

to the public interest, shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). EPA has made such a good cause finding, including the reasons therefor, and established an effective date of April 22, 2004. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 21, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purpose of judicial review nor does it extend the time within which petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental regulations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 1, 2004.

Laura Yoshii,

Acting Regional Administrator, Region IX.  
[FR Doc. 04-9140 Filed 4-21-04; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[CA258-0442(A); FRL-7645-7]

#### Determination of Attainment of the 1-Hour Ozone Standard; Determination Regarding Applicability of Certain Clean Air Act Requirements; Approval and Promulgation of Ozone Attainment Plan; San Francisco Bay Area, CA

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is determining that the San Francisco Bay Area (Bay Area) ozone nonattainment area has attained the 1-hour ozone national ambient air

quality standard (NAAQS) by the deadline required by the Clean Air Act (CAA), September 20, 2006. Based on this determination, we are also determining that the CAA's requirements for reasonable further progress and attainment demonstrations and for contingency measures for the 1-hour ozone standard are not applicable to the area for so long as the Bay Area continues to attain the 1-hour ozone standard.

In addition, EPA is approving the following elements of the 2001 ozone attainment plan for the Bay Area (2001 Plan): Emissions inventory, reasonably available control measures (RACM); commitments to adopt and implement specific control measures; motor vehicle emissions budgets (MVEBs); and commitments for further study measures.

In 2001, EPA disapproved certain components of the 1999 ozone attainment plan for the Bay Area: The RACM demonstration, the attainment demonstration, and the MVEBs. Because of this disapproval the 2 to 1 offset sanction under CAA section 179(b)(2) was imposed in the Bay Area on April 22, 2003. Based on the proposed approval of these elements of the 2001 Plan, EPA made an interim final determination that resulted in a stay of the offset sanction and deferral of the highway sanction. EPA's approval of RACM and the MVEBs in the 2001 Plan terminates the sanctions clock for those plan elements.

Based on the attainment determination for the Bay Area, elsewhere in this **Federal Register** EPA is taking interim final action to stay the offset sanction and defer the highway sanction triggered by the attainment demonstration disapproval for as long as the area continues to attain the 1-hour ozone standard because that plan requirement has been suspended.

**DATES:** Effective Date: This rule is effective on May 24, 2004.

**ADDRESSES:** You can inspect copies of the administrative record (docket number CA258-0442(A)) for this action at EPA's Region 9 office during normal business hours by appointment. The address is U.S. EPA Region IX—Air Division, 75 Hawthorne Street, San Francisco, CA.

**FOR FURTHER INFORMATION CONTACT:** Ginger Vagenas, EPA Region IX, (415) 972-3964, [vagenas.ginger@epa.gov](mailto:vagenas.ginger@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, "we," "us" and "our" refer to EPA.

#### Table of Contents

I. Background

- II. Attainment Finding for the Bay Area
  - A. Attainment Finding
  - B. EPA's Responses to Comments on the Proposed Finding of Attainment
    - 1. Comments Regarding Timing of the Finding of Attainment
    - 2. Comments Regarding the Data on Which the Attainment Finding Is Based
    - 3. Comments Regarding the Impact of an Attainment Finding on the 2001 Plan and on Air Quality in the Bay Area
  - C. Applicability of Clean Air Act Planning Requirements in Areas Attaining the 1-Hour Ozone Standard
  - D. EPA Responses to Comments on Applicability of Clean Air Act Requirements
    - 1. Comments Regarding EPA's Clean Data Policy
    - 2. Comments Regarding the Applicability of EPA Policies to the Bay Area
  - E. Effects of the Attainment Finding on the Bay Area and of a Future Violation of the 1-Hour Ozone NAAQS
- III. Approval of Bay Area 2001 Plan
  - A. Approval of Bay Area 2001 Plan
  - B. EPA's Responses to Comments on the Proposed Approval of the 2001 Plan
    - 1. Comments on the Proposed Approval of the Emissions Inventory
    - 2. Comments on the Proposed Approval of RACM
    - 3. Comments on the Proposed Approval of the Control Measure Commitments
    - 4. Comments on the Downwind Transport of Air Pollution
    - 5. Comments on Additional Plan Elements
    - 6. Comments on the Impact of the State Law and Court Orders
    - 7. Comments on the Interim Final Determination
  - IV. Effect of the Attainment Determination and 2001 Plan Action on Transportation Conformity
  - V. Statutory and Executive Order Reviews

## I. Background

Upon enactment of the Clean Air Act Amendments of 1990, the Bay Area was classified as a moderate nonattainment area for the 1-hour ozone NAAQS. 56 FR 56694 (November 6, 1991). EPA redesignated the Bay Area to attainment in 1995, based on then current air quality data (60 FR 27029, May 22, 1995), and subsequently redesignated the area back to nonattainment without classification on July 10, 1998 (63 FR 37258), following renewed violations of the 1-hour ozone standard. Upon the Bay Area's redesignation to nonattainment, we required the State to submit a state implementation plan (SIP) addressing applicable CAA provisions, including a demonstration of attainment as expeditiously as practicable but no later than November 15, 2000.

The Bay Area Air Quality Management District (District or BAAQMD), along with its co-lead agencies—the Metropolitan Transportation Commission and the

Association of Bay Area Governments—prepared a 1-hour ozone attainment plan, which was submitted to EPA by the California Air Resources Board (CARB) on August 13, 1999. On September 20, 2001 (66 FR 48340), we approved the emissions inventories, reasonable further progress (RFP) provisions, control measure commitments, and contingency measures in that plan. In the same rulemaking, we disapproved the remaining portions of the SIP, *i.e.*, the attainment demonstration, MVEB, and RACM demonstration, issued a finding that the area failed to attain by the applicable deadline, and set a new attainment deadline of as expeditiously as practicable but no later than September 20, 2006. The effective date of the final disapproval (October 22, 2001) started an 18-month clock for the imposition of sanctions pursuant to CAA section 179(a) and 40 CFR 52.31, and a 2-year clock for EPA to promulgate a federal implementation plan (FIP) under CAA section 110(c)(1). 62 FR 43796 (August 15, 1997). The Bay Area became subject to the 2 to 1 offset sanction under CAA section 179(b)(2) on April 22, 2003.

On November 30, 2001, CARB submitted the 2001 Plan for the Bay Area addressing the new attainment deadline. On February 14, 2002, we found the MVEBs in the 2001 Plan adequate. 67 FR 8017 (February 21, 2002). On July 16, 2003 (68 FR 42174), we proposed to approve the following elements of the 2001 Plan: Emissions inventory, RACM demonstration, attainment assessment, MVEBs, and commitments to adopt control measures and to adopt and submit a plan revision by April 15, 2004 based on new modeling. On the same date, we issued an interim final determination that the 2001 Plan corrects the deficiencies in the 1999 Plan, thereby staying the CAA section 179 offset sanction and deferring the imposition of the highway sanction triggered by our September 20, 2001 disapproval. 68 FR 42172.

On October 31, 2003 (68 FR 62041), we proposed to find that the San Francisco Bay Area ozone nonattainment area had attained the 1-hour ozone standard by its CAA mandated attainment date of September 20, 2006. Based on this proposed finding, we also proposed to suspend the attainment demonstration, RFP and contingency measure requirements of the CAA for the Bay Area for so long as the area continues to attain the 1-hour ozone standard.

On January 30, 2004, CARB withdrew the attainment assessment, the RFP demonstration, the contingency

measures, and the technical correction to the attainment assessment (Appendix F) in the 2001 Plan from EPA's consideration as revisions to the Bay Area SIP.<sup>1</sup> In the same letter, the State also specifically requested that EPA approve the motor vehicle emissions budgets in the 2001 Plan.

## II. Attainment Finding for the Bay Area

### A. Attainment Finding

In this action, EPA is finalizing its proposed finding of attainment for the Bay Area. The 1-hour ozone NAAQS is 0.12 parts per million (ppm) not to be exceeded on average more than one day per year over any three-year period. 40 CFR 50.9 and appendix H. We determine if an area has attained the 1-hour standard by calculating, at each monitor, the average number of days over the standard per year during the preceding three-year period.<sup>2</sup> We use all available, quality assured monitoring data and we generally base our determination of attainment or failure to attain on the area's design value as of its applicable attainment deadline. In this case, the attainment deadline (September 20, 2006) has not been reached, so we are making our attainment finding based on the Bay Area's current air quality data and design value, which demonstrate attainment of the 1-hour standard. See section II.E. for a discussion of consequences of future violations.

The design value for the Bay Area for 2001–2003 was 0.123 ppm, which is below the 0.12 ppm standard using the applicable rounding convention discussed below. No monitor in the Bay Area recorded an average of more than one exceedance of the 1-hour ozone standard per year during the 2001 to 2003 period. Documentation of the monitoring data and design value calculation can be found in the docket for this rulemaking.

Our October 31, 2003 proposed attainment finding was based on all available air quality data collected from the monitoring network, which we

<sup>1</sup> See January 30, 2004 letter from Catherine Witherspoon, Executive Officer, CARB, to Wayne Nasti, Regional Administrator, U.S. EPA Region 9. This letter is subsequently referred to as the 1/30/04 Witherspoon letter.

<sup>2</sup> See generally 57 FR 13506 (April 16, 1992) and Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, EPA, to Regional Air Office Directors; "Procedures for Processing Bump Ups and Extensions for Marginal Ozone Nonattainment Areas," February 3, 1994 (Berry memorandum). While explicitly applicable only to marginal areas, the general procedures for evaluating attainment in this memorandum apply regardless of the initial classification of an area because all findings of attainment are made pursuant to the same procedures.

determined met our regulations for state air quality monitoring networks. On November 12, 2003, the District submitted an interim certification that the data had been quality assured.<sup>3</sup> On December 1, 2003, Jack Broadbent, Executive Officer/Air Pollution Control Officer, BAAQMD, sent a letter to Deborah Jordan, EPA, (12/1/03 Broadbent letter) transmitting the District's formal certification in accordance with 40 CFR part 58 that the ozone ambient air monitoring data submitted to EPA are complete and accurate. The quality assurance process did not result in any changes to the data.

Because the Bay Area's design value was below the 0.12 ppm 1-hour ozone standard and the area averaged one or fewer exceedances per year at each monitor for the 2001 to 2003 period, we find that the Bay Area attained the 1-hour ozone standard by its CAA mandated attainment deadline of September 20, 2006. Based on this final attainment determination, we are also determining that the CAA requirements for RFP, an attainment demonstration and contingency measures for the 1-hour ozone standard are not applicable to the Bay Area for so long as the area continues to attain the standard. For a discussion of EPA's policy and legal basis for suspending these requirements, see our proposed attainment determination at 68 FR 62044.

Finally, based on our final attainment determination, elsewhere in this **Federal Register**, we are taking interim final action to stay the offset sanction and defer the highway sanction for the attainment demonstration because that plan requirement has been suspended. The stay/deferral will remain in effect for as long as the area continues to attain the 1-hour ozone standard.

### B. EPA's Responses to Comments on the Proposed Finding of Attainment

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from seven parties. We summarize the most significant comments and provide our responses below; the entire set of comments and responses can be found in the docket in a separate Response to Comment document (RTC).

#### 1. Comments Regarding Timing of the Finding of Attainment

*Comment 1:* Several commenters expressed support for a determination that the Bay Area has attained the 1-

<sup>3</sup> See November 12, 2003 email from Mark Stoelting, BAAQMD, to Catherine Brown, EPA, and Catherine Brown's November 21, 2003 response.

hour ozone standard. Another commenter concurred with the determination that Bay Area's monitoring network meets or exceeds EPA's specified requirements. In contrast, other commenters pointed to the Bay Area's prior history of slipping back out of attainment following EPA action redesignating the area to attainment in 1995 and recent year-to-year differences in design values as a reason for exercising caution in making an attainment finding. One commenter stated that, in light of the small margin of attainment, EPA should scrutinize the foundation for the asserted finding of attainment.

*Response:* A determination that an area has attained the standard is based on an objective review of air quality data. The 1-hour ozone NAAQS is 0.12 ppm, not to be exceeded on average more than one day per year over any three year period. A review of the data from the prior three years (2001–2003) indicates that the Bay Area has met this standard. 68 FR 62042–62043.

The redesignation of an area to attainment under CAA section 107(d)(3)(E) is a separate process from a finding of attainment. Unlike an attainment finding where we need only determine that the area has had the prerequisite number of clean years, a redesignation requires multiple determinations. Under section 107(d)(3)(E) these determinations are:

1. We must determine, at the time of the redesignation, that the area has attained the relevant NAAQS.

2. The state must have a fully approved SIP for the area.

3. We must determine that the improvements in air quality are due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable federal regulations and other permanent and enforceable reductions.

4. We must have fully approved a maintenance plan for the area under section 175A.

5. The state must have met all the nonattainment area requirements applicable to the area.

## 2. Comments Regarding the Data on Which the Attainment Finding is Based

*Comment 2:* The data do not support a finding of attainment. The District previously reported two separate exceedances on July 10, 2002, of 160 parts per billion (ppb) and 151 ppb, respectively, and stated that EPA should recognize the July 10, 2002 reading of 151 ppb at 4 p.m. as a separate exceedance from the 160 parts per billion (ppb) exceedance from earlier that day. As of December 1, 2003, the

District's website stated that the region experienced three violations of the 1-hour ozone NAAQS at Livermore in 2002.

*Response:* An area's ozone attainment status is determined by calculating the average number of days over a three-year period on which it exceeds the ozone standard. See 40 CFR 50.9(a) and 40 CFR part 50, Appendix H. Therefore, multiple hourly exceedances on any single day count as only one exceedance. The Bay Area's website apparently mistakenly counted a reading of 0.123 ppm at Livermore on August 9, 2002 as an exceedance of the 1-hour ozone NAAQS. As explained at length in the proposed finding of attainment (68 FR 62043, October 31, 2003), and discussed below (see response to comment 6), rounding conventions and the form of the standard dictate that values between 0.120 and 0.124, inclusive, are to be rounded to 0.12 parts per million.

*Comment 3:* According to EPA guidance, an attainment finding should be based on certified data, however, the proposal was published before the data were certified. EPA's guidance demands quality assured data from states to establish evidence of attainment. The EPA memorandum "Procedures for Processing Requests to Redesignate Areas to Attainment" signed by John Calcagni, Director Air Quality Management Division, OAQPS, dated September 4, 1992 (9/4/92 Calcagni memo)\* states that "[t]he data should be collected and quality-assured in accordance with 40 CFR 58 and recorded in the Aerometric Information Retrieval System (AIRS) in order for it to be available for the public to review." EPA has cited this memo as applicable authority for the proposed rulemaking, and cannot pick and choose portions as applicable and inapplicable without explanation. The Administrative Procedure Act (APA) and CAA direct that EPA's decision-making must be based on data and information in the record and available to the public, and the law of the Ninth Circuit clearly requires that when EPA acts on SIPs, it must comply with its own rules.

*Delaney v. EPA*, 898 F.2d 687, 693 (9th Cir. 1990). The data and information purportedly supporting the proposed action are simply unavailable, or were unavailable during the comment period.

*Response:* Air quality data are available to EPA and the general public on a real-time basis from the District's website. EPA based its proposal on this

\* This memo is available online at <http://www.epa.gov/ttn/naaqs/ozone/ozonetech/940904.pdf>.

publicly available monitoring data that indicated the Bay Area had attained the 1-hour ozone standard. While the data for 2003 had not yet been quality assured at the time of the proposal, the District maintains a monitoring network that meets or exceeds all applicable requirements. See 68 FR 62042–62043 and "System Audit of the Ambient Monitoring Program of Bay Area Air Quality Management District," available online at <http://www.epa.gov/region09/air/sfbayoz/tsd1003.pdf>. EPA had no reason to believe the quality assurance process would indicate there had been problems with the data and so proceeded with the proposed finding.

On November 12, 2003, the District notified EPA that it had quality-assured the data from the 2003 ozone season and submitted it to AIRS. See footnote 3. Thus the quality-assured data were accessible to the public on that date, *i.e.*, during the public comment period. The November 12, 2003 notification was followed by the 12/1/03 Broadbent letter, which confirmed that the data had been collected and quality assured in conformance with 40 CFR part 58. The quality assurance process did not result in any changes to the data. While the proposal was published shortly before the data were certified, this final rulemaking is based on data that were collected and quality assured in conformance with EPA regulations.

*Comment 4:* Improved air quality in the Bay Area is not the product of real, permanent, surplus, and enforceable emissions reductions, as required by the CAA and EPA policy and guidance. It came as a result of a significant economic downturn that reduced, temporarily, emissions from all sectors of the emissions inventory and the weather had not been particularly ozone conducive. Because recent Bay Area ozone levels result from a combination of temporarily favorable economic and meteorological conditions rather than documentation of the effectiveness of permanent and enforceable measures, an attainment finding is inappropriate and obligations for RFP, attainment demonstration and contingency measure should not be suspended in the Bay Area.

*Response:* The requirement to determine that clean air is the result of permanent and enforceable emissions reductions is a criterion for the redesignation of an area to attainment under CAA section 107(d)(3)(E). It need not be met for a finding of attainment or for the suspension of the associated RFP, attainment demonstration, and contingency measure requirements.

That aside, we believe that the finding of attainment itself addresses in part the

concern about unusually favorable meteorological conditions. We have long recognized that meteorological conditions have a profound effect on ambient ozone concentrations. In setting the current 1-hour ozone standard in 1979, we changed the form of the standard, *i.e.*, the criterion for determining attainment, from a deterministic form “no more than once per year” to a statistical form “when the expected number of days per year is less than or equal to one” over a three-year period in order to properly account for the random nature of meteorological variations. The three-year period for averaging the expected number of exceedances was a reasoned balance between evening out meteorological effects and properly addressing real changes in emission levels. See the proposed and final actions promulgating the current 1-hour ozone standard at 43 FR 26962, 26968 (June 22, 1978) and 44 FR 8202, 8218 (February 8, 1979).

*Comment 5:* Even if EPA has the discretion to dismiss SIP requirements upon a finding of attainment, it would be an abuse of discretion to dismiss these requirements without a finding that the reductions are permanent and enforceable in the circumstances of the Bay Area’s recession and weather conditions. Given the narrow margin of attainment, it is inappropriate to relax the SIP through elimination of the RFP, attainment demonstration, and contingency measures requirements.

*Response:* As noted above, EPA is not dismissing or eliminating these requirements. Rather, we interpret the requirements for an attainment demonstration, an RFP demonstration and contingency measures as inapplicable to an area that has attained the standard, but only for so long as the area remains in attainment. The requirements will again apply if such an area violates the standard. In order to be redesignated to attainment of the ozone standard, the State will be required to demonstrate, among other things, that the reductions contributing to the attainment record are permanent and enforceable, and that atypical weather conditions were not responsible for the improvement in air quality. CAA section 107(d)(3)(E)(iii).

*Comment 6:* EPA’s methodology for rounding off conflicts with Congress’s intent that 0.12 ppm should be read as 0.120 ppm, as evidenced by section 181 of the CAA, at Table 1. See also 40 CFR 50.9, which states that the equivalent unit for the standard is 235 ug/m<sup>3</sup>. (Livermore’s design value is 245 ug/m<sup>3</sup>). Finally, the specific regulation for the ozone standard contains no provision for rounding off, unlike the regulation

for CO. (Compare 40 CFR 50.9 with 40 CFR 50.8(d)).

*Response:* In our proposed finding of attainment, we explained that the 1-hour ozone NAAQS is 0.12 parts-per-million; it is not expressed in parts-per-billion, nor does it contain three digits.<sup>5</sup> Because air quality monitors and models express results in three digits, EPA applies the established rounding convention to determine whether the measurements meet or exceed the standard. Under the rounding convention, 0.005 rounds upward and 0.004 rounds downward, so that a 0.124 parts per billion (ppb) ozone level meets the NAAQS of 0.12 ppm, while a 0.125 parts per billion (ppb) ozone level rounds up to 0.13 ppm and thus exceeds the NAAQS. The use of rounding neither changes the NAAQS nor relaxes it.

The commenter’s reliance on the design values set forth in Table 1 of section 181(a)(1) is misplaced. These design values are used to classify nonattainment areas, not to determine whether an area has attained the standard. See *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1047 (D.C. Cir. 1999) (“\* \* \* although the numbers in the classification table are based upon the 0.12 ppm ozone NAAQS, they are neither equivalent to nor a codification of the NAAQS.”).

EPA’s procedure for calculating the design value for classification purposes is different from the analysis used for purposes of determining attainment. Under EPA’s classification procedures, it is possible for an area that lacks a full set of monitoring data to be designated nonattainment and to have a design value of less than 0.125 parts per billion (ppb). Under these circumstances, the area would be classified as a marginal nonattainment area. See Memorandum from William G. Laxton dated June 18, 1990, “Ozone and Carbon Monoxide Design Value Calculations” (Laxton Memo), available at [http://](http://www.epa.gov/ttn/naaqs/ozone/ozonetech/guide-o3.htm)

<sup>5</sup> See 40 CFR 50.9(a) and footnote 8 of the October 31, 2003 proposal (68 FR 62043). Also see “Guideline for the Interpretation of Ozone Air Quality Standards.” U.S. Environmental Protection Agency, Office of Air, Noise and Radiation, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, January 1979, EPA-450/4-79-003, OAQPS No. 1.2-108. In the 1979 guidance document, EPA states, “[i]t should be noted that the stated level of the standard is taken as defining the number of significant figures to be used in comparisons with the standard. For example, a standard level of .12 ppm means that measurements are to be rounded to two decimal places (.005 rounds up), and, therefore, .125 ppm is the smallest concentration value in excess of the level of the standard.” This document is available on line at <http://www.epa.gov/ttn/naaqs/ozone/ozonetech/guide-o3.htm>.

[www.epa.gov/ttn/naaqs/ozone/ozonetech/laxton.htm](http://www.epa.gov/ttn/naaqs/ozone/ozonetech/laxton.htm). The procedures set forth in the Laxton Memo constitute the “interpretation methodology issued by the Administrator most recently before November 15, 1990.” Finally, the translation of the standard from ppm to ug/m<sup>3</sup> is provided for informational purposes only and does not constitute an alternative form of the standard.

### 3. Comments Regarding the Impact of an Attainment Finding on the 2001 Plan and on Air Quality in the Bay Area

*Comment 7:* EPA should direct the District to include in the next SIP submittal a safety margin of additional emissions reductions to compensate for the narrow margin of attainment. EPA should also mandate that the 2004 SIP contain sufficient contingency measures to achieve emissions reductions totaling 3% of the emissions inventory should the region experience a subsequent violation. See “General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990” (General Preamble), 57 FR 13510-11, April 16, 1992. EPA should institute extraordinary measures to respond immediately in the event of a future violation. The Bay Area’s design value, which is just 2 parts per billion (ppb) below the attainment level, indicates that contingency measures must be included in the upcoming SIP. Only the requirement of federally enforceable contingency measures can provide any reasonable assurance that air pollution control efforts and emissions reductions will continue aggressively in the likely event that the area subsequently exceeds the 1-hour ozone standard once again. EPA should change course and take final action on the 2001 SIP as submitted and require appropriate emissions inventory adjustments to incorporate the effect of episodic control measures and reduced emissions activity from the economic recession experienced during modeled episode days.

*Response:* As noted above, our determination that the Bay Area has attained the standard is based on an objective review of air quality data. No information has been presented that casts doubt on the accuracy of the data, therefore we are proceeding with our finding of attainment. Our guidance provides for the suspension of the attainment demonstration, RFP and contingency measure requirements applicable to the Bay Area upon such a finding.<sup>6</sup> In our proposed action on the

<sup>6</sup> Memorandum from John S. Seitz, Director, OAQPS, EPA, to Regional Air Directors, entitled “Reasonable Further Progress, Attainment

2001 plan, we proposed to approve as part of the attainment assessment the commitment by CARB and the co-lead agencies to submit a SIP revision by April 15, 2004 (68 FR 42181, July 16, 2003). Consistent with the suspension of the attainment demonstration requirement, the State has withdrawn the commitment in the 2001 plan to submit a 2004 SIP revision from EPA consideration.<sup>7</sup> Therefore EPA cannot act on this commitment and, as a result, there is currently no federally enforceable requirement for a 2004 SIP.

The co-lead agencies have, however, expressed their intent to shift their focus to developing a maintenance plan to support a redesignation request if EPA finalizes its finding of attainment. Should the Bay Area violate the 1-hour standard prior to redesignation, the attainment demonstration, RFP and contingency measure requirements will be once again imposed. Also note that, among other things, an approvable maintenance plan must include contingency measures that are designed to promptly address a violation of the standard. Finally, even without the adoption of additional measures, ozone precursor emissions in the Bay Area will continue to decline as a result of previously adopted state, local, and federal measures. Between 2003 and 2006, emissions of oxides of nitrogen (NO<sub>x</sub>) will decline 81 tpd and volatile organic compound (VOC) emissions will decline 52 tpd. 2001 Plan, p. 32–33. These numbers do not include additional reductions to be achieved by the implementation of Smog Check 2 in the Bay Area, which was mandated by the California legislature after adoption of the 2001 Plan.

*Comment 8:* While EPA's Notice of Proposed Rulemaking on the determination of attainment specified three SIP elements that "no longer apply to the Bay Area" EPA did not elect to change or withdraw the District's outstanding enforceable commitment to secure 26 tpd of additional VOC emissions reductions. In light of the data indicating attainment, there could be some question whether all of the enforceable commitments remain valid, but EPA did not in the Notice of Proposed Rulemaking, authorize the rescission of the commitment to achieve an additional 26 tpd of reductions. Given the restatement of commitment

by State and local agencies and EPA's failure to specify which, if any of the State's prior "enforceable commitments" should not be included in the 2004 mid-course review, the District must completely fulfill its "enforceable commitments" as pledged as part of the 2001 SIP submittal package. EPA has endorsed this concept in the proposed 8-hr implementation policy. Other commenters stated that EPA should expressly determine that the 26 tpd reduction is no longer necessary for the Bay Area to reach attainment.

*Response:* In our proposed finding of attainment, we discussed the CAA requirements that would be suspended should we finalize the proposal. 68 FR 62044. Those requirements are the RFP, the attainment demonstration, and contingency measure requirements. The suspension of these requirements, and our rationale supporting it, apply so long as the area continues to attain the 1-hour ozone NAAQS. Consistent with the suspension of the attainment demonstration requirement, the State has withdrawn the attainment assessment in the 2001 Plan, which includes the associated commitments to undertake a mid-course review and to achieve additional reductions as necessary to attain the 1-hour ozone standard. See 1/30/04 Witherspoon letter. A mid-course review, the purpose of which is to evaluate progress toward attainment, and a commitment to adopt the measures necessary to attain the standard are unnecessary in an area that has attained the standard. Finally we note that our final implementation guidance for the 8-hour standard has not yet been issued.<sup>8</sup>

*Comment 9:* A loss of progress could occur as a result of a finding of attainment. The proposed finding of attainment provides an incentive for areas to defer SIP preparation in hopes that they might achieve clean data before the deadline to perform a deferred SIP element preparation arrives. Part of the State's rationale for employing the mid-course review was the absence of competent modeling to demonstrate attainment in the Bay Area. EPA's proposed action undermines the State's prior commitment to use the more technically robust CCOS<sup>9</sup> model and more recent data to both model attainment in the Bay Area and quantify the effect of Bay Area emissions upon downwind district attainment. As the

District has finally developed a model through the CCOS process, EPA must insist on the completion of the modeling exercise in the 2004 mid-course review SIP to identify issues associated with the federal 1-hour ozone standard, the state ozone standard, the 8 hour federal ozone standard, and transport issues.

*Response:* We disagree with the commenter's assessment of the impact of the attainment finding. The State and the co-lead agencies have all acknowledged the need to address the state ozone standard, the federal 8-hour standard, and downwind transport of air pollution and have pledged to continue their efforts.<sup>10</sup> Despite the commenters' concerns, work on the CCOS modeling does not appear to have slackened. In fact, given the technical challenges, EPA is satisfied that work is progressing as quickly as could be expected. Should the Bay Area once again violate the standard, new modeling based on CCOS data would be available to support an attainment demonstration. In addition, much of the work being done to prepare a maintenance plan and to prepare the state clean air plan will be transferrable to the nonattainment requirements that would once again apply.

*Comment 10:* The steps and delays that are embedded in EPA's proposed approach in the event of a future exceedance verify that EPA's future actions will be ineffective at bringing the region back onto the path of true attainment. EPA should make a commitment in its final notice to act immediately upon the observance of a single Livermore violation because, even if the EPA were to move swiftly, it could take three years to get a new attainment plan in place (6 months for rulemaking, 12 months for plan submittal, 18 months to act). Commenters fear that EPA will wait until the end of the ozone season, then

<sup>10</sup> In the District's October 16, 2003 letter to Catherine Witherspoon, CARB (10/16/03 Norton letter), Executive Officer William Norton states that the District "want[s] to reduce local ozone and transport, and to maintain progress toward the state standard." In a January 16, 2004 letter to Catherine Witherspoon, CARB (1/16/04 co-lead agencies letter), the directors of the co-lead agencies recognize that they "have a continuing obligation to reduce emissions further in order to attain and maintain all national ambient air quality standards and to make expeditious progress toward California standards." They state their commitment to "continuing [their] ozone control program in order to reduce ozone levels in the Bay Area and to address transport to downwind regions." In closing, they acknowledge the "need to make progress toward the California 1-hour standard, address transport to downwind regions, and meet the national 8-hour ozone standard." In the 1/30/04 Witherspoon letter, the State recognizes "the importance of a continuing commitment to further emission reductions that will \* \* \* contribute to better air quality in downwind areas."

Demonstrations, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," May 10, 1995 (<http://www.epa.gov/ttn/oarpg/t1/memoranda/clean15.pdf>). This memo is subsequently referred to as the "Clean Data Policy" or the "Seitz memo."

<sup>7</sup> 1/30/04 Witherspoon letter.

<sup>8</sup> On June 2, 2003, EPA published in the **Federal Register** a proposed rule to implement the 8-hour ozone NAAQS. 68 FR 32803.

<sup>9</sup> In an effort to establish a more reliable database for ozone analysis, the Central California Ozone Study (CCOS), a large field measurement program, was conducted in the summer of 2000.

await quality assured data, which would add 12 months to the process.

Commenters request that EPA specify the protocol for making a determination of a violation in the event of an exceedance [at Livermore] in July, 2004.

*Response:* As described in the proposed rule, should the Bay Area violate the 1-hour standard prior to EPA redesignating the area to attainment, we will notify the State that we have determined that the area is no longer attaining the 1-hour standard. We will also provide notice to the public in the **Federal Register** and will at that time indicate what pertinent SIP provisions apply and when a SIP revision addressing those provisions must be submitted. The public will have an opportunity to comment on our determinations. In the event of an exceedance, EPA will work closely with the District to facilitate prompt quality assurance of the data. We also note we would not be precluded from initiating the above process in advance of submittal of quality assured data. In setting the due date for submittal of the SIP revisions, EPA will consider all the relevant circumstances. For example, should the Bay Area violate the 1-hour standard, EPA will take into account the history of the area and the date on which the Bay Area violates the 1-hour standard.

*Comment 11:* The CAA states that an area shall be classified as nonattainment if the area contributes to ambient air quality in a nearby area that does not meet the federal standard (CAA section 107(d)(1)(A)(i)). Activities in the Bay Area that generate ozone precursors translate into substantial contributions to ozone nonattainment status in the Sacramento Valley and San Joaquin Valley air basins; CARB has concluded that pollution generated in the Bay Area has a significant, and at least in one case, overwhelming impact on the Sacramento region.

Another commenter noted that the federal CAA and case law establish that downwind ozone transport concerns are an appropriate basis to deny designation of ozone attainment status to an upwind area even if monitoring limited to the upwind area shows compliance. Air district boundaries established to regulate localized pollutants cannot be used to ignore adverse effects which emanate beyond these boundaries when highly mobile pollutants such as ozone precursors are involved. Until EPA takes regulatory action to designate the Bay Area nonattainment for the 8-hour ozone standard it is premature to rely on that designation to deal with as yet unresolved transport issues. Because the Bay Area plan has not addressed

transport contribution to downwind areas it is premature to relieve the area of the nonattainment designation and reasonably available control technology (RACT) and other requirements that are needed to demonstrate attainment in the downwind areas.

*Response:* CAA section 107(d)(1)(A)(i) applies to the submission by state governors of initial designations following promulgation of new or revised standards and is thus unrelated to determinations of attainment. Similarly, the cases cited<sup>11</sup> concern the permissible scope of EPA's authority in redesignating areas from nonattainment to attainment. Moreover, in determining whether an area has attained the 1-hour ozone standard, EPA does not evaluate whether it meets all other requirements of the Act. Thus, while EPA does interpret CAA section 110(a)(2)(A) and (D) to require States to address intrastate and interstate transport, EPA does not need to determine whether the State has regulated emissions from the Bay Area for purposes of transport in determining whether the Bay Area has attained the ozone standard. To the extent that emissions from the Bay Area significantly contribute to nonattainment or maintenance of the ozone standard in downwind areas, the State will need to address those contributing emissions in the context of an attainment demonstration for the downwind areas. Further, as a result of our attainment finding, certain CAA requirements are suspended but will once again be imposed should the Bay Area violate the standard prior to redesignation. As described in our response to comment 1, a redesignation to attainment requires that several additional requirements be fulfilled. Finally, note that in today's action, EPA is approving the RACT control measure commitments included in the 2001 Plan.

*Comment 12:* Under the Clean Data Policy, EPA must ensure that the Bay Area submits the CCOS local attainment demonstration and regional assessment of the influence of Bay Area transported air pollution. (Seitz memo, page 7.)

*Response:* The Seitz memo provides that "[d]eterminations made by EPA in accordance with the [Clean Data Policy] would not shield an area from EPA action to require emission reductions from sources in the area where there is evidence, such as photochemical grid modeling, showing that emissions from sources in the area contribute significantly to nonattainment in, or

interfere with maintenance by, other nonattainment areas. EPA has the authority under the Act (\* \* \* section 110(a)(2)(A) in the case of intrastate areas) to require emissions reductions if necessary and appropriate to deal with transport situations." For many years, the effort to address transport has been stymied by an inability to define the transport problem due to lack of data. At the present time, the Bay Area District, several downwind areas, and CARB are engaged in an effort to refine modeling based on the CCOS. Once complete, the modeling should provide a better understanding of the degree to which air pollution generated in the Bay Area affects air quality in downwind areas. The co-lead agencies and CARB have acknowledged the need to address transport<sup>12</sup> in addition to their obligations to achieve the state 1-hr and new federal 8-hr ozone standard. As a result, EPA fully expects that diligent efforts to finalize CCOS modeling will continue and that those results will be used to revise SIPs if appropriate.

*Comment 13:* Commenters expressed concern with the fate of the motor vehicle emissions budgets submitted with the 2001 Plan,<sup>13</sup> and the conformity and emissions consequence if those budgets were not approved. One commenter noted that the conformity budgets are an important tool to limit transported emissions from the Bay Area and argued that the budgets must remain in effect, if not be made more stringent, to further mitigate transported emissions. Another commenter urged that EPA maintain MVEBs consistent with attainment during periods of normal economic activity until the area has qualified for redesignation.

*Response:* As noted above and discussed in section IV below, the co-lead agencies and CARB have requested that EPA fully approve the motor vehicle emissions budgets in the 2001 Plan. In this action, EPA is finalizing its approval of those budgets.

### *C. Applicability of Clean Air Act Planning Requirements in Areas Attaining the 1-Hour Ozone Standard*

When we redesignated the Bay Area back to nonattainment in 1998, we concluded that the area became subject to the provisions of subpart 1 rather than subpart 2 of part D of the Clean Air Act. 63 FR 37258 (July 10, 1998). CAA

<sup>12</sup> See footnote 10.

<sup>13</sup> On February 14, 2002, EPA found the motor vehicle emission budgets in the 2001 Plan to be adequate for transportation conformity purposes. EPA's letter to CARB conveying the adequacy finding, along with responses to public comments regarding the adequacy of the budgets can be found at <http://www.epa.gov/region09/air/sfbayoz/#0202>.

<sup>11</sup> *Illinois State Chamber of Commerce v. USEPA*, 775 F.2d 1141 (7th Cir. 1985) and *State of Ohio v. Ruckelshaus*, 776 F.2d 1333 (6th Cir. 1985).

subpart 1 at section 172(c) requires states to submit plans with certain revisions that are tied to the attainment demonstration:

1. A demonstration that the plan will result in annual incremental reductions in emissions of ozone precursors for the purposes of ensuring attainment of the 1-hour ozone standard by 2006. This provision is known as the reasonable further progress (RFP) demonstration or plan, CAA section 172(c)(2);

2. A demonstration that the plan will result in attainment of the 1-hour ozone standard as expeditiously as practicable but not later than September 20, 2006, CAA section 172(c)(1);

3. Contingency measures that will be undertaken if the area fails to make reasonable further progress to attain the standard by the applicable attainment date, CAA section 172(c)(9).

We believe that it is reasonable to interpret the CAA to not require these provisions for ozone nonattainment areas that are determined to be meeting the 1-hour ozone standard. We discuss our reasoning in the Seitz memo, in the proposal for this action, and below in our response to comments.<sup>14</sup>

We received comments on the proposed attainment determination regarding the applicability of certain CAA planning requirements to the Bay Area. The comments and our responses are summarized below.

#### *D. EPA Responses to Comments Regarding Applicability of Clean Air Act Requirements*

##### 1. Comments Regarding EPA's Clean Data Policy

*Comment 14:* Several commenters concurred with EPA's determination that attainment demonstration, contingency measures and RFP requirements do not apply. In contrast, a number of commenters contend that EPA has no authority in this situation to eliminate SIP requirements without a formal redesignation. Congress created a process for determining whether a region should be treated differently as to its requirements for planning and pollution controls if the region monitored attainment. That process is called redesignation under section 107(d)(3) of the Act. Redesignation

actions involve a more complete and robust State submittal, and have the additional security of data collected during the period between the end of the attainment demonstration period and EPA's action on redesignation. Under the Act designation determines the applicable controls. There is nothing in the CAA that explicitly states that upon only a finding of attainment, the EPA can jettison SIP requirements. EPA says it is implicit, but that would require splitting apart an explicit redesignation process. Congress did not provide for that, and such an action would frustrate the purposes of the Act and redesignation process.

*Response:* In today's action, we are finalizing our determination that the Bay Area has attained the 1-hour ozone standard by its statutory deadline of September 20, 2006 as demonstrated by three consecutive years without a violation. As a result, we are also finalizing our determination that certain Clean Air Act requirements are not applicable to the Bay Area. The statutory basis for finding that these planning requirements are not applicable is described in the proposal and in the Clean Data Policy. See 68 FR 62041, 62044—62045; Seitz memo at 2–5. Contrary to the commenter's assertion, we are not eliminating any applicable requirements. Rather, we have interpreted the requirements of sections 172(c)(1), 172(c)(2), and 172(c)(9) as not being applicable once an area has attained the standard, as long as it continues to do so. This is not a waiver of requirements that by their terms clearly apply; it is a determination that certain requirements are written so as to be operative only if the area is not attaining the standard. Our interpretation is consistent both with the CAA's goal of achieving and maintaining clean air, and with the concomitant policy goal of avoiding costly and unnecessary emission reductions, and, as mentioned above, has been upheld in the Tenth Circuit in *Sierra Club v. EPA*, 99 F.3d 1551.

##### 2. Comments Regarding the Applicability of EPA Policies to the Bay Area

*Comment 15:* EPA cites *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996) as authority for the waiver of CAA requirements. Several commenters, however, contend that the case was incorrectly decided. Further, commenters argue that the Bay Area is distinguishable from Utah in several respects:

In contrast to the 0.123 ppm design value in the Bay Area, the design value in Utah is 0.111 ppm, well below the 1-hour standard.

The emissions that achieved improved air quality were determined by the court to be enforceable (unlike the Spare the Air program).

The Bay Area is recognized to be a nonattainment area for the 8-hour ozone standard.

The Bay Area is an upwind district for transport purposes. The court observed that air quality controls designed to surpass the applicable ozone standard would be costly and unnecessary.

*Response:* In *Sierra Club*, the Tenth Circuit Court of Appeals upheld the rationale in the Seitz memo as it applies to moderate ozone nonattainment areas. There, pending completion of the redesignation process, and based on three years of air quality data, EPA found that two Utah Counties designated as nonattainment for ozone and classified as moderate had attained the ozone NAAQS. As a result, EPA determined that the CAA's moderate area requirements for attainment and RFP demonstrations, and contingency measures (sections 182(b)(1)(A) and 172(c)(9)) were inapplicable. Finding that this determination was a logical extension of EPA's original interpretation in the General Preamble, the Court accorded deference to EPA's statutory interpretation that once a moderate ozone nonattainment area has attained the NAAQS, the moderate area CAA requirements for RFP, attainment and contingency measures no longer apply. *Id.* at 1556. Although the Bay Area is a non-classified nonattainment area, there is no doubt that the analogous subpart 1 area provisions serve exactly the same purpose as the provisions at issue in *Sierra Club* for moderate areas. Thus the Court's reasoning in that case applies equally to the Bay Area situation. Finally, EPA expects that fact patterns will vary from one area to the next but we do not believe such variations undermine the legal and policy bases for our interpretation of the applicability of CAA requirements in areas that have attained the standard.

*Comment 16:* In a similarly situated area, EPA did not determine attainment until it was able to redesignate the area to attainment and thus its residents had assurance of maintenance in the form of a maintenance plan. See EPA's St. Louis rulemaking, 68 FR 25418, May 12, 2003.

*Response:* CAA section 179(c) provides that “[a]s expeditiously as practicable after the applicable attainment date for any nonattainment area, but not later than 6 months after such date, the Administrator [of EPA] shall determine, based on the area's air quality as of the attainment date, whether the area attained the standard

<sup>14</sup> We have also explained at length in other actions our rationale for the reasonableness of this interpretation of the Act and incorporate those explanations by reference here. See 61 FR 20458 (May 7, 1996) (Cleveland-Akron-Lorain, Ohio); 60 FR 36723 (July 18, 1995) (Salt Lake and Davis Counties, Utah); 60 FR 37366 (July 20, 1995) and 61 FR 31832–33 (June 21, 1996) (Grand Rapids, MI). Our interpretation has also been upheld by the U.S. Court of Appeals for the Tenth Circuit in *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996).

by that date.” See also CAA section 181(b)(2). Thus the statute provides for findings of attainment based on air quality. The Clean Data Policy provides for such findings prior to the attainment date applicable to a nonattainment area. The policy indicates that EPA’s regional offices will conduct individual rulemakings concerning areas that have three consecutive years of clean data demonstrating attainment to make binding determinations that such areas have attained the standard and need not submit SIP revisions addressing the CAA requirements that are no longer applicable. Seitz memo, p. 6. Thus the timing of attainment findings is authorized by the statute and dictated by longstanding Agency policy.

*Comment 17:* EPA’s Clean Data Policy only addresses subpart 2 authority. Since the Bay Area is designated nonattainment under subpart 1, it is not applicable to the Bay Area.

*Response:* EPA’s Clean Data Policy specifically addresses the RFP requirement in CAA section 172(c)(as defined in section (171(1)) and the contingency measure requirement in section 172(c)(9). Both of these statutory provisions apply to the 2001 Plan. With respect to the attainment requirement, the policy addresses the attainment requirement in section 182 which does not apply to the Bay Area plan. However, the analysis of that requirement applies equally to the section 172(c)(1) attainment requirement that does apply to the 2001 Plan. See Seitz memo, pages 3–5.

*Comment 18:* EPA’s action is not supported by EPA’s adopted guidance and policy documents. Specifically, John Calcagni’s October 28, 1992 memo entitled “State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (Act) Deadlines’ (10/28/92 Calcagni memo) is inconsistent with EPA proposed action on the specific issue of whether the Bay Area’s SIP requirements may be relaxed at this stage. “States, however, are statutorily obligated to meet SIP requirements that become due any time before an area is actually redesignated to attainment. [ . . . ] Hence, if there is a failure of the State to meet a statutory deadline [and, ergo, a SIP commitment to mid-course review] for an area, (before EPA has redesignated the area as attainment), a finding of failure to submit should be made. This, in turn, begins the sanctions process.” 10/28/92 Calcagni memo, pages 3–4. This properly describes how the Act works—areas must still meet all SIP commitments after a determination of attainment, but before the redesignation is complete. Otherwise there is a gap in SIP coverage that is

irrational and illegal. Logically, since an area must meet all applicable part D SIP requirements, including section 172(c) elements, in order to gain redesignation, section 107(d)(3)(E), these SIP requirements must be present at the time of redesignation. It would make little sense to excuse their inclusion now, then to require their adoption immediately prior to redesignation. The SIP must be continually effective during the period between determination of attainment and redesignation. EPA cannot rewrite the Act and waive the otherwise applicable part D SIP requirements during this “gap” period.

*Response:* The 10/28/92 Calcagni memo addresses the historical situation in which certain states were planning to submit redesignation requests prior to November 15, 1992 in an attempt to be exempted from implementing mandatory CAA programs due to start in November of that year (e.g., oxygenated fuels program, stage II vapor recovery rules, etc.). The memo explains that while the approvability of a redesignation request is based on requirements in place on the date of the complete submittal, until the redesignation was finalized, states would be statutorily bound to implement those programs. The types of mandatory programs covered by the 10/28/92 Calcagni memo are distinguishable from the planning requirements suspended by a finding of attainment. In the Clean Data Policy, EPA has interpreted the attainment demonstration, RFP, and contingency provisions of the Act to be inapplicable to an area that is attaining the ozone standard as long as the area continues to attain or is redesignated to attainment.<sup>15</sup> This interpretation is based on the language and purpose of those provisions. By contrast, the requirements for mandatory programs addressed by the 10/28/92 Calcagni memo do not contain qualifying language tied to attainment, such as “for the purpose of ensuring attainment of the applicable ambient air quality by the applicable date.” Compare, e.g., stage II vapor recovery (section 182(b)(3)) with RFP (section 171(1)).

*Comment 19:* The 9/4/92 Calcagni memo indicates that the Bay Area retains its obligation to model attainment as required by the mid-course review commitment as part of its redesignation showing: “No such *supplemental* modeling is required for

O3 non-attainment areas seeking redesignation” (page 3, emphasis added). The term “supplemental” reflects EPA’s requirement that ordinary modeling of attainment, as required for all SIPs and which is contained in and was deferred by California’s “enforceable commitment” must still be provided. EPA explains the purpose for supplemental modeling, which applies with vigor to the initial modeling requirement as follows: “Modeling may be necessary to determine the representativeness of the monitored data. *Id.*, page 3. If the data should be supported by modeling for redesignation, it should similarly be supported by modeling to support the determination of attainment, particularly where the region’s actual emissions inventory has been depressed by economic forces and the District stands at the cusp of finalizing the modeling it has postponed for over a decade. While commenters recognize that the 9/4/1992 Calcagni memo purports to address redesignation actions, they assert that EPA itself cites this guidance as authority supporting EPA’s proposal to delete RFP, attainment demonstration and contingency measure requirements from the Bay Area SIP. 68 FR 62044.

*Response:* EPA disagrees that its reference to the 9/4/92 Calcagni memo somehow retroactively modifies the scope of that memo. The purpose of our reference to the memo was to illustrate the consistency of our position that RFP becomes unnecessary when an area attains the standard. On page 6, the memo states that the “requirements for reasonable further progress \* \* \* will not apply for redesignation because they *only have meaning for areas not attaining the standard.*” Emphasis added.

The 9/4/92 Calcagni memo states the following: “The state must show that the area is attaining the applicable NAAQS. There are two components involved in making this demonstration which should be considered interdependently. The first component relies upon ambient air quality data. \* \* \* The second component relies upon supplemental EPA-approved air quality modeling. No such supplemental modeling is required for O3 (ozone) nonattainment areas seeking redesignation \* \* \* ” (pages 2 and 3). This document explains that supplemental modeling may be needed, for example, in sulfur dioxide and carbon monoxide areas, where emissions are localized and a small number of monitors may not be representative of air quality (page 3). In contrast, ozone is not a localized

<sup>15</sup> See also 9/4/92 Calcagni memo at p. 6: “The requirements for reasonable further progress, identification of certain emissions increases, and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.”

pollutant, and the Bay Area has an extensive monitoring network consisting of 24 monitors operating each year from 2001 through 2003 as described in EPA's proposal at 68 FR 62043. Consistent with the language in the memo and the rationale in calling for modeling in some cases for some pollutants and not in other cases, modeling would not be required for redesignation of ozone areas. The memo should not be read to create a requirement for modeling in an area that has been determined to be attaining the ozone standard.

Finally, we reiterate that a finding of attainment does not delete CAA requirements. The requirements for an attainment demonstration, RFP, and contingency measures are suspended by the finding only as long as the area continues to attain the standard or until the area is formally redesignated.

*E. Effects of the Attainment Finding on the Bay Area and of a Future Violation of the 1-Hour Ozone NAAQS*

Based on our finding that the Bay Area is attaining the 1-hour ozone standard, we are finding that the State of California is no longer required to submit an RFP plan, an attainment

demonstration, or contingency measures for the area.

The lack of a requirement to submit these SIP revisions will exist only as long as the Bay Area continues to attain the 1-hour ozone standard. If we subsequently determine that the area has violated the 1-hour ozone standard (prior to a redesignation to attainment), the basis for the determination that the area need not make these SIP revisions would no longer exist. Thus, a determination that an area need not submit these SIP revisions amounts to no more than a suspension of the requirements for so long as the area continues to attain the standard.

Should the Bay Area begin to violate the 1-hour standard, we will notify California that we have determined that the area is no longer attaining the 1-hour standard. We also will provide notice to the public in the **Federal Register**. Once we determine that the area is no longer attaining the 1-hour ozone standard then California will be required to address the pertinent SIP requirements within a reasonable amount of time. We will set the deadline for the State to submit the required SIP revisions at the time we make a nonattainment finding.

California must continue to operate an appropriate air quality monitoring network, in accordance with 40 CFR part 58, to verify the attainment status of the area. The air quality data relied upon to determine that the area is attaining the ozone standard must be consistent with 40 CFR part 58 requirements and other relevant EPA guidance.

**III. Approval of Bay Area 2001 Plan**

*A. Approval of the 2001 Plan*

In this action, EPA is finalizing its proposed approval of the following elements of the 2001 Plan: The emissions inventories, RACM, commitments to adopt and implement specific control measures, the motor vehicle emissions budgets, and further study commitments. The commitments to adopt and implement specific control measures<sup>16</sup> are listed in Tables 1, 2, and 3 below, and the commitments to conduct further study of potential control measures, are listed in Table 4 below. We are approving a VOC motor vehicle emissions budget of 164.0 tons per day and a NO<sub>x</sub> motor vehicle emissions budget of 270.3 tons per day, both for the year 2006.

TABLE 1.—NEW STATIONARY AND AREA SOURCE CONTROL MEASURES

2001 SIP No.	BAAQMD regulation No.	Source category	Adoption on date	Implementation date	Estimated VOC reduction (tpd), 2000 to 2006	Estimated NO <sub>x</sub> reduction (tpd), 2000 to 2006
<b>Measures To Be Adopted by the BAAQMD</b>						
SS-11	8-3	Improved Architectural Coatings Rule	172001	2003-2004	2.9	
SS-12	8-5	Improved Storage of Organic Liquids Rule	2002	2002	1.9	
SS-13	8-14 and 8-19	Surface Preparation and Cleanup Standards for Metal Parts Coating.	2002	2003	0.3	
SS-14	8-16	Aqueous Solvents	2002	2003	3.0	
SS-15	TBD	Petroleum Refinery Flare Monitoring	2003	2004	<sup>18</sup> TBD	
SS-16	8-18	Low-Emission Refinery Valves	2003	2004	TBD	
SS-17	8-10	Improved Process Vessel Depressurization Rule	2003	2004	0.1	
Total					8.2	0.0

TABLE 2.—NEW MOBILE SOURCE CONTROL MEASURE

2001 SIP No.	Source category	Request <sup>19</sup> date	Implementation date	Estimated VOC reduction (tpd), 2000 to 2006	Estimated NO <sub>x</sub> reduction (tpd), 2000 to 2006
<b>Measure To Be Requested by the BAAQMD</b>					
MS-1	Motor Vehicle Inspection and Maintenance Program—Liquid Leak Inspection and Improved Evaporative System Test.	2002	2002-2003	4.0	
Total				4.0	0.0

<sup>16</sup> We are approving the adoption and implementation dates of the new measures and the total emissions reductions they are cumulatively projected to achieve. We are approving all dates, including those that have passed, in order to make

the commitments enforceable by EPA and citizens under the CAA.

<sup>17</sup> For commitments in the plan that do not identify the month, as in Tables 1, 2, and 3, or the day of the month, as in Table 4, EPA interprets the

deadline to be no later December 31st of the noted year or the last day of the month, respectively.

<sup>18</sup> At the time of plan adoption, the BAAQMD was not able to determine the amount of emissions reductions that could be achieved by adoption of rules implementing SS-15 and 16. The District

TABLE 3.—NEW TRANSPORTATION CONTROL MEASURES

2001 SIP No.	Control measure description	Description and implementation steps	Schedule	Estimated VOC reduction (tpd), 2000 to 2006	Estimated NO <sub>x</sub> reduction (tpd), 2000 to 2006
TCM A	Regional Express Bus Program.	Program includes purchase of approximately 90 low emission buses to operate new of enhanced express bus services. Buses will meet all applicable CARB standards, and will include particulate traps or filters. MTC will approve \$40 million in funding to various transit operators for bus acquisition. Program assumes transit operators can sustain service for a five year period. Actual emission reductions will be determined based on routes selected by MTC.	FY 2003. Complete once \$40 million in funding pursuant to Government Code Section 14556.40 is approved by the California Transportation Commission and obligated by bus operators.	See Below	See Below.
TCM B	Bicycle/Pedestrian Program.	Fund high priority projects in countywide plans consistent with TDA funding availability. MTC would fund only projects that are exempt from CEQA, have no significant environmental impacts, or adequately mitigate any adverse environmental impacts. Actual emission reductions will be determined based on the projects funded.	FY 2004–2006. Complete once \$15 million in TDA Article 3 is allocated by MTC.	See Below	See Below.
TCM C	Transportation for Livable Communities (TLC).	Program provides planning grants, technical assistance, and capital grants to help cities and nonprofit agencies link transportation projects with community plans. MTC would fund only projects that are exempt from CEQA, have no significant environmental impacts, or adequately mitigate any adverse environmental impacts. Actual emission reductions will be determined based on the projects funded.	FY 2004–2006. Complete once \$27 million in TLC grant funding is approved by MTC.	See Below	See Below.
TCM D	Additional Freeway Service Patrol.	Operation of 55 land miles of new roving tow truck patrols beyond routes which existed in 2000. TCM commitment would be satisfied by any combination for routes adding 55 miles. Tow trucks used in service are new vehicles meeting all applicable CARB standards.	FY 2001. Complete by maintaining increase in FSP mileage through December 2006.	See Below	See Below.
TCM E	Transit Access to Airports.	Take credit for emission reductions from air passengers who use BART to SFO, as these reductions are not included in the Baseline.	BART—SFO service to start in FY 2003. Complete by maintaining service through 2006.	See Below	See Below.
Total				0.5	0.7

TABLE 4.—FURTHER STUDY MEASURES

2001 SIP No.	Measure	Timeline for completion
FS-1	Study Potential for Accelerating Particulate Trap Retrofit Program for Urban Buses.	April 2002.
FS-2	Update MTC High Occupancy Vehicle Lane Master Plan	December 2002.
FS-3	Study Air Quality Effects of High Speed Freeway Travel	April 2003.
FS-4	Evaluate Parking Management Incentive Program	July 2003.
FS-5	Enhanced Housing Incentive Program	December 2003.
FS-6	Further Smog Check Program Improvements	December 2003.
FS-7	Parking Cash Out Pilot Program	December 2003.
FS-8	Refinery Pressure Vessels, Blowdown Systems, and Flares	December 2003.
FS-9	Refinery Wastewater Systems	December 2003.
FS-10	Organic Liquid Storage Tanks	December 2002.
FS-11	Marine Tank Vessel Activities	December 2003.

*B. EPA's Responses to Comments on the Proposed Approval of the 2001 Plan*

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from six parties. We are responding only to comments that pertain to the plan

elements on which we are taking final action.

1. Comments on the Proposed Approval of the Emissions Inventory

*Comment 20:* The 2001 Plan's emissions inventory is inaccurate and may drastically underestimate precursor

emissions. It contains errors that should have been known and could have been corrected at the time of submittal. It is evident that better, more current and accurate data were known to the District and available for incorporation into the 2001 Plan.

indicated that the reductions were to be determined (TBD). Therefore, the emission reduction total for

SS-11 through SS-17 does not include reductions from these two measures.

*Response:* In order to be approvable, CAA section 172(c)(3) requires that the emissions inventory must be comprehensive, accurate, and current. We proposed to approve the emissions inventories in the 2001 Plan because, when evaluated in the context of the time in which they were developed, the inventories accurately incorporated the best available data. Subsequent to the submittal of the 2001 Plan, the District, in fulfillment of its 2001 Plan commitment to undertake several further study measures, collaborated with representatives of community groups and industry to study emissions and potential controls from certain sources of air pollution. Some of these studies revealed that there are flaws in the inventory. This was not particularly surprising—inventory data is constantly being reevaluated and refined—and, in general, the quality of technical data and analyses techniques will continually improve.

Once a plan has been adopted, EPA does not generally require plan elements such as emissions inventories and attainment demonstrations to be revisited and updated in response to new information.<sup>20</sup> There will always be situations when new, better information is on the horizon. Evaluating a plan element based on information that was not available at the time of submittal would create a moving target that would be impossible to meet. We do not, therefore, believe it is appropriate to disapprove the inventories based on data that was developed subsequent to submittal of the 2001 Plan.

The commenter fails to provide a concrete example of substantiated data that was available at the time of Plan adoption that is not included in the inventory. The version of EMFAC the commenter notes would have provided improved accuracy for motor vehicle emissions was not yet approved and available for use by the co-lead agencies when the 2001 Plan was being developed. See also section III.4. of the RTC.

*Comment 21:* EPA must specify a much more broad series of emissions inventory corrections in the 2004 SIP than those indicated in the proposed approval of the 2001 Plan. A commenter notes that reductions from Smog Check II, which was approved by the California legislature for the Bay Area in September 2002, need to be factored into the inventory. In addition, the commenter stated that, according to an

<sup>20</sup>The U.S. Court of Appeals for the District of Columbia Circuit recently addressed a similar issue and affirmed EPA's position. *Sierra Club v. EPA*, 356 F.3d 296 (DC Cir. 2004).

article in the Los Angeles Times published on January 16, 2003, CARB has discovered errors in the South Coast Air Basin's emissions inventory and, because the Bay Area relies on many of the same CARB-derived emissions factors, those errors are therefore present in the Bay Area's inventory and must be corrected in the next inventory.

*Response:* We agree with the general point made by the commenter: inventories must be comprehensive, accurate, and current. In the notice of proposed rulemaking, we stated that if the findings in the draft technical assessment documents<sup>21</sup> regarding the inventory numbers are confirmed, the inventory submitted with the subsequent plan must reflect the new data. In addition, we noted that the inventories must be modified to incorporate data generated by the most recent model developed by CARB and accepted by EPA to determine emissions from motor vehicles. We did not intend to imply that those items can be considered an exhaustive list of future corrections because there is no way to predict the state of knowledge that will exist when the next inventory is submitted to EPA. Other refinements to the numbers that are made before the next inventory is submitted, including (but not limited to) any additional corrections and any adjustments to reflect the adoption of new regulations, must of course be included.

EPA finds the emissions inventory in the 2001 Plan to be very detailed. The emission categories are well documented, comprehensive, accurate, and current. The emissions inventory was prepared following the procedures in EPA guidance,<sup>22</sup> using either EPA emission factors found in AP-42 or other appropriate emission factors combined with Bay Area specific activity data to estimate emissions from each type of emissions source. This approach is the customary method used for preparing emissions inventories and the one required by EPA guidance. Emission inventories are not static but are constantly updated and renewed as new information, techniques, and studies are made available. EPA finds the emissions inventory in the SIP to be sufficiently detailed.

<sup>21</sup>The District has prepared technical assessment documents (TADs) that describe its findings with respect to further study measures. The TADs can be viewed online at <http://www.baaqmd.gov/enf/RefineryFSM/refinery.asp>.

<sup>22</sup>See Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations, EPA-454/R-99-006, April 1999, available online at [www.epa.gov/ttn/chief/ei\\_guide.html](http://www.epa.gov/ttn/chief/ei_guide.html).

While we acknowledge that various inventory enhancements and corrections (including those to which the commenters allude) need to be reflected in future plan and budget updates, we believe that such inaccuracies, taken together, do not rise to such a level of importance that they justify our rejection of the current inventories and budgets as insufficient to provide an adequate framework for air planning.

## 2. Comments on the Proposed Approval of RACM

*Comment 22:* Commenters contend that the 2001 Plan fails to include many measures that should be considered RACM for the Bay Area. Further, they allege that EPA has not provided sufficient support for its proposed determination that the RACM analysis is adequate.

*Response:* CAA section 172(c)(1) requires nonattainment area plans to provide for the expeditious implementation of all reasonably available control measures. EPA's principle guidance interpreting the Act's RACM requirement is found in the General Preamble. See also "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas," from John S. Seitz, Director, Office of Air Quality Planning and Standards, to EPA Regional Air Division Directors, November 30, 1999. Under our interpretation, a state does not need to adopt measures that would not advance the attainment date for the applicable standard.<sup>23</sup> The Bay Area's and the State's previously enacted control measures, along with the measures committed to in the 2001 Plan that have already been adopted and implemented, have resulted in improved air quality sufficient to qualify the Bay Area for a finding of attainment at the end of the 2003 ozone season. We therefore conclude that those controls reflect RACM and are approving the plan as meeting the RACM requirement of CAA section 172(c)(1).

## 3. Comments on the Proposed Approval of the Control Measure Commitments

*Comment 23:* The TCMs in the 2001 Plan are not approvable; they are impermissibly vague in their quantification of emissions reductions and are unenforceable. The 2001 Plan

<sup>23</sup>EPA's interpretation of the section 172(c)(1) RACM requirement has been upheld by the District of Columbia and Fifth Circuit Courts of Appeal in, respectively, *BCCA Appeal Group et al. v. EPA*, 348 F.3d 93 (5th Cir. 2003) and *Sierra Club v. EPA*, 294 F.3d 155 (DC Cir. 2002).

lumps the TCMs for the purposes of calculating emissions reductions. This complicates the legal enforceability of the measures, which renders the SIP and the TCMs unapprovable. Specific emissions reductions should be assigned to the TCMs.

*Response:* Since the emission reductions associated with most TCMs (e.g. demand management TCMs) are interdependent, it is not unusual for the impacts of TCMs to be assessed on a cumulative basis. This is particularly the case when, as here, the total emission reductions from the measures are small. The 2001 Plan provides an enforceable commitment to implement the TCMs to reduce VOC emissions by 0.5 tpd and NO<sub>x</sub> emissions by 0.7 tpd between 2000 and 2006. The effectiveness of the TCMs in meeting this commitment will be documented in future conformity determinations. In order to show timely implementation as required in future conformity analyses (40 CFR 93.113) MTC must document that the TCMs are being implemented on schedule. Because the enforceable commitment is to achieve the cumulative emissions reductions by 2006, MTC must also document those reductions. MTC should also document the extent to which the implementation of the individual TCMs meets the identified levels. For example, for TCM A, MTC should identify the number of low-emission buses that were purchased.

#### 4. Comments on the Downwind Transport of Air Pollution

*Comment 24:* CAA section 107(a) directs states to address intrastate transport "by submitting an implementation plan for such state which will specify the manner in which the national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." The currently approved statewide SIP, the 1994 SIP, does not adequately address the topic. Given the universal acceptance of the fact that the Bay Area is an upwind contributor of air pollution to downwind areas that violate the ozone NAAQS, EPA may not lawfully approve the Bay Area SIP until it specifically addresses air pollution transport sufficiently to eliminate significant consequences to downwind Districts. The Bay Area SIP is not adequate unless and until it is part of a statewide SIP that comprehensively addresses air pollution transport.

*Response:* CAA section 107(a) simply affirms that each state has the primary responsibility for assuring the air quality within its borders and for

determining how this goal is to be achieved. The commenter attempts to improperly transform this straightforward statutory provision into one that establishes a SIP requirement concerning intrastate transport. The nonattainment area plan requirements for the Bay Area are contained in sections 110(a) and 172(c). While EPA does interpret CAA section 110(a)(2)(A) to require states to address intrastate transport, they have significant latitude in how they choose to do so. Thus EPA, in acting on the 2001 Plan, does not need to determine whether the State has regulated emissions from the Bay Area for purposes of transport. To the extent that emissions from the Bay Area significantly contribute to nonattainment or maintenance of the ozone standard in downwind areas, however, the State will need to address those contributing emissions in the context of an attainment demonstration for the downwind areas.

#### 5. Comments on Additional Plan Elements

*Comment 25:* The Clean Air Act requires that plans provide an affirmative demonstration of their authority and ability to implement the proposed plan. The District has failed to include such a demonstration in the SIP.

*Response:* In *BCCA Appeal Group*, the U.S. Court of Appeals for the Fifth Circuit agreed with the holdings of other federal circuit courts that the determination of what constitutes "necessary assurances" should be left to the discretion of EPA. The Fifth Circuit found that EPA was entitled to rely on a certification of legal authority to implement an ozone plan for Houston-Galveston by the State of Texas' legal counsel. Here, the State in its "Completeness Checklist for SIP Revision: 2001 Bay Area Ozone Plan," (Checklist), section 2.1(c), has certified that it, as well as the District and MTC, have the necessary legal authority under State law to adopt and implement the plan. EPA has routinely accepted such checklists as evidence of the requisite legal authority and the Fifth Circuit ruling validates that Agency decision.

#### 6. Comments on the Impact of the State Law and Court Orders

*Comment 26:* The District committed several violations of State law during its hasty plan promulgation process, and is currently subject to an order of the San Francisco County Superior Court to correct those violations. Statement of Decision and Order Thereon (Order), filed July 24, 2003, *Communities for a Better Environment, et al. v. Bay Area*

*Air Quality Management District, et al., San Francisco County Superior Court Case No. 323849.*<sup>24</sup> Until the District cures these violations, it is plainly without authority to implement the SIP or provide the assurances required by the Act. This provides an independent basis for EPA's disapproval of the Plan's adequacy. CAA section 110(a)(2)(E) and 40 CFR part 51, Appendix V, section 2.1(c) and (e).

Based on the California Public Records Act, Government Code section 6250, *et seq.*, the petitioners in the above case claimed that the District improperly destroyed files necessary to enforce the 2001 Plan and the District's rules. The parties settled the issue through a stipulated agreement and an order of the Court under which the District agreed to halt its practice of destroying enforcement records without notice and to institute practices assuring permanent preservation of District notices of violation and other enforcement file materials. However, some enforcement records were destroyed prior to the order. Because of the destruction of these documents, it is certain that at least some repeat violators will not be subject to the proper form of enforcement because records of their prior violations are unavailable. The District is therefore unable to provide assurance to EPA that it has the resources to implement the Plan and enforce its rules.

*Response:* The Court Order cited by the commenter requires the District to comply with California Government Code section 60203 prior to any destruction of certain public records. That section allows the destruction of such records if they are "\* \* \* photographed, microphotographed, reproduced by electronically recorded video images on magnetic surfaces, recorded in the electronic data processing system, recorded on optical disk, reproduced on film or any other medium that is a trusted system and that does not permit additions, deletions, or changes to the original document. \* \* \*". Thus, reproductions of these documents must be made before the originals can be destroyed.

The commenter's claim that the alleged destruction of certain of the District's enforcement files has resulted

<sup>24</sup>The Order of the San Francisco Superior Court has been appealed. *Communities for a Better Environment et al. v. Bay Area Air Quality Management District et al.*, First Appellate District Case Nos. A103991, A104179. EPA is aware that the parties have recently reached a settlement of these appeals that, if approved by the State courts, would result in the vacatur of the July 24, 2003 Order. However, because that vacatur has not yet occurred, EPA responds in this action to the public comments concerning the July 24, 2003 Order.

in the inability of the District to enforce its rules or implement the Bay Area plan is unsubstantiated. Assuming, arguendo, that the information in any files that may have been destroyed is necessary to the ongoing efforts of the District to implement the plan and enforce its rules, there are clearly numerous methods of preserving and recording data short of retaining reproductions of original documents. More importantly, even if some repeat violators are not treated as such as a result of missing records, that circumstance would not be sufficient to impair an overall enforcement program. Nor would it call into question the District's ability to otherwise implement its plan. The commenter has provided a conclusion but no support for it.

*Comment 27:* The District violated the California Environmental Quality Act (CEQA) by adopting the Plan without first preparing an adequate environmental impact report. The Court ruled that the District's environmental review documentation of the 2001 Plan was vague and that the District's actions did not accord Petitioners an adequate opportunity to comment on whether the low VOC solvents required by the adopted rules to implement SS-13 and SS-14 could have adverse impacts. The Court ordered the District to prepare an EIR for the adoption of the rules to implement SS-13 and SS-14. Thus EPA's action on the adequacy of the plan is premature and inappropriate under the Act and EPA's regulations. The Court's CEQA ruling clearly reflects the State Court's conclusion that the District failed to follow all the procedural requirements of the State's laws in conducting and completing the adoption and issuance of the plan, as required under 40 CFR Part 51, App V, 2.1(e).

*Response:* The commenter's contention has no merit. In this action, EPA is approving two control measure commitments in the plan known as SS-13 and SS-14. The Court's order on the CEQA claim does not, however, implicate these two control measure commitments. In addition to declining to set aside the District's adoption of the 2001 plan, the Court noted that, after its adoption of the plan, the District adopted rules to implement SS-13 and SS-14. The Court then ordered the District to prepare an EIR for the adoption of these rules. EPA in today's action is not approving the rules that are the actual subject of the Court's order. Therefore the CEQA defect addressed by Court's order is not relevant to EPA's action here.

*Comment 28:* The State Court has held that the 2001 Plan violates section

40233 of the California Health and Safety Code and ordered that the co-lead agencies develop a plan for public comment that accomplishes the necessary 26 tons of VOC emissions reductions no later than 60 days from the notice of entry of the order. Section 110(a)(2)(E) of the Clean Air Act prohibits approval of a state clean air plan if it violates state clean air laws.

*Response:* In addition to withdrawing the attainment assessment in the 2001 plan, the State has withdrawn the associated commitment by the co-lead agencies and CARB to adopt and submit measures to achieve 26 tpd of VOC emission reductions. As a result of our final attainment finding for the area and the resulting suspension of the CAA's attainment demonstration requirement for the Bay Area, these plan elements are not currently required. Therefore the State Court's holding that the 2001 plan violates section 40233 of the California Health and Safety Code is not relevant.

*Comment 29:* The CAA and EPA's regulations require assurances that the 2001 Plan and all of its elements were properly adopted. Several defects in the State's process and/or legal authority jeopardize the Plan and its implementation. CEQA was intended to be an environmental full disclosure statute and the EIR process necessarily requires consideration of alternatives and adoption of feasible alternatives or mitigation measures that substantially lessen or avoid adverse effects. The EIR process also promotes public involvement in agency decision making. The San Francisco Superior Court's finding that additional environmental disclosure and process is required is damning evidence of the flaws in the public review and involvement processes leading to plan adoption.

*Response:* EPA's completeness criteria require evidence that the State has the necessary legal authority under state law to adopt and implement the plan and evidence that the State followed all of the procedural requirements of its laws and constitution in conducting and completing the adoption/issuance of the plan. 40 CFR part 51, Appendix V, section 2.1(c) and (e). EPA regulations require public notice and hearings. 40 CFR 51.102. The commenter appears to believe that these requirements compel the State to comply with every aspect of all of its laws and regulations. That is not the case. The State need only demonstrate that it has the legal authority to adopt the plan and that it has followed all of the requirements in the State law and constitution that are related to adoption of the plan. The State has provided evidence that it has met these requirements. See Checklist,

section 2.1(b) and (c). Contrary to the commenters's assertions, the State Court Order actually supports this conclusion: "The Court finds no violation of the Clean Air Act or other applicable authority occurred with respect to the Air Resources Board's adoption and transmittal of the 2001 [plan] to the Environmental Protection Agency." Order, p. 6.

#### 7. Comments on the Interim Final Determination

Based on our proposed approval of the 2001 Plan (68 FR 42174), we made an interim final determination that California had corrected the deficiencies for which a sanctions clock began on October 22, 2001 (68 FR 42172, July 16, 2003). The comments we received and our responses are included in the RTC document.

#### IV. Effect of the Attainment Determination and 2001 Plan Action on Transportation Conformity

CAA section 176(c) requires that federally funded or approved transportation actions in nonattainment areas "conform" to the area's air quality plans. Conformity ensures that federal transportation actions do not worsen an area's air quality or interfere with its meeting the air quality standards.

One of the primary tests for conformity is to show that transportation plans and improvement programs will not cause motor vehicle emissions higher than the levels needed to make progress toward and to meet the air quality standards. These motor vehicle emissions levels are set in an area's attainment, maintenance and/or RFP demonstrations and are known as the "transportation conformity budgets."

EPA and the Federal Highway Administration have developed guidance that indicates that budgets must be deemed adequate or approved before they can be used.<sup>25</sup> As stated previously, we found the motor vehicle emissions budgets in the 2001 Plan

<sup>25</sup> See EPA memorandum "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision" (EPA4420-F-99-025, May 14, 1999); available online at <http://www.epa.gov/otaq/transp/conform/policy.htm#030299>. This guidance was developed in response to a 1999 decision of the U.S. Court of Appeals for the District of Columbia Circuit that requires EPA to make certain changes in its conformity regulations (40 CFR 93.100 *et. seq*) to provide that budgets must be deemed adequate or approved, rather than simply submitted, in order to be used in conformity determinations. *Environmental Defense Fund v. EPA, et al.*, 167 F. 3d 641 (DC Cir. 1999). As a result, EPA interprets 40 CFR 93.109(c)(5)(ii) to apply to budgets that have been deemed adequate or have been approved, not merely submitted. EPA's current proposal to modify the conformity regulations (68 FR 62690, 62724, November 5, 2003) confirms this interpretation of the conformity rule.

adequate on February 14, 2002. 67 FR 8017. We are approving those budgets in this action.<sup>26</sup> Note that typically, under 40 CFR 93.118(e)(1), the motor vehicle emission budget, once approved, cannot be replaced by another unless the new budget comes from an approved SIP. However, as discussed in our proposed approval of the budgets in the 2001 Plan (68 FR 42174, 42181), EPA is approving the vehicle emission budgets in that plan only until new budgets developed with EMFAC2002 are submitted and found adequate for conformity purposes. See 67 FR 1464 (January 11, 2002). Budgets developed with EMFAC2002 will be more accurate than those developed using EMFAC2000.<sup>27</sup> Therefore, by limiting the duration of our approval of the EMFAC2000-derived budgets to the point when the updated budgets are found adequate, the updated budgets may be in place within a few months of their submission. For further discussion of the rationale for, and the effect of, this limitation, please see our promulgation of a limitation on motor vehicle emission budgets associated with various California SIPs, at 67 FR 69139 (November 15, 2002).

We believe that the State and co-lead agencies should move promptly to develop and submit a maintenance plan. The maintenance plan submittal should include, in addition to the maintenance year budgets, replacement 2006 budgets that are revised based on the latest approved version of EMFAC. Should EPA determine that the Bay Area is again subject to the 1-hour ozone attainment demonstration requirement as a result of a new violation of the 1-hour standard prior to redesignation, the State should submit a replacement 2006 budget with the attainment demonstration. Again, this replacement budget must use the latest approved version of EMFAC.

<sup>26</sup> In our proposed attainment finding we noted that “[i]f the attainment demonstration is withdrawn . . . the continued applicability of the budgets could be affected.” 68 FR 62045. The State did not, however, withdraw the budgets in the 2001 Plan when it withdrew the attainment assessment but, in fact, specifically requested that EPA approve them. See 1/30/04 Witherspoon letter. Further, the State and District continue to implement the control measures that brought the area into attainment. Thus the final attainment finding has no effect on those budgets.

<sup>27</sup> Because EMFAC2000 has certain technical limitations, EPA approved it only for use in development of ozone motor vehicle emissions factors for SIP development and future conformity determinations in the San Francisco Bay Area. It was superior to prior models available for use in the area and the improved EMFAC2002 was not yet available. 68 FR 42181.

## V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. It also finds that the San Francisco Bay Area has attained a previously established national ambient air quality standard based on an objective review of measured air quality data. Finally, it determines that certain Clean Air Act requirements no longer apply to the San Francisco Bay Area because of the attainment finding. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997),

because it is not economically significant.

In reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 21, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Dated: April 1, 2004.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

#### **PART 52—[AMENDED]**

■ 1. The authority citation for Part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### **Subpart F—California**

■ 2. Section 52.220 is amended by adding paragraph (c)(323) to read as follows:

#### **§ 52.220 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(323) The following plan was submitted on November 30, 2001 by the Governor's designee.

(i) Incorporation by Reference

(A) Bay Area Air Quality Management District

(1) San Francisco Bay Area Ozone Attainment Plan for the 1-hour National Ozone Standard (Section 3: Emission Inventory; Section 5: Control Strategy, except subsection "Demonstrating Reasonable Further Progress"; Appendix B: Control Measure Descriptions; Appendix C: Reasonably Available Control Measure Analysis; Appendix E: Further Study Measure Descriptions); adopted on October 24, 2001.

[FR Doc. 04-9142 Filed 4-21-04; 8:45 am]

**BILLING CODE 6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Parts 52 and 81**

[CA 118-PLANa; FRL-7641-7]

#### **Approval and Promulgation of Implementation Plans, Finding of Attainment, and Designation of Areas for Air Quality Planning Purposes; 1-Hour Ozone Standard, East Kern County, CA**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is finding that East Kern County, California, has attained the 1-hour ozone National Ambient Air Quality Standard (NAAQS). EPA is approving the East Kern County 1-hour ozone maintenance plan and motor vehicle emissions budgets as revisions

to the East Kern County portion of the California State Implementation Plan (SIP). Finally, EPA is redesignating the East Kern County area to attainment for the 1-hour ozone NAAQS.

**DATES:** This direct final rule is effective June 21, 2004, without further notice, unless we receive adverse comments by May 24, 2004. If EPA receives adverse comments, we will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Please address your comments to: Dave Jesson, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901 or submit comments at <http://www.regulations.gov>.

You can inspect copies of the docket for this action at EPA's Region IX office during normal business hours. You can also inspect copies of the submitted SIP revision at the following locations:

California Air Resources Board, 1001 I Street, Sacramento, CA 95814  
Kern County Air Pollution Control District, 2700 M Street, Suite 302, Bakersfield, CA 93301-2370

#### **FOR FURTHER INFORMATION CONTACT:**

Dave Jesson, EPA Region IX, (415) 972-3957, or [Jesson.David@epa.gov](mailto:Jesson.David@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

Throughout this document, "we," "us," and "our" refer to EPA.

#### **Table of Contents**

- I. Background
  - A. East Kern Designation, Classification, SIP, and Attainment Status
  - B. Clean Air Act Provisions for Maintenance Plans
  - C. Clean Air Act Provisions for Redesignation
- II. EPA Review of the East Kern County Maintenance Plan and Redesignation Request and EPA Finding of Attainment
  - A. Maintenance Plan
    - 1. Emissions Inventory
    - 2. Maintenance Demonstration
    - 3. Continued Ambient Monitoring
    - 4. Verification of Continued Attainment
    - 5. Contingency Provisions
    - 6. Motor Vehicle Emissions Budgets
  - B. Redesignation Provisions
    - 1. Finding of Attainment of the 1-Hour Ozone NAAQS
    - 2. Fully Approved Implementation Plan under CAA Section 110(k)
    - 3. Improvement in Air Quality Due to Permanent and Enforceable Measures
    - 4. Fully Approved Maintenance Plan
    - 5. CAA Section 110 and Part D Provisions Satisfied
- III. Public Comment and EPA Action
- IV. Statutory and Executive Order Reviews

## **I. Background**

### *A. East Kern County Designation, Classification, SIP, and Attainment Status*

When the Clean Air Act (CAA) was amended in 1990, each area of the country that was designated nonattainment for the 1-hour ozone NAAQS was classified by operation of law as marginal, moderate, serious, severe, or extreme depending on the severity of the area's air quality problem.<sup>1</sup> The East Kern County nonattainment area ("East Kern") was designated under CAA section 107 as part of the San Joaquin Valley nonattainment area, and was classified under CAA section 181 as serious for the 1-hour ozone NAAQS. See 40 CFR 81.305 and 56 FR 56694 (November 6, 1991), designating the entire Kern County as part of the "San Joaquin Valley Area" for ozone.

The Kern County Air Pollution Control District (KCAPCD) adopted a serious area plan, intended to demonstrate rate-of-progress (ROP) and attainment by the applicable deadline of November 15, 1999.<sup>2</sup> The California Air Resources Board (CARB) timely submitted the plan in 1994, along with the plan adopted by the San Joaquin Valley Unified Air Pollution Control District for the remainder of the San Joaquin Valley nonattainment area. We approved the ROP and attainment plans for the San Joaquin Valley, including the portion of the SIP applicable to Kern County, on January 8, 1997 (62 FR 1150).

<sup>1</sup> EPA's 1-hour ozone standard of 0.12 parts per million (ppm) was promulgated in 1979 (44 FR 8202, February 8, 1979). On July 18, 1997, we promulgated a revised ozone standard of 0.08 ppm, measured over an 8-hour period. In general, the 8-hour standard is more protective of public health and more stringent than the 1-hour standard. This action addresses only the 1-hour standard. Areas will be designated attainment or nonattainment of the 8-hour standard in 2004. Ground-level ozone can irritate the respiratory system, causing coughing, throat irritation, and uncomfortable sensations in the chest. Ozone can also reduce lung function and make it more difficult to breathe deeply, thereby limiting a person's normal activity. Finally, ozone can aggravate asthma and can inflame and damage the lining of the lungs, leading to permanent changes in lung function. More details on ozone's health effects and the ozone NAAQS can be found at the following Web site: [http://www.epa.gov/ttn/naaqs/standards/ozone/s\\_o3\\_index.html](http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_index.html).

<sup>2</sup> "Rate-of-Progress and Attainment Demonstration Plans for the Kern County Air Pollution Control District," adopted on December 1, 1994, and submitted on December 28, 1994, by the Governor's designee. Since 1992, KCAPCD jurisdiction extends only to the desert (*i.e.*, eastern) portion of Kern County, while the western portion of the County lies within the jurisdiction of the multi-county San Joaquin Valley Unified Air Pollution Control District.