

LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

October 16, 2002

Public Information
Metropolitan Transportation Commission
Joseph P. Bort MetroCenter
101 Eighth Street
Oakland, CA 94607

By Fax (510 464-7848) and U.S. Mail

RE: Comment on Draft Interim Transportation Improvement Program

Public Information:

This office represents Transportation Solutions Defense and Education Fund (TRANSDEF) in regard to Bay Area air quality and transportation planning issues.

Please accept these comments to the draft 2003 Interim Transportation Improvement Program ("ITIP"). We object to the proposed adoption of the ITIP as proposed at the October 23, 2002 Metropolitan Transportation Commission meeting and request that the ITIP be revised and recirculated for public comment prior to the Commission taking action. Alternatively, certain classes of projects should be removed from this program before the Commission considers its adoption.

I. MTC IS IMPROPERLY MELDING TO TWO SEPARATE EXTRAORDINARY RESPONSIBILITIES

A. MTC Can Adopt an Interim TIP and Interim RTP Only Containing Exempt Projects During a Conformity Lapse

The ITIP improperly merges two separate unusual responsibilities faced by MTC. The first is responding to the conformity lapse that began on October 5, 2002 due to the absence of an adequate Motor Vehicle Emissions Budget ("MVEB") for transportation conformity purposes. Although the current unavailability of the MVEB is due to an Order of the federal Court of Appeals from the Ninth Circuit, the fundamental failure of the 2001 Ozone Attainment Plan to specify control measures sufficient to reduce air pollution emissions to achieve attainment condemns the MVEB to inadequacy. The Clean Air Act simply does not authorize "enforceable commitments," § 110(k)(4); *NRDC v. EPA*, 22 F.3d 1125 (D.C.Cir. 1994), and MTC will not be capable of making a finding of transportation conformity for any plan, program or project until the additional controls accomplishing the requisite 26 tons per day of ROG emissions reductions are specified in a revised and adopted SIP submittal.

MARC CHYTILO
P.O. Box 92233 • Santa Barbara, California 93190
Phone: (805) 682-0585 • Fax: (805) 682-2379
Email: airlaw5@cox.net

Until an adequate SIP and MVEB is submitted to EPA, the region will continue in conformity lapse. While in lapse, MTC must adopt an interim Transportation Improvement Program and interim Regional Transportation Plan containing only projects exempt from conformity. TCMs that are contained in an approved State Implementation Plan have themselves been incorporated into the region's emissions inventory and attainment demonstration, and therefore are exempted from the conformity determination requirement during periods of lapse. Projects not expressly identified in the SIP as a TCM do not have their emissions effect integrated into the SIP, and thus are not exempt. See below. Additional TCMs can be adopted by MTC for expedited inclusion into the SIP to advance capital transit projects that are not otherwise exempt, See EPA-DOT MOU, 4/19/2000, Appendix A, C.

Thus, the goal of the ITIP is to identify exempt projects for advancement, including approved TCMs, and foster the rapid development of other TCMs into a SIP amendment that can be employed to apply funding to air quality beneficial projects that can accomplish the 26 tpd shortfall. The ITIP will ensure that federal transportation funds are beneficially used in the Bay Area.

B. The TCM 2 Order Requires Specification of the Elements of TCM 2

The TCM 2 Order has an entirely different basis and application to the processes at hand, although there is some potential overlap. The 1982 TCM requires consultation with transit operators to develop programs that would accomplish a 15% transit ridership increase above 1982 levels, with concomitant air pollution emissions reductions. TCM 2 clearly anticipated a process where MTC consults with transit operators and allocates funding to support the programs and activities identified through that consultation that will increase transit ridership. While the Remedy Order in *Bayview Hunters Point Community Advocates v. MTC*, 212 F.Supp. 2d 1156 (2002) directs MTC to amend the RTP to specifically identify those projects that MTC relies upon to accomplish the transit ridership increase, MTC's authority to amend the RTP is constrained by the absence of an adequate MVEB. MTC thus is unable to find conformity for any such RTP amendment that does not conform to the procedures in the DOT-EPA MOU for interim RTPs. Clearly existing and new bona-fide transit ridership increasing projects with beneficial air quality consequences may proceed through the IRTP and ITIP, and potentially through a SIP revision, but any project advanced by MTC ostensibly for purposes of increasing ridership but which has adverse air quality consequences requires a conformity determination to proceed, otherwise the emissions increases cannot be shown to not cause or contribute to violations as required by § 176(c).

MTC cannot rely on the past finding of conformity and thus the 2001 RTP, as the MVEB employed has had its effectiveness stayed. MTC has no other course, in this conformity lapse, than to adopt an interim Regional Transportation Plan ("IRTP"), as envisioned by the EPA-DOT MOU (4/19/2000), to both address the TCM 2 remedy order and incorporate additional projects

programmed in the ITIP. The IRTP must delete reference to capacity increasing highway projects until the conformity lapse is cured (i.e., until after the 2004 SIP submittal is determined adequate or approved by EPA, depending on the authority in effect at that time) and prioritize exempt projects, including only bona fide existing TCMs, or on a conditional basis, new TCMs and allocate the surplus funds to transportation projects that will help solve the Bay Area's air quality problems.

MTC bears "different, and greater, responsibilities than the regional transit operators in implementing TCM 2." *Bayview II*, 212 F.Supp. 2d 1156, fn 3, citing *Bayview*, 177 F.Supp. 2d at 1028-29. MTC bears overarching responsibility for accomplishing TCM 2's transit ridership increase goals, but in declining to employ TCM 2's express implementation procedure – consulting with transit operators to determine the current (i.e., years 2002-2006) strategies to accomplish the transit ridership increase – MTC runs the risk of appearing to opportunistically, and improperly, use the TCM 2 obligation as a cloak under which many specific projects are improperly deemed exempt without actually being reflected in the text of TCM 2 or in any of the preliminary steps, which here were ignored. While MTC argued that it lacked control over the forces that would determine whether the Bay Area could accomplish the 15% transit ridership increase, here it failed to cooperate with the transit operators that stand ready to provide Short Range Transit Plans that are themselves designed specifically to accomplish the transit ridership increase. Funding for programs and projects in the SRTPs is available only if these Plans and projects are included in the ITIP, but MTC has failed to avail itself of consultation and cooperation with the transit operators in this ITIP. This deprives MTC of authority to unilaterally claim that a string of HOV projects are instrumental to achieving transit ridership increases when the transit operators offer transit ridership increase strategies that fit much more naturally within TCM 2's language and purpose and would increase ridership by a much larger amount and much more cost-effectively.

MTC contended in *Bayview* that the projects necessary to accomplish the 15% transit ridership increase were already in the Transportation Improvement Program and that the 15% transit ridership increase would occur, based on those projects. The conformity lapse has changed the nature of MTC's authority – it may not rely on programmed projects that will reach the 15% transit ridership increase passively, nor may it now rely on any project that is not exempt.

Far from mandating that any projects increasing transit ridership must proceed in any instance as asserted by MTC, the Court in *Bayview II* expressly acknowledged that it would be inappropriate, in a pre-lapse environment, to enjoin any project that didn't contribute to accomplishing the TCM 2 transit ridership increases. 212 F.Supp. 2d at slip p. 40. MTC must demonstrate, as it stated to the Court, that existing RTP projects would accomplish the 15% ridership increase. While the Court admonished "it would therefore be ill-advised to amend the TIP in any way that would make compliance [with the 15% transit ridership increase] unlikely," this does not provide *carte blanche* to describe any (and many) projects as implementing TCM 2 as a means to avoid § 176(c)'s conformity requirement. MTC possesses discretion under

Bayview II to adopt a revised TIP as they see fit, mindful of the duty to comply with TCM 2's goals, and is hardly compelled to include this specific set of projects in the ITIP regardless of whether these projects could be lawfully included in that program.

Assuming, *arguendo*, that MTC's apparent claim that all transit projects must be included in the ITIP has merit, MTC would then need to include all transit (and presumably other classes of) projects in the region that contribute to transit ridership increases, including the 76 transit projects in MTC's Blueprint report, all transit projects in the RTP EIR that were not funded, all SRTP projects that would increase ridership, every project suggested by the public or considered by MTC in the SIP RACM analysis that would increase ridership, every project suggested by the public at any CMA or MTC or SIP meeting or by an transportation agency.

In fact, the Blueprint itself shows that there are 39 INDIVIDUAL projects, any one of which would by itself increase ridership by more than MTC claims for its proposed HOV lanes. There are 17 which would increase ridership by more than 5,000 riders a day, compared with MTC's 1206. The top 4 projects would increase ridership by 62,000 daily riders.

II. ITIP DEVELOPMENT AND ADOPTION VIOLATES APPLICABLE AUTHORITY

The EPA-DOT Memorandum of Understanding (4/19/2000) specifies applicable procedures and elements of an ITIP and IRTP. This MOU requires that all the normal public involvement procedures apply and thus concludes "[I]t is expected that the process necessary to develop Interim Plans and TIPs with new projects, not previously conforming, will take most areas at least 6 months." MOU, Appendix A, C. MTC has instead again rushed through an inadequate and incomplete program, truncating public involvement, apparently excluding transit operators and other partners in the cooperative process, and withholding critical information for release at the last minute, if at all. These flawed procedures bar MTC from adopting the ITIP at this time.

A. MTC's Public Involvement Processes Have Been Inadequate, Prejudicing the Public

Appendix A of the 4/19/2000 EPA-DOT Memorandum of Understanding provides that the interim Regional Transportation Plan and Transportation Improvement Program must be developed using normal public involvement proceedings. MOU, Appendix A, A.2. 23 C.F.R. § 450.316(b) defines the minimal elements of an adequate public involvement process. The MPO's proactive public involvement process should provide complete information, timely public notice, full public access to key decisions. *See* 23 C.F.R. § 450.316(b)(1); 450.316(b)(1)(ii-iv). *See also* 58 Fed. Reg. 58054-55 ("Rather than adopt specific standards that might inappropriately burden MPOs and States, the FHWA and the FTA have adopted a "performance" approach which identifies what an effective involvement process should achieve.") This has not occurred in this case.

MTC has not provided complete or timely information to this process. MTC has not described the legal basis for the unprecedented and unauthorized “supports implementation of a TCM” exemption to the statutory requirement of plan, program and project conformity. Meaningful public comment to such a novel and unconventional conclusion that is utterly unexplained and unauthorized is impossible. MTC’s posturing and refusal to address the issues clearly defined in even MTC’s minutes from the September 16, 2002 Air Quality Conformity Task Force meeting improperly and unfairly shifts the burden to the public to prove a negative, when the legal obligation rests upon the MTC to act within delegated authority or not at all.

MTC withheld basic technical information as to the basis for the hotly contested contention that the purportedly exempt HOV projects provide meaningful and sustainable air quality benefits. MTC’s HOV Lanes Questions & Answers, responding to a flurry of public questions on September 16, 2002, was issued on Monday, October 14, 2002, 2 days before the closure of the public comment period. This cannot comport with the duty to provide complete and timely information.

B. Incomplete Project Information

The ITIP Public notice and accompanying information are chronically short of details necessary to justify each project’s exemption and thus for the public to meaningfully comment. MTC is playing “hide and seek” with the relevant information.

MTC has systematically prevented the public from understanding and organizing basic project information that is necessary for meaningful public review and comment. There still is no concordance between RTP ID #s and TIP ID #s available, making it impossible for the public to verify that all TIP projects are in the RTP and otherwise compare these documents. While MTC staff promised TRANSDEF and the public this concordance at the June Task Force meeting, they later changed their story, and claimed to have offered to supply only the new project IDs. Because there haven't been any new project IDs supplied, they haven't even followed through on that promise.

Staff released on Monday, October 14, 2002 operational and geometric data to support alleged exempt character of truck climbing lane projects. However, it arrived two days before the end of the comment period. The broader public needs to see this material as part of a recirculated draft. Comment on these projects at this time is not possible

Again on Monday, October 14, 2002, staff provided limited additional information on certain HOV projects. Two days is insufficient time to respond to technical information, and this comment letter expressly does not address or respond to information provided on October 14, 2002. Recirculation of the ITIP with additional information responding to the issues otherwise identified in this and other public comment is required.

The October 14, 2002 information is complex, poorly formatted, and difficult to interpret and apply. It is impossible to determine how much ridership comes from each of the HOV projects since transit ridership is aggregated. Some projects with a great number of associated bus routes, such as Marin County San Rafael 101 Gap Closure, are improperly included in the list, as they are already under construction but also listed as needing further federal approval. It is speculative that these subsequent phases will occur while the region is still in lapse. Once such projects are deleted from the list, the associated transit ridership benefits are greatly reduced. Others, such as the Marin Sonoma Narrows, MRN990055, are ineligible, as they will not be completed with construction prior to Nov. 2006. The transit ridership consequences of each TIP project need to be analyzed separately, with TIP ID attached, for meaningful public comment.

C. Failure to Coordinate ITIP with Transit Operators

Regulations at 23 C.F.R. § 450.312 specify that the MPO, State and transit operators “shall cooperatively develop the [RTP and TIP]”. This “envisions a process in which the participating parties will work together toward common goals/objectives, compatible plans and programs.” 58 Fed. Reg. 58045 (Oct. 28, 1993). The Bay Area Conformity SIP requires that before releasing a TIP or RTP in draft that it convene the Conformity Task Force to review assumptions on modeling, projects, TCMs, financial constraint, etc. These requirements apply with equal vigor to the ITIP/IRTP processes. EPA-DOT MOU. Had MTC cooperatively consulted with transit operators in developing the ITIP, the many programs that have recently been developed by the region’s transit operators for the express purpose of increasing transit ridership would have been advanced and considered for funding. This is clearly not the case, as the ITIP is simply a repackaging of MTC’s preferred TIP project list, with minor amendments. Had consultation and cooperation occurred, the Short Range Transit Plans developed by Muni and AC Transit (through settlement with Bayview Hunters Point plaintiffs) would have been considered as recipients of the \$2.4 billion in excess funds liberated by MTC’s inability to fund highway capacity increasing projects. MTC’s shortcut endangers FHWA/FTA’s review of the ITIP. “Evaluation of the level of cooperation will be a major factor in FHWA/FTA’s planning finding.” 58 Fed. Reg. 58045. Here, there is no evidence of formal “cooperation” with transit operators, and the ITIP suffers fatal flaws as a result.

E. Fiscal Constraint of the Revised ITIP and IRTP Must Be Demonstrated

A central element of transportation planning and TIP programming is fiscal constraint. 23 U.S.C. § 134; 23 C.F.R. §§ 450.324(e); 450.322(b); Bay Area Conformity SIP § 93.108. The ITIP removes a number of projects from the TIP, leaving funds available for other exempt projects and TCMs. The ITIP must demonstrate that it satisfies standards of fiscal constraint. 4/19/2000 EPA-DOT MOU, Appendix A, A.3. So should the IRTP. Instead, the ITIP and IRTP demonstrate a surplus of approximately \$2.4 billion. This violates statutory and regulatory requirements of fiscal constraint and preclude adoption of the ITIP.

F. Findings Are Required

In furtherance of § 176(c), MTC must make specific findings addressing project exemption determinations and that these determinations conform under § 176(c)(1)(A-B). Findings are necessary to allow a reviewing court to trace the factual and legal conclusions relied upon by the agency. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, (1974) 11 Cal.3d 506, 514. MTC is a state agency authorized and acting under state law, and TIPs and RTPs are also authorized by state law. The California Administrative Procedures Act requires procedural safeguards accompany MTC's actions, and this includes the adoption of formal findings.

The Draft ITIP was publicly released prematurely, lacking a required preliminary interagency consultation and other required processes. Supporting materials, both inaccurate and incomplete, were released very late into the comment period, necessitating a recirculation.

III. PROJECTS ARE IMPROPERLY DESIGNATED EXEMPT FROM CONFORMITY REQUIREMENTS

MTC may not approve any ITIP or IRTP that does not conform to the SIP pursuant to EPA's conformity regulations. Projects must conform unless they are exempt projects. The list of exempt projects is narrow and specific. 40 C.F.R. § 93.126; BA Conformity SIP § 93.134-135. Many of the projects that MTC has included in the ITIP are not exempt, and/or are so lacking in information as to prevent any verification of the project's potential exempt status.

A. Supports TCM Implementation

MTC's proposed summary reliance on the conclusion that projects may be exempted from conformity by describing these projects as supporting the implementation of TCM 2. This unexplained conclusion has no basis in law, ignores applicable regulatory authority, and cannot be ascribed even to an extension of the theory of conformity. Further, it is asserted without sufficient explanation of how each project serves this function, reflecting a wholly arbitrary determination, were it legal.

EPA's SIP adequacy regulations establish that control measures must be "adopted as [enforceable] rules and regulations." 40 C.F.R. § 51.281. "Copies of rules and regulations must be submitted with the Plan. Submittal of a plan setting forth proposed rules and regulations will not satisfy the requirements of this section nor will it be considered a timely submittal." *Id.* In the case of TCMs, SIPs "must contain procedures for obtaining and maintaining data on actual emissions reductions achieved as a result of implementing transportation control measures." 40 C.F.R. § 51.213(a). These regulations demonstrate that, like all SIP control measures, TCMs

must be specific and are subject to a further monitoring requirement. Thus the projects listed by MTC as “supporting implementation of TCM 2” clearly do not constitute TCMs themselves. Similarly, even if TCM A were approved by EPA and thus the basis for exemption, TCM A does not specify that HOV lanes are a part of the TCM in any way. MTC has created a fiction as an administrative convenience that is not supported by the cited TCMs.

The conformity regulations and process exempt TCMs from the conformity determination requirement because the emissions consequences of TCMs are explicitly included in the SIP’s emissions inventory and attainment demonstration. MTC’s approach prevents any consideration or evaluation of the emissions consequences of the various allegedly exempt projects. In so doing, it improperly abdicates its responsibilities to assure conformity.

B. Partially Exempt Projects

A number of the projects included in MTC’s exempt project list appear to have some features that might properly be considered exempt, but have other aspects and/or portions included within the same project description that are not exempt. If any portion of a project is not clearly within the scope of the § 93.126 exempt project list (Bay Area Conformity SIP §§ 93.134-135), that entire project is not exempt.

C. High Occupancy Vehicle Lane Projects

Commenters have already expressed considerable concern and opposition to the inclusion of HOV lane projects as exempt from conformity. HOV lanes have the propensity to increase highway capacity, induce VMT, increase emissions by enabling additional high speed travel with higher emissions, provide a dis-incentive to transit by speeding SOV travel and exchanging ultra-high occupancy public transit with much lower occupancy 2 person carpools, add mixed use capacity for the majority of each day, etc. E.g., where a lane is restricted to HOVs only 2 ½ hours a weekday in each direction, then 93% of the week it is a mixed flow lane. These potential consequences, established and demonstrated through empirical study of HOV lane projects and systems, preclude MTC’s finding that these projects are categorically exempt from conformity. Tellingly, they are not listed as exempt at § 93.126 (or at Bay Area Conformity SIP § 93.134-135).

Regardless of the exempt status of the HOV lane projects, MTC must supply detailed operational criteria for each HOV lane project for the public to comment meaningfully. All operational criteria for an HOV project in place to ensure an air quality benefit (such as specifying the levels of occupancy, restriction on the periods, if any, when the lane may be used as a mixed use lane, prohibition against conversion to an unrestricted mixed use lane, dedication for use as a transit vehicle only lane, etc.), must be express, written commitments obtained and demonstrated in compliance with the requirements of 40 C.F.R. § 93.125.

D. Interagency Concurrence with Individual Exemptions is Required

EPA's conformity regulations provide that any exempt project with "potentially adverse emissions impacts for any reason" may be determined to not qualify for an exemption from the conformity requirement. 40 C.F.R. § 93.126; Bay Area Conformity SIP §§ 93.134-135. This is a "key decision" that the public must have access to early in the ITIP development process. 23 C.F.R. § 450.316(b)(1). Given public skepticism voiced at the September 16, 2002 Air Quality Conformity Task Force meeting over whether many of the claimed exemptions are legitimate and justified, disclosure of this key decision early in the process is necessary to enable adequate public comment opportunities.

In conclusion, MTC has attempted to improperly meld two separate obligations resulting from independent court orders, and in so doing, seeks to avoid the consequences of either order. Transportation conformity was intended by Congress to contribute emissions reductions to speed attainment of the health based ambient air quality standards, and federal funding of projects that make the problem worse are not to be funded unless and until they conform to the plan for expeditious attainment. Until MTC recognizes its responsibilities in this regard, they will continue to waste valuable resources and time. We implore MTC to withdraw this flawed ITIP, develop a series of new TCMs for inclusion in a revised SIP submittal and include those TCMs in an interim Regional Transportation Plan and interim Transportation Improvement Program.

Sincerely,

Marc Chytilo

CC: EPA Region IX Administrator Wayne Nastri
FHWA Division Administrator Michael Ritchie
FTA Regional Administrator Leslie Rogers