

LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

November 1, 2002

Mr. Gary Hamby
Division Administrator
Federal Highway Administration
980 Ninth Street, Suite 400
Sacramento, CA 95814-2724

By Fax (916-498-5008) and US MAIL

Re: FWHA Action on MTC Interim TIP

Dear Administrator Hamby:

This office represents the Transportation Solutions Defense and Education Fund (“TRANSDEF”), a community-based transportation advocacy organization active in the Bay Area. TRANSDEF has observed and participated in the actions of the Metropolitan Transportation Commission (“MTC”) for the past 9 years, including MTC’s adoption of the 2003 Interim Transportation Improvement Program on October 23, 2002. We submit the following comments in support of this request that Federal Highway Administration (“FHWA”) **NOT** approve the 2003 Interim Transportation Improvement Program (“ITIP”) as submitted by MTC.

TRANSDEF believes the ITIP may not be properly approved by the Department of Transportation’s Federal Highway Administration and Federal Transit Administration as submitted by MTC due to both procedural shortcuts in the adoption process that compromised public input as well as the ITIP’s inclusion of a series of projects that are not exempt from § 176(c) conformity and may not be allowed to proceed during the current conformity lapse.

A bit of background is important. In coalition with a number of Bay Area environmental justice, public health and environmental groups, TRANSDEF has prevailed in several legal and administrative actions that led to the Bay Area conformity lapse. The core problem that these groups seek to address in the Bay Area is the failure of both MTC and the Bay Area Air Quality Management District to develop, adopt and submit integrated air quality and transportation plans that demonstrate and provide for attainment of the applicable ambient air quality standards. The 2001 Bay Area Ozone Attainment Plan, currently submitted to EPA, concluded that the emissions reductions in the Plan are 26 tpd shy of the VOC reductions the Plan’s attainment demonstration determined are needed for attainment of the one hour ozone standard. Thus the Motor Vehicle Emissions Budgets allow more emissions than are consistent with attainment, and the United States Court of Appeals for the 9th Circuit properly issued a stay of the effectiveness

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of those budgets in June of this year. TRANSDEF and the other Petitioners have implored MTC to adopt additional transportation control measures to address this shortfall.

Following the conformity lapse, TRANSDEF urged MTC to adopt an interim TIP and RTP in accordance with the April 19, 2000 Memorandum of Understanding between the Department of Transportation and Environmental Protection Agency (“DOT-EPA MOU”), including projects that were exempt from conformity review as listed in EPA’s conformity regulations, 40 C.F.R. §§ 93.126.

While MTC did proceed to adopt an interim TIP, they refused to adopt an interim RTP as anticipated by the MOU, and have refused to consider the adoption of additional transportation control measures to address the emissions reductions shortfall. A number of TCMs are reasonably available, including the commuter choice and parking cash-out programs specifically authorized by both state and federal law.

Instead, MTC undertook a truncated process where they extracted the majority of the projects in the draft regular 2003 TIP and simply reassigned them into the ITIP. While many of those projects may indeed be exempt under the conformity regulations, a considerable number of projects included in the ITIP are clearly not exempt and have considerable emissions consequences. Approval of these projects into the ITIP will cause increased emissions in the region and clearly not “conform” within the definition at 42 U.S.C. § 7506(c). As you know, “[t]he assurance of conformity . . . shall be an affirmative responsibility of the head of” the FHWA. See § 176(c)(1).

TRANSDEF and other community groups sought to participate in MTC’s ITIP development and adoption process, but were largely stymied in these efforts by MTC’s actions. MTC would not provide a legal or technical explanation of how and why it proposed to adopt the obviously non-exempt transportation projects into the ITIP that should be comprised of only exempt projects. This frustrated public involvement, as we found it extremely difficult to comment when MTC was not forthcoming with either the identify and description of the projects being proposed for programming in the ITIP or the legal basis for including the projects that did appear to be included.

TRANSDEF and others submitted written comments during MTC’s public comment period, which closed 7 days before MTC adopted the ITIP. A number of projects were identified by MTC for the first time for inclusion in the ITIP on the final day of the public comment period. The Responses to Comments were completed and made “available” to TRANSDEF, the public, and to MTC Commissioners on the day of MTC’s hearing where the ITIP was adopted.

Since the Bay Area’s 2001 TIP has expired, and no MVEB exists for determining whether the revised TIP conforms under § 176(c), the region remains in conformity lapse. Under the DOT-EPA MOU, only exempt projects and transportation control measures may proceed. DOT-EPA

MOU, App. A. ¶ A. Exempt projects are defined at 40 C.F.R. § 93.126, Table 2. Transportation control measures from EPA approved State Implementation Plans (SIP) that have emissions reductions benefits may also proceed during conformity lapse. DOT-EPA MOU, App. A. ¶ B.

MTC's first release of the ITIP on September 13, 2002 included a list of 1123 unsorted transportation projects that MTC included in the ITIP. MTC did not separately classify these projects as exempt or TCMs, nor were detailed project descriptions provided. Since this effectively precluded meaningful public review, the public and others objected, and on September 26, 2002 MTC identified 1044 of these projects as exempt and 79 as "TCM Related Projects." Of these "TCM Related projects", 26 are designated "TCM Related HOV projects," with 10 purportedly under construction and 16 purportedly "need federal action." Other "TCM related transit projects" include 18 park and ride or other parking lot expansion projects. Many of the "TCM Related projects" and exempt projects appear to include elements of the projects that increase highway capacity or otherwise will result in increased emissions of criteria pollutants and their precursors. TRANSDEF and others' attempts to secure details about many of the projects were provided late in the public comment period, if at all. TRANSDEF and the public were precluded from commenting on many of these projects due simply to the absence of sufficiently detailed information to discern whether and which of the 1134 projects were completely exempt, partially exempt, or non-exempt. MTC declined to provide the project listing in a format consistent with the RTP or Caltrans' listing, preventing comprehensive comparison of various planning, programming and project descriptions.

TCMs may be excluded from demonstrating conformity because the emissions consequences of the TCM are expressly incorporated into the SIP's attainment demonstration. In this case, MTC's HOV lanes, parking lots, and various other "TCM related projects" each involve potential emissions increases and were plainly not anticipated or identified as part of the 1982 SIP. TCM 2 provides "[r]idership increases would come from productivity improvements, thus additional costs would be moderate." 1982 Air Quality Plan, B-3. TCM 2 does not expressly mention HOV lanes, but other TCMs of that era do. This clearly indicates that TCM 2 was not anticipated in 1982 to encompass HOV projects to accomplish transit ridership increases.

Contrary to MTC's characterization in the Responses to Comments, MTC has not adequately described the authority and rationale for its inclusion of non-exempt projects in the ITIP. MTC's reference to the TCM 2 Order (*Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission*, 212 F.Supp. 2d 1156 (N.D.Cal. 2002)) is vague and general, citing no specific language in the order that supports MTC's conclusion that the District Court's order was intended to or could be construed to somehow preempt the Clean Air Act's § 176(c) and EPA's conformity regulations.

First, the Order in *Bayview Advocates* does not expressly grant MTC the authority it claims to be exercising. In fact, the Order expressly declined to direct that MTC could not amend the TIP until it completed the RTP amendments mandated by the Court. 212 F.Supp. 2d at 1170. The

Court instead cautioned that MTC would “be ill-advised to amend the TIP in any way that would make compliance [with the transit ridership increase requirements] unlikely.” *Id.*

The Court was commenting on what MTC should consider in adopting a TIP through normal procedures, to ensure that MTC did not spend all available funds on highway projects that would confound the necessary transit ridership increase and that sufficient funds were available for transit projects to ensure that ridership would increase. The ITIP is not adopted under normal conditions – the region is in conformity lapse. Congress specified that, while in lapse, no funds may be spent on new projects that will increase emissions until MTC can demonstrate that the projects won’t cause increases in emissions in the region beyond those consistent with attainment, using a MVEB from a SIP that demonstrates attainment. MTC cannot rely on non-specific references to the District Court’s order as authority to allow the inclusion of prohibited, non-exempt projects into the ITIP.

EPA’s conformity regulations specify that compliance with court orders is in addition to the other requirements of the conformity rule. 40 C.F.R. § 93.109(a). Anticipating a similar situation, EPA construed the Act to require that MPOs meet the requirements of the Act, the conformity regulations, **and** any applicable court orders. *Id.* Thus, MTC’s contention that “[t]he Court Order does not provide any limitation on projects MTC may select to implement ridership increases under TCM 2” (Responses to Comments at page 6) overlooks the requirements of the conformity regulations. MTC is without authority to assert that the non-specific Court Order trumps statutory conformity procedures that constrain MTC from approving non-exempt projects during conditions of conformity lapse.

Acknowledging the weakness of its position, MTC next points to TCM A, a TCM included in the submitted, but not approved 2001 SIP, as justification for treatment of the HOV projects as exempt from the requirement of conformity. TCM A contains no reference to HOV projects, and therefore HOV projects play no role in TCM A implementation. Further, EPA’s conformity regulations demand that TIPs implement all TCMs in the “applicable implementation plan.” 40 C.F.R. § 93.113(b). The “applicable implementation plan” is defined as the approved SIP. *Id.*, § 93.101. The statute itself has the same requirement, 42 U.S.C. § 7506(c)(2)(B)(no TIP approval until MPO determines TIP “provides for timely implementation of all transportation control measures consistent with the schedules in the applicable implementation plan”), and uses the same definition for “applicable implementation plan.” 42 U.S.C. § 7602 (q)(EPA approved SIP). MTC cannot rely on TCM A of the submitted 2001 SIP as allowing or enabling the inclusion of HOV lanes in the ITIP.

The Department of Transportation has recently rejected the State of California’s previous attempt to exempt park and ride lots and other potentially mixed projects that add travel lanes from demonstrating conformity. See, FHWA October 4, 2002 letter to Caltrans, re: 2003 FSTIP, at 3. Eighteen of MTC’s “TCM Related Transit Projects” in the ITIP add parking lots, spaces, or other parking facilities. Parking lots are well recognized as indirect sources of air pollution, attracting

cars and inducing travel. While they may ultimately offer greater emissions reductions that compensate for emissions increases and provide a net air quality benefit, that is not always the case and require a case-by-case analysis. Further, they are not on the Table 2 exempt list, and FHWA has properly determined in the October 4, 2002 action that these projects must be shown to conform for approval into a TIP.

Similarly, the HOV projects have the potential to increase emissions by inducing additional single occupancy vehicle use and increased emissions by promoting high speed travel and eliminating congestion that could promote public transit use. TRANSDEF submitted several technical studies that demonstrate that HOV projects often increase total emissions. TRANSDEF commented that HOV project operational parameters must be specified (i.e., hours of HOV status vs. hours of mixed flow, vehicle capacity requirements, etc.) to assess air quality impacts, commented that MTC should consider whether use of these lanes for 24/7 transit only would have a greater air quality benefit, and submitted reports demonstrating the experience of poor HOV project performance that other regions have experienced. MTC did not respond to any of these comments.

While it is clear that the two categories of projects (HOV and Parking structure/space/lot) are not exempt and must be excluded from the ITIP, TRANSDEF is troubled by the flawed public outreach and involvement that accompanied this action. These defects include the following: MTC did not consult with transit operators; prematurely started the public comment period and continued to release new information to the public and agencies up to the last day of the comment period; did not organize the project list or adequately describe projects; used inconsistent project listings; released proposed responses to comments at the last possible minute, precluding any follow-up by the public; did not respond to many comments; did not observe ordinary interagency consultation procedures nor observe the requirements of their conformity SIP procedural requirements; failed to explain the methodology for calculating purported transit ridership increases from the projects relied on; failed to convene a noticed hearing of the proper committee comprised of decisionmakers to receive public comment; added, among others, a new \$214 million project to the ITIP less than 2 hours before the end of the public comment period and providing no publicly available documentation of the project until the day of ITIP adoption; no reasonable opportunity for MTC commissioners to review public comments or staff's proposed responses thereto; and failure to provide a legal analysis or statement of authority with even a superficial citation to the legal basis for the inclusion of non-exempt projects as "supporting" TCMs.

This process is further compromised by the Governor's delegation of approval authority to Caltrans, and Caltrans' failure to conduct any type of noticing of action or period for notice and comment procedures before approval of the ITIP relying nearly exclusively on the defective analysis performed by MTC.

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Cumulatively, these defects have substantially prejudiced the public's ability to understand and comment upon the decision undertaken by MTC.

We respectfully request that the FHWA carefully review the MTC ITIP and, at a minimum, exclude from this ITIP the classes of non-exempt projects identified above. We further request that FHWA direct MTC to develop, adopt and submit an Interim Regional Transportation Plan with a revised financial plan that is consistent with the ITIP.

We are available to meet and confer with you or your staff should you have any questions in this matter.

Sincerely,

Marc Chytilo

CC: Director Jeff Morales, Caltrans
Mr. Jim Nicholas, Caltrans
Mr. Jack Broadbent, EPA
Ms. Sharon Brown, Chair, MTC
Mr. William Norton, BAAQMD