

TECHNICAL SUPPORT DOCUMENT

**RESPONSE TO COMMENTS
on
PROPOSED PARTIAL APPROVAL/PARTIAL DISAPPROVAL
and
PROPOSED FINDING OF FAILURE TO ATTAIN
1999 SAN FRANCISCO BAY AREA OZONE PLAN**

August 28, 2001

A. Overview of Comments

EPA received 15 letters commenting on the March 30, 2001 propose partial approval/partial disapproval of the 1999 San Francisco Bay Area ozone attainment plan (1999 Plan) and proposed finding of failure to attain (66 FR 17379). The commenters represented State and local air quality and transportation agencies, the business community, and a number of public interest environmental and environmental justice groups. The majority of commenters expressed support for the proposed partial disapproval and finding of failure to attain. The proposed partial approval was viewed favorably as strengthening the SIP, but several commenters objected to the proposed approval of specific plan elements as meeting the requirements of section 172 of the CAA. A number of commenters also urged EPA and the Bay Area Air Quality Management District (BAAQMD) to evaluate and explain why the 1999 Plan failed to provide for attainment. Specific comments are addressed below.

B. Comments on Proposed Disapproval of Attainment Assessment

Comment: The BAAQMD objected to EPA's use of the term "attainment demonstration," opining that an attainment demonstration has a very different meaning than an "attainment assessment," and noting that EPA specifically required the submittal of an attainment assessment for the 1999 Plan.

Response: EPA believes that an attainment assessment and an attainment demonstration have effectively the same meaning in the context of the 1999 Plan. EPA's detailed technical guidance for attainment demonstrations applies to areas classified as serious and above that are required to do photochemical modeling.¹ An attainment demonstration for areas classified as less than serious is in practice what EPA required for the Bay Area's attainment assessment, an assessment that employs the best available modeling and other technical information to quantify the level of emission reductions needed to attain (63 FR 37276, July 10, 1998).

Comment: Many commenters asked that EPA provide a detailed analysis of all the reasons why the attainment assessment was flawed. Some commenters went further and asked EPA to supplement its reasons in the final rulemaking for disapproving the attainment assessment. Specifically, commenters argued that the attainment assessment was flawed (by a magnitude in the range of 25-50 tpd) not only because it inaccurately demonstrated

¹ CAA Section 182(c)(2)(A); "Guidance on the Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS." EPA-454/B-95-007, June 1996.

attainment, but also because it: 1) omitted available data by excluding 1998 monitoring data; 2) inaccurately estimated the impact deregulation has had on power plant emissions; and 3) relied on projections of motor vehicle emissions that assume large reductions that historically have not been fully realized.

Response: EPA shares the concerns raised with regard to the attainment assessment. However, we do not believe that it is necessary or productive at this time to determine whether these concerns provide independent bases for disapproval since we are already disapproving the assessment based on air quality monitoring data. Nevertheless, the points raised are good ones, and we will take them into consideration as we review future plans and plan revisions.

Comment: Counsel for the Transportation Solutions Defense and Education Fund (TRANSDEF) commented that EPA's regulations specifically require use of a photochemical model, and that if the Bay Area need not use urban airshed modeling (UAM), the reasons should be fully explained in the Federal Register. The commenter asserted that EPA's "attainment assessment" approach outlined for the 1999 Plan did not accord with 40 CFR part 51.112 and appendix W. TRANSDEF also claimed that the Bay Area should have used EPA's model substitution process pursuant to 40 CFR part 51.112(a)(2) to authorize the techniques used in the 1999 Plan.

Response: EPA regulations at 40 CFR part 51, appendix W (6.0 Models of Ozone, Carbon Monoxide and Nitrogen Dioxide) do not mandate the use of photochemical modeling or the need to undergo a model substitution process. Rather, the pertinent language is as follows:

A control agency with jurisdiction over areas with significant ozone problems and which has sufficient resources and data to use a photochemical dispersion model is encouraged to do so. However, empirical models fill the gap between more sophisticated photochemical dispersion models and may be the only applicable procedure if the available data bases are insufficient for refined modeling.

The attainment assessment for the Bay Area was based on an isopleth diagram generated from photochemical modeling, an approach EPA believes is consistent with the above requirement (1999 Plan, Section V, pp. 16-18).

Comment: TRANSDEF requested that EPA note in the final

rulemaking that past assumptions and inputs to the attainment assessment process have not been sufficiently conservative to accomplish attainment and also asks that EPA require more conservative approaches in the future, including a margin of safety.

Response: The 1999 Plan, itself, notes that "The attainment assessment provided . . . is 'reasonable,' but clearly optimistic" (1999 Plan, p. 4). Erring on the side of being conservative may be a good idea, but it is not required. According to EPA regulations, "use of the 'best estimate' is acceptable and is consistent with Clean Air Act requirements" (40 C.F.R. Part 51, App. W, 10.2).

Comment: One commenter stated that the Bay Area's continued lack of technically competent data and modeling resources mandates that EPA promulgate a Federal Implementation Plan (FIP). The commenter supported this position with language from *Arizona v. Thomas*, 829 F.2d 834 (9th Cir. 1987): "Having failed in its obligation to produce or make reasonable efforts to produce SIPs which would appear to meet the requirements of the Act, Arizona should not be given another opportunity to produce more plans."

Response: EPA's disapproval of the attainment assessment triggers an obligation of EPA to promulgate a FIP not later than two years following the disapproval unless EPA approves an attainment demonstration for the area in the interim. The State is currently working to submit a new attainment demonstration sooner than the one year provided by this final action. EPA believes that it is appropriate to first allow the State to replace the deficient SIP consistent with the work it is now doing.

The commenter's reliance on Arizona v. Thomas is misplaced. That case involved whether EPA appropriately applied a sanctions regulation on the State. The sanctions regulation (under the pre-1990 CAA) applied to areas that failed to meet the statutory attainment date. However, areas with fully approved SIPs were excluded--i.e., not subject to the sanction. Because Arizona did not have a fully approved SIP, the court rejected Arizona's claim that the sanction should not apply and that Arizona should instead be given a chance to develop a new SIP. The narrow regulatory interpretation in that case bears no relevance on the post-1990 requirements of the CAA.

C. Comments on Proposed Disapproval of Motor Vehicle Emissions Budgets

Comment: Earthjustice provided additional justification beyond what was discussed in EPA's proposal for disapproving the transportation conformity budgets. Specifically, Earthjustice commented that the budgets were incorrectly calculated (approximately 20 tpd too high for VOC) because "MTC [Metropolitan Transportation Commission] accidentally 'misbucketed' vehicle miles traveled [VMT] according to speed ranges." The commenter further suggested that EPA improve its oversight role to avoid similar errors in the future.

Response: EPA agrees that there have, in some cases, been problems with allocations of VMT by speed and therefore with emissions estimates. This type of mistake could impact budget levels, as they are based on motor vehicle emissions projected for the attainment year. With respect to this rulemaking, however, EPA is disapproving the budgets because they are based on an attainment assessment that was deficient. Therefore EPA need not explore a separate basis for disapproval. EPA will work with MTC in the future in an attempt to avoid any errors in VMT speed allocation and emissions estimates.

Comment: TRANSDEF urged EPA to reject the motor vehicle emissions budgets on the basis that they were not derived from a competent attainment demonstration. The commenter suggested this deficiency must be corrected in any amended or revised plan submittal.

Response: EPA is disapproving the budgets because they were based on a flawed attainment assessment. This deficiency must be corrected within 18 months of the effective date of this rulemaking in order to avoid the imposition of sanctions. CAA section 179(a)(2).

D. Comments on Proposed Disapproval of Reasonably Available Control Measure Demonstration (RACM)

Comment: The BAAQMD questioned the existence of a RACM obligation, asserting that all RACM are in place and that the Air District had already responded to public comments related to potential control measures for the 1999 Plan.

Response: The federal RACM obligation for ozone nonattainment areas is contained in section 172(c)(1) of the Act, which requires "the implementation of all reasonably available control measures as expeditiously as practicable." The BAAQMD commenter did not deny this obligation, but rather asserted that the obligation has already been fulfilled. EPA disagrees with

this position. EPA guidance, issued November 30, 1999 entitled, "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas," provides that "[i]n order for the EPA to determine whether a State has adopted all RACM necessary for attainment as expeditiously as practicable, the State will need to provide a justification as to why measures within the arena of potentially reasonable measures have not been adopted. The justification would need to support that a measure was not 'reasonably available' for that area and could be based on technological or economic grounds." At a minimum, the justification should address "any measure that a commenter indicates during the public comment period is reasonably available for a given area. . . ." (57 FR 13560, April 16, 1992).

The Bay Area's 1999 Plan itself was silent on the RACM requirement. While the supporting documentation for the 1999 Plan did include a response to many public comments on control measures, not all of the suggested control measures were addressed. Moreover, where measures were specifically rejected, the justifications provided generally did not address the RACM criteria. According to EPA guidance, "measures could be justified as not meeting RACM if a measure (a) is not technologically or economically feasible, or (b) does not advance the attainment date for the area" ("Additional Submission on RACM from States with Severe 1-hour Ozone Nonattainment Area SIPs," EPA, December 14, 2000).

Comment: Several commenters urged EPA and the BAAQMD to thoroughly examine all of the control strategies in place in the South Coast air district as well as those suggested through public comment and at public workshops. A number of commenters suggested specific measures that should be evaluated as RACM. The San Joaquin Valley Unified Air Pollution Control District identified three potential RACM measures for District adoption (or amendments to existing BAAQMD rules): SMOG Check II, aqueous solvent degreasing, and the permitting and control of smaller engines. Sherman Lewis, Chair of the Hayward Area Planning Association identified a range of cash out and transit assistance measures that should be considered. Earthjustice suggested a RACM review of all BAAQMD and MTC measures that are not currently in the SIP. Another commenter urged EPA to clearly state that RACM requires adoption of all measures demonstrated in the State to be reasonably available, including measures in the Bay Area CAP and BAAQMD Rules 9-10 and 9-11. Communities for a Better Environment suggested several refinery measures, marine vessel measures, a requirement for diesel engine replacement, and others.

Response: EPA is disapproving the RACM component of the 1999 Plan for the reasons noted in the previous response. In order to correct the RACM deficiencies, an amended or new plan must consider or evaluate any control measures that are suggested by the public during its development and adoption as well as measures included in public comment on the 1999 Plan and as part of this rulemaking to determine whether or not they represent RACM.

Comment: The majority of commenters emphasized that RACM measures should be viewed collectively to determine whether their emissions reductions would expedite attainment.

Response: EPA agrees that RACM measures should be viewed collectively to determine whether their emissions reductions would expedite attainment. However, EPA has previously concluded that "potential measures may be determined not to be RACM if they require an intensive and costly effort for numerous small area sources." 66 FR 586, 610; January 3, 2001. This interpretation of RACM "is based on the common sense meaning of the phrase, 'reasonably available.' A measure that is reasonably available is one that is technologically and economically feasible and that can be readily implemented. Ready implementation also includes consideration of whether emissions from small sources are relatively small and whether the administrative burden, to the States and regulated entities, of controlling such sources was likely to be considerable. As stated in the General Preamble, EPA believes that States can reject potential measures based on local conditions including cost (57 FR 13561)." 66 FR 586, 610; January 3, 2001. Also, the development of rules for a large number of very different source categories of small sources for which little control information may exist will likely take much longer than development of rules for source categories for which control information exists or that comprise a smaller number of larger sources. The longer the rule development time frame, the less likely that the emission reductions from the rules would advance the attainment date. EPA will analyze future RACM submissions from the Bay Area in light of these conclusions.

Comment: One community member suggested that the Bay Area's past poor performance justifies a higher hurdle for rejecting additional control measures as not being RACM.

Response: The CAA contains provisions that address an area's "poor performance"; e.g., disapproval of a plan and subsequent sanctions (CAA sections 110(k) and 179(a)). In contrast, the RACM requirements and EPA's guidance interpreting those requirements are intended to ensure that all measures that are

"reasonably available" are implemented in nonattainment areas. Furthermore, while EPA's guidance contemplates a case-by-case analysis based on local circumstances (57 FR 13561), the Agency must apply the criteria for determining what constitutes RACM uniformly throughout the nation. The RACM tests outlined in EPA guidance and the CAA do not include a higher hurdle based on poor performance.²

Comment: The only comment received from the business community, the California Council for Environmental and Economic Balance, reasoned that NOx measures should not be considered RACM because of the likelihood that NOx reductions would actually increase ozone formation and because the Bay Area is already complying with Federal NOx RACT Control Technique Guidelines.

Response: As noted above, measures may be excluded from an attainment plan if they would not advance the attainment date.³ There was not sufficient evidence in the 1999 Plan to reject NOx measures as RACM on the basis of not advancing the attainment date. In fact, the Bay Area's control strategy for the 1999 Plan relies on the reduction of both NOx and VOC emissions to attain the federal ozone standard. Nevertheless, EPA will take this point into consideration when evaluating future RACM submissions from the Bay Area.

E. Comments on Proposed Approval of Baseline Emissions Inventory

Comment: Several commenters questioned the approvability of the 1995 baseline emissions inventory. Our Children's Earth and Communities for a Better Environment argued that any approval of the emissions inventory without knowledge of why the plan failed is arbitrary. These organizations also identified concerns with inventory emissions estimates for refineries and power generation. Another commenter questioned the inventory's accuracy citing the increase in on road mobile source emissions when CARB updated its mobile source model. Also raised was a concern that the inventory was not sufficiently "current" to be

² CAA section 172(c)(1); "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas," 11/30/99; "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498, 13560, 4/16/92; "Additional Submission on RACM from States with Severe 1-hour Ozone Nonattainment Area SIPs," 12/14/00.

³ Guidance dated December 14, 2000 entitled, "Additional Submission on RACM from States with Severe 1-hour Ozone Nonattainment Area SIPs."

approvable.

Response: EPA believes it is not appropriate to assess the adequacy of an emissions inventory based on the ultimate success or failure of a plan. EPA reviewed the emissions inventory carefully and had a number of discussions with Air District and CARB staff about the estimates provided for various source categories. As noted in the March 30, 2001 proposal, the inventory figures were based on actual emissions in 1995. EMFAC 2000, CARB's newer mobile source model, was not available at the time, and hence could not be used to evaluate the accuracy of the inventory.

EPA believes that the emissions inventory can be approved because it is current in the context of the 1999 Plan. The decision to allow a 1995 baseline inventory was first proposed by EPA in 1997 and finalized, after public notice and comment, in 1998. No adverse comment was received. The plan was prepared in 1998 and submitted to EPA in 1999.

In short, we found nothing in our review to suggest that the inventory was inconsistent with EPA inventory guidance, "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). Nevertheless, since the Bay Area will have to submit a new plan in response to the disapproval and finding of failure to attain, there will need to be a new emissions inventory to support that plan.

Comment: Communities for a Better Environment pointed out that there are over 1300 Notices of Violation (NOVs) in the Bay Area that have not been processed, suggesting that rule effectiveness assumptions for various source categories may be overstated. If this is the case, emissions levels could likely be higher than the inventory figures.

Response: EPA does not judge the adequacy of emissions inventories on NOV statistics. In many cases, the issuance of a large number of NOVs indicates a healthy enforcement program. Moreover, many NOVs are written for non emissions-related violations (e.g., record keeping) or for extremely minor emissions violations; therefore unresolved NOVs are not a good gauge for the effectiveness of a rule or regulatory program. The BAAQMD's enforcement process is to cite violations on site (sometimes multiple NOVs at a site daily). Compliance is demanded within fifteen to twenty days or further NOVs are issued until the problem is corrected. (See BAAQMD Enforcement Division

Policies and Procedures Manual, Notice of Violation Guidelines, pp.5-6; included in docket for this rulemaking.) Violations are often bunched and then settled as a group for a particular facility; hence, it is not uncommon at any moment in time to find many seemingly "unaddressed" NOV's.

Moreover, one of the concepts behind rule effectiveness is that there is not 100% compliance. The estimated noncompliance is factored into the inventory.

F. Comments on Proposed Approval of Reasonable Further Progress Demonstration

Comment: Counsel for Our Children's Earth and Communities for a Better Environment opined that, unless EPA makes a finding as to why the Bay Area failed to attain the ozone standard, it is arbitrary to assume that the adopted measures were as effective as promised in the SIP. The commenter asserts that continuing exceedances (particularly in 1998 -- after three years of plan implementation) is evidence that the measures were not as effective as promised and that RFP did not occur.

Response: RFP is defined as "annual incremental reductions in emissions of the relevant air pollutant..." (CAA section 171(1)). For ozone, which is not emitted directly, the reductions must come from sources of the ozone precursors, VOC and NOx. While it seems to make sense that reductions in VOC and NOx could be measured by improvement in ozone levels, that is not necessarily the case. For instance, in the Bay Area, ozone levels are not decreasing as expected in response to the precursor emissions reductions. "Proposed Final San Francisco Ozone Attainment Plan for the 1-Hour National Ozone Standard," June 2001, Figure 4. EPA therefore relies on the implementation of control measures, which are designed to reduce precursor emissions, to determine whether or not progress in reduction of emissions is being made. EPA concludes that the adopted measures are being implemented and sufficient reductions in emissions have occurred to represent reasonable further progress.

Comment: One commenter asserted that EPA erred in not requiring RFP interim corrections to the 1999 Plan to address changing circumstances and new information.

Response: The process of developing, work shopping, approving, and submitting a plan revision is a lengthy one and could not have been completed in time between initial plan submittal (August 1999) and the attainment deadline (November 2000). It was because of this truncated time frame that EPA

determined that, for this plan, "the RFP requirement would be satisfied if all required emission reductions occur by...[t]he attainment year." 62 FR 66578, 66581 (December 19, 1997).

G. Comments on Proposed Approval of Control Measures

Comment: Commenters provided several arguments for finding the control strategy inadequate. First, the controls proposed did not compensate for the underestimated motor vehicle emissions calculated by EMFAC7g. The commenter urged EPA to look more closely at emissions reductions relied upon from state measures. In addition, the commenter stressed that control strategies should not be limited to emissions limitations, but should also include strategies such as closing or relocating sources and economic incentive programs. The commenter asked EPA to comment negatively on the control strategy in the 1999 Plan and to direct that all future measures be more specific and enforceable before federal credit is given.

Response: EPA agrees that the 1999 Plan's overall control strategy was inadequate for attainment and, as a result, is disapproving the plan. EPA is, however, approving the individual control measures in the plan because they strengthen the SIP. In any case, in the next planning effort for the Bay Area, the control strategy will have to be supplemented with additional measures needed for attainment and that are specific enough to be federally enforceable. Any future attainment demonstration will have to include sufficient control measures to reduce updated projections of motor vehicle emissions, and could include innovative control strategies as necessary to demonstrate attainment.

H. Comments on Proposed Approval of Contingency Measures

Comment: Counsel for Our Children's Earth and Communities for a Better Environment suggested that EPA revise its proposed approval of the contingency measures to a conditional approval, the condition being the requirement for additional contingency measures within one year.

Response: Contingency measures are intended to provide continued progress "in the year following the year in which the failure has been identified" (57 FR 13511, April 16, 1992). In the Bay Area, the contingency measures in the 1999 Plan have already been triggered. Under CAA section 179(d), a new plan, including additional contingency measures to be triggered in the future, is required to be submitted to EPA within one year after the effective date of the final finding of failure to attain.

Comment: Earthjustice expressed concern that the contingency measures would not safeguard public health because they are primarily on road measures that are unlikely to achieve their projected level of emissions reductions due to over [sic] optimistic assumptions. This commenter further questioned the appropriateness of relying on measures with questionable effectiveness to backstop measures in the plan that are plagued with the same uncertainty.

Response: As we noted in the proposed rulemaking (66 FR 17379, 17382, March 30, 2001), contingency measures must provide sufficient reductions to ensure continued progress towards attainment while the plan is being revised. Even if the on road measures fall short, we believe there are sufficient reductions to meet this test.

Comment: Counsel for TRANSDEF asserted that the contingency measures failed to meet the criteria and purpose of the Act because such measures are intended to be measures above and beyond the ordinary control strategies that come into effect automatically in response to a missed milestone or a failure to attain.

Response: EPA has long held that control measures that are in excess of those projected as being required for timely attainment may be used to satisfy the contingency measure requirements of CAA section 172(c)(9) because the measures will provide for continued emission reduction progress beyond the core control strategy. See, e.g., 58 FR 52467, 52473 (October 8, 1993).

I. Comments on Environmental Justice

Comment: The BAAQMD described its existing public involvement process and requested specific guidance on possible inconsistencies with EPA's environmental justice policies regarding public participation. MTC requested that EPA identify specific environmental justice concerns associated with the SIP or conformity budget.

Response: EPA emphasized in the proposed rulemaking that there must be a full public involvement process that provides opportunities to satisfy environmental justice concerns, and further referenced the District's own adopted environmental justice principles. Since that time EPA has continued to work with the BAAQMD and CARB to encourage additional opportunities for public involvement. Among the pertinent guidance documents

is the "Model Plan for Public Participation", published by EPA's Office of Environmental Justice in February, 2000 (EPA-300-K-00-001; available at <http://www.epa.gov/OECA/ej.html>). This document describes many practical steps that can be taken as well as several core values and guiding principles for effective public involvement. EPA has drawn no conclusion as to the consistency of the current process with EPA policies, but notes that there has been substantial continuing adverse comment that the Bay Area's plan development process is inadequate and violates "procedural environmental justice." This issue is discussed further below.

Comment: Several commenters noted that the public engagement process is key to ensuring environmental justice. According to TRANSDEF, the environmental justice processes at the Air District and MTC are generally inadequate. Earthjustice noted that the time line for the upcoming plan revision is being driven by the wish to avert conformity consequences and is resulting in a rushed public process that compromises procedural environmental justice. Communities for a Better Environment commented on the need for a full public process (i.e., sufficient public notification and adequate time) so that community members can identify and comment on transportation and stationary source control measures that should be adopted.

Response: EPA agrees that an effective public involvement process is important and that more public process and community input is preferable to less. Moreover, EPA is committed to the principles of environmental justice to ensure that all people have equal access to the decision making process. We believe that the public process for the 1999 Plan provided everyone the opportunity for meaningful involvement and met all legal requirements set out in CAA section 110(a) and 40 CFR part 51. Nonetheless, EPA is aware of the public's concerns and is continuing to encourage and support additional public involvement efforts by the State and local agencies.

Comment: A few commenters suggested control strategies that would be particularly beneficial to low-income and minority communities. These strategies include the control of emissions from refineries and utilities and the reclassification of the area under Subpart 2 of the Clean Air Act and the concomitant lowering of the major source threshold to 25 tons per year. In a comment received from a transit advocacy group, the point was made that increased transit ridership is one of the cornerstones of reducing auto emissions, improving public health and addressing environmental injustices. A commenter further stated that EPA is obligated by Executive Order 12898 on Environmental

Justice and its own regulations to use its existing authority to address disproportionate impacts on minority populations.

Response: EPA agrees that control strategies and measures may differ with regard to the degree to which they benefit different populations and communities. In reviewing plans and control strategies when they are submitted for federal approval, EPA is cognizant of its obligations under the Executive Order. EPA assumes that the reference to EPA's regulations is to EPA's nondiscrimination regulations at 40 CFR part 7, applicable to recipients of EPA assistance. These regulations provide, in part, that recipients "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex" (40 CFR 7.35(b)). EPA is unaware of allegations as to specific violations of these regulations.

Comment: TRANSDEF states that the health impacts of the Bay Area's nonattaining air quality disproportionately affect communities of color and others with reduced access to medical care and other aggravating factors.

Response: While EPA has not specifically evaluated this allegation with regard to the Bay Area, the Agency believes that the NAAQS are presumptively protective of all communities included in the nonattainment area. The NAAQS are established based on studies that include asthmatics and other sensitive populations and are intended to provide an adequate margin of safety for everyone in the relevant area. Therefore a plan providing for attainment of the NAAQS should ensure that all populations are protected with an adequate margin of safety.

J. Comments on Proposed Finding of Failure to Attain

Comment: The BAAQMD commented that the November 15, 2000 attainment deadline was unreasonable.

Response: The November 15, 2000 attainment deadline comes from EPA's 1998 redesignation of the Bay Area to nonattainment and was subject to notice and comment rulemaking. (63 FR 37258, July 10, 1998). EPA set an expedited attainment deadline to encourage near term emissions reductions and in response to BAAQMD evidence that the air quality problem would be corrected by that date.

Comment: Legal counsel for TRANSDEF contends that the Supreme Court decision in *Whitman v. American Trucking Association*, 149 L.Ed.2d 1, 31-48, 121 S.Ct. 903, dictates that EPA reconsider its position regarding the Bay Area's nonattainment designation under the general nonattainment provisions of Part D subpart 1 of the Act. This commenter asserts that the Bay Area should be designated as subject to the more prescriptive requirements of subpart 2 of part D and classified as "severe" to impose additional planning and SIP requirements.

Two commenters also argued that the Bay Area ought to be classified as a severe area due to the number of times it has failed to attain since the 1990 CAAA and the date by which it is now expected to attain the national ozone standard (i.e., 2006). It was suggested that EPA propose a severe classification in a separate rulemaking.

Response: The issue of whether subpart 1 or subpart 2 applies to the Bay Area was decided in the action redesignating the Bay Area from attainment to nonattainment for the 1-hour ozone NAAQS (63 FR 37258, July 10, 1998). *Whitman v. ATA* concerned the applicability of subpart 2 to the implementation of a revised ozone NAAQS, in this case the 8-hour standard. There is nothing in the Court's opinion to suggest that subpart 2 must apply to a redesignation from attainment to nonattainment for the 1-hour ozone NAAQS. Thus, at this time, EPA does not intend to reconsider its prior final decision regarding the applicable implementation provisions for the Bay Area. However, EPA is currently beginning efforts to respond to the Court's remand of the implementation issue for the 8-hour standard. If, in developing that policy, EPA reaches any conclusions that would affect the basis for EPA's final rule determining that the Bay Area should implement the 1-hour standard under subpart 1, the Agency will reconsider its position with respect to the Bay Area at that time.

K. Comments on Consequences of Partial Disapproval

1. Conformity Freeze and Lapse

Comment: The Air District and MTC noted the potential for adverse impacts to the region's transportation system, economy, and air quality if a conformity lapse were to delay highway, transit, and congestion relief projects.

Response: EPA is working with state and local agencies to

develop an attainment SIP that contains motor vehicle emissions budgets that EPA can find adequate for conformity purposes.

Comment: MTC stated that there are minor errors in EPA's discussion of the conformity freeze and lapse consequences of a plan disapproval. Specifically, in the event of a freeze, MTC asserted that it can still adopt its upcoming RTP even though a conformity finding cannot be made. In addition, MTC noted that EPA's list of projects that could proceed under a lapse was not exhaustive. The list should include: TCMs in approved SIPs, non-regionally significant non-federal projects, regionally significant non-federal projects that have already been approved prior to a lapse, previously conformed projects that have received funding commitments, exempt projects, projects under 40 CFR 93.127, and traffic synchronization projects. MTC also stated that regionally significant transit expansion projects such as light rail extensions and bus fleet expansions not yet under contract cannot proceed under a lapse.

Response: Although MTC makes some valid points, MTC is not entirely correct. In nonattainment and maintenance areas, a metropolitan planning organization (MPO) must demonstrate that a transportation plan conforms to the SIP before the transportation plan can be approved. During a conformity freeze, no new transportation plans can be found to conform pursuant to 40 CFR 93.120(a)(2). Please note that a transportation plan or transportation improvement program (TIP) amendment can be approved during the freeze if it merely adds or deletes exempt projects specified in 40 CFR 93.126 and 93.127. Rail and bus expansions can proceed if they are implementing TCMs in the SIP or if they only involve minor expansions of rail car or bus fleets (40 CFR 93.126).

Comment: Caltrans noted that the normal 2-year period between onset of a conformity freeze and a lapse is virtually eliminated by the Bay Area's transportation planning schedule.

Response: EPA is aware that the conformity freeze could turn into a conformity lapse in January 2002 because that is when the current *conforming* regional transportation plan (RTP) will expire. EPA is working closely with the ARB and the local Bay Area agencies to correct the deficiencies in the 1999 Plan and lift the freeze before a lapse occurs.

2. Other

Comment: Counsel for Our Children's Earth and Communities for a Better Environment presented an argument that EPA's

disapproval should trigger a construction ban pursuant to CAA section 173(a)(4). The rationale provided was that EPA's disapproval is essentially equivalent to a finding that the SIP is not being adequately implemented. Alternatively, counsel requested that EPA issue the following two orders: 1) an order prohibiting construction or modification of any major source, and 2) an order requiring the BAAQMD to promulgate a rule that places CAA section 173(a)(4) authority in the Bay Area's permitting program.

Response: The CAA separately identifies a plan disapproval and the finding of failure to implement the SIP, and the underlying premise of each is different. A plan disapproval simply means that a specific SIP submission does not meet the applicable requirements of the CAA. See CAA section 110(k)(3). Thus those rules or plans are not incorporated into the approved SIP. A finding of failure to implement, however, concerns whether a state is implementing the requirements of an approved plan. Thus the failure of a state to have approved rules meeting all of the Act's requirements (as evidenced by a disapproval) is not the equivalent of a failure to implement measures or requirements that EPA has approved as meeting the CAA. In this action, there is clearly no finding that the State is not implementing provisions approved into the SIP, and hence, the restrictions on permitting set forth in section 173(a)(4) do not apply. EPA is disapproving portions of a plan and thus the consequences of disapproval will apply.

L. Comments on Requirement for a New Plan

Comment: Several commenters expressed concern that EPA seemed to be rushing the Bay Area into another planning process and was not providing sufficient guidance for the next plan.

Response: Under CAA section 179(d), the Bay Area has one year from the effective date of the finding of failure to attain to submit a new attainment plan. The State and local agencies have accelerated their plan development process, apparently in order to avoid the consequences of a conformity lapse which will take effect January 2002 if the Plan's deficiencies are not corrected by that time. EPA is doing its best to be responsive to the State's concerns and schedule while at the same time providing meaningful input to ensure a viable plan.

Comment: A number of commenters suggested that EPA should exercise its CAA section 179(d)(2) authority to prescribe control measures. Specific suggestions include measures that target

stationary sources located within low income communities of color; public transit measures; measures that address issues such as urban sprawl, land use, and growth in vehicle miles traveled; and any other measures identified through public comment.

Response: It is difficult for EPA to prescribe specific control measures in the Bay Area where both stationary and mobile source controls meet, and often exceed, federal requirements and where innovative programs and emerging technologies will be needed for future emissions reductions. Control measures currently under development in the South Coast region (the only "extreme" ozone area in the country) and at CARB are already being targeted for future Bay Area plans. Initiatives to address issues such as urban sprawl and land use are appropriately devised at the local and State levels. In light of these factors, EPA does not believe it would be reasonable to impose specific controls under CAA section 179(d)(2) until it first allows the local agencies and CARB to explore appropriate feasible measures for the area.

Comment: Members of the environmental community urged EPA to require urban airshed modeling for future plans and plan revisions.

Response: New urban airshed modeling will not be available until the 2003/2004 time frame. Moreover, as noted above, 40 CFR 51.112 allows the use of lesser models for areas not classified as serious and higher.

Comment: One commenter urged EPA to mandate an emissions budget more stringent than required under the Act to compensate for historical shortfalls in mobile source emissions reductions from projected levels.

Response: The emissions budget in an attainment plan is defined as the projected attainment year emissions for motor vehicles. (40 CFR 93.101) While EPA has the authority and responsibility to ensure that motor vehicle emissions projections are based on the most accurate information available, we do not have authority to mandate a safety margin.

M. Miscellaneous Comments

Comment: Comments submitted by Peninsula Rail 2000 raised concerns about MTC's efforts to improve transit, reduce auto use, and improve air quality. This commenter suggested that EPA intervene to ensure proper planning by MTC.

Response: Comment noted. EPA does participate in MTC's planning process and attempts to gain support for better and more cost-effective transit service and reduced auto use and pollution.

Comment: Legal counsel to TRANSDEF commented that EPA must report on the failure of past conformity determinations to comply with 40 C.F.R part 93.118.

Response: The qualitative analysis required by 40 C.F.R. part 93.118 applies to conformity determinations, not to actions on ozone plans. Nonetheless, the commenter appears to be making the point that the current maintenance plan budget in the Bay Area could be causing or contributing to a new NAAQS violation, or could have exacerbated past violations. EPA agrees with the commenter that the current maintenance budget is not satisfactory and needs to be replaced with a new attainment budget.

Comment: TRANSDEF also provided several comments on the emissions budgets in the Bay Area's maintenance plan.

Response: EPA is not acting on the maintenance plan budgets in this rulemaking. For information about the current status of the maintenance plan budgets and a description of how they will be replaced once adequate attainment budgets are in place, see 64 FR 55220, October 12, 1999.

Comment: Counsel for TRANSDEF commented that the District and MTC must demonstrate compliance with the requirements of California Health and Safety Code section 40233 which requires the District to identify, and MTC to help achieve, the amount of air pollution emissions reductions to be accomplished from the mobile source sector to reach attainment.

Response: State law requirements are outside the scope of this rulemaking. Federal law requires that the attainment plan quantify the emissions reductions necessary to accomplish attainment and ensure that those reductions will be achieved by the responsible State and local agencies (CAA section 172(c)).