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ENVIRONMENTAL LAW

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Submitted by email (vagenas.ginger @epa.gov), fax (415 947-3579) and US Mail

RE: Notice of Proposed Rulemaking – Approval and Promulgation of Ozone Attainment Plan, San Francisco Bay Area, 68 Federal Register 42174, July 16, 2003

Dear Ms. Vagenas:

Please accept these comments on behalf of Transportation Solutions Defense and Education Fund, Communities for a Better Environment, and Our Children's Earth Foundation, collectively "Commenters." The Commenters have been actively involved in Bay Area air quality and transportation issues for many years on behalf of their members and Boards of Directors. Additionally, by this letter, TRANSDEF incorporates by reference the separate letters submitted on behalf of Our Children's Earth Foundation and Communities for a Better Environment.

General Comments

The Bay Area has suffered for many years from unhealthful air quality, which has caused thousands of unnecessary cases of respiratory distress and significant economic losses to the community. Adverse health impacts disproportionally affect communities of color and others with reduced access to medical care and other aggravating factors. The root of the sustained unhealthful air quality is the failure of state and local air quality planning officials to take effective action and adopt meaningful air pollution control plans that will eliminate enough air pollution to make Bay Area air healthful and safe to breathe, and to fully ameliorate the adverse effect of Bay Area air pollution on downwind communities. The 2001 Ozone Attainment Plan (hereinafter "Plan" or "OAP") is but one more of a series of facially inadequate plans dating back to the 1980's. EPA has a history of treating the Bay Area Air Quality Management District and its co-lead agencies Metropolitan Transportation Commission and the Association of Bay Area Governments (collectively, for the purpose of these comments "District") more "gently" than comparable Air Pollution Control Districts in the State,

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allowing the submittal of incomplete and inadequate plans that, to date, have proven ineffective at providing reliably healthful air quality in the Bay Area and in downwind areas.

The Plan Was Adopted in Violation of Laws Governing Procedural and Substantive Aspects of SIPs

The 2001 Ozone Attainment Plan was adopted by its co-lead agencies in great haste to avoid perceived problems in transportation funding from a conformity freeze and lapse. This haste was accomplished by the use of a number of procedural and substantive shortcuts that compromised the technical and legal adequacy\[1] of the Plan. These actions compromised the public's ability to participate in meaningful review of the then-proposed plan. For example, the California Air Resources Board ("ARB") was required to make an unprecedented order that the co-lead agencies convene a series of additional public meetings due to the inadequacy of the process\[2] that led to the Plan's first adoption. Unfortunately, at the hands of the District the ARB's mandated public process amounted to little more than a "fire drill" with no changes to the Plan whatsoever, and caused alienation of otherwise interested members of the public.

EPA's refusal to release a Technical Support Document Further Deprives the Public of Information Necessary for Meaningful Public Input

EPA has compounded the public blackout by refusing to prepare a Technical Support Document to provide the basis and rationale for the proposed action. The 2001 Ozone Attainment Plan is one of, if not the shortest and least descriptive, nonattainment plans in California history (excluding other Bay Area SIPs). While every other Air Pollution Control District's nonattainment SIP involves documents comprised of multiple volumes detailing every aspect of the SIP in better detail, ranging from regional air quality history, health effects of air pollution experienced in the District (see Ventura Air Pollution Control District SIP), land use planning issues (see Santa Barbara County Air Pollution Control District 1999 and 2001 SIPs, Chapter 9), environmental review document (compare the Bay Area's miserly and truncated CEQA negative declaration with the environmental impact reports prepared by virtually every other District for major SIP revisions), the Bay Area SIP is a thin, conclusory and superficial document. The brevity and cursory nature of its analysis reflect its fundamental inadequacy, stemming from the fact, admitted in the SIP itself, that it was prepared for purposes of avoiding constraints on expenditures of federal transportation funds, addressing (if at all)

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[1] The District and Metropolitan Transportation Commission are subject to a judgment declaring that the Plan was adopted in violation of State law and a peremptory writ of mandate directing the preparation of draft Plan amendments within 60 days. See Communities for a Better Environment and Transportation Solutions Defense and Education Fund v. Bay Area Air Quality Management District, Metropolitan Transportation Commission and Air Resources Board, San Francisco County Superior Court No. 323849, Final Order filed July 24, 2003, attached as Exhibit 1. See also *infra.*

[2] At one point, the District closed the doors at a public hearing on the Plan and prevented members of Communities for a Better Environment from entering. Many members of the public left in disgust after being allowed 60 seconds to present their testimony on the adequacy of the 2001 Ozone Attainment Plan.

only the bare minimum of air quality issues. EPA proposes to sanction this travesty with several unorthodox and illegal conclusions, impugning the last vestige of EPA's credibility in the eyes of a worried and skeptical public.

EPA has made a practice of releasing TSDs in other SIP rulemaking, including the similar Houston Galveston Area SIPs. See, Houston Galveston Area Notice of Proposed Rulemaking, 66 Fed. Reg. 36655, 36669 (July 12, 2001) and the Technical Support Document ("TSD") accompanying it. Technical Support Document for Rulemaking on the Texas 1-Hour Ozone Attainment Demonstration, July 2, 2001, US EPA, Region VI. Like the Bay Area submittal, the Houston Galveston Area SIP submittal contained an emissions reductions shortfall and "enforceable commitment" from the State, a cursory RACM analysis, and a number of both controversial and unprecedented interpretations of the Act.

Region 9's determination of adequacy of the Bay Area 2001 OAP Motor Vehicle Emissions Budgets included numerous references to future technical analysis that would be undertaken as part of the SIP adequacy process. "EPA will undertake a more detailed and thorough examination of the technical analysis supporting the 2001 Plan's attainment demonstration." EPA Responses to MVEB Comments, 2/14/2002, page 6. As noted *infra*, the attainment demonstration remains highly questionable, and the Notice of Proposed Rulemaking offers no substantive technical explanation or justification for the summary conclusion that the attainment demonstration was adequate, especially in light of the emissions reduction shortfall and a paucity of monitoring data that the District had been previously admonished for. See, 66 Fed. Reg. 48340-41 (9/20/2001) ("EPA shares the concerns raised with regard to the attainment assessment. . . . [T]he points raised are good ones, and we will take them into consideration as we review future plans and plan revisions."

While EPA could schedule a public hearing to receive public comment on their proposed action, they have not. This is probably for the best. After the co-lead agencies maligned the public in the last set of contrived and repressive, formulistic public hearings, most members of the interested public have abandoned the effort, and commenters seek no further delays to final action, which has already been delayed beyond Congress' statutory deadlines for EPA's review of state implementation plans. EPA should disapprove this submittal for the reasons contained herein and promulgate a federal implementation plan by the statutorily mandated deadline, October 30, 2003.

Specific Issue Comments

If a SIP meets all of the applicable requirements of the Clean Air Act, then EPA is required to approve the plan as a whole. 42 U.S.C. § 7410(k)(3). But if a SIP does not meet all of the applicable requirements – if, for instance, it fails to provide sufficient emissions reductions to attain the NAAQS – then EPA is not authorized to approve it in full. Id.

SIPs "provide for attainment" by means of "measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of [the NAAQS]." 40 C.F.R. §

51.100(n). These measures must include "enforceable emissions limitations and other control measures, means or techniques . . . as may be necessary or appropriate" to meet the Act's requirements and the NAAQS. Id. §§ 7410(a)(2)(A), 7502(c)(6).

The failure of the Plan to demonstrate future attainment through a set of specific control measures is a fundamental defect infecting the adequacy of the entire SIP process.

1. Emissions inventory:

The Act requires a SIP to contain "a comprehensive, accurate, current inventory of actual emissions from all sources." 42 U.S.C. § 7502(c)(3). The emissions inventory in the 2001 Ozone Attainment Plan is clearly out dated and lacked currency at the time of submittal, and today. This fundamental flaw taints the remaining elements of the Plan. EPA must specify a much more broad series of emissions inventory corrections in the 2004 SIP than those indicated in the Notice of Proposed Rulemaking.

A. EMFAC

i. The Model Contains Significant Errors

The co-lead agencies proposed in November 2001 to use a specialized version of EMFAC prepared exclusively for the San Francisco Bay Area, EMFAC ver. 2.04x. 2001 OAP, page 7. See also Exhibit 4, ARB website describing EMFAC 2000, version 2.02 as the version used in the 2001 Bay Area Plan. The EMFAC projection of motor vehicle emissions is dependant upon a number of assumptions and calculations for accuracy. The accuracy and completeness of the San Francisco Bay Area EMFAC model was questioned at the time of draft SIP consideration, yet the co-lead agencies and State undertook no effort to correct the substantial errors imbedded within the EMFAC output. The litany of corrections is reflected in Exhibit 4.

ii. More Accurate EMFAC Versions Were Available and Relied on in SIP and Other State Rulemakings Preceding The State Submittal

The State had released for SIP and rulemaking purposes two EMFAC revisions prior to submitting the Bay Area Plan to EPA on November 30, 2001. These revisions included "major revisions" to 18 separate input categories (Exhibit 4), including corrected MTC vehicle activity data and over a dozen other changes that were accomplished before the District adopted the Plan for submittal.

The Bay Area modeling is in stark contrast to the Santa Barbara County Air Pollution Control District's 2001 Clean Air Plan. The CAP was adopted initially on November 15, 2001, at approximately the same time as the Bay Area OAP, using a model substantially improved over the EMFAC version employed by the Bay Area District. Exhibit 4. Further, the State recognized the remaining flaws in the EMFAC2001 model (ver. 2.08) and adopted and submitted a Santa Barbara County SIP revision based on the EMFAC2002 ver. 2.2. See, 68 Fed. Reg. 14382 (March 25, 2003).

The Bay Area District 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.

B. Smog Check II

Smog Check II was approved by the California Legislature for the San Francisco Bay Area in September 2002. See Exhibits 2 & 3. This will alter the mobile source emissions inventory substantially, both by reducing overall emissions, but significantly, by dramatically reducing NO_x emissions (13 tons per day, Exhibit 3), while accomplishing a much smaller reduction in VOCs, estimated at less than 1 ton per day. Id. The adoption of this measure renders the emissions inventory outdated and incomplete. The attainment assessment must be revised to reflect the effect, if any, that the decreased NO_x emissions from Smog Check II may have on the demonstration of attainment.

C. TCM 2

MTC is subject to an order of the United States District Court finding that MTC has failed to implement TCM 2. *Bayview Hunters Point Community Advocates, et al., v. Metropolitan Transportation Commission, et al*., 212 F.Supp. 2d 1156 (C.D.Cal. 2002). MTC has similarly failed to incorporate the air pollution impacts of TCM 2 implementation into its emissions inventory. TCM 2, which involves increased transit ridership in the region, if fully implemented, will reduce the amount of VMT and mobile source emissions, altering the emissions inventory and MVEB.

D. Refinery Emissions Inventory Errors

In both the Bay Area and Houston Galveston Area, recent monitoring has disclosed vast disparities between reported and actual emissions. EPA's Notice of Proposed Rulemaking crudely acknowledges the issue at footnote 4, however the Technical Assessment Documents that are referenced do not actually "describe [the District's] findings." 68 Fed. Reg. 42175, footnote 4. The error is reported to involve excess emissions of 11-22 tpd, potentially doubling the emissions reduction shortfall currently acknowledged by the District and EPA.

EPA's analysis in the Notice of Proposed Rulemaking refers exclusively to the prospective correction of these known errors, rather than evaluating whether these errors preclude Plan approval. EPA's "discussion" of the issue (especially in the absence of a TSD and reliance on vague references to other documents that address the issue in vague and general terms) deprives the public of an understanding of the agency's rationale for its conclusion that the emissions inventory is approvable.

E. ARB's Recently Discovered Statewide Emissions Inventory Errors

As reported in the Los Angeles Times on January 16, 2003, the Air Resources Board has discovered gross errors in the emissions inventory for the South Coast Air Basin, and thus the entire State, including the Bay Area.

> Air quality officials now acknowledge that they have seriously underestimated emissions from cars and trucks. New computer models show that vehicles produce about 30% more smog-forming emissions than once believed. The new modeling accounted for leaks in fuel lines, inefficient old cars, stop-and-go driving and the longer distances people drive these days.
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> At the same time, consumer products, including deodorant, hairspray and household cleaners, were found to produce more emissions than previously realized, said Lynn Terry, deputy executive officer of the state Air Resources Board. "Obviously, we have a lot to learn about the specifics of the motor vehicle fleet," Terry said.
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> As a result of those miscalculations, air quality officials are confronting an emissions reduction shortfall of about 145 tons of hydrocarbons and 90 tons of nitrogen oxides per day. Air quality officials concede they cannot identify enough strategies to eliminate so many emissions.
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> "The state and federal government have fallen behind in their efforts. There is a very deep hole they have to dig out of," said Barry Wallerstein, executive officer of the South Coast Air Quality Management District. "We still have a chance to make the [2010] deadlines, but the EPA and [Air Resources Board] need to break into a full sprint. It's going to be difficult, a daunting task over the next several years."
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> Los Angeles Times, January 16, 2003, originally posted at http://www.latimes.com/news/local/la-me-newsmog16jan16001436,0,1572788.story?coll=la%2Dheadlines%2Dcalifornia

The emissions inventory for the San Francisco Bay Area basin relies upon many of the same Air Resources Board-derived emissions factors for fleets, area sources, and other elements of the emissions inventory as the South Coast Air Basin. The State Air Resources Board's admission of emissions inventory errors reflect directly upon the Bay Area's emissions inventory, which has suffered from a number of other defects, as outlined above.

In examining the status of emissions inventory data that was available on November 30, 2001 when the Plan was submitted by the State, it is evident that better, more current and accurate data was known to the District and available for incorporation into the Plan. The deadline for the District's submittal of the revised Plan was September 2002, yet the District elected to rush the Plan adoption process in defiance of more accurate and current data that would have improved the quality of the Plan and its conclusions. Reliance on antiquated emissions inventory data is inconsistent with the Act, which mandates a "comprehensive, accurate, current inventory of actual emissions from all sources." 42 U.S.C. § 7502(c)(3). EPA should reject the 2001 Plan's emissions inventory as fundamentally flawed and direct the District to update all aspects of the emissions inventory in the 2004 SIP while promulgating a federal implementation plan by October 30, 2003.

F. The Failure of the Heavy Duty Diesel Truck Settlement Agreement to Accomplish Expected Emissions Reductions Taints the Emissions Inventory

The EMFAC model assumed substantial changes in the heavy duty diesel engine categories as a result of EPA's Clean Air Act settlement agreement with engine manufacturers. According to the popular press, only a small fraction, approximately 5%, of the conversions and retrofits anticipated to occur by this time have actually occurred. EPA has estimated that expected emissions reductions from the conversion and retrofit of heavy duty diesel engines should require 20 or more years to be accomplished. The Bay Area emissions inventory must be corrected to delete the emissions reductions expected from this settlement agreement.

2. Modeling

For over six years, EPA has accepted the District's excuses that it lacks adequate air quality data to model attainment. See, 62 Fed. Reg. 66581 (12/19/1997) (impractical to perform modeling for "short term plan"); 66 Fed. Reg. 49340 (9/20/2001) ("EPA shares the concerns raised with regard to the attainment assessment" that omitted data, relied on antiquated EMFAC modeling projections, failed to reflect the actual emissions inventory and was considered inaccurate). The District has maintained its ignorance, and in spite of the fact that ozone data was collected from an episode in the year 2000, they still insist no new data is available to guide the attainment demonstration. EPA must not condone the practice of delays and simply disapprove the Plan until a legally and technically adequate attainment demonstration can support the SIP.

A. <u>The Use of an "Attainment Assessment" is Improper</u>

The attainment demonstration is a cornerstone of SIP adequacy. 42 U.S.C. § 7502(c)(1). Using actual monitored meteorological and air quality data, the "attainment demonstration" is supposed to calculate the specific amount of emissions reductions necessary for the area to have clean air by the attainment deadline, which is then used to determine the level of emissions reductions needed from the control strategy element of the SIP. This is the theory of the state plan as well. See Health and Safety Code § 40233. EPA's regulations specifically require use of a photochemical model, in particular the "urban airshed" model. Instead, the Bay Area District contends an exemption from federal regulatory requirements of an attainment demonstration was provided by EPA to perform a cursory attainment assessment. EPA is without authority to waive the District's duty to model its air quality and craft an attainment Plan based on those results.

The 2001 Plan employs an unacceptable attainment demonstration analysis, this time an illegal rollback method combined with the ineffective isopleth method. 2001 Plan, page 14-23. EPA's regulations at 40 C.F.R. Part 51 and Part 51's Appendix W clearly proscribe this approach. Section 51.112 mandates a demonstration of timely attainment as a minimal element of adequacy. There is no provision for a lesser "attainment assessment." Section 51.112(a)(1) directs that "the adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality models)." Appendix W clearly and unequivocally recommends use of the Urban Airshed Model (UAM). Appendix W, section

6.2.1.a, models for ozone. "Proportional (rollback/forward) modeling is not an acceptable procedure for evaluating ozone control strategies." 40 C.F.R. Part 51, Appendix W, section 6.2.1.e.

EPA's direction permitting the District to submit an attainment assessment rather than a full-fledged attainment demonstration was clearly flawed. The result, characterized as "the co-lead agencies' best effort to estimate the amount of emissions reductions needed for attainment", failed to fulfill requirements of the Act and relevant guidance. Not only did it fail in its ultimate purpose, as noted by EPA in the Notice of Proposed Rulemaking, but the approach did not accord with Section 51.112 and appendix W. Since the UAM approach was not employed (with only a cursory explanation) as recommended by EPA's regulatory requirements, a formal substitution process should have been employed. Part 51.112(a)(2) authorizes substitution of air quality models only with the Administrator's written authorization and after certain substantive and procedural requirements are satisfied. Public notice and comment must be solicited pursuant to Section 51.102 (Section 51.112(a)(2)), and the demonstration must include a summary of the computations, assumptions, and judgments used to determine the degree of emissions reductions resulting from implementation of the control strategy, a control measure by control measure emission level analysis, ambient air quality concentrations after implementation of the control strategies, and description of dispersion models used to project air quality and evaluate control strategies. Section 51.112(b).

The Act also imposes a substantive technical standard to any proposed deviation from EPA's recommended modeling methodology. Section 172(c)(8) provides that the Administrator may allow the use of equivalent modeling techniques that are different than the recommended approach (UAM) "unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the techniques specified by the Administrator." Thus, the District carries a considerable burden in requesting relief from UAM methodology. The District must demonstrate model effectiveness equivalency and must undertake that demonstration in an independent proceeding involving notice, comment and a public hearing proceeding before gaining written authorization from the Administrator. The Administrator must make findings pursuant to § 172(c)(8) and 40 C.F.R. Section 51.112 before relieving the District of its duty to model its attainment demonstration with UAM.

Commenters are unaware of any Administrative Procedures Act notice and comment proceedings in recent years exclusively addressing the model substitution issue for the 2001 Plan. As Section 51.112(a)(2) isolates the issue of model substitution as necessitating an extraordinary "case-by-case" analysis and written authorization by the Administrator, this is not a proceeding that can be considered a part of the plan adoption hearings. If simple inclusion of modeling substitution issues in the Section 51.102 adoption hearings would suffice, the references in Section 51.112(a)(2) would be redundant, as the attainment demonstration and model identification is a mandatory element of a SIP submittal and would ordinarily be addressed at the adoption stage. Section 51.112(a)(2)'s reference to Section 51.102 hearings indicates the requirement that <u>separate</u> notice and comment proceedings be conducted solely on this crucial issue. The District's procedures in evaluating and processing attainment demonstration adequacy, compliance with applicable authority and model substitution were not adequately addressed and should be noted by EPA in its final rulemaking as a point of 2001 Plan inadequacy.

B. The Serial "Attainment Assessment" is Unprecedented

The attainment assessment has no statutory basis, is described in no EPA policy document or guidance, and has no substantive track record of serial application as in the Bay Area. EPA has arbitrarily deferred the Act's requirement that SIPs "provide for attainment" in the Bay Area (42 U.S.C. § 7502(c)(1)) to one where the District may project possible attainment. As with the unprecedented "means and techniques" definition of control strategies, never before gracing a Federal Register notice for such an interpretation, EPA is clearly making the rules up as it goes. Those rules defer to the District's unwillingness to control air pollution to the detriment of the breathing public.

The term "attainment assessment" appears in 3 sets of Federal Register notices – the Bay Area, Atlanta, Georgia (67 Fed. Reg. 30574, 5/7/2002) , and Western Massachusetts (64 Fed. Reg. 70319 (12/16/1999)), and Wisconsin, 66 Fed. Reg. 56931 (11/15/2002). Only in the Bay Area is the attainment assessment allowed to substitute for an attainment demonstration. In Atlanta, the Final Rulemaking was vacated at EPA's request as the 11th Circuit prepared to rule after the rejection of the attainment date extension policy in Washington D.C., St. Louis and Beaumont Port Arthur areas and the D.C., 7th and 5th Circuit Courts of Appeal. In Wisconsin and Massachusetts the attainment assessment was identified as a subsequent step in a mid-course review process, not as a substitute for an attainment demonstration. Of the thousands of other SIP actions undertaken annually, EPA has not ever used the term attainment assessment, and instead has insisted that areas provide attainment demonstrations establishing that SIPs provide for attainment. Here, the State has submitted a SIP that omits an attainment demonstration and includes considerably less emissions reductions than would be required for attainment even under the illegal and unprecedented attainment assessment.

C. Air Quality Data and Trends Are Misrepresented

The Plan improperly characterizes the rules for determining design values, and as a result, erroneously establishes the emissions reductions target. Rather than use the fourth highest ozone concentration observed in a 3 year period, the Plan attempts to simply use the second highest ozone concentration in one year, but actually discards the first highest in an extraordinary effort to mislead EPA and the public.

The Plan notes that the highest values observed include a 155 ppb reading in Livermore, but ignores further treatment of this episode with the statement that the June 15, 2000 episode was "an unusual episode because the exceedence only occurred in the Livermore area." OAP at 15. The Plan then proceeds to assume a design value of 126 ppb in order to minimize both the severity of the region's air quality problems and minimize the need for control strategies. In fact, it is very common for the Livermore station to be the sole point of exceedence and violation in the Bay Area, as recognized by the Plan itself. Further, the 2002 data reflect a maximum ozone concentration of 160 ppb in Livermore, indicating that the 155 ppb exceedence discarded by the District in the purported attainment assessment was actually representative of regional air quality.

Thus the air quality trends demonstrate continuing severe air quality problems in the Bay Area that are getting worse over time in terms of frequency and severity. As of the date of these comments, the Bay Area had already exceeded the one hour ozone standard four times in the prior three calendar years, and plainly was failing in efforts to improve air quality. Exhibits 5 and 6.

D. Weight of evidence analysis is flawed

Commenters object to EPA's employment of the weight of evidence (WOE) analysis on several grounds. First, the WOE guidance (Guidance for Improving Weight of Evidence Through Identification of Additional Emissions Reductions, Not Modeled, U.S. EPA 11/1999) requires that photochemical modeling show levels in excess of the NAAQS. The Bay Area SIP and its "attainment assessment" are not based on photochemical modeling. WOE guidance is inapplicable.

Further, the WOE approach relies, at its core, an inappropriate proportional rollback technique prohibited by EPA's own regulations at 40 C.F.R. Part 51, Appendix W. The fallacy of reliance on the isopleths to determine necessary levels of emissions reductions is evident from the curvaceous line that is assumed, without evidence, to reflect NO_x scavenging.

Finally, the observed ozone concentrations at the Livermore monitoring station are essentially flat. There has been no appreciable improvement in monitored air quality, an essential element of WOE application. The absence of an ozone concentrations improvement trend is particularly troubling in light of trends observed in other parts of the State and nation where ozone concentrations are generally in decline.

3. Control Strategies

A. Enforceable Commitments

At the heart of the Act's SIP process is the expectation and requirement that SIPs "provide for attainment" through the inclusion of "enforceable emissions limitations, and such other control measures, means or techniques . . . , as may be necessary or appropriate to provide for attainment of such standard by the applicable attainment date." 42 U.S.C. § 7502(c)(6). Although EPA's discretion to disapprove a SIP based on a difference of opinion as to the proper control strategies is limited, *Train v. NRDC*, 421 U.S. 60 (1975), this holding presupposes that the control strategies are sufficiently defined to know that those strategies are, in order to assure their ability to meet the test of sufficient emissions reductions. EPA is without authority to approve a SIP that does not identify the measures by which the necessary emissions reductions are to be accomplished, since such a SIP would lack the Act's hallmark enforceability and represent a mere "paper" SIP.

i. EPA's SIP Regulations and Actions Require Specification of Control Measures

EPA's regulations governing SIP approval require that the SIP contain a "control strategy" consisting of control measures that define the duties of entities responsible for reducing emissions, that those "measures" be enforceable against such entities, and that the measures be submitted as adopted

rules and regulations. After enactment of the 1990 Amendments, EPA explained that "the purposes of a SIP . . . are to make demonstrations (of how attainment, maintenance, and progress will be achieved) and to provide a control strategy that will achieve the necessary reductions and otherwise meet the requirements of the Act." General Preamble for the Implementation of Title I of the Clean Air Act Amendments, 57 Fed. Reg. 13498, 13567 (April 16, 1992). More specifically, EPA requires by rule that a state's attainment SIP "must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements." 40 C.F.R. §51.112(a).

EPA's rules also require SIPs to satisfy the Act's requirements for "a program to provide for the enforcement of the measures described [in the SIP]," 42 U.S.C. §7410(a)(2)(C), and for "enforceable" measures, id. §7502(c)(6), by submitting "a control strategy which includes . . . a description of enforcement methods including, but not limited to: 1) Procedures for monitoring compliance with each of the selected control measures . . . ." 40 C.F.R. §51.111(a). EPA has defined the "control strategy" required by §51.111 to include measures that "achieve the aggregate reduction of emissions necessary for attainment." Id. §51.100(n). Each of these regulatory provisions requires that the control measures submitted in the SIP must be adequate to achieve the emissions reductions required for attainment.

Since the early days of the Act, EPA has also had a regulation requiring that the measures needed for attainment must be submitted as adopted rules and regulations.

> Emission limitations and other measures necessary for attainment and maintenance of any national standard, including any measures necessary to implement the requirements of subpart L must be adopted as rules and regulations enforceable by the State agency. Copies of all such rules and regulations must be submitted with the plan. Submittal of a plan setting forth proposed rules and regulations will not satisfy the requirements of this section nor will it be considered a timely submittal.

40 C.F.R. §51.281 (as recodified in 1986; previously promulgated at 36 Fed. Reg. 22398 (Nov. 25, 1971) and codified at 40 C.F.R.§ 51.22). This rule, when read together with EPA's regulatory provisions requiring that the attainment SIP "must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment" and that the measures submitted in the SIP must be adequate to "achieve the aggregate reduction of emissions necessary for attainment," makes clear that EPA's SIP approval criteria have long required that the SIP contain adopted, enforceable control measures that achieve the total amount of emissions reductions needed for attainment.

Over the years, EPA has from time to time confirmed these regulatory policies by rejecting SIPs that fail to comply. See, e.g., 48 Fed. Reg. 51472, 51477 (Nov. 9, 1983) ("EPA cannot accept a state commitment to submit a future SIP revision in lieu of meeting the requirements of the Act."). The cases cited by EPA in the Notice fail to support this extension of an enforceable commitment. In

Nothing in the Act, EPA's long-standing SIP approval rules, or its more recent conformity rules, authorize the approval of SIP containing "enforceable commitments" as an alternative to the submission of adopted, enforceable control measures sufficient to provide for attainment. On the contrary, the law of this Circuit clearly requires that when EPA acts on SIPs, it must comply with its own rules until such time as it changes the rules controlling SIP approvals. Delaney v. EPA, 898 F.2d 687, 693 (9th Cir. 1990). Because EPA asserts authority to rely on a construction of the Act squarely in conflict with EPA's governing regulations, its decision is inconsistent with law.

ii. The Calcagni Memo Is Silent on "Enforceable Commitments"

EPA's Director of OAQPS, John Calcagni circulated an official EPA memorandum regarding the processing of SIP submittals. The memo describes in detail how Regions are to process and evaluate SIP submittals, describing 3 types of actions as alternatives to complete approval. These are partial, limited and conditional approvals. There is no discussion whatsoever of approving an enforceable commitment and considerable explanation on how Regions are to process conditional approval SIPs under 7410(k)(4). EPA has established national procedures for SIP adequacy review and declined to identify the enforceable commitment as one of the methods, although § 110(k)(4) conditional approval is clearly and completely explained.

iii. EPA Has Rejected SIPs Lacking Specified Control Strategies

In a number of SIP decisions, EPA has construed the rule as requiring disapproval when the operative measures in the SIP are not adopted or enforceable. EPA disapproved Montana's proposed SIP revision for sulfur dioxide emissions from industrial sources because it lacked enforceable measures. The emissions reductions needed for attainment included control of emissions from refinery flares, but no control measures for flares were submitted as part of the SIP. EPA disapproved because a --

> plan that is submitted to us shall contain enforceable emission limitations to meet the applicable requirements of the Act, e.g., show attainment and maintenance of the NAAQS. If a plan is lacking in certain control measures necessary for attainment, then it does not meet section 110(a)(2)(A) of the Act. *** Forty CFR 51.281 indicates that any emission limitations necessary for attainment and maintenance of the NAAQS must be adopted as rules and regulations and be enforceable by the State. *** Forty CFR 51.281 and 40 CFR 51.100(j), read together, support the theory that all control measures relied on for attainment and maintenance of the NAAQS must be submitted as part of the plan.

Approval and Promulgation of Air Quality Implementation Plans; Montana; Billings/Laurel Sulfur Dioxide State Implementation Plan, 67 Fed Reg. 22168 (May 2, 2002). This interpretation applies the SIP-approval regulations consistent with decades of prior decisions.[3]

[3] EPA has long applied 40 CFR 51.281 to disapprove SIPs that lack enforceable control measures. In 1985, EPA disapproved Florida's proposed lead SIP because "it does not include

iv. EPA's Unprecedented "Means and Techniques" Rationale is Meritless

For the first time in a Federal Register notice, EPA proposes that the phrase "means or techniques" in 42 U.S.C. § 7410(a)(2)(A) and 7502(c)(6) "is quite broad, allowing a SIP to contain any "means or techniques" that EPA determines are "necessary and appropriate" to meet CAA requirements." 68 Fed. Reg. 42179, at fn. 15. This extraordinary claim of discretion, exercised in this manner, rips the Act from its moorings and threatens to defeat the SIP planning process by authorizing deferral of statutorily mandated SIP elements.

EPA's interpretation suffers from a number of serious flaws. First, the Agency selectively quotes from the Act. The full text of the new phrase added to the Act in 1990 is "means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights)."[4] Rather than adding a broad, open-ended phrase that might arguably be construed to give EPA wide discretion to define its meaning, Congress supplied a list of specific examples of the kind of measures it intended to authorize by adding "means and techniques." Traditional rules of statutory construction hold that when Congress expressly limits by providing examples of what is intended, then such a provision excludes any other kinds of measures. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). American Petroleum Institute, 52 F.3d 1113, 1119 (D.C. Cir. 1995)("EPA cannot …add[] new factors to a list of statutorily specified ones."). Certainly the new statutory terms grant EPA discretion to accept a broad range of fee-based measures, marketable permit programs and auction systems, but this text provides no authority for the discretion claimed here, i.e., arrogation of authority to determine that a SIP may be approved when it lacks sufficient measures to reduce emissions to the levels "necessary or appropriate to provide for attainment."

The legislative history confirms that Congress did not intend to provide the authority EPA claims. The House committee report, elaborating on the House text that became law, explains that

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enforceable laws or regulations to implement the specific measures necessary to assure attainment and maintenace (sic) of the lead NAAQS…. Such enforceable measures are required by section 110(a)(2)(B) of the Act, and EPA's regulations governing the preparation, adoption and submission of implementation plans. (See 40 CFR 51.22 [reclassified as §51.281 in 1986] and 51.87 (1984))." Approval and Promulgation Florida, Lead Implementation Plan, 50 Fed. Reg. 7187 (Feb. 21, 1985); Final Disapproval 50 FR 45603 (November 1, 1985).

Similarly, in 1999 the EPA rejected Colorado's revised visible emissions standards for coal-fired electric utility boilers because the revision was not enforceable as required by 40 CFR 51.281. Approval and Promulgation of State Implementation Plans; Colorado; Revisions to Opacity and Sulfur Dioxide Requirements, 64 Fed. Reg. 48127 (Sept. 2, 1999).

[4] Compare 42 U.S.C. §7506(c)(6) (1991) with §7502(b)(8) (1978) ("emissions limitations, schedules of compliance and such other measures as may be necessary").

> [t]he SIP must include enforceable emissions limitations, other measures (including economic incentives such as fees or auctions) and schedules and timetables for compliance that are necessary or appropriate to meet the applicable Clean Air Act requirements.

H. Rept. No. 101-490, 101st Cong., 2d Sess. (1990), 218. Congress' explanation that SIPs "must include" either "emissions limitations"[5] or "other measures" demonstrates that it understood "means and techniques" as being in the same general category as "control measures," except that the new terms "means and techniques" added specific authority for states to adopt economic incentives as permissible measures for reducing emissions.

This understanding is also compelled by Congress' explanation that "the SIP must [also] provide for the enforcement of the emissions limitations and other measures…as necessary to achieve the NAAQS." Id. A commitment by the State to submit unspecified future measures is not itself a measure that achieves the emissions reductions necessary to attain. The statute's requirement for "a program to provide for the enforcement of the measures described in subparagraph (A)," §7410(a)(2)(C), would fall far short of fulfilling Congress' intent to "achieve the NAAQS" if the means and techniques to be enforced were nothing more than a State's commitment to adopt future measures.

The statutory definition of "schedule and timetable of compliance," §7602(p), also conflicts with EPA's new interpretation. The requirement in both §§7410(a)(2)(A) and 7502(c)(6) that SIPs contain schedules and timetables for compliance means that the SIP must "include an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard." §7602(p). None of these terms suggest that schedules and timetables are for the purpose of enforcing "means and techniques" that are nothing more than promises by the state to adopt as yet unspecified and unquantified measures to be applied by some unknown date to unidentified operators or actors.

Nothing in the statutory text or its history suggests that Congress intended to allow promises to adopt future measures as a substitute for adopting enforceable measures that require actual emissions reductions. If EPA's newly offered interpretation were lawful, then the Act would allow a SIP to consist entirely of promises by the State to take future actions to develop, adopt and submit unspecified and unquantified control measures. The statutory deadline for submitting a SIP that provides for attainment would be rendered a mere bureaucratic formality, full of sound and fury, signifying nothing.

v. EPA's New Interpretation Conflicts with its Prior Interpretations

In EPA's initial interpretation of the two "means and techniques" amendments, the Agency explained that "[t]he use of economic incentives are explicitly allowed for in the general SIP requirements (section 110(a)(2)) [and] the general provisions for nonattainment SIPs (section 172(c)(6))." General Preamble for the Implementation of Title 1 of the Clean Air Act Amendments of

[5] Defined 42 U.S.C. §7602(k).

1990, 57 Fed. Reg. 13,559 (April 16, 1992). The Agency cautioned "that the implementation of economic incentive programs must also meet the standards of enforceability currently found in traditional regulatory programs." Id., 13,560. Nothing in EPA's initial reading of the amendments suggested the kind of departure from "traditional regulatory programs" that enforceable commitments represent.

Indeed, EPA took care to explain that "any implementing instruments" in the "control strategy" on which a SIP is based "should adhere to certain principles." Id., 13,567. These include the principles that 1) "the effect of the measure [on emissions] must be identified in order to assess the contribution to the necessary emissions reductions;" 2) "the measure must be enforceable;" and 3) "the SIP must contain means…to track emissions changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan." Id., 13,567-68. These general principles describing the elements of a SIP clearly contemplate measures, means and techniques that require some entity to take actions that reduce emissions. These principles do not include enforceable commitments as the elements of an approvable SIP.

vi. Conditional Approval Pursuant to § 7410(k)(4) Is The Only Applicable Authority

EPA's action, in essence, seeks to resurrect its "committal SIP policy" that was vacated in NRDC v. EPA, 22 F.3d 1125, 1135 (D.C.Cir. 1994). There the court rejected "conditional approval of a committal SIP that contains no specific substantive measures . . . although not approvable in its present form, [that] can be made so by adopting the EPA-required changes within the prescribed conditional period." NRDC, 22 F.3d at 1133-34. As in NRDC, the Act's symmetry requires a complete SIP submittal that identifies control measures and concomitant emissions reductions on a schedule that demonstrates attainment. Otherwise, EPA lacks "the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of [the CAA]," Id. at 1134, citing §7410(k)(1). "Accordingly, we hold that section 110(k)(4) does not authorize the EPA to use committal SIPs to postpone SIP deadlines." Id. at 1135. The Act is clear when and how committal SIPs may be used, and EPA is without authority to fashion a new species of conditional approval. Whitman v. ATA, 121 S. Ct. 903, 918-19 (2001) ("EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.")

EPA has acknowledged in prior rulemaking on the MVEB adequacy that 42 U.S.C. §7410(k)(4) of the Act expressly "provides for 'conditional approval' of commitments that need not be enforceable. Under that section, a State may commit to 'adopt specific enforceable measures' within one year of the conditional approval." Id. EPA however, points to no authority for the proposition that Congress authorized approval, conditional or otherwise, of a SIP that not only lacks a commitment to adopt specific enforceable measures, but also fails to remedy the deficiency in the SIP within the one year grace period allowed for conditional approval.

EPA's long-standing construction of the Act, i.e., that a SIP lacking adopted control measures sufficient to attain may only be conditionally approved or disapproved, was affirmed and strengthened

by the 1990 Amendments. Congress substantially amended the Act to add more explicit criteria to govern EPA's decisions on SIP revisions, including criteria to determine when full approval may be granted and specific authorization for "conditional approval" of deficient SIPs under narrowly defined circumstances. 42 U.S.C. §7410(k)(3) and (4).

New language required that EPA approve a submittal from a State only "if it meets all of the applicable requirements of this chapter." §7410(k)(3). This text reflects the Congressional expectation that "plans are approved on the premise that they contain all the measures which are necessary to attain and that the measures will meet the objective in precisely the way planned." S. Rep. No. 228, 101st Cong., 1st Sess., at 45 (1990), *reprinted in* 1990 CAA Leg. Hist. 8338; 8402.

Second, Congress added discretion for EPA not to wait until an entire SIP revision was fully approvable "if a portion of the plan revision meets all the applicable requirements of this chapter." But where EPA acts to approve a partial SIP revision, it is still required to act on the portion that is not approvable, i.e., "the Administrator may approve the plan revision in part and disapprove the plan revision in part." Id. Especially relevant here, Congress also added express language governing the legal effect of any decision that EPA makes with regard to parts of a SIP, regardless of whether EPA denominates its action as "approval" or "disapproval."

> The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter. Id.

EPA itself interprets this provision as requiring that "where a submittal as a whole serves to improve air quality by providing progress toward attainment . . . , yet fails to comply with all of the Act's requirements," EPA may issue a limited approval but "must also issue a limited disapproval whereby the Agency disapproves the SIP revision request as a whole for failing to meet one or more requirements of the Act." General Preamble, 57 Fed. Reg. 13566. This provision is particularly significant because it establishes the obligation to fully satisfy all the requirements of the Act in order for a State to escape the statutory remedies that apply when a State submits a late or partially deficient SIP. See §7509(a) (imposing mandatory sanctions beginning 18 months following the failure of a State to submit a required SIP revision, or EPA disapproval of a required element of a SIP); §7410(c)(1), (requiring promulgation of a "Federal implementation plan" 24 months after SIP disapproval "unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such federal implementation plan.").

Third, Congress added new language limiting the authority of the Administrator to grant "conditional approval" to SIP revisions.

> The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

§7410(k)(4). This provision was enacted to set limits on EPA's extra-statutory "conditional approval policy" which had been adopted after the 1977 Amendments to approve deficient SIPs, subject to conditions that were to be subsequently satisfied by the State. 44 Fed. Reg. 67182 (November 23, 1979). The 1990 amendment was drafted to eliminate EPA's abuse of its policy when it approved SIPs based on conditions requiring a State to remedy a deficiency, but then failed to convert its approval into a disapproval when the State failed to satisfy the condition. "Commitments to these measures were made when the SIP was last submitted, but EPA has not taken aggressive oversight and enforcement action to assure that all measures proposed have actually been imposed." S. Rep. No. 228, at 58, 1990 CAA Leg. Hist. at 8398. The amendment avoids the administrative purgatory resulting from EPA inaction by ensuring that after the one-year period allowed to remedy a SIP deficiency, the conditional approval automatically converts to a disapproval unless EPA determines that the condition has been satisfied.

Prior to the 1990 Amendments, EPA's approval of a deficient SIP, subject to conditions, was used by EPA to avoid its statutory obligation to commence a federal rulemaking to promulgate a federal implementation plan ("FIP") required by §7410(c)(1). The Act requires a FIP to "fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy" in a deficient SIP. §7602(y). In construing the Administrator's FIP duty in the period before EPA developed its conditional approval policy, the Courts of Appeals typically held that "[i]f the Administrator determines that the regulations [in the SIP] are not independently sufficient to assure attainment, then it will be his duty to promulgate regulations which do so assure attainment of the standards." NRDC v. EPA, 489 F.2d 390, 411 (5th Cir. 1974). Application of that duty here would require the Administrator to commence the FIP process to fill the 26 tpd gap in VOC emissions required for attainment. But EPA developed its extra-statutory "conditional approval" policy in 1979 to evade that duty under the 1977 Act, and now has developed its "enforceable commitment" policy to evade that duty under the 1990 Amendments by unlawfully granting "full approval" to deficient SIPs.

EPA has claimed that its pre-1990 conditional approval policy was based on 42 U.S.C. §7410(c)(1)(C) (1977), a statutory provision that Congress repealed in 1990. In City of Seabrook v. U.S. EPA, 659 F.2d 1349, 1356 (5th Cir. 1981), EPA claimed that subparagraph (C) authorized the Agency to both approve a deficient SIP and postpone a FIP until after: 1) the State had been granted a designated period of time to remedy identified deficiencies; 2) the State failed to remedy the deficiencies; and 3) EPA subsequently undertook another rulemaking to convert the approval to a disapproval. But subparagraph (c)(1)(C) was repealed in 1990 along with the adoption of the new §7410(k)(4) imposing major limitations on EPA's discretion to conditionally approve.

Unlike EPA's pre-1990 policy, Congress limited to one year the time when a State may commit to remedy the deficiency, and mandated that the approval "shall be treated as a disapproval if the State fails to comply with such commitment." Congress explained that --

> The conditional approval is to be automatically treated as a disapproval, subject to the sanctions of section 179 and the Federal implementation plan provision of section 110(c), if the State fails to comply with its commitment within the one year period.

H.R. Rep. 490 at 220, 1990 CAA Leg. Hist. at 3244. The Amendments also narrowly limit the application of the policy by only authorizing conditional approval "based on a commitment of the State to adopt specific enforceable measures." §7410(k)(4).

These amendments demonstrate a clear determination by Congress to constrain EPA's discretion to approve SIPs that do not qualify for full approval under §7410(k)(3) when they do not "meet all the applicable requirements of this chapter." Obviously, the terms of the Act do not authorize conditional approval of the Bay Area SIP because the State 1) has not committed "to adopt specific enforceable measures," and 2) did not commit to adopt any additional measures within one year. Sadly, the Agency has become no more willing to "take[ ] aggressive oversight and enforcement action to assure that all measures" are imposed than it had been before the Senate Committee criticized it in 1990.

EPA's "enforceable commitments" policy is clearly a ploy to avoid Congress' decision in 1990 to limit the conditions under which EPA may lawfully approve deficient SIPs. EPA's policy flies in the face of well-settled principles of statutory construction and the decision in NRDC v. EPA, 22 F.3d at 1135. EPA's decision unlawfully seeks to modify the statutory scheme by expanding the circumstances when deficient SIPs may be approved: 1) to include commitments longer than the one-year extension Congress allowed; 2) to allow much less specific commitments than the "commitment . . . to adopt specific enforceable measures" that Congress required; and 3) to avoid the automatic conversion to disapproval that Congress imposed as the remedy for Agency inaction when a State fails to fulfill the commitment. This broad expansion of the circumstances when EPA may approve a deficient SIP subject to the performance of future conditions violates the fundamental principle enunciated repeatedly by the Supreme Court that "[r]egardless of how serious the problem an administrative agency seeks to address, [ ] it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 517, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988))." Ragsdale, et al. v. Wolverine World Wide, Inc., 122 S.Ct. 1155, 1162 (2002).

Nor may EPA claim there is a statutory gap that Congress gave it discretion to fill. Congress clearly addressed the question of allowing more time for States to correct the inadequacies in a SIP. The Act sets carefully defined limits on the circumstances under which EPA may approve a deficient SIP subject to a commitment by the State to remedy the deficiency. EPA cannot now claim discretion to approve a deficient SIP based on additional criteria that Congress did not authorize. American

Petroleum Institute v. USEPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("EPA cannot…add[ ] new factors to a list of statutorily specified ones.").

vii. EPA's Proposed Action Weakens The Act

As a practical matter, EPA's action replaces Congress' more onerous standard with a more lenient one. Under § 7410(k)(4), the State must offer a modicum of specificity about the measures and/or source categories to be controlled, through "specific enforceable measures," and a "date certain" is required, no more than 12 months. These constraints on the application of the conditional approval process forces States to work much harder and be more specific than EPA's "enforceable commitment" approach. Under EPA's proposed action, the State can merely make an illusory promise (see *infra* for how the State's commitment has little, if any substance) to future consideration of action, and the SIP submittal requirements are overcome. Query how EPA can make its completeness determination in light of such a submittal?

EPA attempts to outline guidelines and criteria for the implementation of this approach, but offers very little in the form of explanation of how these criteria were chosen, why they are believed to suffice, how they are to be implemented for other situations, etc. The "enforceable commitment" policy, relying on the "means and techniques" language, is a completely new interpretation of the Act with significant policy ramifications and consequences to SIP submittals in numerous circumstances. As such, any action to adopt this significant new interpretation must be accomplished through national rulemaking, not ad hoc, SIP by SIP application. EPA is evading its responsibility to promulgate national rules interpreting the Clean Air Act to establish regulatory guidelines for uniform application that can be tested first by public comment and then by a reviewing Court.

viii. EPA's Cited Authority Does Not Support Its Actions

EPA cites several cases it contends represent actions where EPA has approved enforceable commitments and been upheld by the Courts. Although EPA's citation is to the cases themselves without page citations, each such case is plainly is distinguishable, and none may be cited as authorizing EPA's action in the Bay Area.

Neither the District Court nor Court of Appeals addressed the issue of enforceable commitments to accomplish unspecified control measures in *American Lung Ass'n of N.J. v. Kean,* 670 F.Supp. 1285 (D.N.J. 1987); aff'd at 871 F.2d 310 (3rd Cir. 1989). In those cases, the New Jersey SIP contained specific commitments to implement specific control measures on specific schedules. Examining the underlying EPA actions, the only treatment of an issue that could be equated with an enforceable commitment of the nature at issue in the instant proceeding, "extraordinary measures," were required by EPA's proposed action to be specified before EPA took final action.

> "EPA finds that for the State's program to use extraordinary measures to control stationary sources to be adequate and approvable, the State must select the specific

> measures that will be implemented in the NJ-NY-CT AQCR and submit a schedule for implementation. EPA will not take final approval action on the NJ-NY-CT AQCR until the schedules for specific measures are submitted."

48 Fed. Reg. 5144. (2/3/1983).

Of course, the *American Lung Ass'n of N.J. v. Kean* cases preceded Congress' adoption of the 7410(k)(4) conditional approval.

Similarly, *NRDC v. NY DEQ*, 668 F.Supp. 848 (S.D.N.Y. 1987), another case pre-dating the Clean Air Act Amendments and § 7410(k)(4), is unavailing to EPA. In that case, the Court agreed with Petitioners that the State had an unwavering duty to implement the SIP it adopted. Some of the measures to control specific sources required the results of certain studies before the regulations themselves could be adopted. 668 F.Supp. at 853, and Appendices A and B. Nevertheless, the sources to be controlled were specifically identified and the emissions reductions specifically attributed to those sources, *id*., a far cry from EPA's proposed approval of a bald promise to adopt unspecified control measures in the future no later than the attainment deadline.

In *Communities for a Better Environment v. Deukmejian*, 731 F.Supp. 1448, recon. In part, 746 F.Supp. 976 (N.D.Cal. 1990), a case controlling EPA's action in this matter, State commitments to regulate certain source categories on a particular schedule were found enforceable. The Court found that upon the State's failure to accomplish the levels of emissions reductions expected from the control measures that were specified, a specific SIP commitment to adopt whatever further contingency measures were needed to make up the shortfall was enforceable. The Court was not asked to determine whether EPA's approval of that provision was consonant with the Act as it read at the time, indeed it could not have ruled on that issue since § 7607 grants jurisdiction exclusively to the Courts of Appeal for review of EPA's final action on a SIP's adequacy. Unchallenged, the SIP was properly determined enforceable, but there was no judicial determination as to whether the Act permitted EPA to approve such a SIP, only that once it did, that SIP commitment was enforceable. Again, § 7410(k)(4) was not in existence at that time, and the emissions reductions shortfall was not known when the SIP was adopted. The contingency measures being enforced applied only if the specified measures failed to accomplish the expected and necessary emissions reductions. **In the instant case, the few adopted measures are not reasonably expected to yield an additional 26 tons of VOC emissions reductions per day. Here, the State admits they have not identified or adopted controls to secure the needed emissions reductions, and ask for a delay before completing that obligation. This request is inappropriate and illegal**.

Finally, the *Coalition for Clean Air v. South Coast Air Quality Management District* citation references a stipulated consent decree based on yet another failure to implement challenge before the District Court pursuant to § 7604. The compromise agreement of parties on a failure to implement hardly constitutes authority establishing that a SIP may contain mere commitments to future emissions reductions. Any reference to SIPs concerning the South Coast Air Basin or any other area classified extreme are simply irrelevant to the Bay Area. The Administrator is specifically and statutorily authorized to consider enforceable commitments of future emissions reductions as parts of attainment demonstrations in SIPs from areas classified extreme. § 7511a(e)(5).

The common thread in each of these cases is the legal conclusion that SIP commitments to control specific sources on certain timelines are federally enforceable. In each case, the State claimed its SIP commitments should not be enforced against them, and in each case, the court found the commitments were enforceable. The question here is not whether the SIP commitment is enforceable. The question is whether a SIP containing a commitment that specifies no control measures, no identification of the sources to be controlled and no implementation schedule, but only to potentially take unspecified actions if needed in the future, is approvable by EPA. SIP enforcement cases don't bear on that question, since only the Courts of Appeal have jurisdiction to determine whether such a SIP may be found adequate by EPA. If EPA's approval of such a SIP is not reviewed by the Court of Appeal, that issue may not be reviewed in subsequent enforcement actions. § 7507(b)(2). As demonstrated by the cases cited by EPA, the commitment may remain enforceable, but this is not dispositive of whether the SIP is legally adequate.

ix. Conditional Approval Is EPA's Practice

There are numerous instances where EPA has employed the § 7410(k)(4) conditional approval mechanism to address SIP flaws. This is a case where it could similarly have worked, since the "commitment" offered by the State would be addressed by the upcoming 2004 SIP, and thus the condition could have been met within 12 months of the conditional approval.

In *McCarthy v Thomas*, 27 F.3d 1363 (9th Cir. 1994), enforcement of a conditional SIP was upheld. Conditional approval authority was examined and upheld in *City of Seabrook v. US EPA*, 659 F.2d 1349 (5th Cir. 1981) and *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998 (2nd Cir. 1981). There is no precedent, authority or need for EPA to sanction the State's novel and dangerous approach.

B. Reasonably Available Control Measures (RACM)

The Act's § 7502(c)(1) specifies that SIPs shall provide for the implementation of all reasonably available control measures as expeditiously as practicable. The Plan fails to meet this standard, and EPA's proposed action fails to direct that all reasonably available control measures are actually included in the Bay Area SIP.

EPA's definition of control strategy at 40 C.F.R. Part 51.100 is considerably more broad than the measures contained in the 2001 Plan. A control strategy includes not only emissions limitations but emissions charges, economic incentives/disincentives, closing or relocation of sources (also relevant to environmental justice concerns), changes in scheduling, operations, and transportation systems, motor vehicle testing regimes, and transportation control measures. 40 C.F.R. Part 51.100.

i. Given the Emissions Reductions shortfall, EPA's RACM Policy Requiring One Year Advancement of the Attainment Date Is Inapplicable

The Notice of Proposed Rulemaking references, at footnote 5, 68 Fed. Reg. 42176, the 11/15/1999 Seitz EPA Memo which purports to define the statute's expeditious attainment language to mean "would not advance the date of attainment by one year." 68 Fed. Reg. 42176. The Bay Area

Plan acknowledges a 26 ton per day ("tpd") VOC emissions reduction shortfall in order to meet the latest possible attainment date, 2006. The Plan does not attempt to specify what would be the attainment date if the 26 VOC tpd shortfall were not accomplished, nor does the Plan identify the quantity of emissions reductions that would be necessary to advance the attainment date by one year. Under these circumstances, the purported rationale behind EPA's interpretation of the RACM commitment does not apply. Given the emissions reductions shortfall, and feasible control measure that accomplishes any level of emissions reduction would reduce the magnitude of the shortfall and thus would constitute RACM.

Indeed, the District's excuse and rationale for submitting the Plan with the 26 tpd emissions reduction shortfall is the fact that it is simply unable to identify any other control measures that would accomplish any further emissions reductions. While commenters contend that the District's position in this regard is not supported by the evidence, as a matter of law and EPA policy, EPA must declare that the definition of RACM in the Bay Area, given the shortfall, does not include the limitation that the measure(s) advance the date of attainment by at least one year.

ii. RACM Is Not Adopted In the Plan

The Plan asserts, and EPA concurs, that the Bay Area had or would have adopted "essentially all VOC measures that were currently in place in other areas of the Country." 68 Fed. Reg. 42179. The State has categorically failed to demonstrate this conclusion.

a. Reasonably Available Measures Are Omitted

- stationary sources

The District found it could not adopt a flare control rule. Amid hundreds of public comments on this issue, the District resisted heartily. In the mean time, other District have had flare control rules in place for nearly a decade. The Santa Barbara County Air Pollution Control District Rule 359 has controlled flares since 1994. See, Exhibit 6, also at http://www.arb.ca.gov/DRDB/SB/CURHTML/R359.HTM. Thus the District's assertion that it currently possesses rules and control measures equivalent to all other California Air Pollution Control Districts is false. The Plan lacks a rule by rule, source by source comparison that would evidence this fact, and as noted by this one example, is simply untrue.

- Transportation Control Measures

The District, and in particular MTC, have defined the scope of potential control measures narrowly, and effectively avoided their RACM duties in the process. For example, the District erects a barrier through the criteria "authority to implement measure?" which permits the (selective) exclusion of any public transit measure since MTC is not a transit operator. Plan, page 79 et seq. As noted below, MTC and the District simply avoided the TCM Planning process required by California Health and Safety Code § 40233, which would be the means by which transit operators would incorporate reasonably available measures to increase transit ridership and services as Transportation Control

Measures. A number of public transit enhancements have been identified as reasonably available by transit operators, but for funding. The absence of funding is not an excuse to deny a measure RACM status if there are other funds that can be used. In the Bay Area, MTC has proposed and committed hundreds of millions of dollars to highway expansions. These funds must be considered available for use to fund transit enhancements as TCMs. See EPA TCM RACM Guidance Memo, Exhibit 12.

The TCM RACM analysis asserts that "[o]perating funds come from state agencies other than MTC (State and counties through sales tax measures.)" Plan at 81, suggested TCM # 1c. The analysis ignores the ability of MTC to capitalize preventative maintenance functions as a means to liberate additional funds for operating expenses. MTC is currently undertaking this form of funding shift for some Bay Area transit operators, so it is incorrect for MTC to assert that this cannot be done as part of its TCM RACM analysis. See, Exhibit 13, Metropolitan Transportation Commission's Fourth Quarterly Report, *Bayview Hunters Point Community Advocates, et al., v. Metropolitan Transportation Commission, et al.*, No. C-01-0750 TEH, N.D.Cal., served August 11, 2003.

The Plan's TCM RACM analysis fails to distinguish between those aspects of suggested TCMs that MTC claims are being implemented or are "in the baseline" and those that would represent expanded services, and again, hides behind the conclusory statement that "no new operating funds have been identified to increase service." TCM RACM analysis #s 1, 1a-1g.

The TCM RACM analysis clearly relies on the limitation that TCMs must advance attainment, but as noted herein, given the emissions reduction shortfall, any emissions reductions that is reasonably available through implementation of a feasible TCM must be included. See, TCM RACM #s 1a, 1h, 1c, 1d, 1f, 1g, 2.

EPA unfairly dismisses as lacking "persuasive evidence" public comments that the co-lead agencies Plan did not address or incorrectly characterized suggested TCMs. 68 Fed. Reg. 42176. EPA's RACM guidance does not impose a "persuasive evidence" test to 42 U.S.C. § 7502(c)(1), not is it fair to manufacture one. EPA's obsequious footnote 6 states "FOR EXAMPLE, the general nature of SOME comments precluded detailed analysis." (Emphasis added). Apparently only one comment need be considered "general" in nature for EPA to reject wholesale the public's comments. The general nature of EPA's universal rejection of this important issue underscores the inadequacy of EPA's RACM assessment. "We must impress upon EPA that it has a duty to: (1) demonstrate that it has examined relevant data; and (2) provided a satisfactory explanation for its rejection of those proposed RACMs." *Sierra Club, et al., v. EPA*, 314 F.3d 735, 745 (5th Cir. 2002), citations omitted. EPA has not met its obligation in this regard, and as noted herein and in comments to the Plan and EPA's MVEB action, the District manipulated suggestions of TCMs to avoid serious consideration.

This phenomena is repeated in the further study measures reports prepared by the District. The control measures "investigated" (and rejected) through the further study measure review process bears little resemblance to the control measures described in the Plan's Appendix E. Further study measure 4, for example, addressed, in an oblique way, a portion of TRANSDEF's suggested parking management TCM strategies. MTC's dismissive review of this measure, undertaken by an MTC intern

(while MTC hired a consultant to examine the HOV Lane Master Plan) was designed to fail. Similar conclusory determinations have already been rendered dismissing FS-5 and 7. FS-7 was supposed to include a demonstration pilot parking cash out program.

The Plan's TCM RACM Review Was Hampered by the Violation of Health and Safety Code § 40233

The District and MTC must provide evidence to EPA of the District's compliance with the requirements of Health and Safety Code § 40233. 40 C.F.R. Part 51, App V, § 2.1(e). This authority, specific to the Bay Area, has direct application to the adequacy of the 2001 Plan and its RACM analysis. Under this authority, the District must identify the amount of air pollution emissions reductions to be accomplished from the mobile source sector to reach attainment. Health and Safety Code § 40233(a)(1). MTC is then commanded to develop a plan and sufficient TCMs that accomplish at least that level of emissions reductions. Health and Safety Code § 40233(a)(2). Health and Safety Code § 40233 plainly applies to both state and federal plans (40233(a)(1)) and created an on-going obligation applicable to each and every plan revision. Health and Safety Code § 40233(a)(4).

The Health and Safety Code § 40233 process provides an essential step to the TCM RACM identification process, since it requires the invitation and involvement of other agencies that can implement TCMs. MTC, as a MPO, has certain capabilities to implement TCMs, and the TCM Plan process mandated by the California Legislature to apply in the Bay Area, was designed to incorporate other entities into the TCM planning process. As noted below, the District and MTC has been adjudged in violation of § 40233 for purposes of the 2001 OAP, and thus, legally and practically, the RACM analysis is deeply flawed. Other agencies, including transit operators, local entities and employers, have authority and capabilities that extend beyond the scope of MTC. For example, two prominent transit operators, Muni and AC Transit, each prepared transit expansion plans which, if funded, contained programs that would increase their transit ridership by at least 15%. These plans, submitted to EPA's administrative record, were developed pursuant to partial settlement of the TCM 2 litigation, and clearly demonstrate that MTC's RACM analysis ignored important opportunities to expand transit ridership, inter alia, which has been identified as a Transportation Control Measure relevant to the Bay Area.

C. The TCMs Are Unapprovable

The five TCMs proposed in the Plan are themselves impermissibly vague in their quantification of emissions reductions. Merely spending funds does not assure emissions reductions, yet the description of measures A-C offers little more than this assurance. The TCMs are not enforceable, and thus the TCMs are not approvable.

EPA guidance ("Transportation Control Measures: State Implementation Plan Guidance," EPA Region 9 (September 1990) ("TCM Guidance"), at 1) identifies "six criteria [that] TCMs must meet before the agency can consider them for approval in a SIP":

1. A complete description of the measure and its estimated emissions reduction benefits;

2. Evidence that the measure was properly adopted by a jurisdiction(s) with legal authority to commit to and execute the measure;

3. Evidence that funding has been (or will be) obligated to implement the measure;

4. Evidence that all necessary approvals have been obtained from all appropriate government entities (including state highway departments if applicable);

5. Evidence that a complete schedule to plan, implement, and enforce the measure has been adopted by the implementing agency or agencies;

6. A description of the monitoring program to assess the measure's effectiveness and to allow for necessary in-place corrections or alterations.

Id. at 2-3.

The Plan offers no individual emissions reductions estimation for each measure, instead lumping them into a single measure. This denies the public, the MVEB and the attainment demonstration specific information from which to draw conclusions about TCM implementation, conformity and attainment. It is inconsistent with EPA guidance, item #1, above.

TCM A is clearly contingent upon quasi-legislative action by the CTC and transit operators. This defies the Guidance items #2-4.

Further, the TCMs lack a "complete schedule to plan, implement, and enforce the measure has been adopted by the implementing agency or agencies." Generic references to fiscal years is inadequate.

Finally, there is no monitoring program in the Plan. The TCMs are unapprovable in their current form.

4. Other Plan Inadequacies

A. Absence of Stationary Source Surveillance Element

The Bay Area SIP, and the 2001 OAP, lacks specification of the stationary source surveillance elements of the SIP mandated by EPA's SIP adequacy regulations. See, 40 C.F.R. § 51.210-51.214. Specifically, the Plan lacks provisions that provide for the periodic testing of stationary sources that

have been mandated by Congress. "In 1990, Congress enacted amendments to the Clean Air Act intended to enhance emissions source monitoring and compliance and to impose new monitoring and reporting requirements on emissions sources. Specifically, the new amendments sought to identify and clarify the kinds of data to be collected and to require major sources to monitor their emissions and report their results to EPA." NRDC v. EPA, 194 F.3d 130, 132-3 (D.C.Cir. 1999). As EPA itself notes, the District possesses data indicating that some major stationary sources are emitting air pollution in excess of their permits, and in excess of the amounts permissible by the Bay Area SIP's rules and emissions limitations. 68 Fed. Reg. 42175, fn. 4. While EPA recognizes this affects the accuracy of emissions inventories, EPA overlooks the substantive inadequacy

B. Specific Emissions Reductions Should Be Assigned to the TCMs

The five TCMs contained in the 2001 OAP are poorly defined and lack specification of the emissions reductions associated with their implementation. The Plan simply lumps the TCMs for purposes of calculating emissions reductions. This complicates the legal enforceability of the measure by the State or through § 304 citizen suit, depriving the SIP of approvability.

C. Data Requirements Are Absent

EPA's SIP adequacy rules clearly specify that the SIP must "contain procedures for obtaining and maintaining data on actual emissions reductions achieved as a result of implementing transportation control measures." 40 C.F.R. § 51.213(a). "The data must be maintained in such a way as to facilitate comparison of the planned and actual efficacy of the transportation control measures."

The 2001 OAP contains no reference, procedures or methodology for complying with 40 C.F.R. § 51.213. This precludes subsequent calculation of the effectiveness of the TCMs. This in turn stymies enforcement (if it is discovered that one or more of the TCMs did not substantially decrease emissions, or actually increased emissions, as is evident from MTC's calculation of bus emissions from TCM A or other measures that act to induce single occupancy ridership and generate increased emissions.

Significantly, MTC has assumed an institutional posture that is hostile to TCMs, refusing to implement past TCMs and defying state law concerning TCM planning procedures and substantive emissions reductions. The Plan's omission of TCM data collection procedures taints future TCM planning efforts, since MTC can claim the absence of data supporting the efficacy of TCMs. The Plan must be returned to MTC for the development of TCM data collection procedures to meet the substantive requirements of 40 C.F.R. § 51.213(a-c).

5. SIP Authority – § 110(a)(2)(E) Issues

The Act requires that Plans provide an affirmative demonstration of their authority and ability to implement the proposed Plan. In this case, not only has the District failed to include such a demonstration in the SIP, but 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. See, Statement of Decision and Order Thereon, 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 Civil No. 323849. Exhibit 1. 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.

A. Plan Adequacy Requires Legal Authority

The Clean Air Act provides that each SIP shall -

> "provide [] necessary assurances that the State (or, [the District]) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof)."

Id. § 7410(a)(2)(E).

EPA's SIP completeness criteria elaborates on this language.

> "The following shall be included in plan submission for review by EPA:
> 2.1 Administrative Materials
> [. . .]
> (c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.
> [. . .]
> (e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan."

40 C.F.R. Part 51, Appendix V.

B. The State Court Orders

Commenters CBE and TRANSDEF filed a petition for a writ of mandate against Respondents District, MTC and ARB shortly after the adoption of the 2001 Plan. The petition alleged, inter alia, that the District was improperly destroying files necessary to enforce the Plan and the District's rules against regulated entities within the District; that the District violated the California Environmental Quality Act ("CEQA") in the process of adopting the Plan without first preparing an environmental impact report ("EIR"), since the District prepared an abbreviated form of environmental review document, a "negative declaration,"; and that the District failed to observe and comply with the requirements of a section of the California Clean Air Act, Health and Safety Code § 40233, which mandates the District and MTC to prepare a TCM Plan to accompany each revision to the state implementation plan.

Petitioners prevailed on each of these three theories. The first issue, based in the California Public Records Act, Government Code § 6250, et seq., was settled through a stipulated agreement of the parties and an order of the Court. Respondent District agreed that it would desist from its practice of destroying District enforcement records without notice and institute practices assuring permanent preservation of District notices of violation and other enforcement file materials. See, Exhibit 7, Stipulation and Order Regarding Bay Area Air Quality Management District Records Retention Policy, filed September 20, 2001, *Communities for a Better Environment, et al., v. Bay Area Air Quality Management District, et al*., San Francisco County Superior Court Civil No. 323849. See also Exhibit 1, ¶ II.1.

Unfortunately, some District files were destroyed prior to the order. The District is thus unable to provide assurance to EPA that it has the resources to be able to implement the Plan and the District's existing SIP rules and regulations. Given the Plan's failure to include the applicable enforcement procedures as required by EPA regulation, commenters cannot specify the exact magnitude of the District's willful destruction of enforcement records, but it is certain that at least some repeat violators will not be subject to the proper form of enforcement if records of their prior violations are unavailable.

On the CEQA claim, the Court ruled more recently that the District's environmental review documentation of the Plan were "vague." ¶ I.3. Statement of Decision and Order Thereon, 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 Civil No. 323849, attached as Exhibit 1. The Court further ruled that the District's actions "did not accord Petitioners an adequate opportunity to comment on how the low VOC solvents required by the adopted rules and whether such solvents could have any adverse impacts. Therefore it orders the District to prepare an EIR for the adoption of the rules to implement SS-13 and SS-14." Id., ¶ I.5. And in the final order, the Court directed that "Respondent District shall prepare an EIR for the adoption of the rules to implement SS-13 and SS-14." Id., ¶ V.1.

The 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/issuance of the plan." 40 C.F.R. Part 51, App. V, 2.1(e). The District has been directed to prepare an EIR for an element of the Plan, and thus EPA's action on the adequacy of the Plan is premature and inappropriate under the Act and EPA's regulations.

Finally, on the California Clean Air Act claims, the Court roundly rejected Respondents' adoption of the Plan as follows:

> "The Court finds there has been a violation of Health and Safety Code § 40233. The best evidence of the emissions reductions requirements necessary to achieve the federal ambient standard is the EPA's estimate as reflected in the Ozone Attainment Plan, dated September 2001, as set forth in the administrative record at page 00027. This shows that the EPA's best estimate of the attainment inventory, or carrying capacity, of the

> region is 406 tons of VOC emissions. The Plan estimates it will achieve a reduction to 432 tons of VOC emissions per day. This is a shortfall of 26 tons of VOC emissions per day. Accordingly, Respondents have not complied with Health and Safety Code § 40233. They are ordered within 60 days from notice of entry of order to develop a plan for public review that reduces the VOC emissions by an additional 26 tons per day. The Court has reviewed the Environmental Protection Agency's letter of July 23, 2001 in the administrative record at page 27023 and finds it to support the Court's ruling."

Id., ¶ III.1.

The final order on the 40233 issue provides:

> "The Writ of Mandate on the Health and Safety Code § 40233 claim is granted pursuant to C.C.P. § 1094.5. Respondents shall develop a plan ready for public comment that accomplishes the necessary 26 tons of VOC emissions reductions per day to attain and maintain the federal one hour ambient air quality standard for ozone no later than 60 days from the notice of entry of order."

Id., ¶ V.2.

It is evident from the Statement of Decision and Order that this decision is based entirely on State law issues. By its own terms, Health and Safety Code § 40233 creates a separate process for identifying additional TCMs and thus emissions reductions. Petitioners contended that if this process had been observed, additional participants would have suggested additional strategies to reduce VMT, trips and emissions. A TCM Plan prepared by MTC in 1990, Exhibit 9, demonstrated the ability of a TCM Plan to accomplish a 25 tpd VOC reduction, thus it was reasonable and appropriate for Petitioners, the Court and the public to expect that the TCM Plan process would yield further, substantial emissions reductions. 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.

C. The State Law Failure Necessitates Plan Disapproval

The Act and EPA's regulations require the State's assurances that the Plan and all of its elements were properly adopted. Defects in the State's process and/or legal authority jeopardizes the Plan and its implementation. That is the case here.

CEQA was intended to be an environmental full disclosure statute, warning decisionmakers and an apprehensive citizenry of the environmental consequence of agency action. *County of Inyo* v. *Yorty,* 32 Cal.App.3d 795, 810 (1973). Agency actions undertaken in violation of CEQA, such as the instant District Plan adoption process, are subject to invalidation or other forms of judicial interruption. In this case, two elements of the Plan were identified by the Court as having the potential for significant impact and other defects that necessitated a full EIR process. The EIR process has both substantive and procedural impacts. The EIR process necessarily requires consideration of alternatives and adoption of feasible alternatives or mitigation measures that substantially lessen or avoid adverse effects. California Public Resources Code § 21002; *Mountain Lion Foundation v. Fish and Game*

Commission, 16 Cal.4th 105, 134 (1997). The EIR process also promotes public involvement in agency decisionmaking. *Id*., 133 Cal.4th at 133; *Citizens of Goleta Valley v. Board of Supervisors*, 53 Cal.3d 553, 564 (1990). The Plan at issue has engendered extensive public outcry. The Plan did not enjoy the benefit of a robust public review – the miserly schedule employed by the District alienated more people than it invited. The finding of the San Francisco County Superior Court that additional environmental disclosure and process is required is damning evidence of the flaws in the process leading to Plan adoption.

Similarly, the judicial declaration of the Health and Safety Code § 40233 violation casts several aspects of the Plan into jeopardy. First, the process mandated by California law was ignored, and thus the product is legally (and technically) suspect. Had the District properly observed the process and requirements of Health and Safety Code § 40233, the product would likely have been a robust TCM Plan similar to that adopted in 1990, attached as Exhibit 9. The Court implicitly observed that the District simply set the emissions reductions target too low, and thus failed to create the conditions necessary to identify, adopt and implement the type and magnitude of TCMs that could achieve an appropriate portion of the emissions reductions shortfall. The District's failure to observe the procedures required by § 40233 tainted the substantive outcome.

Additionally, Health and Safety Code § 40233 creates substantive goals, including the requirement that the TCM Plan achieve sufficient "emissions reductions from transportation sources necessary to attain and maintain the state and federal ambient air standards." The 2001 Plan expressly acknowledges that "[a]nalysts believe that Livermore ozone [where the highest ozone concentrations are typically observed and which sets the regions design value] is produced primarily from mobile source emissions." 2001 OAP at page 22. Had the District complied with Health and Safety Code § 40233 and properly prepared a TCM Plan in accordance with the California Clean Air Act, those mobile source emissions "primarily responsible" for Livermore exceedences would have been abated, and the Plan, the emissions reductions shortfall, the RACM analysis, and the attainment assessment would all likely be much more acceptable to commenters and the public at large.

Congress, in adopting § 7410(a)(2)(E) and EPA, in promulgating Appendix V to 40 C.F.R. 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, including identifying additional emissions reductions. The TCM Planning process will likely identify other TCMs for implementation. Depending on available funding, the District may reconsider the TCMs that it has adopted, electing to apply the funds available for TCM projects to a different suite of projects from those in the Plan. The State budget crisis and federal reauthorization of TEA-3 each may dramatically affect potential funding sources for TCM projects, necessitating State reconsideration of the TCMs in the 2001 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 C.F.R. Part 51, App. V, § 2.1(e). The Court's remedial order

clearly anticipates that the District will undertake a process, since the agencies have 60 days to "develop a plan ready for public comment." Order, ¶ III.1, Exhibit 1. EPA must consider the applicable authority and the Court's order. 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 no apparent caselaw 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. *City of Columbus v. Ours Garage and Wrecking Serv*., 536 U.S. 424, 439, fn. (2002). When a State lacks authority to implement a SIP due to the absence of authority, the State is subject to enforcement due to violation of 7410(a)(2)(E). *Sweat v. Hull*, 200 F.Supp. 2d 1162, 1168-69 (D.Ariz. 2001). In the absence of the legal authority to implement the control measures, EPA may not approve a SIP. *Wall v. EPA*, 265 F.3d 426, 429 (6th Cir. 2001).

6. Mid Course Review

EPA proposes to defer many aspects of an adequate SIP, pending a "Mid Course Review." EPA fails to identify under what authority it may demand and rely upon a Mid Course Review, when the Plan itself lacks several mandatory elements. While commenters recognize that EPA has included Mid Course Reviews in other SIP actions, this does not overcome the presumption that a SIP must be complete and adequate on its face for complete EPA approval.

Commenters re-pose a question to EPA – given the District's past repeated inadequate SIPs, failed attempts at attainment, failures to implement committed control strategies, and self-imposed ignorance as to monitoring data, why should the District have another chance? See 66 Fed. Reg. 48341 and *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, [the Bay Area, like] Arizona should not be given another opportunity to produce more plans.").

EPA should not delude itself into believing that the State will meet its "enforceable commitment" to the schedule – the Sate made a similar "voluntary commitment" to EPA in the California MVEB rulemaking to submit revised SIPs using the revised EMFAC model no later than April, 2003. See, letter, ARB's Mike Kenny to EPA's Wayne Nastri, June 14, 2002, Exhibit 14, and 67 Fed. Reg. 69139 (11/15/2002). Four months later, no SIP submittals are in sight. Some areas, such as Ventura County, have not even started, and clearly have no intentions of fulfilling this commitment.

The Bay Area is already reporting that it has "encountered" "obstacles" in the "attempts to use" the CCOS data. See, Exhibit 15, Bay Area Air Quality Management District, Inter Office Memorandum, to Chairman Haggerty from Peter Hess, RE: status report on 2003-2004 Ozone Planning, July 23, 2003. The preliminary emissions reductions targets, originally due in June, 2003, is delayed until, at least, "the end of September 2003." Id., page 1. According to Jean Roggenkamp, lead staffperson at the District, as of July 29, 2003, "about one-third" of the previously- suggested

control strategies have been evaluated. (Pers. Conversation, 7/29/2003). A cursory examination of Exhibit 16, the District draft schedule for development of the 2004 ozone Plan, discloses that the 2004 Plan is well behind schedule. The District's cavalier attitude towards SIP planning deadlines is displayed in the failure to submit the required triennial SIP revision for the California ozone standard, Health and Safety Code § 40925, a standard the Bay Area has exceeded 11 times this year alone. Exhibit 6.

7. Contingency Measures

The 2001 Plan lacks contingency measures required by 42 U.S.C. § 7502(c)(9). Although the Plan has a four paragraph section entitled contingency measures, no control measures that could qualify as contingency measures under the Clean Air Act are identified. The Plan relies entirely on the Air Resources Board's statewide mobile source emissions controls. This are reflected in the EMFAC model and the District's "attainment assessment." These control measures fail utterly to serve the Act's purposes of filling gaps in expected emissions reductions from control measures failures, reasonable further progress failures, or a failure to attain.

EPA's Notice of Proposed Rulemaking is silent on the issue of contingency measures. This fundamental SIP element must be addressed in EPA's rulemaking.

8. Motor Vehicle Emissions Budgets (MVEB)

EPA cannot rely on MVEBs that contain known errors which inflate the size of the budgets and thus promote excessive mobile source emissions growth.

First, EMFAC2000 is an inaccurate tool to predict mobile source emissions. A number of the problems were known at the time the SIP was submitted, but the State declined to address those errors, and other errors have since been identified, such that the budgets did not reflect the latest planning assumptions at the time of adoption and today. Errors known on November 30, 2001, the date of the State's submission, included heavy duty truck trips (substantial undercounting of heavy truck trips), high speed travel (bucketing did not encompass average speeds above 65 mph, when emissions are highest), and visitor travel (VMT associated with non-resident/visitor trips were omitted from EMFAC2000).

Other errors in EMFAC2000 that have since been uncovered and are reflected in Exhibits 4, 17. As a product of the SIP, the MVEB is unapprovable for all the reasons stated in Exhibit 17.

9. Reasonable further progress

The Plan, and EPA's Notice of Proposed Rulemaking, are silent as to reasonable further progress. RFP is required under 42 U.S.C. § 7502(c)(2). In the absence of this element, the submittal may not be approved.

10. Transport

As EPA is well aware, Bay Area emissions of air pollution contribute to unhealthful air quality, including exceedences and violations of the one and eight hour national ambient air quality standards for ozone, in the Sacramento and San Joaquin Valley regions. See Exhibits 2-3; 21, 22, and the ARB Transport website, http://www.arb.ca.gov/aqd/transport/transport.htm, http://www.arb.ca.gov/regact/trans01/trans01.htm, http://www.arb.ca.gov/aqd/transport/mitigation/mitigation.htm, each of which is incorporated herein by reference.

The Clean Air Act 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." 42 U.S.C. § 7407(a). The Plan, the CCOS study materials, EPA's prior rulemaking, and other State submittals to EPA each implicitly or explicitly acknowledge that the Bay Area's air pollution adversely affects downwind air pollution control regions. The Bay Area SIP is not adequate unless and until it is part of a statewide SIP that comprehensively addresses air pollution transport, reconciling upwind and downwind Districts' responsibilities. The currently approved statewide SIP, the 1994 SIP, does not adequately address the topic. ARB has indicated that they would have submitted a revised State SIP by this time, or in relatively short order. Given the universal acceptance of the fact that the Bay Area is an upwind contributor of air pollution to downwind areas that violate the national ambient air quality standards for ozone, EPA may not lawfully approve the Bay Area SIP until it specifically addresses air pollution transport sufficiently to eliminate significant consequences to downwind Districts.

11. The Interim Final Determination of Deficiency Correction Is In Error

Commenters object to EPA's interim final determination that the State has corrected the SIP deficiencies identified in EPA's prior Bay Area SIP rulemaking. 66 Fed. Reg. 48340 (9/20/2000). As described above, the State has not corrected the SIP deficiencies, and the revised submittal suffers from numerous flaws beyond those noticed in EPA's prior rulemaking. The submittal is deficient for, *inter alia*, its inadequate emissions inventory, the failed attainment demonstration, for the failure to include all reasonably available control measures, for the absence of contingency measures, for the absence of treatment of air pollution transport, and the violation of state procedural and substantive law. 42 U.S.C. § 7502; 7509; 40 C.F.R. § 52.31.

In enacting the Clean Air Act, Congress intentionally incorporated a series of punitive, graduated sanctions designed to come into effect upon the disapproval of a SIP and the determination of failure to attain, and specifically elected to allow EPA to lift those sanctions only when the SIP deficiencies were formally and finally determined to be corrected. EPA seeks, through the "interim final rule," to thwart Congressional purpose and subvert the plain and unambiguous language of the Act. EPA may think it knows better, but Congress has the final word. Under these circumstances,

EPA may not interrupt the flow of sanctions as required by Congress, and its attempt to do so is subject to vacatur.

Under these circumstances, the Administrative Procedures Act's "good cause" exemption, 5 U.S.C. § 553(d)(3), to the requirement that substantive rules be published not less than 30 days before their effective date, should not and can not apply.

The APA specifically requires that the "good cause" supporting the exemption from publication and notice and comment be "published with the rule." 5 U.S.C. § 553(d)(3); *US v. Sunny Grove Citrus Ass'n*, 854 F. Supp. 669, 672 (E.D.Cal. 1994). The rule at 68 Fed. Reg. 42172 explains EPA's belief, to a "more likely than not" standard, that the deficiency has been corrected. This alone cannot serve as good cause.

EPA's rulemaking is notably void of explanation of either the impracticality or public interest justifying the omission of public comment.

The effect of the current level of sanctions are increased air pollution offset ratios for major stationary sources applying for new or modified permits. 42 U.S.C. § 7509(b)(2). There is no evidence that the imposition of a 2:1 offset for such sources poses a burden on industry generally or any individual source, or that it is impractical to take notice and comment on a proposal to lift the sanctions. Clearly this process could be accomplished quickly if, after considering the public's comments, EPA remains committed to its course, it could simply public final rulemaking to that effect. There is no explanation, nor any good reason, why not to follow the ordinary course of APA notice and comment rulemaking in this case. Arguably the public's interest is advanced if the higher offset ratio is in place for the remainder of the summer ozone season – the relaxed standards for new source review available on Monday August 18, 2003 could create a rush to the permit fountain and deleterious effects to ambient air quality and human health.

The Notice is silent concerning the highway construction sanction that will take effect in late October, 2003, if EPA is unable to complete rulemaking on the 2001 SIP by a time 24 months after submittal. The interim final rule does not state that the SIP adequacy determination cannot be completed in the approximately 65 days before highway sanctions take effect. Nor does the action describe what possible "public interest" is served by the rushed acceptance of a SIP EPA themselves recognizes is less than perfect. The Act's sanctions provisions were crafted simply to maintain pressure for swift and continuous movement towards improved air quality, and designed to take effect automatically in the event of State failure. The public's interest in healthful air quality and meaningful implementation and enforcement of the law is advanced from letting the sanctions clocks remain running until EPA takes final action on the submittal. Note that the highway sanctions exempt eight categories of programs and projects, including most if not all projects that would qualify as TCMs. Should the highway sanctions take effect, the RACM analysis, above, might be substantially altered as significant amounts of funds might be made available for TCMs.

EPA fails to explain, other than a summary conclusion, what harm there is to the public's interest for sanctions to be initially imposed or to remain applied during EPA's consideration of final action, particularly in light of the numerous substantive issues underlying the SIP action. EPA appears to have completely resolved this issue and is simply going through the motions, making a mockery of the APA and public input requirements.

EPA does a disservice to itself and public in waiting to act on the submittal until after its 18 months have run, then trying to rush the action through using abbreviated public procedures. The District claimed it was employing parallel processing with EPA for this SIP, and EPA has completed and defended a determination of MVEB adequacy, so has considerable staff familiarity with the SIP in question. EPA's delay is inexplicable and indefensible.

12. Environmental Justice

The procedural defects associated with the adoption of the Plan that were identified previously underscore the District's and the Plan's denial of environmental justice consequences. Not only does the Plan delay improvements in air quality to the disproportionate detriment of people of color and low economic means, but the Plan permits excess air pollution along the transportation corridors that are home to disproportionate percentages of target populations. Additionally, the Plan's failure to embrace TCMs such as public transit disproportionally and adversely affects transit dependent communities. See, Exhibit 18. EPA compounds this difficulty by failing to provide as many methods for the submittal of comments to this proceeding as possible. No everyone has computer access, or the ability to hand deliver comments on the date they are due. Given the short notice period (following EPA's protracted delay in issuing the notice), EPA should encourage public participation, not seek to narrow the means of comment. This office managed to secure the number of the Air Division's Fax for the submittal of various exhibits that are hard copy documents, but this access is not universally available since the Notice of Proposed Rulemaking omitted a fax number.

Conclusion

In conclusion, Commenters believe that EPA must revise its proposal and disapprove the 2001 Ozone Attainment Plan for the Bay Area as lacking most of the required SIP elements. Past practice has shown EPA strategies to gradually "bring the District along" are ineffective, and disapproval is not only required by law, but the swiftest and most direct path to improved air quality. A federal implementation plan must be promulgated on October 22, 2003. 42 U.S.C. § 7410(c).

Sincerely,

? Marc Chytilo
Signature Not Verified
Digitally signed by Marc Chytilo
DN: cn=Marc Chytilo, c=US
Date: 2003.08.15 16:50:09 -07'00'

Marc Chytilo
Counsel to TRANSDEF

CC: Mr. David Schonbrunn, President, Transportation Solutions Defense and Education Fund
Ms. Tiffany Schauer, Our Children's Earth Foundation
Mr. Will Rostov, Communities for a Better Environment
Dr. Alan Lloyd, Chairman, California Air Resources Board
Mr. Bill Norton, Control Officer, Bay Area Air Quality Management District
Mr. Steve Heminger, Executive Director, Metropolitan Transportation Commission

Exhibits to TRANSDEF, et al., Comments to
Environmental Protection Agency Notice of Proposed Rulemaking – Approval and Promulgation of Ozone Attainment Plan, San Francisco Bay Area, 68 Federal Register 42174, July 16, 2003

Filed August 15, 2003

1. Statement of Decision and Order Thereon, 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 Civil No. 323849.

2. Assembly Bill 2637, as approved by Governor Davis, September 2002.

3 Assembly Report, Assembly Bill 2637, as amended August 22, 2002 (reflecting Assembly concurrence in Senate Amendments)

4. Air Resources Board ms emissions inventory home page, http://www.arb.ca.gov/msei/on-road/previous_version, updated as of October 4, 2002.

5. Bay Area Air Pollution Summaries, 2000-2002, and Bay Area Air Quality Management District Box Score.

6. Santa Barbara County Air Pollution Control District Rule 359, Flares and Thermal Oxidizers

7. Stipulation and Order Regarding Bay Area Air Quality Management District Records Retention Policy, filed September 20, 2001, *Communities for a Better Environment, et al., v. Bay Area Air Quality Management District, et al*., San Francisco County Superior Court Civil No. 323849.

8. California Health and Safety Code § 40233

9. Memorandum, Metropolitan Transportation Commission, 10/31/1990, RE: TCM Adoption, and attached Plan to Meet the Mobile Source Reduction Objectives of the California Clean Air Act. (attached as Exhibits 10, 12, 13 to letter of CBE's Will Rostov, 8/15/03, submitted under separate cover)

10 Opening, Response and Reply Briefs, *Communities for a Better Environment, et al., v. Bay Area Air Quality Management District, et al*., San Francisco County Superior Court Civil No. 323849 (attached as Exhibits 10, 12, 13 to letter of CBE's Will Rostov, 8/15/03, submitted under separate cover)

11. Law Office of Marc Chytilo Comments to District and ARB Plan actions, June 4, 2001, July 16, 2001, and October 17, 2001.

12 EPA RACM Guidance Summary

13. Metropolitan Transportation Commission's Fourth Quarterly Report, *Bayview Hunters Point Community Advocates, et al., v. Metropolitan Transportation Commission, et al.*, No. C-01-0750 TEH, N.D.Cal., served August 11, 2003.

14. Letter, Air Resources Board Executive Officer Mike Kenny to EPA Region IX Regional Administrator Wayne Nastri, June 14, 2002.

15 Bay Area Air Quality Management District, Inter Office Memorandum, to Chairman Haggerty from Peter Hess, RE: status report on 2003-2004 Ozone Planning, July 23, 2003.

16 District draft schedule for development of the 2004 ozone Plan, 2/5/03.

17. TRANSDEF Comments on Proposed EPA Determination of MVEB Adequacy Submittal, complete packet, January 7, 2003, With Attachments A-Z. (submitted under separate cover)

18. Title VI Complaint [Civil Rights Act] Seeking EPA and DOT Investigation and Remediation of Disproportional Impact To Minority and Disadvantaged Communities From Local and State Agency Administration of Air Pollution Control Programs in the Bay Area, September 7, 2001. (submitted under separate cover)

19. Strategic Vision, AC Transit, August 2002 (submitted under separate cover)

20. A Vision for Rapid Transit in San Francisco, San Francisco Municipal Railway, February 2002 (submitted under separate cover)

21. Letter, William Norton, Bay Area Air Quality Management District Executive Officer, to Robert Fletcher, ARB, January 24, 2003.

22. Letter, ARB Executive Officer Catherine Witherspoon to EPA Air Division Director Jack Broadbent, July 15, 2003