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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 BAYVIEW HUNTERS POINT COMMUNITY Case No. C-01-0750 TEH
ADVOCATES, et al.,

16 Plaintiffs,

17 vs.

18 METROPOLITAN TRANSPORTATION
19 COMMISSION, et al.,

20 Defendants.

DEFENDANT METROPOLITAN
TRANSPORTATION COMMISSION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PERMANENT
INJUNCTION AND DECLARATORY RELIEF
RE: CIVIL PENALTIES

Date: June 10, 2002
Time: 10:00 a.m.
Ctrm: 12
Judge: Hon. Thelton E. Henderson

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DECLARATION	EXHIBIT	DESCRIPTION
Declaration Of Steve Heminger ("Heminger Decl. II")	A	Abstract of MTC Resolution 3300, Revised
	B	August 2001 Draft RTP.
	C	December 2001 Revisions to Draft RTP.
	D	April 9, 2002 Letter to Steve Heminger from Cynthia J. Burbank, Program Manager, Planning and Environment, of the Federal Highway Administration (FHWA), with attachments
	E	March 2002 MTC's Twenty-Third Annual Report to Congress.
	F	February 21, 2002, U.S. Environmental Protection Agency (USEPA) Federal Register Notice.
	G	MTC Resolution 3432.
	H	March 21, 2002 Letter from Leslie Rogers of the Federal Transit Administration (FTA) and Michael Ritchie of the Federal Highway Administration (FHWA).
	I	1994 RTP.
	J	MTC Bay Area Maps Depicting Location Of New Rail And Express And Rapid Bus Routes.
	K	Housing Incentive Program ("HIP") Description
	L	Table Detailing HIP Grants And Projects.
	M	MTC's FY 2001-2002 Productivity Improvement Program
	N	Lifeline Transportation Network Report: 2001 Regional Transportation Plan.
	O	Equity Analysis and Environmental Justice Report, 2001 Regional Transportation Plan"
Declaration Of Christopher P. Brittle ("Brittle Decl. III")	A	Transportation Air Quality Conformity Analysis for the 2001 Regional Transportation Plan and the 2001 Transportation Improvement Program Amendment 01-32 ("Conformity Analysis").

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DECLARATION

EXHIBIT

DESCRIPTION

	B	List of Projects to Be Amended Into 2001 Transportation Improvement Program (Appendix A to Conformity Analysis)
	C	"Travel Forecasting Assumptions For 2001 Regional Transportation Plan" (Appendix B Conformity Analysis)
	D	Table published by MTC compiling reported transit ridership data from FY 1982-83 through FY 2000/01.
	E	Bay Area's 2001 Ozone Attainment Plan (OAP).
	F	MTC diagram entitled "Ozone Exceedances Compared to Communities of Concern (# of Exceedances of Federal 1-Hr Standard over Last 3 Years).
Declaration Of Martin Wachs ("Wachs Decl.")	A	Curriculum Vitae.
	B	Table 1 (Data re: elimination of subsidized parking)
	C	Table 2 (Data re: cash substitute for subsidized parking)
	D	April 9, 2002 Letter to Steve Heminger from Cynthia J. Burbank, Program Manager, Planning and Environment, of the Federal Highway Administration (FHWA), with attachments
Declaration Of Arthur E. Bauer ("Bauer Decl.")*	A	Curriculum Vitae.
Declaration Of Alexander D. Crockett ("Crockett Decl.")	A	Bay Area Transportation and Land Use Coalition's ("BATLUC") "Report on the Bay Area's 2001 Regional Transportation Plan.
Declaration Of Peter Straus ("Straus Decl.")	A	Computer Spreadsheet Of Ridership Data.
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Declaration Of Bonnie Nelson ("Nelson Decl.")		No Exhibits

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DECLARATION	EXHIBIT	DESCRIPTION
"CMA (Congestion Management Agency) Director Declarations":		Table 18. Observations About The Transit System.
Declaration Of Dennis Fay	A	
Declaration Of Daryl K. Halls		No Exhibits
Declaration Of Farhan Mansourian		No Exhibits
Declaration Of Robert Mccleary		No Exhibits
Declaration Of Richard Napier		No Exhibits
Declaration Of Suzanne Wilford*		No Exhibits
Declaration Of Michael Zdon		No Exhibits
Courtesy Copies of Declarations Filed in Support of MTC's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion For Summary Judgment.	A	Declaration Of Steve Heminger In Opposition To Plaintiffs' Motion For Summary Judgment ("Heminger Decl. I")
	B	Declaration Of William F. Hein In Opposition To Plaintiffs' Motion For Summary Judgment ("Hein Decl.")
	C	Declaration Of Charles L. Purvis In Support Of Defendant Metropolitan Transportation Commission's Motion For Summary Judgment ("Purvis Decl. I")

*MTC files faxed copies of these declarations today and will substitute the originals when received.

1 Defendant Metropolitan Transportation Commission ("MTC") hereby opposes "Plaintiffs'
2 Motion for Permanent Injunction and Declaratory Relief re: Penalties."

3 **I. INTRODUCTION**

4 Supporting public transit and encouraging transit ridership are functions that lie at the core
5 of MTC's mission, and they have for years, with or without TCM 2, and with or without a lawsuit.
6 MTC's record of support for public transit, culminating in the recently adopted 2001 Regional
7 Transportation Plan ("RTP"), is unequaled among major U.S. metropolitan areas. Yet plaintiffs
8 disregard this record and ask the Court to impose new obligations and restrictions on MTC that are
9 unjustified by the Court's liability order, or by the undisputed facts.

10 Strong evidence of irreparable harm, necessity, and public interest is essential to justify
11 "the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312
12 (1982). Such evidence is missing in this motion because there is no such evidence to offer. On
13 the subject of public health and irreparable harm the motion is abundant in rhetoric but devoid of
14 evidence. The motion does not show, nor could it, that an injunction is needed in this region to
15 advance the goal of increasing transit ridership; but without such evidence the point of an
16 injunction in this case is lost. Plaintiffs fail to demonstrate that the overbroad injunction they
17 propose would be effective in service of the goal of increasing transit ridership in this region, or
18 that it would do more good than harm.

19 In fact, the injunction plaintiffs seek is decidedly not in the public interest, and it goes
20 almost without saying that an injunction compelling MTC to "ensure" that which no one can
21 "ensure" – that a specific number of people will board a Bay Area transit vehicle in one twelve-
22 month period – will do far more harm to MTC than good to the plaintiffs or to the public.

23 The Court must therefore deny this motion. This does not mean, however, that there is no
24 appropriate relief in light of the Court's liability order. In the 2001 RTP MTC projects that transit
25 ridership, which rose 12.5% from 1982/83 through the end of the last full fiscal year, will reach
26 the TCM 2 target level by mid 2007, assuming that the RTP is implemented and that the economic
27 and demographic projections supporting the forecast prove to be reasonably accurate. That is
28 about five years from now, and the parties agree that a five year period is a reasonable one. On

1 that basis and on this record the Court will fairly enforce TCM 2, as it has interpreted that
2 measure, with a declaratory judgment holding that, based upon the best available current forecasts,
3 a five year period through the end of fiscal year 2006/07 is a reasonable period of time for transit
4 ridership to rise to the TCM 2 target ridership level, and that this period provides for
5 implementation of TCM 2 "as expeditiously as practicable." The Court should also declare that
6 the TCM 2 target ridership level is 544.7 million annual boardings, based upon a baseline of 473.7
7 million annual boardings. MTC is also prepared to report to the Court, upon adoption of the next
8 RTP revision on progress achieved in obtaining ridership increases, on any obstacles identified in
9 achieving ridership increases, and on the manner in which the next RTP revision promotes transit
10 ridership.¹

11 **II. THE RELEVANT FACTS**

12 Plaintiffs' case for the necessity of their proposed injunction boils down to two
13 assumptions. They claim, for one, that without it MTC will "rely passively on predictions of
14 transit ridership trends instead of proactively planning and allocating funding" to increase transit
15 ridership. Second, they insist that TCM 2 is a "key component" of the Bay Area's ozone control
16 strategy, and that this injunction is needed to protect public health. Both assumptions are untrue.

17 **A. With or Without TCM 2, and With or Without this Lawsuit, MTC Has** 18 **Worked Consistently and Aggressively to Encourage Increased Transit** **Ridership.**

19 MTC has never needed a legal mandate, in a SIP or otherwise, to place transit at the
20 forefront of its plans and programs for the Bay Area's transportation system.

21 **1. The 2001 RTP Is the Culmination of MTC's Longstanding Emphasis** 22 **On Transit Services.**

23 The 2001 RTP, adopted in December 2001, is the most recent manifestation of MTC's
24 extraordinary commitment to improving and expanding the Bay Area's public transit system.
25 Heminger Decl. II, Exhs. B, C. The RTP is a comprehensive blueprint for the future of the
26 transportation system in the Bay Area for the next 25 years. A product of months of intense effort
27

28 ¹ Of course, proposals by MTC regarding remedies are made without prejudice to MTC's right
to appeal all elements of the final judgment.

1 by MTC's commissioners and staff, other governmental agencies, and members of the public, the
2 RTP governs the allocation of some \$87.4 billion in federal, state and local transportation funding.

3 A look at the funding numbers in the RTP reveals an overwhelming investment emphasis
4 in favor of transit. While currently about 6% of all trips and 10% of all trips are taken on transit,
5 MTC devotes 77% of the RTP's total funding package to transit operations, rehabilitation, and
6 expansion, and only about 20% to roadways. Three-quarters of the transit expenditures will go
7 toward operations, maintenance and rehabilitation – ensuring that the transportation needs of
8 transit-dependent citizens in urban core areas, which are already the best-served by transit, will
9 continue to receive the highest priority. The Regional Transit Expansion Program (RTEP) follows
10 up on such ridership enhancing projects in recent years as the BART extensions to Dublin and Bay
11 Point and (soon) to San Francisco International Airport, as well as the Tasman light rail extension
12 to Silicon Valley. The RTEP guides the allocation of about \$11 billion towards ridership-building
13 projects such as the addition of several new regional express bus routes; creation of an AC Transit
14 rapid bus service linking Berkeley, Oakland and San Leandro; the extension of BART to San Jose
15 and Santa Clara, the addition of a BART connector to Oakland Airport, and possible BART
16 extensions or other rail improvements to Livermore and Antioch; a "Central Subway" that will
17 extend SF Muni's Third Street light rail line from Bayview Hunter's Point to Chinatown;
18 electrification of CalTrain and extension of CalTrain service into a rebuilt TransBay Terminal in
19 downtown San Francisco. Many of these new facilities will serve low-income residents of urban
20 core areas in Oakland, Berkeley, San Leandro, San Francisco, and east San Jose. When completed
21 these projects will add hundreds of new route miles of transit service and are expected to attract
22 tens of millions of new riders each year. Heminger Decl. II, ¶ 14-25; 34-35.

23 What little remains for roadways will be spent mainly on maintenance and operations of
24 the existing network. Only about 4% of the RTP's funding will be spent on roadway expansion.
25 Much of this expansion consists of high occupancy vehicle (HOV) lanes that can be utilized by
26 buses to shorten transit trip times, making transit more attractive. Heminger Decl. II, ¶ 15.

27 Almost 90% of the total funding allocated in the RTP consists of "committed" funds
28 devoted to ongoing operations and maintenance of the existing transportation system and specific

1 expansion projects that are either voter-approved or nearing construction. Of the committed
2 funds, fully 81% are earmarked for transit operations, rehabilitation or expansion, and only 17%
3 are earmarked for roadways. Most of the latter will be spent on maintenance and operations of the
4 existing network. Heminger Decl. II, ¶¶ 16, 33; *see also* Bauer Decl., ¶¶ 16-21. Some of these
5 committed funds result from the application of transit-weighted funding formulas that MTC
6 helped to write. Heminger Decl. II, ¶ 24.

7 The remaining ten percent of funds allocated in the RTP – about \$8.6 billion – are
8 uncommitted, or "Track 1" funds. These are "flexible" funds over which MTC may, within limits,
9 exercise some discretion. One of the key limits is that these funds are generally available only for
10 capital programs, not as an operating subsidy such as would be required for new transit services.
11 Heminger Decl. II, ¶ 52. Of the Track 1 funds, MTC directly controls \$3.9 billion, and authorizes
12 the counties to allocate about \$3.4 billion to meet local needs. As a regional agency, MTC directs
13 its \$3.9 billion share to regional priorities. Of this total, it has allocated 79% to transit capital
14 rehabilitation, regional transit expansion, and related transit programs, and only 2.5% to streets
15 and roads. This small proportion, moreover, is invested only in maintenance of key existing
16 regional arterial routes. *None* of the MTC-controlled Track I funds will be spent on expansion of
17 the road and highway system. Heminger Decl. II, ¶¶ 17-22.²

18 This heavy regional emphasis in favor of transit investment establishes MTC as the
19 national leader among regional planning agencies in advancing public transit. Under MTC's
20 leadership the Bay Area will devote the *largest proportion of funding to public transit (77%) of*
21 *the nineteen largest metropolitan areas in the United States (compared to an average of 50%),*
22 *and the smallest proportion to highways in general (operations, maintenance and expansion*
23 *combined) (19%, compared to an average of 49%), and to highway expansion in particular (4%,*
24 *compared to an average of 21%.)* Heminger Decl. II, ¶ 23; Wachs Decl., ¶ 17.³

25
26 ² Some of the county priorities are described in the CMA Director Declarations.

27 The California Transportation Commission controls the remaining Track 1 funds and devoted
28 them to state highway and intercity rail projects that facilitate interregional travel. Heminger
 Decl. II, ¶ 22.

³ One of plaintiffs' declarant's organizations praised this RTP. Crockett Decl., Exh. A.

1 MTC did not need TCM 2 or a lawsuit to persuade it to throw its funding support so
2 heavily in favor of transit in this manner. The transit emphasis in the 2001 RTP reflects MTC's
3 assessment of funding priorities *long before this lawsuit was filed* in February 2001 and *long*
4 *before the Court ruled on TCM 2 liability* last November. Heminger Decl. II, ¶¶ 14-25; 29-32.
5 Indeed, the heavy emphasis in favor of transit investment reflected in the 2001 RTP is the
6 culmination of MTC's longstanding program priorities. Hein Decl., ¶¶ 22-26; Heminger Decl. I,
7 ¶¶ 7, 8, 11-14. The Bay Area, under MTC's leadership, has consistently devoted a
8 disproportionate and increasing share of transportation funding to transit: 63% of total funds in
9 the 1994 RTP, 66% in the 1998 RTP, and 77% in the 2001 RTP. Heminger Decl. II, ¶¶ 29-32.

10 Although the funds available for transportation almost always fall short of the need, in the
11 1998 RTP MTC decided that it would not tolerate *any* committed funding shortfalls in the transit
12 rehabilitation program, and ensured, through its 1998 RTP "Track 1" funding, that the shortfall
13 would be eliminated. See Heminger Decl. II ¶ 33; Heminger Decl. I, ¶ 11. Many of the projects
14 and priorities that MTC preserved with this decision directly enhance the mobility of low-income
15 and minority communities. Heminger Decl. II ¶ 33. The 2001 RTP continues this commitment.
16 *Id.*, ¶¶ 33, 41-45. Indeed, the very existence of "flexible funding" that enables MTC to support
17 transit in this way is the product in part of MTC's own national lobbying efforts. Hein Decl., ¶¶
18 22-25.

19 **2. MTC Has Consistently Authored, Administered and Supported a**
20 **Variety of Programs Intended to Expand Transit Ridership and**
Increase Transit Opportunities for All.

21 Raw numbers tell only part of the story of MTC's longstanding commitment to building
22 transit ridership in the Bay Area. MTC has initiated and funded a variety of programs to make
23 transit more accessible, efficient and fair.

24 Some of the programs serve everyone. The TransLink® program, designed years ago and
25 now being tested in public trials, utilizes "smart card" technology to link services of multiple
26 transit operators throughout the area by enabling travelers to use a single card to board trains and
27 buses throughout the Bay Area. The "Take Transit™" program enables travelers to plan transit
28 trips throughout the Bay Area online. "TravInfo®" gathers, organizes and disseminates free and

1 timely information on traffic and road conditions, public transit routes and schedules, carpooling
2 opportunities, and the like, in order to encourage the use of public transit and ridesharing services
3 and to help motorists avoid congestion. In 2001 travelers logged about 2.5 million "hits" per
4 month on its TravInfo® website for these services. The "Commuter Check®" program enables
5 commuters, through their employers, to purchase transit or vanpool tickets at substantial tax
6 savings. Last year, about 2,000 employers provided tax-free transit benefits to their employees
7 under this program. The pioneering Housing Incentive Program, launched in 2000, promotes
8 transit use by disbursing incentive funds to cities and counties that locate compact housing near
9 public transit facilities. MTC has also sponsored "Smart Growth" programs to encourage cities to
10 adjust their land use policies in ways that favor transit ridership. Heminger Decl. II, ¶¶ 36-40.

11 In its quest to increase transit ridership MTC has also sought to ensure that the transit
12 system meets the needs of those who are most dependent upon public transit. In 1998, long before
13 the complaint was filed in this case, MTC commenced the Transportation for Livable
14 Communities (TLC) program, pursuant to which MTC has earmarked \$40 million in grants to
15 promote transit, bicycle and pedestrian projects designed to help revitalize such disadvantaged
16 neighborhoods as Bayview Hunter's Point in San Francisco, West Oakland, and North Richmond.
17 The 2001 RTP just adopted committed to tripling the funding level for the TLC program. Before
18 the complaint was filed, MTC also conceived, and in July 2001 adopted, a Regional Welfare-to-
19 Work Transportation Plan, intended to ensure that the transit network would not impede the efforts
20 of disadvantaged individuals and families coming off welfare to find work and travel to their jobs
21 once they found them. MTC acted quickly to dedicate new federal funds to a Low Income
22 Flexible Transit (LIFT) program, which helps run new transit service for welfare recipients
23 transitioning into the workforce, when this funding became available. MTC has also earmarked
24 funding for a pilot project that supports free passes on AC Transit buses for disadvantaged
25 students to use to travel to and from school. The Regional Welfare-to-Work Transportation Plan
26 led to the identification of the "Lifeline Transit Network," a route-by-route system of public transit
27 services that are most vital to disadvantaged neighborhoods. Heminger Decl. II, ¶¶ 37, 41-45.

28 Meanwhile, MTC has persisted in its advocacy efforts on behalf of transit, notably through

1 its support for Proposition 42, approved by the voters in March 2002. Heminger Decl. II, ¶ 47. Its
2 longstanding transit productivity improvement program continues unabated. *Id.*⁴

3 **B. While MTC Cannot Guarantee a Particular Level of Transit Ridership, Its**
4 **Forecasts Show that Transit Boardings May Reach as Many as 600 Million by**
5 **Fiscal Year 2006/07 If the 2001 RTP Is Implemented on Schedule.**

6 There is no button that MTC can push to ensure an increase in transit ridership. MTC can
7 foster incentives for transit ridership, it can provide funds to maintain and expand transit services,
8 it can help operators improve productivity, and it can help to coordinate transit services. MTC has
9 done all these things. But it cannot guarantee that people will board transit vehicles. A myriad of
10 factors influence individual decisions to ride transit or to drive a car. Some are obvious: the
11 convenience of driving a car versus riding a train or a bus, or the perceived differences in safety
12 and reliability. Other factors include the comparative costs of fares and tolls for transit, and of
13 gasoline, insurance and acquisition costs for automobiles. Wachs Decl., ¶ 15(a), 15(b). A robust
14 economy that enables people to afford new cars, fueled by inexpensive gas, may encourage single-
15 occupant driving and depress transit ridership, whereas a significant increase in gasoline prices
16 may cause travelers to flock to buses and trains. In a recession economy with climbing
17 unemployment rates, people take fewer trips altogether, by transit or by car. *Id.*

18 Political will is a factor in encouraging transit use. It is well understood, for example, that
19 intelligently-applied "congestion pricing" policies – such as increasing bridge tolls during rush
20 hour or charging people to park at work – create a direct disincentive to automobile travel and are
21 perhaps the most effective tools to increase transit ridership. But MTC has no authority to impose
22 congestion pricing and parking surcharges and restrictions. MTC lobbied hard for legislation
23 adopting a congestion pricing program for the Bay Area's busiest toll bridge, but no legislator
24 could be persuaded to sponsor the bill. Heminger Decl. II, ¶ 48; Wachs Decl., ¶ 15(b), (c), 16.

25 ⁴ During the liability phase MTC presented undisputed evidence proving that it "sought to
26 ensure" the implementation of transit operators' 1983-87 Five Year Plans, as required by
27 TCM 2. See especially Hein Decl., ¶¶ 18 and MTC Exh. U. MTC also presented an enormous
28 volume of undisputed evidence of its support over the past twenty years on a programmatic
and funding level for transit productivity, the focus of TCM 2. See especially Hein Decl.,
¶¶ 5-17, 19-21 and Heminger Decl. I, ¶¶ 4-6, 9, 10. MTC incorporates all of the evidence it
presented at the liability phase to support its opposition to injunctive relief at this remedy
phase.

1 There are, in short, inherent limitations on MTC's ability to effect changes in human
2 behavior. Despite MTC's extraordinary efforts, ridership levels fluctuate for reasons that are
3 outside MTC's control. MTC simply cannot ensure that transit ridership will reach a particular
4 level by a particular time. Wachs Decl., ¶¶ 17, 25, 27.

5 While it is impossible to *guarantee* ridership levels, it is possible to make educated
6 *forecasts* of ridership based upon reasonable assumptions about such factors as travel behavior,
7 travel costs, jobs and population growth, and improvements in the transportation system such as
8 the many transit projects in the 2001 RTP. Forecasting travel is, as the Court knows, one of the
9 principal functions of MTC's planners. In the 2001 RTP, MTC projected that if the RTP projects
10 are implemented on schedule and population and jobs increase normally, transit ridership may
11 increase to as many as 600 million annual boardings by the end of fiscal year 2006-07, i.e., by
12 June 30, 2007. This is about 55 million boardings in excess of the TCM 2 target. The projects
13 that will contribute the most to this projected gain are part of the RTEP or its predecessor, such as
14 the upcoming BART extension to San Francisco Airport. Brittle Decl. III, ¶ 2.

15 It is true that these projections are based in part on economic forecasts developed in 2000
16 and early 2001, before the economy sagged. But no one knows now how long the recession will
17 last, or whether and how the current focus on the terrorist threat will impact travel over the next
18 several years. There is no planning value in performing another travel demand forecast in
19 response to such current events. Bauer Decl., ¶¶ 38-40; Wachs Decl., ¶ 26; Heminger Decl. II,
20 ¶¶ 8-10.⁵ In any event, all of the assumptions underlying the 2001 RTP projections will be
21 reviewed no later than 2004, when the RTP is scheduled to be updated again.

22 **C. The RTP Is a Detailed and Financially Constrained Plan That Reflects a**
23 **Detailed and Exhaustive Process of Analysis, Policy Development, Interagency**
24 **Consultation, Public Input, and Balancing of Interests.**

25 Developing an RTP is a lengthy and complex process of consultation, analysis and
26 collaboration. The 2001 RTP consumed 18 months and occupied many MTC staff members

27 ⁵ Without performing another travel demand forecast, however, MTC has mathematically
28 adjusted the 2006-07 forecast based on recent reported declines in ridership, resulting in a
reduced 2006/07 boardings estimate of 575 million. Brittle Decl. III, ¶ 6. This is still about 30
million boardings in excess of the TCM 2 target.

1 nearly full time, not to mention the scores of employees, consultants and planners affiliated with
2 transit operators, county Congestion Management Agencies, and participants as varied as Caltrans
3 and the plaintiffs themselves. Brittle Decl. III, ¶ 7; *see also* CMA Director Declarations.

4 There is nothing simple about preparing an RTP or about the process that leads to an
5 approvable plan. Allocating flexible transportation funds, in particular, is a "zero-sum game."
6 Paying Paul means robbing Peter. This is true as between transit operators, who compete for
7 available funds, and as between transit and highway recipients of funding. The RTP is and must
8 be "financially constrained," meaning that sources of funding must be identified for each proposed
9 project. Since new projects, and particularly transit projects, require both capital funds and
10 operating funds, new projects and services cannot be added to a financially constrained RTP
11 unless (a) the proponent either identifies new sources of capital funds, or MTC eliminates other
12 capital projects, *and* (b) in the case of transit, the proponent indicates that new sources of
13 operating funds are available to sustain proposed new services over time. There are significant
14 legal and practical limitations to MTC's ability to convert funds intended for capital projects into
15 operating subsidies. Heminger Decl. II, ¶¶ 49-53; Bauer Decl., ¶¶ 12-24.

16 Because the 18-month RTP update process is repeated every three years, Heminger
17 Decl. II, ¶ 8, an RTP update is "in the works" at least half the time.

18 **D. The Most Accurate Regional Baseline Ridership Figure Against Which the**
19 **15% Ridership Increase May Be Measured is 473.7 Million Annual Boardings.**

20 Establishing the baseline level of transit ridership, measured in millions of annual
21 boardings, is an essential step in calculating the 15% increase target. MTC and the plaintiffs agree
22 generally on the baseline year boardings for all operators except Muni.⁶

23 Muni's 1982-83 boardings data grossly overstates its ridership that year. The error was the
24 product of Muni's inexperience at the time with statistical sampling – as opposed to actual counts
25 – of boardings during the period from 1979-84. Muni was working with a new statistical approach
26

27 _____
28 ⁶ The baseline year for calculating a TCM 2 ridership increase target is 1982/83 because the
boardings from FY 1981/82 were reflected in ridership increases credited to TCM 1. Brittle
Decl. III, ¶ 10.

1 to estimating boardings in order to meet new reporting requirements of the Urban Mass Transit
2 Administration. When the numbers that emerged proved to be, in the view of Muni's planners,
3 absurdly high, Muni hired new staff and engaged a new consultant who developed a more refined,
4 and realistic, approach to statistical ridership data collection. The results, starting in about 1984,
5 were more realistic, as Muni publicly acknowledged thereafter, Straus Decl., ¶ 17, and to this day
6 Muni still uses the same approach, with some refinements. Straus Decl., ¶¶ 8-17; Nelson Decl., ¶¶
7 4-9.

8 The best estimate of Muni boardings for 1982-83 is 264 million. Straus Decl., ¶ 18.
9 Adding this to the other operators' data yields a regional baseline of 473.7 million boardings, and a
10 15% increase of this figure works out to 544.7 million. Brittle Decl. III, ¶ 11.

11 **E. The Impact of Increasing Transit Boardings on Ozone Levels Remains**
12 **Negligible.**

13 This Court recognized twelve years ago that the emissions reductions projections
14 associated with all ten "original" TCMs was only "slight," and that "these measures were
15 considered too minimal to be included in the 1982 Plan's calculations." *CBE v. Deukmejian*, 746
16 F.Supp. 976, 978 n. 3 (N.D. Cal. 1990). The emission reduction targets associated with TCM 2,
17 one of the ten original TCMs, were therefore less than "slight." Brittle Decl. III, ¶¶ 15-16.
18 Moreover, by the end of FY 2000-01, the last complete fiscal year, transit ridership had increased
19 12.5% over the 1982-83 baseline, using the best available data for that year. Brittle Decl. III, ¶ 11.
20 The emissions reductions to be achieved from further gains in ridership making up the last 2.5% of
21 the target increase are not just "slight," they are infinitesimally small – 0.03% of regional
22 hydrocarbons and 0.05% of NOx. *Id.*, ¶ 16. These reductions are diminished even further by the
23 reductions in tailpipe emissions since 1982, as more transit riders are needed in 2002 to
24 accomplish the same emissions reductions that were achievable with 15% ridership increase in
25 1982. Wachs Decl., ¶ 20; Brittle Decl., ¶ 16. And, as the 1982 Plan explained, decreasing VOC
26 and NOx emissions simultaneously cancels any local ozone reduction benefit altogether. 1982
27 Plan, pp. 101, 102. (MTC Liability Exh. A.)

28 However slight TCM 2's contribution to emissions reductions, moreover, it has *never* been

1 and cannot be disputed that the Contingency Plan TCMs made up for the shortfall in reductions
2 more than ten years ago. *CBE v. Wilson*, 775 F. Supp. 1291, 1300-03 (N.D. Cal. 1991).

3 These measures and many others contributed to the success the Bay Area has achieved in
4 its continuing effort to attain federal ozone standards. From 1990-94, the region was in attainment
5 of the federal ozone standard, and since 1995 ozone exceedances have been in steady decline.
6 Brittle Decl. III, ¶ 13, Exh E. The exceedances that have been recorded have occurred not in
7 urban areas with large numbers of transit-dependent, lower-income citizens, but instead in outer
8 suburban areas like Livermore, Concord and San Martin. *Id.*

9 III. ARGUMENT

10 A. The Standards Applicable to this Motion

11 1. **The Court Should Deny Injunctive Relief Where the Plaintiff Fails to 12 Demonstrate that it Will Suffer Irreparable Harm, Where the Balance 13 of the Competing Claims of Injury Tips in Favor of the Defendant, Where There Is an Adequate Remedy at Law, or Where the Requested Injunction Is Not in the Public Interest.**

14 "In brief, the bases for injunctive relief are irreparable injury and inadequacy of legal
15 remedies. In each case, a court must balance the competing claims of injury and must consider the
16 effect on each party of the granting and withholding of the requested relief." *Amoco Production*
17 *Co., et al v. Village of Gambell, et al.*, 480 U.S. 531, 542 (1987); *see also Weinberger*, 456 U.S.
18 305, 311-313 (1982).⁷ This rule applies to demands for permanent as well as preliminary
19 injunctive relief. *Amoco*, 480 U.S. at 556 n. 12 ("The standard for a preliminary injunction is
20 essentially the same as for a permanent injunction with the exception that the plaintiff must show a
21 likelihood of success on the merits rather than actual success."); *Quechan Tribe of Indians v.*
22 *Rowe*, 531 F.2d 408, 410 (9th Cir. 1976) ("prime prerequisite" for injunctive relief after summary
23 judgment in favor of plaintiff on liability is "threat of irreparable future harm").⁸ Courts may

24
25 ⁷ This is clearly not a damages case, but that fact alone does not compel and injunction.

26 ⁸ Authorities cited by plaintiffs, *see, e.g., Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24
27 F.3d 1099 (9th Cir. 1994), holding that irreparable harm is not an independent requirement in
28 cases of permanent injunctions, are irreconcilable with *Weinberger*, in which the Supreme
Court applied the irreparable harm standard in reviewing a reversal of the district court's denial
of a *permanent* injunction. This Court should follow the Supreme Court rule. Under either
formulation, however, the absence of irreparable harm must be a significant factor in the
exercise of discretion whether to issue an injunction, and, if it is to be issued, how to frame it.

1 consider impacts of a requested injunction on non-parties as well. *Ward v. Walsh*, 1 F.3d 873,
2 879-80 (9th Cir. 1993), *cert. denied*, 510 U.S. 1992 (1994). Speculative injury is not sufficient to
3 justify an injunction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

4 In evaluating the necessity for an injunction, the Court must consider the defendant's "good
5 faith and diligence" in its actions pertaining to the violation found, particularly when there has
6 been a "misunderstanding of the regulation," or in light of the "complexity of the problem, and the
7 fallibility of humans. . . ." *Hecht Co. v. Bowles*, 321 U.S. 321, 325 (1944). *See also Rondeau v.*
8 *Mosinee Paper Corp.*, 422 U.S. 49, 61-62 (1975) (shareholders' good faith and prompt action to
9 cure Williams Act violation supported denial of injunctive relief); *Morrow v. Harwell*, 768 F.2d
10 619, 627 (5th Cir. 1985) (injunction in county jail conditions case set aside because
11 "superintending federal injunctive decrees directing state officials are appropriate only when
12 constitutional violations have been shown *and* when the state officials are demonstrably unlikely
13 to implement the required changes without its spur.").

14 In evaluating a demand for injunctive relief the district courts must remember the purpose
15 of the statute to be enforced. In *Rondeau*, for example, the plaintiffs alleged that they had been
16 harmed by the defendants' conduct, but the Court held that the case was unsuitable for injunctive
17 relief in part because "none of the evils to which the Williams Act was directed has occurred or is
18 threatened in this case." *Rondeau, supra*, 422 U.S. at 59; *see also Amoco*, 480 U.S. at 541-47.
19 The present case arises under the Clean Air Act, not a statute governing transportation funding,
20 and not the Civil Rights Act. "The purpose of the [Clean Air Act] . . . is 'to protect and enhance
21 the Nation's air quality, to initiate and accelerate a national program of research and development
22 designed to control air pollution, to provide technical and financial assistance to the States in the
23 execution of pollution control programs, and to encourage the development of regional pollution
24 control programs.' " *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250, 1256 (1st Cir.
25 1996) (internal citation omitted). An injunction issued under the authority of the Clean Air Act
26 that does not address a significant harm relating to air quality fails to serve the purpose of that Act.

27 Finally, "[i]n exercising their sound discretion, courts of equity should pay particular
28 regard for the public consequences in employing the extraordinary remedy of injunction."

1 *Weinberger, supra*, 456 U.S. at 312; *see also Amoco*, 480 U.S. at 545.⁹

2 **2. An Injunction Does Not Issue as of Course in this Case.**

3 It is a "fundamental principle that an injunction is an equitable remedy that does not issue
4 as of course." *Amoco, supra*, 480 U.S. at 555, *quoting Weinberger, supra*, 456 U.S. at 311. "The
5 grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so
6 under any and all circumstances, and a federal judge sitting as chancellor is not mechanically
7 obligated to grant an injunction for every violation of law." *Weinberger*, 456 U.S. at 313. Rather,
8 "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the
9 court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." "
10 *Id.*, *quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

11 Section 304 of the Clean Air Act, under which plaintiffs proceed in this case, does not, " in
12 so many words, or by necessary and inescapable inference, restrict [this] court's jurisdiction in
13 equity." It states, instead, that "[t]he district courts shall have jurisdiction, without regard to the
14 amount in controversy or the citizenship of the parties, to enforce . . . an emission standard or
15 limitation. . . ." 42 U.S.C. § 9604(a). This is a grant of exclusive federal jurisdiction, not a
16 command to issue injunctions. A "grant of jurisdiction to issue [equitable relief] hardly suggests
17 an absolute duty to do so under any and all circumstances." *Hecht Co.*, 321 U.S. at 329.¹⁰

18 **3. If Granted, Injunctive Relief, Particularly Federal Court Injunctions of**
19 **State Government Agencies, Must Be Narrowly Tailored, Effective, and**
No More Burdensome Than Is Necessary.

20 "[A]n injunction must be narrowly tailored to give only the relief to which plaintiffs are
21 entitled." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990); *see also*

22 _____
23 ⁹ The only exception is where a Congressional mandate forbids consideration of such evidence.
24 *U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 498 (2001) (district court may not
25 consider "public interest or convenience of the parties" such as patients' medical needs, where
Congress had expressly rejected the medical necessity defense to laws criminalizing marijuana
use). Plaintiffs cite no such provision in the Clean Air Act that prohibits courts from
considering public consequences in evaluating requests for injunctions under that Act.

26 ¹⁰ Plaintiffs cite *Oakland Cannabis Buyers' Co-op* for the proposition that once liability has been
27 established an injunction must be granted, and the only issue is the terms of the injunction. Pl.
28 Mem. at 10:10-16. This contention misreads *Oakland Cannabis Buyers' Co-op*, which did not
purport to overrule the Supreme Court's long line of authorities including *Weinberger*, *Hecht v.*
Bowles, or *Amoco Production Co.*, that require irreparable harm and a balancing of burdens
and benefits to justify injunctive relief. 532 U.S. at 498 and n. 9.

1 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (injunction "should be no more burdensome to
2 the defendant than necessary. . . ."); *Meinhold v. Department of Defense*, 34 F.3d 1469, 1480 (9th
3 Cir. 1994).

4 This rule applies with special force where the defendant is a state agency. "[F]ederal
5 courts in devising a remedy must take into account the interests of state and local authorities in
6 managing their own affairs. . . ." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). *See also*
7 *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) ("appropriate consideration must be given to principles
8 of federalism in determining the availability and scope of equitable relief"); *Clark v. Coye*, 60 F.3d
9 600, 604 (9th Cir. 1995); *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986).

10 A corollary of the rule requiring narrow tailoring of the remedy holds that a court cannot
11 require a defendant to take any action unless failure to take that action has been found to have
12 been a violation of the law. *Hoptowit v. Ray*, 682 F.2d 1237, 1251 (9th Cir. 1982) ("Without
13 having found [that defendant's failure to act constituted] an Eighth Amendment violation, the
14 district judge was without power to make an order" requiring defendant to undertake the act);
15 *Hoptowit v. Spellman*, 753 F.2d 779, 785 (9th Cir. 1985) (injunction requiring prison to provide
16 adequate food and shelter overbroad in absence of finding that food or clothing was
17 constitutionally inadequate).

18 **4. In A Motion for Permanent Injunction, Where the Burden Of Proof**
19 **Rests With the Plaintiff, The Court Should Deny The Motion If The**
20 **Plaintiff Fails To Come Forward With Any Evidence on An Essential**
Element, Or Where The Material Facts Are In Substantial Dispute.

21 Plaintiffs bears the burden of proving the necessity of and entitlement to injunctive relief.
22 *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (citation omitted). "The
23 determination that there is a danger [of irreparable harm] must be based on appropriate findings
24 supported by the record." *FEC v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989). Indeed, "[a]
25 *strong factual record* is . . . necessary before a federal district court may enjoin a State agency."
26 *Cupolo v. BART*, 5 F. Supp. 2d 1078, 1085 (N.D. Cal. 1997) (emph. supplied).

27 "Generally, 'the entry or continuation of an injunction requires a hearing. Only when the
28 facts are not in dispute, or when the adverse party has waived its right to a hearing, can that

1 significant procedural step be eliminated.'" *Charleton v. Estate of Charleton*, 841 F.2d 988, 989
2 (9th Cir. 1988) (citation omitted); *cf. Continental Airlines, supra*, 24 F.3d at 1102 (trial on the
3 merits not required if there is no genuine issue of material fact to try). Of course, if the plaintiff
4 fails to present admissible evidence of a material fact, the motion should be denied.

5 **5. A Declaratory Judgment Furnishes Appropriate Relief When An**
6 **Injunction Is Unnecessary**

7 A declaratory judgment provides relief where an injunction is too intrusive or unjustified
8 due to the absence of irreparable harm. *Steffel v. Thompson*, 415 U.S. 452, 466-67 (1974); *see*
9 *also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[A] district court can generally protect
10 the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger
11 injunctive medicine will be unnecessary."); 12 *Moore's Federal Practice*, § 57.07 (Matthew
12 Bender 3d ed.). An example of this principle in practice is the Fifth Circuit's decision in *Morrow*,
13 *supra*, 768 F.2d 619, where the Court set aside an injunction issued to a state official found liable
14 for unconstitutional conditions at a county jail, holding that "superintending injunctive relief was
15 not necessary." *Id.* at 628. "[T]he new jail's construction was completed without the whip of a
16 federal decree." *Id.* The Court, per Higginbotham, J., concluded: "Where, as here, the defendant
17 makes dutiful progress to remedy the asserted problems, whether or not it is encouraged to do so
18 by a suit, a federal court should exercise restraint. Any other course contradicts our system's
19 principles of shared power." *Id.* On this basis the Court adopted the "passive remedy" of
20 declaratory relief that is "far less intrusive into state functions than injunctive relief that
21 affirmatively commands specific future behavior under the threat of the court's contempt powers."
22 *Id.* at 627.

23 Thus withholding injunctive relief, when a plaintiff fails to establish the prerequisites for it,
24 does not necessarily leave the plaintiff without relief. As we now show, declaratory relief is the
25 only appropriate relief that can be justified based on this record and the Court's liability order.

26 **B. Injunctive Relief Is Inappropriate Because, on the Undisputed Facts, Plaintiffs**
27 **Will Not Be Harmed, Irreparably or Otherwise, If Injunctive Relief Is Denied.**

28 To justify an injunction based on grounds of irreparable harm to public health, as plaintiffs

1 ask the Court to do, TCM 2 must have significant implications for public health. The undisputed
2 evidence shows that it does not.

3 All parties agree that ground level ozone is a health hazard and that automobile exhaust
4 contains "precursor" emissions of hydrocarbon compounds and oxides of nitrogen that contribute
5 to ozone formation. Proving this, however, does not prove irreparable harm if an injunction is
6 denied. Missing from plaintiffs' presentation is a meaningful link between TCM 2 and any "harm"
7 to public health. As a substitute for proof of this link plaintiffs mention unenforced new ozone
8 standards, unrelated interregional pollution transport issues, and the same hearsay study about the
9 Atlanta Olympics that they presented previously. They point out that the region is not in
10 attainment of the ozone NAAQS but imply that it has never attained the standard (which is
11 untrue); and they suggest that air quality is getting worse (it is not). Brittle Decl. III, ¶ 13, Exh E.
12 None of this adds up to evidence that TCM 2 is the "key component of the Bay Area's strategy for
13 controlling ozone pollution" plaintiffs claim it to be. Pl. Mem. at 1:8.

14 In fact, emissions reductions from TCM 2 were always less than "slight," and the
15 reductions that could be achieved by a ridership increase up to the 15% target increase level are
16 infinitesimally small. Brittle Decl. III, ¶¶ 15-16. And whatever shortfall in emissions reductions
17 there was has been made up with the implementation of the contingency plan, as the Court has
18 held.

19 An injunction does not issue "to restrain an act the injurious consequences of which are
20 merely trifling." *Weinberger, supra*, 456 U.S. at 311-312, quoting *Consolidated Canal Co. v.*
21 *Mesa Canal Co.*, 177 U.S. 296, 302 (1900). The Court need not parse the distinction between
22 "trifling" and "slight": public health is simply not a factor in this case.

23 Even if TCM 2 ever had significant implications for air quality, moreover, increasing
24 transit ridership without discouraging automobile use will not reduce emissions. Improving
25 service to those who are already transit-dependent – i.e., those who live in dense urban
26 environments, many of whom are low-income citizens who drive little or not at all – does nothing
27 for air quality. Wachs Decl., ¶ 18. Indeed, service additions for these citizens may increase
28 emissions. *id.*, ¶ 19, an ironic consequence for residents of, say, San Francisco and Oakland, who

1 have not experienced recent ozone exceedances in their areas. Yet adding new transit services in
2 these areas, which are already better served than other parts of the region, is a focus of the AC
3 Transit and Muni "vision" plans for which plaintiffs obviously hope to obtain funding through this
4 litigation. Heminger Decl. II, ¶¶ 41-45, Exh. O.

5 Meanwhile, plaintiffs agree that five years is a reasonable period of time to reach the 15%
6 ridership increase target, they acknowledge that MTC forecasts that the target will be met within
7 those five years, and they provide no evidence to undermine that forecast.¹¹ Even if there was
8 some link between TCM 2 implementation to public health, and there is not, an injunction is
9 hardly necessary when the plan MTC developed before litigation commenced is predicted to meet
10 the goal within a timeframe that the parties agree is reasonable.

11 If plaintiffs really believed that a failure to achieve the target ridership increase constituted
12 a health threat, then presumably they would not have waited thirteen years after the original target
13 date passed in 1987 to bring this action. Now they are in court and cannot forge a meaningful link
14 between TCM 2 and public health. The Court should accordingly deny injunctive relief.

15 **C. The Injunction Plaintiffs Propose Is Unjustified by the Liability Order,**
16 **Unnecessary For the Implementation of TCM 2 As the Court Has Construed**
It, and Ineffective.

17 Injunctions must be "narrowly tailored"; they must be necessary to ensure compliance; and
18 they should be effective. Plaintiffs' proposed injunction meets none of these standards.

19 **1. Plaintiffs' Proposed Injunction Is Not Narrowly Tailored To Address**
20 **the Violation Found in the Liability Order.**

21 A defendant should not be ordered in an injunction to perform a duty unless it has first
22 been found to be in violation of that duty. *Hoptowit v. Ray, supra*, 682 F.2d at 1251. The Court
23 found MTC, together with six major transit operators, liable for violation of a "separate
24 obligation" to increase transit ridership to the level of a 15% increase from the 1982/83 baseline.

25
26 ¹¹ More precisely, MTC's travel demand model, as applied in the RTP, forecasts that transit
27 ridership will increase to as many as 600 million riders by the end of FY 2006/07, or by
28 June 30, 2007. Annual ridership statistics are not kept on a month-by-month basis that would
enable MTC to make a reasonable estimate of ridership by the date (November 9, 2006) that
plaintiffs suggest. Brittle Decl. III, ¶¶ 2, 12. But in principle the parties do not disagree about
the time period at issue.

1 The Order found MTC *not liable* for failing to obtain an adequate Short Range Transportation
2 Plan ("Five Year Plan") for 1983-87 from any transit operator; it found "*irrelevant*" any failure
3 twenty years ago to consult with operators about those plans; it found that MTC did in fact *adopt* a
4 ridership increase target; it found MTC *not liable* for failing to "seek to ensure" that the transit
5 operators' five year plans are implemented through TIP implementation and allocation of regional
6 funds; and it found MTC *not liable* for failing to report on ridership gains. *Bayview Hunters*
7 *Point, et al. v. MTC, et al.*, 177 F.Supp. 2d 1011, 1029-31 (N.D. Cal. 2001). There is nothing else
8 in TCM 2 except, according to the Order, the "separate requirement" of reaching the ridership
9 target itself. *Id.* at 1031 n. 23. If the 15% ridership increase is a "separate requirement" that can
10 be breached without liability also for failing to implement the other steps in TCM 2, then these
11 other steps are clearly not the "heart" of TCM 2, as plaintiffs claim.

12 Yet plaintiffs would have MTC re-perform all, or nearly all, of the steps in TCM 2 – as if
13 MTC were in breach of a duty to perform these acts the first time.¹² This time around, however,
14 the consultation element would begin only after plaintiffs have prepared the ground by inducing
15 two handpicked subregional transit operators – AC Transit and Muni – to present wish lists of
16 projects in their service areas to the Court and challenge MTC, an agency responsible to citizens
17 throughout the region, to reject them. Needless to say, plaintiffs do not insist that the projects be
18 designed to promote transit productivity, which is how TCM 2 ridership gains were to be obtained
19 in the first place. Indeed, this injunction proposal completes the plaintiffs' campaign to write the
20 productivity focus of TCM 2 out of the measure altogether.

21 The logic of plaintiffs' theory of TCM 2 as a continuously viable measure has always held
22 that the six major transit operators must continuously prepare "Ridership Increase Plans" (RIPs)
23 and MTC must continuously "confer" with them to come up with fundable RIPs that add up to a
24 15% regional ridership increase. The Court's liability order does not sanction this theory. Now
25 the plaintiffs resurrect it at the remedy phase, with some modifications obviously intended to route
26 extra funding to handpicked operators providing service in selected subparts of the region. This is

27

28 ¹² We say "nearly all" because plaintiffs do not suggest that MTC should, "after consultation with
the operators[,] adopt [a] ridership increase target," as TCM 2 required.

1 not a narrowly-tailored injunction, and it is not justified by the liability order.

2 **2. There Is No Justification for Prematurely Reopening the RTP and TIP.**

3 In a setting where narrow tailoring is the rule, plaintiffs let the seams out altogether with
4 their next demand, a proposal that the Court order MTC immediately to reopen the RTP and TIP it
5 has just completed and revise it by next January to include a detailed explanation how the TCM 2
6 target level will be reached within five years. Implicit in the proposal is the assumption that the
7 RTP would have to be substantively modified to eliminate some projects in order to make room
8 for projects in the AC Transit or Muni "vision" plans that MTC has not already included in the
9 RTP. But since the RTP already projects more than the target level of transit riders by FY 06/07,
10 there is no logical basis for this assumption.

11 Evidence one would expect to see in support of a request such as this is missing. Plaintiffs
12 present no evidence that anything in the 2001 RTP or the TIP as most recently amended interferes
13 with the implementation of TCM 2; as MTC has shown, the evidence is to the contrary. They
14 offer no basis for suggesting that the RTP and amended TIP, if implemented, will not result in the
15 achievement of TCM 2's ridership increase target within a period that they have agreed reasonably
16 meets a TCM implementation standard of "as expeditiously as practicable." Plaintiffs present no
17 evidence to suggest, moreover, that the forecast in the RTP is unreasonable, that it is based on
18 false assumptions, or that it is otherwise improper or unprofessionally prepared. (To the contrary,
19 the forecasts are prepared by highly qualified professional transportation planners. *See, e.g.*,
20 Purvis Decl. I, ¶¶ 2-10.)¹³ There is no evidence of anything MTC has done that reduces transit
21 ridership, or of any failure by MTC to demonstrate the utmost good faith and or to take all
22 reasonable measures to increase transit ridership.

23 Just as MTC did not require TCM 2 or a lawsuit to throw its unqualified support behind
24 public transit, the region does not need the process plaintiffs propose in order to ensure that
25 worthy and effective transit projects are included in the RTP.¹⁴ Even if it were practicable to open
26

27 ¹³ Plaintiffs may assume that the forecasts are valueless, but forecasts were the basis of TCM 2
28 itself, and if the RTP were reopened as they hope, MTC would need the model to project the
ridership impacts of any RTP amendment.

¹⁴ Several of the projects proposed by Muni and AC Transit in their respective plans are already

1 up the RTP on such a short timetable, moreover, there is no reason to believe that any achievable
2 amendment would accelerate the date on which MTC could forecast the target number of transit
3 riders; the lead time for project development and changes in funding allocations is too long to
4 make a significant difference in the existing five-year forecast. Heminger Decl. II, ¶ 49.¹⁵

5 In 2004, that is, before the next five years are up, MTC will complete the complex, 18-
6 month process of revising the RTP – i.e., which means *MTC will begin the RTP update process all*
7 *over again next year anyway*. There is nothing to gain by accelerating this process by a few
8 months. Bauer Decl., ¶ 38-40; Heminger Decl. II, ¶¶ 9-10.

9 **3. MTC Cannot "Ensure" Transit Ridership, and Any Injunction That**
10 **Assumes It Can Is Ineffective And Unwarranted.**

11 To enforce a TCM that called upon MTC to "seek to ensure" the implementation of
12 operators' 1983-87 Five Year Plans, plaintiffs propose that MTC and Muni be enjoined to "ensure"
13 that the TCM's target is reached by November 2006. The court should reject this proposal.

14 "[A] court of equity may refuse to give any relief when it is apparent that that which it can
15 give will not be effective or of benefit to the plaintiff." *Virginian Railway Co. v. System Fed'n.*
16 *No. 40*, 300 U.S. 515, 550 (1937), *quoted by In Re Estate of Ferdinand Marcos Human Rights*
17 *Litigation*, 94 F.3d 539, 545 (9th Cir. 1996); *see also Hecht Co., supra*, 321 U.S. at 325-26. There
18 is nothing effective about an injunction that compels a defendant to achieve a result it cannot

19
20 in the 2001 RTP. Brittle Decl. III, ¶ 17. Others were not added to the RTP because they are
21 insufficiently developed, or because the proponent did not identify sources of operating
22 subsidies. Brittle Decl. III, ¶¶ 17-18. This is a serious omission: there is no point in buying
23 new buses if there is no money to pay the drivers. In the space allotted it is not possible to
24 explore the complexities of federal, state and local transportation funding; suffice here to note
25 that there are no pat solutions to funding transit operating shortfalls; that cannibalizing the
26 capital rehabilitation program to cover new operating expenses, as MTC understands AC
27 Transit and the plaintiffs would propose, is no answer; and that there are significant legal and
28 practical obstacles and uncertainties, and many policy drawbacks, to robbing from other
investments to fund new transit operating expenses. Heminger Decl. II, ¶¶ 49-53; Bauer Decl.,
¶¶ 11-37.

15 In formulating regional policy and in meeting regional obligations, moreover, MTC relies
upon its regional travel demand forecast model, not on forecasts prepared by local agencies or
transit operators like AC Transit. Brittle Decl. III, ¶ 19. While AC Transit's settlement with
plaintiffs generated a plan that purports to predict ridership increases that will result in certain
levels of increased ridership, neither the method for making these predictions nor the
assumptions underlying them is disclosed. *Id.*

1 guarantee, and MTC simply cannot "ensure" that a particular number of transit boardings will
2 occur in one year. Wachs Decl., ¶¶ 15-17. An injunction that commands a state agency to
3 "ensure" a result that no one can "ensure" – to guarantee future human behavior – is not effective,
4 and it is certainly not "narrowly tailored."¹⁶

5 Accordingly, while injunctive relief is simply unjustified on this record, any injunction or
6 declaration that requires MTC to "ensure" a ridership level or that incorporates a timetable for
7 reaching the TCM 2 target must at a minimum provide that (a) contempt liability does not attach if
8 a failure of the region to reach the target is the not result of a failure by MTC to exert good faith
9 and reasonable efforts, and (b) the time shall be adjusted as appropriate in the event of unforeseen
10 or uncontrollable circumstances.

11 **D. The Injunction Plaintiffs Seek Is Not In the Public Interest As It Would**
12 **Impose Needless Burdens On MTC and Other Public Agencies Who Rely On**
13 **the 2001 RTP, With No Corresponding Benefit.**

14 "In exercising their sound discretion, courts of equity should pay particular regard for the
15 public consequences in employing the extraordinary remedy of injunction." *Weinberger, supra*,
16 328 U.S. at 312. A premature reopening of the RTP would also be exceedingly bad public policy
17 and contrary to the public interest. As a matter of law the RTP must be "directed at achieving a
18 coordinated and balanced regional transportation system, including, but not limited to, mass
19 transportation, highway, railroad, maritime, bicycle, pedestrian, goods movement, and aviation
20 facilities and services." Cal. Gov't Code § 65080(a). The process of crafting a plan like the 2001
21 RTP that meets these statutory requirements and the area's essential transportation needs was an
22 intensely collaborative one that entailed a lengthy and painstaking process of complex analysis.

23
24 ¹⁶ Such an order would, moreover, be manifestly harmful to MTC as it would improperly subject
25 MTC to potential liability for contempt of an order with which MTC indisputably cannot
26 ensure compliance. *Cf. Go-Video, Inc. v. MPAA*, 10 F.3d 693, 695 (9th Cir. 1993) (good faith
27 of contemnor not a defense to civil contempt liability). Indeed, under the order plaintiffs
28 propose, MTC could be held in contempt if ridership fails to reach the target level for any
reason, yet MTC, lacking the power to guarantee transit ridership levels, would lack the ability
to purge the contempt, an essential feature of civil contempt. *International Union, UMWA v.*
Bagwell, 512 U.S. 821, 828-29 (1994). MTC would, of course, argue that it is unable to
comply, *see U.S. v. Rylander*, 460 U.S. 752, 757 (1983), but there is no point to an order that,
due to a demonstrably false assumption about the defendant's power to comply, invites such a
defense in advance.

1 dialogue, interagency negotiation, and participation by elected officials and members of the
2 public. The delicate balance emerged from this process was embodied in a unified plan upon
3 which public agencies – and the public – reasonably rely. Heminger Decl. II, ¶ 9; Bauer Decl.,
4 ¶¶ 12-27; CMA Director Declarations.

5 For MTC the burden of reopening the RTP prematurely would be great. The 2001 RTP
6 development consumed some 20,000 MTC employee hours and cost more than \$1.3 million to
7 prepare. Brittle Decl. III, ¶ 7. These costs do not include the time of MTC's commissioners
8 themselves, *id.*, or that of the scores of public and quasi-public agencies that must be consulted in
9 order to modify the RTP. See CMA Director Declarations. As a practical matter, it would be
10 extremely problematic in any event to accomplish the revision of the RTP that plaintiffs seek by
11 January 2003. Heminger Decl. II, ¶ 10.

12 And, of course, there is no evidence of air quality benefits and no promise of ridership
13 increase benefits that would result from the proposed injunction. The burdens of this injunction
14 plainly outweigh the benefits, and it is decidedly not in the public interest to place this
15 extraordinary transportation plan in jeopardy. Under these circumstances injunctive relief should
16 be denied. *Weinberger, supra*, 456 U.S. at 305.

17 **E. There Is No Justification for an Order Pertaining To Conformity Or**
18 **Enjoining TIP Amendments.**

19 In their memorandum, but not in their proposed order, plaintiffs ask the Court for an
20 injunction requiring MTC to comply with EPA's conformity regulations and to enjoin MTC from
21 approving any amendments to the Transportation Improvement Program ("TIP") until the RTP has
22 been amended. They provide no authority for such an extraordinary order in this case in the case
23 law or in the text of TCM 2. Instead, plaintiffs attempt to justify this request by pronouncing
24 'illegal' a finding on March 15 of this year by MTC that the TIP amendment needed to implement
25 the 2001 RTP conforms to the State Implementation Plan (SIP). Pl. Mem. at 20. This finding
26 necessarily included a finding that the RTP and TIP as amended provide for the "timely
27 implementation" of TCM 2 – a separate regulatory process that parallels these proceedings and
28 that indeed provides other means for ensuring compliance with TCM 2. Plaintiffs claim that MTC

1 ignored regulations governing such a finding, and the Court's liability order as well.

2 The claim is false. In detailed responses to public comments, the TIP conformity analysis,
3 which also addresses the conformity of the 2001 RTP itself, discusses the basis for the finding that
4 the RTP and the amended TIP "timely implement" TCM 2. Brittle Decl., ¶ 3, Exh. A at 37-41.¹⁷
5 The Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), in
6 consultation with the U.S. Environmental Protection Agency, concurred with these findings.
7 Heminger Decl. II, ¶ 28. Plaintiffs may disagree with them, but that does not make them improper
8 or invalid. Indeed, considering all that the RTP does, as we have seen, to provide for the
9 "expeditious implementation" of TCM 2, complaints about a finding that the RTP and the TIP
10 (which merely implements the RTP) provide for the "timely implementation" of TCM 2 are
11 misplaced.¹⁸

12 In any event, this issue is not properly before the Court. A conformity finding is not itself
13 an "emissions standard or limitation," and is therefore not amenable to challenge in a citizen suit.
14 Rather, challenges to conformity findings must be made under the Administrative Procedures Act.
15 *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250, 1257-62 (1st Cir. 1996);
16 *Environmental Council of Sacramento v. Slater*, 2000 U.S. Dist. Lexis 20184, *18-*20, 51 ERC
17 1790,1795-96 (E. D. Cal. 2000) (Karlton, J.). Even if a conformity challenge were the proper
18 subject of a citizen suit, and it is not, the Court cannot entertain allegations not included in a 60-
19 day notice of intent to sue. *Save our Health Organization v. Recomp of Minnesota, Inc.*, 37 F.3d
20 1334, 1337 (8th Cir. 1994). The recent conformity finding is not referred to in the notice that
21 preceded this action, nor could it have been. It is improper to circumvent these procedures and

23 ¹⁷ The charge that MTC "ignored" the Court's liability order is demonstrably false. The
24 conformity finding acknowledges the order but also observes, correctly, that the order itself
25 did not impose any new obligations on MTC. Brittle Decl. II, ¶ 3, Exh. A at 37-38. The
liability order did not invalidate any conformity finding or enjoin MTC from making such
findings, nor could it have, since the issue was not raised and could not have been placed
before the Court.

26 ¹⁸ Plaintiffs use the conformity findings to inject a sense of false urgency to their otherwise
27 unsupported case for an injunction. But a finding that the RTP conforms is not evidence of
28 irreparable harm or of the need for an injunction. From the standpoint of air quality, it is
evidence of the opposite. And from the standpoint of transit ridership, plaintiffs cannot justify
an injunction requiring MTC to reopen the RTP simply by pointing out that the RTP can now
be implemented.

1 convert this proceedings into a forum for attacking this finding.

2 Plaintiffs also ask the Court to enjoin further TIP amendments pending an amendment of
3 the RTP. If the Court rejects plaintiffs' proposal to require a special RTP amendment, as it should,
4 then the proposed additional restriction on TIP amendments, contingent as it is on that misguided
5 proposal, falls away. But this proposal is inappropriate and overbroad in its own right. MTC
6 amends the TIP frequently for a variety of reasons that have nothing at all to do with the approval
7 of projects of any kind, or with funding decisions or choices, or with conformity. Heminger
8 Decl. II, ¶ 12. Enjoining TIP amendments, moreover, may impede MTC's effort to increase transit
9 ridership. *Id.* Plaintiffs do not even try to show that enjoining TIP amendments, which must be
10 consistent with the RTP, would advance the cause of increasing transit ridership.

11 **F. No Remedy that Refers to a 15% Ridership Increase from a 1982 Baseline**
12 **Should Employ the Wildly Overstated Ridership Figures Reported by Muni**
During the Period 1980-83.

13 Plaintiffs claim that the total boardings for the baseline year was 503 million, yielding a
14 15% increase target of 579 million. This total reflects the fiction of 298 million boardings on
15 Muni in 1982-83, a figure that reflects a massive overstatement, as Muni has long acknowledged.
16 That figure is indisputably the product of data and methodological errors, and must be corrected.

17 Muni contends, MTC agrees, and plaintiffs have no evidence to dispute, that the reported
18 figure is inaccurate, and that a far more accurate estimate is 264 million. Straus Decl., ¶¶ 8-18; *see*
19 *also* Nelson Decl., ¶¶ 4-9. Plaintiffs contend instead that the baseline should reflect an inaccurate,
20 and inflated, boardings estimate for the sole reason that this was the number "officially reported."
21 Pl. Open. Mem. at 18:24-25. In other words, plaintiffs ask the Court to compound a known error
22 because the error was made in an "official" report.

23 Plaintiffs also contend that Muni's ridership numbers could not have been "estimates" and
24 must have been counts because ridership numbers were "officially" reported to "FTA." (They
25 mean UMTA.) Pl. Open. Mem. at 18:23-25. This is simply not true. Since before 1980 all of
26 Muni's ridership totals have been estimates based on statistical sampling techniques, not counts.
27 Nelson Decl., ¶¶ 4-9; Straus Decl., ¶¶ 9-15.

28 There is no evidence to the contrary. Application of the 15% ridership increase target to a

1 demonstrably inaccurate baseline would be clear error. If there were a genuine factual dispute,
2 then the matter would have to be resolved by trial, but there is not.

3 **G. The Proposed Declaration of Maximum Penalty Amounts Is Neither Necessary**
4 **Nor Meaningful.**

5 Plaintiffs ask the Court to render a declaration of the maximum possible penalty amounts
6 to which MTC and Muni might be exposed. A more pointless exercise can scarcely be imagined.
7 The penalties claim should be resolved, if it can be resolved, on a Rule 56 motion; otherwise the
8 matter must be tried.

9 **IV. CONCLUSION**

10 MTC urges the Court to reject the plaintiffs' proposed injunction. On this record, the only
11 appropriate remedy in light of the Court's liability decision is declaratory relief on the terms MTC
12 suggests. Should the Court find that material facts are genuinely in dispute, then the remedy issue
13 should be tried at the earliest reasonable opportunity.

14 Dated: April 23, 2002

Respectfully submitted

15 METROPOLITAN TRANSPORTATION
16 COMMISSION

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