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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 REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION AND DECLARATORY RELIEF RE: CIVIL PENALTIES Hearing: June 10, 2002 Time: 10:00 a.m. Judge: Hon. Thelton E. Henderson

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INTRODUCTION

Transportation Control Measure 2 ("TCM 2"), first incorporated into the Bay Area Air Quality Plan (or "SIP") in 1982 and still in the SIP to this day, requires defendant Metropolitan Transportation Commission ("MTC") to increase ridership on public transit in the San Francisco Bay Area by 15 percent over 1982-83 levels, pursuant to a four-step implementation strategy involving close coordination with transit operators. TCM 2 was developed by MTC itself and explicitly represented to the public and the Environmental Protection Agency ("EPA") as a method of reducing ozone pollution from cars.

Twenty years later, despite a huge increase in population, Bay Area transit use is hovering near 1983 levels – representing a ***decrease*** in per capita ridership of ***20 percent***. And still the Bay Area is not in attainment with the national health-based standard for ozone. Tired of breathing air that is dangerous to their health and equally frustrated by the lack of adequate transit opportunities in the Bay Area, the coalition of plaintiffs herein (collectively "Bayview Advocates") filed this Clean Air Act citizen enforcement suit with one simple goal: to compel MTC at long last to implement TCM 2.

On November 9, 2001, this Court found MTC "liable for failing to achieve the increase in transit ridership required under TCM 2" and further found that MTC's obligations under TCM 2 are ongoing for as long as that measure remains in the SIP. *Bayview Hunters Point Community Advocates, et al. v. Metropolitan Transportation Commission ("Bayview"),* 177 F. Supp. 2d 1011, 1026-32 (N.D. Cal. 2001). Given the minimal briefing on remedies, the Court chose not to issue its remedial order with its liability ruling. *Id.* at 1032. Hopeful that the parties could "develop an appropriate remedy" without its assistance, the Court directed them to a mandatory settlement conference, the failure of which necessitates the current briefing.

Nonetheless, the Court emphasized not only that "it has the ***authority*** to enforce both the implementation strategies and the 15% ridership increase" required by TCM 2 (*id.* at 1026), but also that it is "in fact ***obligated*** to enforce such provision[s]" (*id.* at 1021) (emphasis added). Even in deferring a ruling on remedies, the Court specifically referenced "a scheme for ***injunctive relief***." *Id.* at 1032 (emphasis added).

Thus Bayview Advocates, both in settlement negotiations and in the instant briefing, have

focused on devising a remedial scheme to ensure that TCM 2 is finally implemented. They seek an order that simply directs MTC to comply with TCM 2 – by following its implementation steps and achieving the ridership increase it requires – on approximately the same timeline MTC incorporated into TCM 2 twenty years ago. They also request that MTC be directed to set some interim ridership increase milestones, so the parties are not back before this Court in the same posture five years from now, with TCM 2 still unimplemented. Finally, Bayview Advocates seek an injunction preventing MTC from further amending its transportation plans to divert funding from transit improvements – but only until MTC has amended those plans, as required under TCM 2 – to specifically ensure that the ridership increase will be realized. Pursuant to this remedial scheme, Bay Area residents would finally enjoy the 15 percent regional ridership increase by 2006 – 19 years after the 1987 deadline specified by TCM 2.

MTC does not respond with its own proposed remedial scheme for implementing TCM 2. Instead, it clings to the stance it has taken throughout this litigation – to insist adamantly that it should not be required to implement this SIP measure. The bulk of the 45 pages of briefing and 200 pages of declarations submitted by MTC and the amici congestion management authorities is devoted to rearguing the merits of the case with an array of irrelevancies intended to convince the Court that enforcing TCM 2 would be a bad idea – because TCM 2 will not have any air quality benefits, despite the fact that MTC itself designed it as an ozone control measure; because the very premise of TCM 2 that ridership can be increased by thoughtful planning and funding is flawed; because providing better transit for poor people in the inner cities does not reduce air pollution; and because amending its Regional Transportation Plan ("RTP"), adopted ***after*** the Court issued its liability order, to provide for the expeditious implementation of TCM 2 would just be too hard. Thus MTC urges the Court to refrain from issuing any injunctive relief whatsoever to enforce TCM 2.

MTC knows better. It has litigated this very issue in both the liability and remedies contexts through several phases of the earlier CBE/Sierra Club litigation and in this case. Consistent with a large body of uniform case law on this point, this Court has repeatedly advised MTC that its recourse in avoiding its obligations under TCM 2 lies not with this Court, but solely with an EPA-approved amendment removing TCM 2 from the SIP. "Absent such a formal revision, [MTC] is 'relegated to a lone option: compliance.'" *Citizens for a Better Environment v. Wilson* ("*CBE III*")*,* 775 F. Supp.

1291, 1296 (N.D. Cal. 1991) (quoting *Friends of the Earth v. Carey ("FOE")*, 535 F.2d 165, 178 (2nd Cir. 1976), *cert. denied*, 434 U.S. 902, 98 S. Ct. 296 (1977)). Just as the Court refused to write TCM 2 out of the SIP by interpreting it as requiring no ridership increase, as MTC urged during the liability litigation, the Court should refuse MTC's present request that it decline to order enforcement of TCM 2, effectively writing the measure out of the SIP.

Interestingly, at the same time MTC argues that it should not be ordered to actually achieve the 15 percent or any other ridership increase by any given date, it simultaneously assures the Court that no injunction is necessary, since its projections show that implementation of its new RTP will increase ridership beyond the TCM 2 target level, albeit nearly six years after the liability order. This is not the first time MTC has asked this Court to accept its assurances that it is finally on course toward implementing a long overdue SIP measure in lieu of an injunction mandating such implementation by a date certain. As this Court appropriately responded, "[G]iven the past history with respect to the measures at issue, we conclude that this Court's involvement is necessary and perhaps crucial to ensuring timely compliance and enforcement." *Citizens for a Better Environment v. Deukmejian ("CBE I")*, 731 F. Supp. 1448, 1461 (N.D. Cal. 1990).

ARGUMENT

I. INJUNCTIVE RELIEF IS BOTH APPROPRIATE AND NECESSARY TO ENSURE THAT TCM 2 IS INDEED FINALLY IMPLEMENTED.

A. The Appropriate Remedy for a SIP Violation is an Enforcement Order Mandating Expeditious Compliance with the SIP Measure at Issue.

While injunctive relief must always be supported by a balancing of harms, courts have been unanimous in concluding that the appropriate remedy for redressing a violation of a SIP measure is an order mandating its expeditious implementation. *See, e.g., FOE,* 535 F.2d at 173 ("[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 orders for its enforcement."); *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"); *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); *Citizens for a Better Env't v. Deukmejian* ("*CBE II*"), 746 F. Supp. 976, 985 (N.D. Cal. 1990) ("courts must require that overdue SIP commitments be satisfied without delay and without rebalancing costs and benefits already balanced"); *Coalition for Clean Air v. SCAQMD*, No. CV97-6916-HLH, 1999 U.S. Dist. LEXIS 16106, at *13 (C.D. Cal. Aug. 27, 1999) ("the Court's duty is to enforce [the SIP]").

MTC offers no reason why the standard remedy for a SIP violation should not issue in the present case. In urging the Court to refrain from issuing an order enforcing TCM 2, MTC asks the Court to believe both that: (1) because it is virtually impossible for MTC to ever achieve a ridership increase, of any amount, by any date, an order to that effect would be "ineffective and unwarranted;" and (2) the ridership increase required by TCM 2 is such a near certainty under the current RTP that an order to that effect is unnecessary. There is simply no way for the Court to square these contradictory assertions, and in any event, neither proposition excuses MTC from implementing TCM 2.

B. MTC's Request that It be Excused from Enforcing TCM 2 Because It Now Believes It Cannot "Ensure" the Ridership Increase must be Denied.

Despite the fact that MTC itself developed and adopted TCM 2, explicitly requiring MTC to "ensure" that a specific ridership increase is achieved by a specific deadline, it now proclaims that "an injunction compelling MTC to 'ensure' that which no one can 'ensure'… is decidedly not in the public interest." Opp. at 1.[1] MTC maintains that despite all it has done and continues to do to promote public transit, it simply "cannot guarantee that people will board transit vehicles" to the extent of ensuring ***any*** increase in transit ridership over ***any*** timeframe, ***ever***. *Id.* at 3-5, 21. Thus, MTC argues, it should be categorically excused from complying with TCM 2.

MTC's and the amici's own evidence, however, demonstrates that increasing ridership on public transit is hardly "rocket science." MTC's own expert concludes that "the collected body of behavioral research in transportation is unequivocal" in demonstrating that "[p]eople can be convinced to change their travel patterns quite dramatically in response to changes in conditions affecting their choices." MTC McCleary Dec, Ex. B at 335. The experts agree that lower fares, more frequent service and reliable schedules are major factors influencing residents' willingness to move from their cars to transit.

Id. at 336-337. *See also* MTC Wachs Dec; Rubin Dec. ¶¶70-72. All of these are factors that MTC, through its transportation planning and funding decisions, can influence.

Further, contrary to MTC's repeated proclamations that the most significant factors in encouraging transit use are outside its control, MTC in fact does have the authority to influence at least two factors – "the comparative costs of fares . . . and of gasoline" and "parking surcharges and restrictions" that MTC (Opp. at 7) and its expert (Wachs Dec. ¶¶ 15(a), 16) characterize as having "enormous influence" on travel choices.[2] It has simply chosen not to exercise its authority to do so.

MTC would have the Court believe that it is flexing all the funding toward transit that it can justify, allocating 77 percent of the RTP funding to transit. Opp. at 3. However, MTC's claims are grossly exaggerated. Over 73 of the 77 percent of RTP funding MTC claims to allocate to transit is earmarked exclusively for transit spending by statute and/or voter initiative. Rubin Dec. ¶31. Indeed, 19 percent of the funding MTC credits itself for allocating to transit are fare box revenues, which are collected from transit riders by operators and remain with the operators, never even entering MTC's hands. *Id*. at ¶20. When one reads the fine print, MTC admits that less than half of the "Track 1 funds," over which it has greater control, are allocated to transit. MTC Opp. Heminger Dec. ¶17. But even this is an exaggeration. Of the Track 1 funds over which MTC has complete discretion, nearly 60 percent are allocated to freeways, roads and non-transit-only HOV lanes. Rubin Dec. ¶¶42-43. The excuse MTC offers for not funding many of the proposed improvements to bus systems is lack of funding for operating expenses. Opp. at 19 n. 14. Yet it is MTC that chooses to withhold two billion dollars of federal funding that could be used for operations. Virtually no other major metropolitan planning agency refuses, as MTC does, to utilize federal formula grants for this purpose. Rubin Dec. ¶¶60-66.

Finally, while MTC touts itself as "the nation's leader among regional planning agencies in advancing public transit" because it spends more on transit than the other large metropolitan areas (Opp.

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[1] Bayview Advocates' opening and MTC's opposing brief on remedies are referenced herein as "Memo" and "Opp," the Amicus Brief as "Amicus" and declarations by the last name of the Declarant (with "Opp." or "Amicus" as relevant).

[2] MTC was granted legislative authorization in 1995 to place on any county's ballot a measure imposing a 10-cent tax on gasoline to be used for transit (*see* Ex. E-19) and in 1999 was advised by General Counsel to the California Air Resources Board that it has the authority to condition RTP transportation funding allocations on recipient counties instituting such measures as "parking cash-out," a program heralded by MTC's own expert for its dramatic influence on mode choice. Tobey Reply Dec., Ex. E-18; *see also* MTC Wachs Dec. ¶16 and Exs. B and C.

at 4), it does not reveal the results Bay Area residents are getting for all that spending. Of the metropolitan areas for which such data is available (eight of the ten largest areas), the San Francisco Bay Area anticipates increases in both absolute and per capita transit ridership ***far below average*** and indeed ***less than half*** the increases projected by Los Angeles. Pelc Dec. ¶16. More alarming still for the breathing public in the Bay Area, MTC's transportation spending will earn the Bay Area the ***highest*** per capita increase in "vehicle miles traveled," the measure of automobile travel, of any of these regions (21 percent compared to an average of 6 percent). *Id.*

MTC accuses Bayview Advocates of naïvely assuming that more money expended on transit will lead to increased ridership. In fact, Bayview Advocates are well aware that transportation funding is limited; they simply want MTC to spend the public's money as wisely as possible, and in a manner that ensures the ridership increase required under TCM 2.[3] MTC knows how to increase transit use. Bayview Advocates firmly believe that if MTC were to consider the ridership increase potential and cost-efficacy of transit projects as essential criteria in evaluating which projects it will fund, Bay Area residents would finally see the transit improvements TCM 2 promised so long ago.

But in the final analysis, for the purposes of determining remedies in this case, MTC's difficulties in promoting transit use, perceived or real, are irrelevant. This Court has already heard and rejected the very excuses MTC now advances as to why it cannot implement TCM 2:

> States have an unwavering obligation to carry out federally mandated SIPs; thus, where a SIP is violated, liability attaches, regardless of the reasons for the violation." *CBE I,* 731 F. Supp. at 1458. Defendants could have taken the potential effect of individual preferences into account when setting the ridership increase target to be achieved. ***Now that the target increase has been set, Defendants' only alternative, besides compliance, is to petition the EPA for removal of TCM 2 from the SIP; this Court lacks any power to engage in SIP modification or revision.***

Bayview, 177 F. Supp. at 1028 (emphasis added). As the Third Circuit has emphasized:

> It is not for a federal court to revise a SIP merely because it thinks it is better able to create economic efficiency. . . . If parties think that changes in circumstances make the requirements of the SIP unduly harsh, the proper course in general is to comply with administrative procedures for revising the SIP.

American Lung Ass'n of New Jersey v. Kean, 871 F.2d 319, 329 (3rd Cir. 1989).

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[3] For example, nearly half of all Track 1 funding for transit is allocated by MTC to only two projects, costing *3 and 14* times more per rider than other unfounded transit proposals. Rubin Dec at ¶¶44-59.

C. Nor Can MTC's Casual Assurance that the Region should Achieve the TCM 2 Ridership Increase by 2007 Substitute for an Injunction Ensuring that It Does.

At the same time it is advising the Court that it cannot possibly be expected to commit to achieving any ridership increase by any given date, MTC also assures the Court that an injunction ordering the implementation of TCM 2 is unnecessary because MTC predicts that regional ridership will increase to some 600 million annual boardings by 2007, exceeding the TCM 2 target. Opp. at 8.

While Bayview Advocates are pleased at MTC's confidence that the RTP will achieve the TCM 2 target, nowhere in the RTP record nor in MTC's opposition papers can they find any evidence of actual "forecasting" or modeling of these projections. Rather, these projections were inserted into a chart for the first time in the February 2002 draft conformity analysis for the RTP, backed only by a table listing seven "Major Near Term Transit Expansion Projects that Will Promote Ridership Increases." Nowhere in the RTP are there any ridership projections for these projects. Tobey Reply Dec. ¶16. Other sources offer every indication that these projects will *not* bring about the TCM 2 increase by 2007.[4]

Further undermining Bayview Advocates' confidence that the TCM 2 increase is "in the bag" is the fact that transit ridership has crashed since MTC did its RTP projections. MTC purports to have "mathematically adjusted" to 575 million its projection that ridership will reach 600 million annual boardings by 2007 to reflect "recent reported declines in ridership," but it does not disclose the extent of these declines. Opp. at 8, n.5. Even assuming no declines in ridership on either MUNI or AC Transit (which together carry 60 percent of regional transit riders), and assuming that the declines experienced by other major operators will stop at current levels, regional ridership has still plummeted by nearly 12 million annual boardings over the numbers MTC uses in both its RTP and its Opposition. Tobey Reply Dec. Tables 1-6. This brings regional ridership to a level only 3 percent above 1983 ridership. *Id.*

Moreover, MTC's "adjusted" number does not account for the further declines in ridership that will surely ensue from the numerous fare increases and service cuts recently adopted and/or proposed by

[4]Ridership increases for two of the projects have never been projected, while the minimal increase on MUNI's Third Street line is not anticipated before 2011. There are no projections prior to 2010 on the BART extension to SFO. Tobey Reply Dec. ¶¶17-23 and Exs. E-12 through E-15.

the Bay Area's seven largest transit operators.[5] Given that the cost and speed of transit are the two most important factors influencing ridership, according to MTC's and the amici's own experts, it is doubtful that ridership will continue to increase at the rates projected by MTC.

In any event, courts have found that "promise[s] to change established patterns of conduct [are] not sufficient to overcome [a] strong record of past neglect." *Cupolo v. BART*, 5 F. Supp. 2d 1078, 1085 (N.D. Cal. 1997). Certainly MTC's current rosy projections (particularly when juxtaposed with its adamant protest that it cannot ensure ***any*** ridership increase commitment) are no substitute for injunctive relief. MTC's promises that it will comply with its SIP obligations without the need for a remedial order should not have much credibility with this Court, which a decade ago noted that: "[A]s we have responded to this similar refrain before, defendants' past history, and the Court's experience with this litigation, convinces us that continuing judicial oversight at the remedial stage is necessary to ensure timely compliance." *CBE II,* 746 F. Supp. at 982.

D. A Declaratory Judgment Cannot Substitute for Injunctive Relief Mandating MTC's Compliance with TCM 2.

MTC offers the presumably straight-faced suggestion that this Court should issue as its sole remedy "a declaratory judgment holding that, based upon the best available current forecasts, a five year period through the end of fiscal year 2006/07 is a reasonable period of time for transit ridership to rise to the TCM 2 target ridership level, and that this period provides for implementation of TCM 2 'as expeditiously as practicable.'" Opp. at 2. Thus, MTC asserts, "withholding injunctive relief" in this case would not leave Bayview Advocates "without relief." Opp. at 15. Of course, such "relief" would constitute nothing more than permission from the Court for MTC to continue evading its obligations under TCM 2. Certainly it would do nothing to advance the enforcement of TCM 2.

Declaratory relief is intended to "serve a useful purpose in clarifying and settling the legal relations between the parties, and . . . [to] terminate the controversy." *Los Angeles County Bar Ass'n v.*

[5]Since March 2002, SamTrans, VTA, Golden Gate Transit, and Caltrain (which has the seventh largest ridership among Bay Area transit operators) have all approved fare increases, while Santa Clara VTA has approved major service cuts (eliminating seven bus lines) and BART has shortened trains. Moreover, public hearings have already been scheduled by AC Transit and BART to address fare increases and by SamTrans and Caltrain to address service cuts. Tobey Reply Dec. ¶¶7-15.

Eu, 979 F.2d 697, 703 (9th Cir. 1992).[6] The declaratory relief requested by MTC would accomplish neither of these functions. Even a declaratory judgment embodying the Court's liability ruling, while appropriate, is insufficient by itself to ensure implementation of TCM 2, as evidenced by MTC's intransigence during the six months since the Court issued its liability order.

II. THE INJUNCTIVE RELIEF REQUESTED BY BAYVIEW ADVOCATES, TRACKS THE TCM 2 IMPLEMENTATION PLAN AND SCHEDULE, AND IS NARROWLY TAILORED AND EMINENTLY REASONABLE.

A. MTC should be Ordered to Follow the Four Implementation Steps It Incorporated into TCM 2 to Ensure that the Ridership Increase is Achieved.

This Court repeatedly emphasized in its liability order, as in each of its previous *CBE* orders, that MTC's duties under the SIP are continuous and ongoing. In this case, the Court explicitly ruled that "implementation of transportation control measures must continue permanently until they are either substituted or removed from the SIP." *Bayview*, 177 F. Supp. 2d at 1022. It just as explicitly ruled that with respect to TCM 2, "[s]uch implementation requires both completion of the four-step 'implementation schedule' listed in the [SIP] – as is clear from the language of TCM 2, and which Defendants do not contest – as well as a 15% increase in regional transit ridership." *Id.* at 1026. It hardly makes sense for the Court, in crafting its remedial order to mandate enforcement of the TCM 2 ridership increase, to ignore the very steps MTC itself designed to ensure the increase is attained.

Bayview Advocates address the four TCM 2 implementation steps at some length at pages 13-18 of their Opening Memorandum. The first step requires the six major transit operators to adopt 5-year operating plans "to facilitate increased transit ridership" (*id.* at 1029), while the second step requires MTC to consult with the operators to determine the projects which, if funded, will ensure that the regional increase is achieved. *See* Memo at 14-16. With this week's Settlement Agreement, MUNI has now joined AC Transit in amending its operating plan to include an array of projects that would substantially increase ridership; thus, the first TCM 2 step will be satisfied by both of the defendant operators. Because, as this Court has emphasized, TCM 2 requires the close collaboration of MTC and the transit operators (*Bayview,* 177 F. Supp. 2d at 1029), MTC should be directed by this Court to

[6] See also *State Farm v. Mhoon*, 31 F.3d 979, 983 n.5 (10th Cir. 1994); *Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1001 (2d. Cir. 1969); *Panhandle Eastern Pipe Line v. Michigan Consol. Gas Co.*, 177 F.2d 942, 944 (6th Cir. 1949); *Goldwyn v. United Artists*, 113 F.2d 703, 709 (3d. Cir. 1940).

consult with the six major transit operators by September 9, 2002.

The third TCM 2 step is the mechanism by which MTC ensures that sufficient individual operator ridership increase proposals "are implemented through implementation of the TIP and allocation of sufficient funding" (*Bayview* at 1028) to achieve the 15 percent regional ridership increase. As Bayview Advocates have previously explained (Memo at 16-18), because a project must be included in the RTP to be included in the Transportation Improvement Program ("TIP"), MTC must amend both its RTP and TIP to ensure that the TCM 2 ridership increase is reached by the deadline ordered by this Court. The Court should order MTC to do so by no later than January 9, 2003. Bayview Advocates' request that MTC be directed to include as a separate section of the RTP and TIP a detailed description of the specific ridership increase scheme it has determined will achieve and maintain the TCM 2 increase (Memo at 17), is entirely reasonable. After 20 years of non-implementation of TCM 2, the public deserves the assurances such a Court order would provide. And the parties, the Court and the public need 2004 and 2005 interim ridership increase milestones to be included in the RTP/TIP section to determine whether MTC and the operators are in fact making progress toward the TCM 2 increase deadline set by the Court. Otherwise, we could all be back before this Court in exactly the same position five years after the Court's liability order.

MTC and its amici have attempted to convince the Court that if MTC is ordered to add a chapter to the RTP describing its strategy for implementing TCM 2, life as we know it will grind to a halt in the Bay Area. While the sheer volume of paper devoted to this effort is impressive, the content is less so. Assuming MTC's claim that the 2001 RTP already provides for an increase in regional ridership of "55 million boardings in excess of the TCM 2 target" (Opp. at 8) is both genuine and accurate, the exercise of amending the RTP and TIP should be far from burdensome. On the other hand, if for some reason MTC does not expect that the 2001 RTP will enable MTC to achieve the required 15 percent ridership increase as expeditiously as possible, or if further consideration of this matter leads MTC to that conclusion, then amending the RTP and TIP with an overriding goal of providing for the TCM 2 ridership increase is all the more necessary to ensure compliance with TCM 2. Surely MTC cannot be permitted to adopt the current RTP ***after*** it had been fully apprised by this Court of its obligations under TCM 2 and then argue as a defense to TCM 2 implementation that it would be too much trouble to go

back and revise it to comply with its SIP obligations.

The fourth and final TCM 2 step requires MTC to annually monitor ridership levels. Bayview Advocates have proposed that MTC be directed to report to the Court by November 9th of each year beginning in 2002 on its progress toward and its ultimate compliance with the Court-ordered deadline for achieving the TCM 2 increase. As is the case with the first and second of the TCM 2 steps, MTC does not specifically object to an order requiring such reporting. Instead, MTC rests its defense on its blanket objection to complying with the TCM 2 implementation scheme at all.

B. MTC should be Ordered to Achieve by 2006 and Thereafter Maintain a Regional Ridership of at Least 579 Million Annual Boardings.

In crafting TCM 2, MTC considered five years an adequate period within which to achieve the 15 percent ridership increase. Bayview Advocates proposed that the Court allow MTC until November 9, 2006 – a full five years after the liability order – to comply with TCM 2. Memo at 12-13. MTC responds by asserting that annual regional ridership levels can only be determined as of June 30, the end of its fiscal year. Instead of agreeing to judge its compliance with TCM 2 as of June 30, 2006, only months short of the five-year timetable, MTC instead asks for yet another full year, to June 30, 2007. But MTC can easily compile monthly regional ridership statistics; all that is needed is for MUNI to institute monthly reporting, hardly a difficult task. Rubin Dec. ¶¶104-109. Bayview Advocates remain adamant in their belief that the TCM 2 deadline must not be extended beyond 2006; if MTC wants to base its compliance with TCM 2 on its fiscal year, the deadline should be set at June 30, 2006.[7] Twenty years down the line, the TCM 2 ridership target is far from ambitious; in fact, achieving the target by 2006 would bring regional ridership to a level that would still be ***14.5 percent less than per capita ridership in 1983.*** It is time to get on with it.

The remaining dispute concerns whether the 1982-83 ridership upon which the required 15 percent ridership increase level is calculated under TCM 2 should be based on the 1982-83 MUNI ridership of 293 million annual boardings that was actually reported by MUNI at the time to the UMTA,

[7] Bayview Advocates have bent over backwards to be conservative in their interpretation of TCM 2 throughout this litigation. They have never suggested that the target be adjusted to reflect the 30 percent increase in population; that the regional ridership be determined by reference to the six major operators alone, despite the fact that TCM 2 on its face contemplates just that; or that the TCM 2 timetable be accelerated to two or three years, despite the fact that courts, including this Court, have routinely ordered overdue SIP implementation on schedules far shorter than those originally provided in the SIP.

the agency then responsible for collecting ***and vetting*** such data (Rubin Dec. ¶93), or whether it should be based on the new "guestimate" of "approximately 264 million annual riders" that MTC and MUNI have devised for purposes of this litigation. MTC claimed in its RTP Conformity Analysis that the reported number is "most likely too high," and the new estimate of 264 is "more likely." MTC Brittle Opp. Ex. A at 12. Now, MTC characterizes the reported ridership as "wildly overstated" and the litigation estimate as "far more accurate." Opp. at 24.

In fact, MUNI's current estimate is highly questionable. MUNI arrives at its estimate by "interpolat[ing]" ridership between 1978-79, "the last year for which credible ridership estimates are available," and 1984-85, the first year MUNI used its new sampling methodology. MTC Straus Dec. ¶18. But MUNI itself questions the credibility of its 1978-79 data (*id.* ¶10); in fact, MUNI failed to report its ridership for that year altogether. Rubin Dec. ¶89. At the same time, MUNI contends that its methodology for calculating its 1982-83 was "sophisticated for its time." MTC Straus Dec. ¶12. Neither MTC nor MUNI explain why MUNI's 1982-83 estimates should be any less reliable than those of the other operators. Further, there is a good explanation for the sharp increase in ridership reported in 1982-83 – namely, the MUNI Metro light rail system began service in 1980 and was fully operational by 1982. Rubin at ¶91. Finally, MUNI attempts to explain away its failure to correct its "overstated" ridership report to UMTA "because to do so would have imposed an administrative burden without conferring any benefit to MUNI in operating its system." MTC Straus Dec. ¶17. MUNI does not acknowledge that had it reported this correction, its proportion of a huge pot of federal funding would almost assuredly have been reduced accordingly. Rubin at ¶¶94-95. MUNI and MTC should not be permitted to derive benefit from a supposedly inflated number back in 1983 and now, when that number might make it tougher to reach the TCM 2 ridership target, deny its validity.

C. Enjoining MTC from Diverting Additional Transportation Funding Away from Transit Until MTC has Amended Its RTP and TIP to Provide for TCM 2 is Hardly Unreasonable.

MTC's latest TIP amendment, adopted on March 15, 2002, allocates $328 million in funding to the construction of new highway projects. It is obvious that a Court order enjoining future TIPs and TIP amendments – just until MTC amends its RTP and TIP to include its program for attaining the TCM 2 ridership increase as expeditiously as possible – is necessary to ensure the availability of sufficient

transportation funding for whatever measures MTC determines necessary to achieve the expeditious implementation of TCM 2. As Bayview Advocates have demonstrated, there is nothing novel or onerous about such an injunction. The Clean Air Act already expressly prohibits MTC from adopting or amending a TIP until the TIP provides for the timely implementation of transportation control measures such as TCM 2. 42 U.S.C. §7506(c)(2)(B). *See* Memo at 19-21.

MTC, arguing that "this issue is not properly before the Court," misunderstands Bayview Advocates' position. Bayview Advocates are not – at least at this time – asking this Court to overturn MTC's or the Department of Transportation's Clean Air Act conformity determinations for the RTP and TIP. Instead, they merely point to the Act's conformity procedures as closely related legal authority providing the obvious reference for fashioning an equitable remedy in this case. Just as a court devising a remedial order for groundwater contamination in a nuisance suit might look to standards provided by, *e.g.*, the Safe Drinking Water Act, it is reasonable for this Court to consider the Clean Air Act's prohibition of TIPs or TIP amendments that do not expeditiously advance the implementation of TCMs in determining whether to grant Bayview Advocates' request that it temporarily enjoin such actions in its remedial order in this case.

III. THE PUBLIC INTEREST AND THE BALANCE OF HARMS COMPEL THE ISSUANCE OF AN INJUNCTION DIRECTING MTC TO IMPLEMENT TCM 2.

"The public has a strong interest in the vigilant enforcement of the Clean Air Act." *Bayview,* 177 F. Supp. 2d at 1024. Still, MTC contends: "Missing from plaintiffs' presentation is a meaningful link between TCM 2 and any 'harm' to public health." Opp. at 16. This is an astonishing statement, considering that MTC itself developed TCM 2 and represented the measure to both the public and EPA specifically as a means to control ozone pollution from vehicles. While MTC now characterizes the ozone reductions achieved through TCMs as "trifling," this is in stark contrast to its consistent boasting over the past decade as to the important air quality benefits of this and other TCMs, culminating in its statement in the 2001 SIP that: ***"The most global transportation measure for improving air quality is the extensive transit system in the Bay Area."***.[8] It is axiomatic that better air quality means a healthier

[8] MTC Brittle Dec. *See also* MTC pronouncements that: "At the core of the [ozone mobile source control] package is a $582-million-a-year program for boosting public transit service;" that "Transportation Control Measures . . . are essential elements of … air quality plans;" and that "most important, perhaps" in terms of "beneficial air quality impacts . . . is the
(Cont'd next page)

1 public. The Ninth Circuit long ago concluded: "There is no doubt [the public] will suffer injury if
2 compelled to breathe air less pure than mandated by the Clean Air Act." *Natural Resources Defense*
3 *Council v. EPA,* 507 F.2d 905, 910 (9th Cir. 1974). A host of other courts have agreed that as a matter
4 of law, such injury constitutes irreparable harm. In short, MTC must be estopped from arguing that
5 "public health is simply not a factor in this case."

6 In any event, MTC's claim here rests exclusively on the off-hand reference in the 1982 SIP that
7 decreasing VOC and NOx emissions simultaneously through reduced vehicle emissions "cancels any
8 ***local*** ozone reduction benefits altogether" (Opp. at 10), a theory since contradicted by both EPA and the
9 Air District (Liab. Reply at 3-5). The uncontroverted evidence in the record before this Court is that
10 NOx generated in the Bay Area is transported to the Central Valley, where it does combine with VOCs
11 to form ozone – indeed, contributing up to 30 percent of ozone pollution in portions of the Valley.
12 Memo at 6-7. MTC may dismiss this fact as involving "unrelated interregional pollution transport
13 issues" (Opp. at 16), but the nearly 9,000 members of plaintiff Sierra Club, who in 1997 alone were
14 forced to breathe air that EPA has proclaimed unhealthy for ***130 days of the year***, might disagree.

15 The harm MTC and the amici congestion management agencies insist counterbalances the
16 irreparable harm to public health of enforcing TCM 2 is that they ***may*** have to revisit "the lengthy,
17 expensive and laborious process of determining which projects should remain in the RTP." Amicus
18 Brief at 1; Opp. at 21-22. But the trouble and expense of complying with a SIP measure are not factors
19 supporting denial of injunctive relief. As the Second Circuit has concluded:

20 > We are aware that enforcement of the air quality plan might well cause inconvenience and
21 > expense to both governmental and private parties, particularly when a congested metropolitan
> community provides the focal point of the controversy. But Congress decreed that whatever
22 > time and money otherwise might be saved should not be gained at the expense of the lungs and
> health of the community's citizens.

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24 *FOE,* 535 F. 2d at 179. *See also CBE III*, 775 F. Supp. at 1307 ("inconvenience, unpopularity, or
25 moderate burdens" do not excuse a court from enforcing a SIP measure); *American Lung*, 871 F. 2d at
26 329 ("economic practicability arguments" are equally unavailing).

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28 RTP's commitment to maintaining our existing public transit network." *See* MTC 1990 Annual Report at 2; Ex. E-20; and MTC Liab. Ex. QQ at 8.

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IV. THE COURT SHOULD DETERMINE MTC'S MAXIMUM EXPOSURE TO CIVIL PENALTIES AT THIS TIME, IF ONLY TO PROMOTE THE SETTLEMENT OF BAYVIEW ADVOCATES' FINAL CLAIM.

Finally, Bayview Advocates again ask this Court for a declaration as to MTC's liability and maximum exposure to the imposition of civil penalties under the Clean Air Act, 42 U.S.C. §7413(e)(1-2). The Court deferred a decision on this issue, briefed in the cross-motions for summary judgment on liability, until remedies were litigated. The parties and Court specifically identified MTC's exposure to penalties as one of the outstanding issues to be addressed in the remedies briefing at the last status conference. MTC's objection that there should be a yet another round of briefing on this simple and narrow issue is hyper-technical silliness. If the Court's remedial order is accompanied by a ruling on MTC's maximum liability for penalties, the potential for settlement of this final outstanding claim would be substantially advanced. Accordingly, the Court should declare that MTC is subject to the imposition of civil penalties in a total amount of $26,959,166.[9]

CONCLUSION

As this Court observed more than a decade ago: "There is little more basic in life than the air we breathe." *CBE I*, 731 F. Supp. at 1450. Yet 26 years after smog was supposed to have been relegated to the history books by the Clean Air Act, unsafe levels of ozone pollution persist throughout the Bay Area. While no single ozone control measure will do the job by itself, each such measure – certainly TCM 2 – is crucial to bringing healthy air to all our residents. Considering that MTC has made virtually no progress in implementing TCM 2 over the past 20 years, "at the late date of a remedial order, there can be no quarrel that time is truly of the essence." *CBE II*, 746 F. Supp. at 985. Bayview Advocates' motion on remedies should be granted in full.

Respectfully submitted on this 24th day of May 2002,

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[9] *See* Memo at 21 (with calculation updated through the date of this brief).