

RESPONSES TO COMMENTS

ON

EPA'S

PROPOSED DETERMINATION OF ATTAINMENT OF THE 1-HOUR OZONE STANDARD AND PROPOSED
DETERMINATION REGARDING APPLICABILITY OF CERTAIN CLEAN AIR ACT REQUIREMENTS
(68 FR 62041, OCTOBER 31, 2003);

PROPOSED APPROVAL AND PROMULGATION OF OZONE ATTAINMENT PLAN
(68 FR 42174, JULY 16, 2003);

AND

INTERIM FINAL DETERMINATION THAT THE STATE OF CALIFORNIA HAS CORRECTED
DEFICIENCIES
AND STAY AND DEFERRAL OF SANCTIONS
(68 FR 72172, JULY 16, 2003)

FOR THE

SAN FRANCISCO BAY AREA, CALIFORNIA

PREPARED BY

GINGER VAGENAS, AIR PLANNING OFFICE
JAN TARADASH, OFFICE OF REGIONAL COUNSEL
REGION 9

MARCH 31, 2004

Contents

I. 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
4. Comments regarding new source review

II. EPA's Responses to Comments on Applicability of CAA Planning Requirements

1. Comments regarding EPA's Clean Data Policy
2. Comments regarding the applicability of EPA policies to the Bay Area

III. 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 proposed approval of the motor vehicle emissions budgets
5. Comments on the downwind transport of air pollution
6. Comments on additional plan elements
7. Comments on the impact of the State law and court orders
8. Comments on the interim final determination
9. Comments on environmental justice

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

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-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.¹ 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.

Comment 2: EPA should only consider finalizing the proposed finding of attainment if attainment is maintained through the 2004 ozone summer season and the updated photochemical models support the permanence of the current attainment of the ozone standard. Prompt EPA action on the 2001 Bay Area plan making the control measure commitments federally enforceable is critical to the Sacramento region's efforts to attain the 1-hour standard by 2005.

¹See 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.

Response: Since the Bay Area has already met the requirements for an attainment finding, we do not believe it would be appropriate to delay final action on the finding. In this action EPA is finalizing its approval of the commitments in the 2001 Plan to adopt and implement specific control measures. By virtue of this approval those commitments become federally enforceable.

2. Comments regarding the data on which the attainment finding is based

Comment 3: 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 8), 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 4: 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)² 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 publicly available monitoring data that

²This memo is available online at <http://www.epa.gov/ttn/naaqs/ozone/ozonetech/940904.pdf>.

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.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 5: EPA has not published a notice that the data have met the relevant criteria. This rulemaking should be postponed until final, certified data are publicly available for the attainment period in question. The comment period should be reopened for not less than 30 days and the certified data upon which EPA has purportedly relied should be published. The District should post complete monitoring and meteorological data for the last three years’ ozone seasons. If in fact the verified data are available, the verification and the data should be made available for public scrutiny.

Response: EPA does not publish notifications when a state or district fulfils its obligation to certify its data. As noted above, the verified data were submitted to AIRS on November 12, 2003 and have been publicly available in AIRS since that date via the internet. The letter transmitting the verification has been available upon request from EPA since December 1, 2003. The commenter did in fact request this information from EPA, and we provided it on December 19, 2003.

Comment 6: The District has failed to maintain ambient air quality data in a publicly accessible manner. The District moved air quality data around on its website without leaving links, making the process of reviewing the data a frustrating exercise in “hide the ball.” The District’s website inexplicably will not report monthly data from July 2002, a critical period for the instant rulemaking.

Response: The District’s website is not the only means by which this information can be obtained. If a member of the public is having difficulty accessing data available via the internet, he or she can always call the District to request assistance with navigating the website or to request a paper copy of the information. Ambient air quality data are available online at several location, including the following:

³See November 12, 2003 email from Mark Stoelting, BAAQMD, to Catherine Brown, EPA, and Catherine Brown’s November 21, 2003 response.

<http://gate1.baaqmd.gov/aqmet/AQ.aspx>; <http://www.baaqmd.gov/pio/aqsummaries.asp?Grp=1>,
<http://www.arb.ca.gov/aqd/aqdpag.htm>.

Comment 7: 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 8: 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/m³. (Livermore’s design value is 245 ug/m³). 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.⁴

⁴ 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

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://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/m³ 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 9: 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

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>.

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.⁵ In our proposed action on the 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.⁶ 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_x) 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 10: 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

⁵Memorandum from John S. Seitz, Director, OAQPS, EPA, to Regional Air Directors, entitled "Reasonable Further Progress, Attainment 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."

⁶ See January 30, 2004 letter from Catherine Witherspoon, Executive Officer, CARB to Wayne Nastri, Regional Administrator, U.S. EPA Region 9. This letter is subsequently referred to as the 1/30/04 Witherspoon letter.

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.⁷

Comment 11: 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 CCOS⁸ 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

⁷ On June 2, 2003, EPA published in the Federal Register a proposed rule to implement the 8-hour ozone NAAQS. 68 FR 32803.

⁸In 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.

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.⁹ 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 12: Assuming EPA adopts an implementation policy for the 8-hour rule as proposed, EPA may instruct the Bay Area to ignore 1-hour requirements in April 2005 anyway, and any progress towards additional emissions reductions that could be achieved between now and that time will be forever lost. By this rulemaking, EPA has abdicated the 1-hour standard.

Response: Until EPA Agency takes final action on its June 2, 2003 proposed rule to implement the 8-hour ozone standard, we are not able to address issues regarding the relationship between the 1-hour and 8-hour standards. As stated above, however, EPA is approving the specific control measure commitments in the 2001 Plan. Therefore, progress will not be stopped pending the implementation of the 8-hour standard.

Comment 13: 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 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.

⁹In 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."

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 14: By its action, EPA unnecessarily sanctions the shutting down of regional air pollution control and planning efforts until the 8-hour SIP is due. Progress towards attainment of the 8-hour ozone standard can be best assured by maintaining the attainment demonstration, RFP, and contingency measure requirements in the 2004 mid-course review SIP. EPA could suggest that the District make an early submittal of the 8-hour SIP to maintain progress toward the emissions reductions necessary for healthful air quality in the Bay Area and to moderate the inequities associated with dropping SIP elements at this juncture. See 68 FR 322822.

Response: See response to Comment 12.

Comment 15: 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 cited¹⁰ 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 16: 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 transport¹¹ 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 17: The proposed attainment determination ignores uncontroverted substantial evidence regarding the severity of ozone transport which was introduced into the Federal Register when the Bay Area was redesignated to nonattainment status in 1998. See 63 FR

¹⁰ *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).

¹¹ See footnote 9.

37258 (July 10, 1998). This evidence indicated that up to 27 percent of the smog in the Central Valley was produced by pollution transported from the Bay Area, based on findings from an earlier CARB study (63 FR 37268).

Response: The commenter refers to a section in the preamble to a final rule wherein EPA is replying to comments that were submitted in response to the proposed redesignation to nonattainment of the Bay Area. The language to which the commenter apparently refers is simply EPA's restatement of a comment. It should not be interpreted as EPA taking a position with regard to the accuracy of the comment. As EPA explained in the response to that particular comment, the basis for the nonattainment redesignation was the large number of recent violations of the 1-hour ozone NAAQS, not any new evidence regarding the impact of Bay Area pollution on downwind areas.

Comment 18: Commenters expressed concern with the fate of the motor vehicle emissions budgets submitted with the 2001 Plan,¹² 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: 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.¹³

4. Comments regarding new source review

Comment 19: Revisions to EPA's new source review (NSR) regulations will cause hardening of current emissions and emissions growth. Reductions from erstwhile major modifications that would have yielded offsets and control technologies will be lost, compromising future air quality. Therefore the improvements in air quality data are not real, permanent, and enforceable.

Response: Before EPA redesignates an area to attainment, we must determine that the improvements in air quality are due to permanent and enforceable reductions in emissions. CAA section 107(d)(3)(E). In this action, however, we are not redesignating the Bay Area; we are making a finding of attainment, which is based on ozone levels measured in 2001 - 2003. Changes to the federal regulations governing the NSR program (67 FR 80186, December 31, 2002; 68 FR 61248, October 27, 2003), which the commenter believes will have an impact on future emissions, are therefore not germane to this action. If the District were to adopt and the

¹² 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>.

¹³ See 1/30/04 Witherspoon letter.

State submit modifications to the NSR rule for the Bay Area, we would need to ensure that the changes are consistent with the CAA, including the attainment or maintenance provisions, as applicable.

II. EPA's Responses to Comments on Applicability of CAA Planning Requirements

1. Comments regarding EPA's Clean Data Policy

Comment 20: 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.

Comment 21: The Act requires adequate emissions reductions as RFP to "ensure attainment by the applicable attainment date." EPA has confused the definition of the word "ensure" with the definition of the word "achieve." "Ensure" is defined by Merriam-Webster as "to make sure, certain, or safe: Guarantee." It connotes ongoing compliance, not a singular act of attainment. EPA's General Preamble uses the term "ensure" in describing redesignation issues by stating that "[t]he need for additional measures to ensure that maintenance continues is addressed under the requirements of maintenance plans." 57 FR 13564. By this action, EPA is blurring guidance and authority of redesignation with that of determinations of attainment, creating an illegal and unauthorized gap in the Bay Area's SIP coverage.

Response: The commenter focuses on the single word "ensure" in the definition of RFP in CAA section 171(1) to assert that the statutory RFP requirement continues after an area has in fact attained a NAAQS. By doing so, the commenter ignores the context in which the word is used.

The purpose of the RFP requirement is to ensure (i.e., make certain) that timely attainment is achieved by mandating annual incremental emission reductions instead of allowing, for example, all of the necessary reductions to be achieved in the attainment year. The requirement allows progress towards attainment to be tracked and adjustments made if a nonattainment area is falling short. By this method, attainment is ensured “by the applicable attainment date.” Thus there is nothing in the use of the word “ensure” in the RFP definition to suggest that the requirement survives attainment of the NAAQS.

As noted in the proposed rule, EPA has consistently interpreted section 171(1) to mean that since the stated purpose of RFP is to ensure attainment by the applicable attainment date, if an area has in fact attained the standard, the stated purpose of the RFP requirement will have already been fulfilled. 68 FR 62041, 62044.

Comment 22: *NRDC v. EPA*, 279 F.3d 1180, 1188 (9th Cir., 2002) clearly establishes that the statutory term “ensure” was interpreted to guarantee continuing compliance, not a one time satisfaction of a numerical standard. See also *Ariz Pub. Svc. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir., 2000). Congress used the word “achieve” in various portions of the Act to describe an area’s one time achievement of the relevant ambient air quality standard. See section 107(a), 110(a)(2)(c), 172(a)(2)(A), and 176(d). Congress’s use of specific terms is intentional, and the ample use of “achieve” in other portions of the Act to denote the act which EPA now attempts to apply the term “ensure” demonstrates that EPA’s interpretation is irrational and unlawful.

Response: EPA agrees that Congress’ use of specific terms is intentional and, as we have shown above, the use of the word “ensure” in the RFP definition in CAA section 171(1) is completely consistent with EPA’s interpretation of that statutory section. The commenter’s reliance on *NRDC v. EPA* and *Ariz Pub. Svc. Co. v. EPA* is inexplicable. *NRDC* is based *solely* on the APA (“We conclude that the EPA failed to provide adequate notice and opportunity for comment prior to issuing the final general permits...”; *NRDC* at 1182). The case sheds no light on the distinction the commenter is attempting to make between the word “ensure” and the word “achieve.” Similarly perplexing is the commenter’s citation to *Ariz Pub. Svc. Co.* which concerns provisions of the CAA Amendments of 1990 relating to the power of tribes to implement air quality regulations and EPA’s interpretation of those provisions. Both opinions contain the words “ensure” and “achieve.” Beyond that fact, we cannot discern how these cases are relevant to the point the commenter is trying to make.

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

Comment 23: 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 24: 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 25: 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 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 26: 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 27: In reciting its prior interpretation of subpart 1 areas' requirements during the gap, EPA mischaracterizes the General Preamble that it claims to rely on. The General Preamble is silent on the gap issue – all of its treatment is of redesignation. The citation to 57 FR 13564 can only apply to the overall section of the General Preamble beginning at 13561 entitled "Redesignations." The General Preamble does not support EPA's proposed action to create a SIP gap for the Bay Area.

Response: The commenter mischaracterizes EPA's reference to the General Preamble. We do not cite the General Preamble as the authority for the attainment finding and suspension of the certain Clean Air Act requirements. In fact, we clearly note in our proposed rule that the discussion in the General Preamble occurs in the context of redesignation. 68 FR 62044. Our reference to the General Preamble was intended to illustrate the consistency of our position that certain CAA requirements become inapplicable when an area attains the standard and to provide additional explanation of the reasoning behind our interpretation.

Comment 28: 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 re-write 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.¹⁴ 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 29: 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

¹⁴ 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.”

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 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.

Comment 30: The 9/4/92 Calcagni memo specifically anticipated Bay Area circumstances in mandating that the achievement of attainment must be based on permanent and enforceable improvement in air quality. See page 4. The memo provides that EPA must require a “showing” by the state attributing the improvement in air quality to emission reductions which are permanent and enforceable. EPA neglects to recognize that the Calcagni memo is directly on point to the Bay Area situation when it emphasizes that “attainment resulting from temporary reductions in emission rates (e.g., reduced production or shutdown due to temporary area economic conditions) or unusually favorable meteorology would not qualify as an air quality improvement due to permanent and enforceable emission reductions.” Commenters challenge the representativeness of the District’s monitored data, and request that the District model ozone concentrations during the period assuming all emissions in the planning emissions inventory. They state their belief that such an exercise would confirm the temporary nature of the District’s purported attainment. EPA has not met its burden to justify an ozone attainment finding based on the particular fact pattern prevailing in the Bay Area according to appropriate application of its own internal guidance documents.

Response: EPA agrees that a redesignation to attainment requires a showing that reductions

leading to attainment are permanent and enforceable and that they are not due to temporary economic downturns or unusually favorable meteorology. However, today's action is not a redesignation. Rather, it is a finding of attainment. As explained in the proposal, a finding of attainment is not the same as redesignation and does not guarantee a redesignation to attainment. An attainment finding requires only that an area has the prerequisite number of clean years. On the other hand, a redesignation requires multiple determinations. See CAA section 107(d)(3)(E).

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

1. Comments on the proposed approval of the emissions inventory

Comment 31: 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.

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.¹⁵ 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. As discussed below (section III.4.), 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.

Comment 32: 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 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

¹⁵ 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 (D.C. Cir. 2004).

comprehensive, accurate, and current. In the notice of proposed rulemaking, we stated that if the findings in the draft technical assessment documents¹⁶ 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 documents,¹⁷ 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.

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 33: 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,

¹⁶The 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>.

¹⁷See 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.

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.¹⁸ 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 34: The new BA enhanced I/M program should be approved as an enforceable commitment.

Response: Based on its air quality status, the Bay Area was required to have a basic inspection and maintenance program (I/M) at the time the 2001 Plan was adopted and submitted. 62 FR 1150 (January 8, 1997). The 2001 Plan identifies a 4.0 tons/day reduction in emissions in 2006 due to improvements to the I/M program by the addition of the liquid leak inspection and improved evaporative system check. In this action we are approving the commitment for the measure.

State law was amended in 2002 (AB 2637 – Cardoza) to mandate expeditious implementation of the full enhanced inspection and maintenance program in the Bay Area, which will deliver substantially greater emissions reductions than the commitment in the 2001 Plan. However, AB 2637 has not been submitted by the State as a revision to the SIP. In the absence of such a submittal, EPA cannot approve it as an enforceable commitment.

Comment 35: 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 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 NOx 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

¹⁸ 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 (D.C. Cir. 2002).

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 proposed approval of the motor vehicle emissions budgets

Comment 36: The MVEBs are inflated by errors that were known at the time the 2001 Plan was submitted. More accurate versions of EMFAC were available prior to the submittal of the 2001 Plan. Santa Barbara's Clean Air Plan (the plan mandated by California state law for attainment of the State ozone standard), which was adopted initially on November 15, 2001 used a model that was substantially improved over the version of EMFAC employed in the 2001 Plan. The co-lead agencies could have used a more current model that corrected the 18 categories of known errors, rather than relying on a version of the model with known, substantial defects.

Response: Plans are based on the information available at the time they are developed.¹⁹ At the time the 2001 Plan was developed, the motor vehicle emissions model used by the District (SF Bay Area EMFAC2000) represented the latest, most up-to-date and accurate emissions model available. As the commenter noted, the model used by the Bay Area did have some flaws. At the time the 2001 Plan was submitted to EPA, CARB was in the process of finalizing EMFAC2001 for use in the development of SIPs and conformity determinations across California. It was our understanding that CARB did not plan to submit EMFAC2001 until early 2003. (See 67 FR 1465). This schedule allowed CARB time to refine and perform additional quality control on EMFAC2001 before it was released for statewide use, but did not allow the District to await its completion. Although EPA recognizes the technical limitations in EMFAC2000, we believe it was the best model available when the District developed the 2001 Plan and that it was a vast improvement over prior models.²⁰

5. Comments on the downwind transport of air pollution

Comment 37: 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

¹⁹ See *Sierra Club v. EPA*, 356 F.3d 296.

²⁰A discussion of the ways in which EMFAC2000 represented improvements over previous models is included in EPA's February 14, 2002 adequacy determination, which is available online at <http://www.epa.gov/region09/air/sfbayoz/#0202>.

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.

6. Comments on additional plan elements

Comment 38: The Bay Area SIP and 2001 Plan lack specification of the stationary source surveillance elements of the SIP mandated by EPA's SIP adequacy regulations (40 CFR 51.210-51.214). The 2001 Plan lacks provisions that provide for the periodic testing of stationary sources that have been mandated by Congress. Further, the 2001 Plan does not contain procedures for obtaining and maintaining data on actual emissions reductions achieved as a result of implementing TCMs (40 CFR 51.213(a)).

Response: The source surveillance requirements of 40 CFR subpart K, as they apply to stationary sources, are adequately addressed in the approved SIP for the Bay Area. See, for example, Regulation 1, which incorporates continuous emission monitoring requirements, and permitting regulations and individual stationary source rules, which contain testing, reporting, and recordkeeping provisions.

We note that previous SIP submittals have included TCMs that fail to meet all adoption criteria. In such cases, EPA has not allowed the state to take credit for projected emission reductions. See EPA guidance document "Transportation Control Measure: State Implementation Plan Guidance" September 1990.²¹ Since the requirement for an attainment demonstration and an RFP plan have been suspended by the finding of attainment, credit is not being sought or granted for the implementation of these TCMs.

Finally, the 2001 Plan includes language that adequately addresses the means by which emissions reductions resulting from the implementation of TCMs will be determined. (2001 Plan, Table 8.) We expect that the transportation planning process will take into account implementation of the TCMs and the associated emission reductions as needed to support 40

²¹This document is available on the web at <http://www.epa.gov/cgi-bin/claritgw?op-Display&document=clserv:OAR:0717;&rank=4&template=epa>.

CFR 51.213(a) and note that this process is a matter of public record. More specifically, we interpret the 2001 Plan to require that, as these projects are selected, they will be either coded into MTC's transportation model, which will enable MTC to calculate emissions from mobile sources or included as off-model reductions. The transportation modeling calculations are completed in support of updates to the transportation program and plan, which occur at least every two years, and for future SIP revisions, including the establishment of motor vehicle emissions budgets. EPA recognizes the complexity of TCM implementation and the interdependence of TCMs, and does not require that each measure be disaggregated from the whole. See response to comment 35 and the General Preamble, 57 FR 13560.

Comment 39: 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.

7. *Comments on the impact of the State law and court orders*

Comment 40: 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. 323849.²² 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

²² 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.

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 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 41: 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 42: 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 43: Health and Safety Code section 40233 creates a separate process for identifying additional TCMs and thus emission reductions. The plan acknowledges that Livermore ozone is primarily from mobile source emissions. Had the District complied with section 40233 and properly prepared a TCM plan, the Livermore exceedances would have been abated and the plan, the emission reductions shortfall, the RACM analysis and the attainment assessment would likely be much more acceptable to commenters and the public at large. The District's defiance of state law denied petitioners, the public and the plan the benefits of an expanded set of TCMs and the mandated process.

Response: Sections 108(f), 110(a) and 172(c) of the federal CAA contain the requirements for TCMs and RACM that apply to the 2001 Plan. Because of EPA's final attainment finding for the Bay Area, the attainment requirements of the Act have been suspended. Moreover, as pointed out by the commenter, the federal CAA requires that the State (or local jurisdiction) have adequate personnel, funding and authority under State (and, as appropriate, local) law to carry out the implementation plan. CAA section 110(a)(2)(E). While Health and Safety Code section 40233 creates a separate State process for identifying TCMs that arguably could have resulted in an expanded set of TCMs, it is not a process mandated by federal law. Thus a failure to comply with that process does not affect the State's or District's legal authority or ability to implement the 2001 Plan.

Comment 44: 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' 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.

Comment 45: Congress, in adopting section 110(a)(2)(E) and EPA, in promulgating Appendix V to 40 CFR part 51, understood the need for the SIP to be both substantively authorized and adopted in a procedurally correct manner. Here, the State's authority to move forward with the plan is clouded by the State Court order directing Respondent District to undertake further steps as part of the Plan. Importantly, the State is obviously unable to include in the Plan "evidence that the State followed all of the procedural requirements of the State's laws ... in conducting and completing the adoption/issuance of the plan. 40 CFR Part 51, App. V, section 2.1(e)." Under these circumstances, the only permissible action is to determine the Plan is not approvable and direct that the necessary corrections, including those ordered by the Court, be undertaken immediately.

While there is apparently no case law directly on point, it is well established that California's decision to delegate a portion of the SIP promulgation duties to a local agency such as the District does not exculpate the State from its obligation to assure the SIP is adopted in accordance with State law. When a State lacks authority to implement a SIP due to the absence of authority to implement the control measures, EPA may not approve a SIP.

Response: See response to previous comment and other responses above that address the effect of the State Court ruling on EPA's ability to approve the 2001 Plan. See also September 30, 2003 letter from Catherine Witherspoon, CARB, to Jack Broadbent, EPA re Judge Robertson's July 23, 2003 decision in *Communities for a Better Environment, et al., v, Bay Area Air Quality Management District, et al.*

8. *Comments on the interim final determination*

Comment 46: EPA's use of a "more likely than not" standard to determine that California may have corrected its deficient Plan is inappropriate because the standard has no statutory basis and was created by EPA in the 1994 preamble to regulations implementing the sanctions provisions in the CAA and, as such, is not itself an adopted rule. In addition, EPA's finding that the state has "more likely than not" corrected the Plan's deficiencies is not acceptable as it does not satisfy the statutory requirement that the deficiencies must in fact be corrected.

Response: In the 1994 preamble cited by the commenter, EPA addressed at length the legal basis for the Agency's use of the "more likely than not" standard. Among other things, EPA analogized its approach of suspending and/or deferring sanctions upon a finding that it is more likely than not that the deficiencies triggering them have been corrected to the method (e.g., preliminary injunction) courts use to grant interim equitable relief. EPA also stated that the Agency does not believe, following proposed approvals, that it would be in the public interest for sanctions to remain in effect, as at that point the Agency believes that there is nothing further that the State need do to come into compliance, and thus there is no further need for the deterrent effect of sanctions. Moreover, EPA noted that, like the judicial preliminary injunction model, this approach provides that upon reversal of EPA's preliminary assessment that the SIP revision is approvable, and that, therefore, the deficiency has not been corrected, sanctions would be in effect as if the interim final determination that the State had corrected the deficiency had never been made. 59 FR 39832, 39849 (August 4, 1994).

Furthermore, the commenter had the opportunity to challenge EPA's application of the "more likely than not" standard in the July 16, 2003 interim final rule in the U.S. Court of Appeals and chose not to do so. In any case, EPA has promulgated a new interim final rule suspending/deferring sanctions that is based on a finding of attainment and EPA's Clean Data Policy rather than on a proposed approval of the plan. The comment regarding the "more likely than not" standard in the prior interim final rule is therefore moot.

Comment 47: EPA should not have relied on the good cause exception to the 30-day public comment notice requirement in the APA. EPA's interim final determination that the agencies have corrected the deficiencies is erroneous and inappropriate. EPA should remove the stay and deferral and reimpose sanctions. In addition, EPA's belief that the deficiencies have "more likely than not" been corrected cannot alone serve as good cause. EPA's rulemaking is void of explanation of either the impracticability or public interest justifying the omission of public comment. There is no evidence that imposition of the offset sanction poses a burden on industry generally or any individual source and the interim final rule does not state that the SIP adequacy determination cannot be completed prior to highway sanctions taking effect. The public's interest in healthful air quality and meaningful implementation and enforcement of the law is advanced by letting the sanctions clocks remain running until EPA takes final action on the SIP submittal.

Response: EPA also explained at length the legal basis for its application of the good cause exception in the 1994 preamble to its sanctions rule. Section 553(b)(B) of the APA provides that the notice and opportunity for comment requirements do not apply when the Agency finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." EPA explained that, in the case of sanctions, the Agency believes it would be both impracticable and contrary to the public interest to have to propose and provide an opportunity to comment before any relief is provided from the effect of sanctions. See 59 FR 39832, 39849-39850 EPA reiterated this reasoning in its July 16, 2003 interim final rule. 68 FR 42172.

As with the previous comment regarding the "more likely than not" standard, the commenter had the opportunity to challenge EPA's application of the good cause exception in the interim final rule in the U.S. Court of Appeals and chose not to do so. In any case, EPA has promulgated a new interim final rule suspending/deferring sanctions that is based on a finding of

attainment and EPA's Clean Data Policy rather than on a proposed approval of the plan. The comment regarding the good cause exception in the July 16, 2003 interim final rule is therefore moot.

With respect to the commenter's contention that EPA's interim final determination that the agencies have corrected the deficiencies is erroneous and inappropriate, the Agency provided extensive analysis of its views on the approvability of the plan in its proposed rule and has reaffirmed those views in today's final action with respect to those portions of the plan that the State has not withdrawn.

9. Comments on Environmental Justice

Comment 48: The 2001 ozone plan delays improvement in air quality to the disproportionate detriment of people of color and low economic means, especially along the transportation corridors that are home to disproportionate numbers of target populations. Further, the plan's failure to embrace TCMs such as public transit disproportionately and adversely affects transit dependent communities. EPA should require the agencies to include in the 2001 Plan information regarding the unequal distributional impacts of Bay Area's nonattainment of the federal 1-hour ozone standard. The agencies should identify and assess the disproportionate impacts of ozone pollution on low income communities and communities of color, given their proximity to both mobile and stationary sources. Lastly, the plan should include an assessment of the impacts of the Bay Area's nonattainment on ozone transport to other regional air basins, particularly in low income areas and communities of color.

Response: We understand the community concerns about how ozone nonattainment or delays in improvement to ozone air quality may have possible disproportionate impacts to people of color and low economic means, especially those that live along the transportation corridors. EPA notes that these comments were provided to us last summer at a time prior to our finding of attainment. Today's action is a finding of fact that Bay Area air quality meets the health-based one hour federal ozone standard. EPA believes that this action does not trigger the need to assess the disproportionate impacts of ozone nonattainment on people of color and low economic means. Our finding of attainment is based on measured ambient air quality from approved monitoring stations throughout the nine Bay Area Counties. In the future, should the Bay Area begin to violate the 1-hour standard, we will notify the State and also will provide notice to the public in the Federal Register. Any future nonattainment finding would prompt a new round of planning requirements for Bay Area. Any Environmental Justice concerns raised at that time, including those that may be associated with downwind transport to other air basins, can be addressed through the air quality planning process that will occur.