ridership. AC Transit Strategic Vision (Ex. B-8) at 5-16. MUNI has also published "A Vision for Rapid Transit in San Francisco" which similarly identifies numerous measures by which its ridership could be substantially increased. *See* Cohen Dec at ¶14. If this Court orders MUNI to incorporate those near-term projects into its operating plan, they could be funded by MTC and fully operational by 2006. *Id.* at ¶¶11-12.

Even MTC acknowledged this timetable is adequate, as recently as February 2002, when it published its Final Transportation Air Quality Conformity Analysis for the 2001 Regional Transportation Plan and 2001 Transportation Improvement Program Amendment ("Conformity Analysis"). Ex. B-1 and Attachment 1 hereto. In that document, "MTC projects that regional transit boardings for all operators may increase to as high as 600m in 2006/2007" – a level higher than the TCM 2 target by any party's calculation. *Id.* at 12 (further predicting increases to "657m in 2010 and 695m in 2020").[13] MTC should not be allowed to represent to the public that such transit ridership increases are possible, while maintaining an opposite position in this Court for the sake of litigation.

After all, as this Court has observed, "'Congress set up [the Clean Air Act] in order to force communities and industry to do their utmost to bring about attainment as rapidly as possible.'" *CBE II,* 746 F. Supp. at 985 (quoting EPA guidance). It is time for MTC and MUNI to do their share, and they should do so by no later than November 9, 2006.

B. MTC and MUNI Should be Ordered to Comply with the Five Steps for Implementing TCM 2.

While Bayview Advocates are pleased at MTC's confidence that ridership levels will exceed the TCM 2 target by 2006/07, they are concerned that MTC and MUNI may proceed as they have over the

[13] *See* Argument II.B.5, *infra*, regarding the parties' dispute as to the TCM 2 target number.

past twenty years, relying passively on predictions of transit ridership trends instead of proactively planning and allocating funding to ensure the region attains and maintains the TCM 2 ridership level. We have all seen where that has led the Bay Area: to a decrease in per capita ridership of nearly 21 percent since 1983.

Particularly with such an extended deadline for achieving the TCM 2 increase, it is critical that the Court include in its remedial order deadlines for MTC's and MUNI's compliance with each of the following implementation steps, which it has concluded are required by TCM 2. *See Bayview Hunters Point,* 177 F. Supp. 2d at 1028-32. Those steps are:

- The six major transit operators prepare plans that proactively facilitate increased ridership;
- MTC consults with the operators;
- MTC implements ridership proposals sufficient to achieve the TCM 2 increase, through implementation of its Transportation Improvement Program and its allocation of transportation funding;
- MTC monitors ridership gains annually; and
- MTC and the region's six major transit operators achieve a regional transit ridership increase of 15% over 1982-83 levels.

Id. See also TCM 2, 1982 Plan, Att. 2. The Court should also include deadlines as well as specific guidance to govern MTC's and MUNI's implementation of each of these TCM 2 steps, to provide reasonable assurances to the Court, to Bayview Advocates and to the public that TCM 2 will finally be implemented.[14]

1. MUNI Should Amend Its Operating Plan by August 9, 2002 to Include at Least the Ridership Increase Measures It has Already Identified.

The first step in TCM 2's "Implementation Schedule" requires that the "6 major transit operators adopt FY 1983-87 plans by July, 1982." Att. 2. This Court described "this step . . . as requiring the operators to adopt plans, including productivity improvements, to facilitate increased transit ridership."

[14] Certainly the Court has the authority – indeed, the responsibility – to issue such guidance. As the Supreme Court observed in *Hecht Co. v. Bowles,* 321 U.S. 321, 329-30, 64 S.Ct. 587, 592 (1944): "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *See*

Bayview Hunters Point, 177 F. Supp. 2d at 1029. Because MTC can fund only transit projects contained in the transit agencies' operating plans, this step is obviously crucial. Without transit operators proactively identifying and including in their plans projects that would increase ridership on their systems, TCM 2 falls apart.[15]

The Court has recognized the importance of the operators' roles in implementing TCM 2. Rejecting MUNI's contention that only MTC could be held responsible for achieving the TCM 2 regional ridership increase, the Court reasoned:

> [W]hile TCM 2 imposes no individual ridership increase targets on each transit operator, it defies logic to conclude that, as a result, TCM 2 imposes no obligations on transit operators to help the region as a whole achieve the target increase. MTC operates no systems of public transit directly; thus, the only way the region could achieve a ridership increase would be for at least some of the individual transit operators to increase ridership.

Id. at 1028-29. "Consequently, this Court concludes that, while MTC bears the greatest responsibility in ensuring that the region achieves the target increase, the region's six major transit operators also share collective responsibility under TCM 2." *Id.* at 1029.

MUNI is, of course, one of the region's six major transit operators. Indeed, it alone carries almost 45 percent of the entire region's transit riders. While the Court disagreed with Bayview Advocates that MUNI's 1983 operating plan was inadequate under TCM 2, there can be no question that since 1983, MUNI has not taken sufficient responsibility for contributing to the TCM 2 ridership increase. The fact that its ridership has ***decreased by more than 22 percent*** since 1983 alone provides a dramatic indication that MUNI has failed to consider proactive measures for increasing (or recovering) its ridership. Tobey Dec at Table 3.[16] We know that MUNI has identified such measures (*see* Cohen Dec); it has simply failed to implement them.

This Court should order MUNI to amend its operating plan by no later than August 9, 2002 to include an additional chapter, as AC Transit has done, that proposes measures by which it can

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also U.S. v. Akers, 785 F.2d 814, 823 (9th Cir. 1986) (district courts have "considerable discretion to fashion appropriate injunctive relief").

[15] Of course, as the agency through which all transportation funding is funneled, MTC has the ability to considerably influence the operators to produce such ridership increase proposals – *e.g.,* by conditioning funding of other projects on the inclusion of ridership increase projects.

[16] Even using the "adjusted" number for MUNI's 1983 ridership preferred by MTC (*see* Argument II.B.5, *infra*), MUNI's ridership has declined by over 14 percent since 1983. Tobey Dec at Table 4.

substantially increase its ridership. The chapter should include all ridership-increasing measures included in MUNI's Vision for Rapid Transit that can be operational by November 9, 2006. It should also provide for each of the specific improvements proposed: (1) an estimate of the increased ridership expected to result from the improvement, (2) a timeline for its completion, and (3) an estimate of the cost for each project, both in capital expenditures and operating costs. AC Transit has done no less in its Strategic Vision. Ex. B-8 at Figure 5-8.

With a menu of projects for achieving ridership increases from MUNI and AC Transit, along with similar proposals that MTC may solicit and/or receive from other Bay Area transit operators, MTC can proceed to comply with its duties under TCM 2.

2. MTC Should Consult with the Six Major Operators by September 9, 2002 in Determining How to Achieve the 15 Percent Regional Ridership Increase.

The next TCM 2 implementation step directs: "MTC consults with operators on ridership targets by Jan., 1983." While concluding that "MTC failed to perform the required consultations," in light of its finding that MTC did in fact adopt 15 percent as the "actual target," the court considered the "consultation issue to be irrelevant." *Bayview Hunters Point,* 177 F. Supp. 2d at 1031.

However, because this step refers to "ridership targets" in the plural, Bayview Advocates believe the purpose of this consultation – or at least one of its purposes – is to determine the respective targeted contributions of each of the six major transit operators to the requisite regional ridership increase. Since, as the Court has held, MTC and the operators are jointly liable for ensuring that the region achieves the target increase, consultation between them is necessary to the successful implementation of TCM 2. Accordingly, Bayview Advocates request the Court to order MTC to consult with MUNI and the other five major operators by no later than September 9, 2002 to discuss the ridership increases each could contribute to the effort to achieve and maintain a 15 percent regional increase.

3. MTC Should Amend Its RTP and TIP by January 9, 2003 to Specify How It Will Achieve the TCM 2 Regional Ridership Increase Through Its Funding Allocations and to Establish Interim Milestones Toward that Target.

The third implementation step requires that "MTC, through implementation of the TIP and allocation of regional funds, seeks to ensure [the six major transit] operators' 5-year plans are implemented." MTC describes the RTP as its "policy and action statement . . . for addressing the

region's transportation needs over the next 25 years,"[17] and the "TIP" (Transportation Improvement Program) as its "primary spending plan for federal funding expected to flow into the region from all sources for transportation projects."[18] MTC's obligation to include in its TIP those ridership increase projects proposed by transit operators that it believes will accomplish the TCM 2 increase, and its corresponding allocation of funding to those projects, are the heart of TCM 2.

A project must be in the RTP to be included in a TIP, and it must be included in a TIP in order to receive federal funding.[19] Thus MTC's prompt amendment of its just-adopted RTP and TIP are essential to the implementation of TCM 2 by November 9, 2006. Accordingly, MTC should be directed to amend these plans by January 9, 2003 to incorporate projects that will accomplish the TCM 2 ridership increase. This would allow MTC a full four months after MUNI's amendment of its operating plan to review that operator's ridership increase proposals, along with AC Transit's proposals (which it will have received substantially earlier) and those other operators may submit, and to determine which mix of projects will best ensure that the TCM 2 increase will be achieved by the deadline.

Because of the critical importance of this TCM 2 step, MTC should be directed to include a separate section in both the TIP and RTP setting forth in one place, for the benefit of the public, Bayview Advocates and this Court, its plan for achieving and maintaining the TCM 2 increase. In that section, MTC should: (1) identify with specificity the transit projects it will fund in order to implement TCM 2; (2) for each such project, set forth the implementation schedule, the estimated annualized ridership gain expected to result from implementation of the project and the estimated cost; and (3) set interim milestones for the regional ridership increases to be gained by November 9 of 2004 and 2005, respectively.

While MTC will undoubtedly object that TCM 2 contains no such requirements, Bayview Advocates suggest that given the agency's 20-year failure to implement this measure, such assurances should be required by the Court at this juncture. As this Court observed back in 1990 with respect to MTC's failure to implement another 1982 SIP measure, "given the past history with respect to the

[17] Conformity Analysis (Ex. B-1) at 1
[18] Glossary, Citizen's Guide to "Transportationese," available at www.mtc.ca.gov/publications
[19] *See* 23 U.S.C. § 134(h)(3)(C), 23 C.F.R. §450.324(f)(2) and 23 U.S.C. § 134(h)(3)(A), (h)(5)(A), § 135(f)(2)(C)(ii), 23 C.F.R. § 450.332(d), respectively.

measure[] at issue, we conclude that this Court's involvement is necessary and perhaps crucial to ensuring timely compliance and enforcement." *CBE I,* 731 F. Supp. at 1461. Without MTC's disclosure of its plan for achieving and maintaining the TCM 2 ridership increase, and without interim milestones toward that increase, we could find ourselves in the same place in November 2006 as we are now – no closer to increasing regional ridership and once again starting from scratch.

4. MTC Should Annually Track Regional Ridership Levels to Judge TCM 2 Compliance for as Long as the Measure is in the SIP.

The final implementation step specified in TCM 2 is that "Ridership gains are monitored through annual RFP [Reasonable Further Progress] reports." While MTC no longer prepares RFPs, it does annually publish its Statistical Summary of Bay Area Transit Operators, a compilation of all major transit operators' FTA-reported and -audited statistics, including ridership levels. By November 9th of each year from 2002 until the 2006 TCM 2 deadline, MTC should be directed to submit this report to the Court, with copies to Bayview Advocates, so that MTC's progress toward and its ultimate compliance with the Court-ordered deadline for achieving the TCM 2 increase may be monitored.

5. MTC and MUNI Shall Ensure that the Bay Area Attains by November 9, 2006 and Maintains as Long as TCM 2 Remains in the SIP a Regional Ridership of at Least 579 Million Annual Boardings.

There is a dispute between the parties over the specific regional transit ridership level required by TCM 2. The dispute concerns MUNI's 1983 ridership which – because MUNI's ridership comprised over 58 percent of the total regional ridership in that year – has enormous impact on the baseline by which the 15 percent increase required by TCM 2 is calculated. MTC explains:

> As reported in its 1986 and 1987 [operating plans], methodology errors in determining Muni's annual ridership resulted in FY 82/83 numbers that were most likely too high. Muni has advised that its actual ridership for FY 82/83 is more likely to have been approximately 264 million annual riders (compared to about 293 million riders that has been assumed for that year).

See, e.g., Conformity Analysis, Att. 1 at 12. *See also* Tobey Dec at Table 3-5. In fact, MUNI's ridership in 1983 was not "assumed" to be 293 million riders, but rather officially reported by MUNI to the Federal Transit Authority in 1983. *See* Yung Liab. Dec.

The fact that MUNI – as the 1987 deadline for achieving TCM 2 approached, with regional ridership plummeting, rather than increasing – revisited its 1983 estimate and decided it was too high is

not compelling. The TCM 2 increase should be calculated on the basis of the ridership levels reported in 1983 and consistent with the 1982 numbers MTC and MUNI had before them when they adopted TCM 2, not some other number MUNI has recently decided is "more likely." Conformity Analysis, Att. 1 at 12. This results in a TCM 2 ridership target of 579 million annual boardings. *See* Tobey Dec at Table 5.[20]

III. MTC SHOULD BE ENJOINED FROM APPROVING FUTURE TIPS OR TIP AMENDMENTS UNTIL SUCH TIME AS ITS RTP AND TIP PROVIDE FOR TIMELY IMPLEMENTATION OF TCM 2.

The Court should, in the exercise of its equitable powers, ensure in its remedial order that MTC does not take any additional action to obstruct the remedial scheme ultimately ordered by the Court to implement TCM 2. As indicated below, MTC has already taken one such action, in violation of both the Clean Air Act and federal transportation law.

Thus the Court's order should require MTC to comply with the statutory duties imposed on metropolitan planning organizations such as MTC with respect to approvals of TIPs or TIP amendments. The Clean Air Act expressly prohibits MTC from adopting or amending a TIP until the TIP provides for the timely implementation of TCM 2. The Act directs that:

> [N]o metropolitan transportation organization . . . shall adopt or approve a transportation improvement program of projects ["TIP"] until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan [as defined by §7602(q), *i.e.,* the SIP].

42 U.S.C. §7506(c)(2)(B). Where implementation of TCMs are "behind the schedule established in the applicable implementation plan," a TIP or TIP amendment may be approved only if both the metropolitan transportation organization and the U.S. Department of Transportation have "determined that past obstacles to implementation of the TCMs have been identified or are being overcome, and that

[20] As the Court noted in its liability ruling: "Curiously, some of the numbers provided by Plaintiffs differ slightly (generally by less than 1%) from those provided in MTC's reports." *Bayview Hunters Point*, 177 F. Supp. 2d at 1032 n. 25. Bayview Advocates have scrutinized the difference between its and MTC's 1983 numbers (the source of all the discrepancies) and determined that MTC's numbers are lower than Bayview Advocates' by almost exactly the number of paratransit riders reported for 1983. Apparently MTC excluded paratransit ridership from the baseline year, while at the same time including paratransit riders in its numbers since 1988/89. Conformity Analysis, Att. 1 at 12. While as the Court notes, the difference is not significant, apples should be compared to apples in calculating the required increase, with paratransit ridership either excluded from or included in both sets of numbers. For this reason, Bayview Advocates continue to use their numbers. Tobey Dec at ¶15.

all State and local agencies with influence over approvals or funding for the TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control." 40 C.F.R. § 93.113(c)(3).

Federal transportation law contains similar requirements. Department of Transportation ("DOT") regulations require that TIPs in non-attainment areas (like the Bay Area for ozone) "give priority to eligible TCMs identified in the approved SIP in accordance with the U.S. EPA conformity regulation (40 CFR Part [93]) and shall provide for their timely implementation." 23 C.F.R. § 450.324 (d). Accordingly, metropolitan planning organizations such as MTC must identify in the TIP each project listed as a TCM in the SIP. *Id.* at § 450.324(g)(6). *See also id.* at §§ 450.330(b), 450.332(d) (before approving a TIP, federal agencies must make determination that "priority has been given to the timely implementation of transportation control measures contained in the SIP.")

MTC is indisputably "behind the schedule established in the applicable implementation plan " with respect to TCM 2. 40 C.F.R. § 93.113(a). The SIP requires the TCM 2 ridership to have been accomplished by 1987 (Att. 2), and this Court has found that MTC has yet to achieve that increase. Nonetheless, MTC literally ignored Clean Air Act and federal transportation law when it amended its TIP just this past Friday, March 15, 2002. *See* MTC Resolution 3432 (Ex. B-7). In fact, MTC does not even ***mention*** TCM 2 in this latest TIP, let alone specify those measures slated for funding by the TIP that would ensure "timely implementation" of TCM 2. The "Findings" section of MTC's Conformity Analysis for the TIP contains the only "discussion" of TCM 2, reports only that:

> TCM 2 [has been] fully implemented to the extent possible, but by its own terms is out of date. A recent court order has found that there is a continuing obligation to obtain a 15% regional transit ridership increase. Further proceedings are still pending in regards to the order.

Conformity Analysis, Att. 1 at 12. Neither the TIP nor the Conformity Analysis demonstrates that MTC has "determined that past obstacles to implementation of the TCM[] have been identified or are being overcome," as required by the Clean Air Act regulations. 40 C.F.R. § 93.113(a). And while the Conformity Analysis "projects" that Bay Area transit ridership "may increase to as high as 600m in 2006/2007" (*id.*), this is hardly the demonstration that the TIP, MTC and other State and federal agencies that influence transit funding "are giving maximum priority to approval or funding of TCMs

over other projects within their control." *Id.* *See also* 23 C.F. R. §§ 450.324(d), 450.330(b), 450.332(d).

Its latest TIP amendment allocates $328 million in funding to the construction of new highway projects.[21] Obviously, a Court order prohibiting future approvals by MTC of TIPs or TIP revisions is necessary to ensure that transportation funding is still available to implement TCM 2 as directed by this Court in its remedial order. MTC should be enjoined from taking future such actions until such time as it has amended both its RTP and its TIP to specify funding allocations to transit ridership projects sufficient for the region to achieve by November 9, 2006 and then maintain the TCM 2 ridership increase, in accordance with this Court's order.

IV. MTC'S AND MUNI'S MAXIMUM EXPOSURES TO THE ASSESSMENT OF CIVIL PENALTIES ARE $25 AND $13 MILLION, RESPECTIVELY.

The Clean Air Act authorizes the assessment of civil penalties against defendants in citizen suits of up to $27,500[22] for each day of violation and directs that "the days of violation shall be presumed to include the date of such notice [of intent to sue] and each and every day thereafter until the violator establishes that continuous compliance has been achieved." 42 U.S.C. § 7413(e)(1-2). In this case, the Court may assess daily penalties against MTC beginning on September 17, 1999, the date it was first notified by plaintiff TRANSDEF that it was in violation of TCM 2, and against MUNI beginning on November 15, 2000, when it was so noticed by Bayview Advocates, through the date MTC and MUNI finally implement TCM 2. Thus MTC is subject to civil penalties up to a maximum of $25,162,500, and MUNI to a maximum of $13,475,000.

CONCLUSION

As this Court observed in 1990 with respect to MTC's failure to implement another measure contained in the 1982 SIP: "Compliance with this Plan being long overdue, time is of the essence." *CBE I,* 731 F. Supp. at 1460. Twelve years down the line, and fifteen years after the requisite regional ridership increase was to have been achieved, it could not be more obvious that, once again, "this Court's involvement is . . . crucial to ensuring timely compliance and enforcement." *Id.*

[21] The list of projects allocated for funding by MTC in TIP Amendment 01-32 is available at www.mtc.ca.gov/publications/tip/tipind.htm.

Considering MTC's and MUNI's past history of neglect with respect to TCM 2, compounded by their continued inaction in the face of the Court's November 9, 2001 liability order, it is clear that this Court's remedial scheme must be specific and deadline-driven if Bay Area residents are ever to enjoy transit improvements sufficient even to attract TCM 2's modest increase in ridership. In light of MTC's adoption last week of a new TIP amendment, it is equally clear the Court cannot trust this agency to avoid taking illegal action that could potentially interfere with its ability to ensure that the TCM 2 ridership increase is accomplished as expeditiously as possible. Rather, it must explicitly enjoin it from taking further such actions pending full implementation of the measure.

Accordingly, Bayview Advocates request that this Court issue an order: (1) permanently enjoining MTC and MUNI to comply with TCM 2 on the timeline and in accordance with the specific guidance set forth above; (2) prohibiting MTC from approving any further TIP or TIP amendment until such time the TIP provides for implementation of TCM 2 by the Court-ordered deadline; and (3) declaring that MTC and MUNI are potentially subject to the assessment of civil penalties under the Clean Air Act in the maximum amounts set forth above.

Respectfully submitted on this 19th day of March 2002,

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[22] The statutory penalty amount increased from $25,000 to $27,500 per day under the Civil Monetary Inflation Adjustments. *See* 40 C.F.R. § 19.4.