45. Personal and social services rendered by others to meet the needs of individuals; security services for the protection of property and individuals.

Dated: September 14, 2001.

Nicholas P. Godici,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[FR Doc. 01–23454 Filed 9–19–01; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA232–0289, FRL–7048–1]

Approval and Promulgation of Ozone Attainment Plan and Finding of Failure To Attain; State of California, San Francisco Bay Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving in part and disapproving in part the 1999 San Francisco Bay Area Ozone Attainment Plan (1999 Plan), submitted by the State of California to EPA to attain the 1-hour ozone national ambient air quality standard (NAAQS) in the San Francisco Bay Area. Specifically, EPA is approving the baseline emissions inventory, the Reasonable Further Progress (RFP) demonstration, control measure commitments, and contingency measures in the 1999 Plan as meeting the requirements of the Clean Air Act (CAA) applicable to the Bay Area ozone nonattainment area. EPA is also approving the removal of transportation control measures (TCMs) 6, 11, 12, and 16 from the state implementation plan (SIP) for ozone purposes.

We are disapproving the attainment assessment, its associated motor vehicle emissions budgets, and the reasonably available control measure (RACM) demonstration. The disapproval triggers, on its effective date, an 18-month clock for mandatory application of sanctions, a 2-year time clock for promulgation of a federal implementation plan (FIP), and a transportation conformity freeze.

EPA is also finding that the San Francisco Bay Area ozone nonattainment area did not attain the 1-hour ozone NAAQS by its November 15, 2000 attainment deadline. As a consequence, the State is required to submit a new plan no later than 12 months after the effective date of this rulemaking.

EFFECTIVE DATE: This rule is effective on October 22, 2001.

ADDRESSES: A copy of this final rule and related information are available in the air programs section of EPA Region 9's website, *http://www.epa.gov/region09/air.* The docket for this rulemaking is available for inspection during normal business hours at EPA Region 9, Planning Office, Air Division, 17th Floor, 75 Hawthorne Street, San Francisco, California 94105. A reasonable fee may be charged for copying parts of the docket. Please call (415) 744–1249 for assistance.

FOR FURTHER INFORMATION CONTACT: Celia Bloomfield (415) 744–1249, Planning Office (AIR–2), Air Division, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105; *bloomfield.celia@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

On March 30, 2000, EPA proposed to partially approve and partially disapprove the San Francisco Bay Area Ozone Attainment Plan for the 1-Hour National Ozone Standard, June 1999 (1999 Plan). Specifically, EPA proposed to approve the baseline emissions inventory, the Reasonable Further Progress (RFP) demonstration, a commitment to reduce volatile organic compound (VOC) emissions by 11 tons per day (tpd) by adopting and implementing specified control measures, and contingency measures in the 1999 Plan as meeting the requirements of the Clean Air Act (CAA) applicable to the Bay Area ozone nonattainment area. EPA also proposed to approve the removal of transportation control measures (TCMs) 6, 11, 12, and 16 from the ozone portion of the California state implementation plan (SIP). EPA proposed to disapprove the attainment assessment, its associated motor vehicle emissions budgets, and the reasonably available control measure (RACM) demonstration.

EPA's March 30, 2000 notice also included a proposed finding that the Bay Area failed to attain the 1-hour National Ambient Air Quality Standard (NAAQS) for ozone by its November 15, 2000 attainment deadline. For details about EPA's evaluation of the 1999 Plan elements and proposed failure to attain finding, please see the proposed rulemaking at 66 FR 17379, March 30, 2001.

The 1999 Plan was submitted to EPA on August 13, 1999 as a proposed revision to the SIP. The submittal was made by the California Air Resources Board (CARB) on behalf of the Bay Area Air Quality Management District (BAAQMD), the Metropolitan Transportation Commission (MTC), and the Association of Bay Area Governments (ABAG) to comply with EPA's July 10, 1998 rulemaking that redesignated the Bay Area from attainment to nonattainment (63 FR 37258, July 10, 1998).

II. EPA's Responses to Comments on the Proposal

A. Overview of Comments

EPA received 15 letters commenting on the March 30, 2001 proposal. The commenters represented State and local air quality and transportation agencies, the business community, and a number of public interest environmental and environmental justice groups. The majority of commenters expressed support for the proposed partial disapproval and finding of failure to attain. The proposed partial approval was viewed favorably as strengthening the SIP, but several commenters objected to the proposed approval of specific plan elements as meeting the requirements of section 172 of the CAA. A number of commenters also urged EPA and the BAAQMD to evaluate and explain why the 1999 Plan failed to provide for attainment. Significant comments are addressed below; the remaining comments are addressed in the Technical Support Document for this rulemaking.

B. Comments on Proposed Disapproval of Attainment Assessment

Comment: Many commenters asked that EPA provide a detailed analysis of all the reasons why the attainment assessment was flawed. Some commenters went further and asked EPA to supplement its reasons in the final rulemaking for disapproving the attainment assessment. Specifically, commenters argued that the attainment assessment was flawed (by a magnitude in the range of 25–50 tpd) not only because it inaccurately demonstrated attainment, but also because it: (1) Omitted available data by excluding 1998 monitoring data; (2) inaccurately estimated the impact deregulation has had on power plant emissions; and (3) relied on projections of motor vehicle emissions that assume large reductions that historically have not been fully realized.

Response: EPA shares the concerns raised with regard to the attainment

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

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

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

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

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

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

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

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

C. Comment on Proposed Disapproval of Motor Vehicle Emissions Budgets

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

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

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

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

Response: The federal RACM obligation for ozone nonattainment areas is contained in section 172(c)(1) of the Act, which requires ''the implementation of all reasonably available control measures as expeditiously as practicable.'' The BAAQMD commenter did not deny this obligation, but rather asserted that the obligation has already been fulfilled. EPA disagrees with this position. EPA guidance, issued November 30, 1999 entitled, ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas,'' provides that ''[i]n order for the EPA to determine whether a State has adopted all RACM necessary for attainment as expeditiously as practicable, the State will need to provide a justification as to why measures within the arena of potentially reasonable measures have not been adopted. The justification would need to support that a measure was not 'reasonably available' for that area and could be based on technological or economic grounds.'' At a minimum, the justification should address ''any measure that a commenter indicates during the public comment period is reasonably available for a given area * * *.'' (57 FR 13560, April 16, 1992).

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

Comment: Several commenters urged EPA and the BAAQMD to thoroughly examine all of the control strategies in place in the South Coast air district as

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

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

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

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

E. Comments on Proposed Approval of Baseline Emissions Inventory

Comment: Several commenters questioned the approvability of the 1995 baseline emissions inventory. Counsel for Our Children's Earth and Communities for a Better Environment argued that any approval of the emissions inventory without knowledge of why the plan failed is arbitrary. Another commenter questioned the inventory's accuracy, citing the increase in on-road mobile source emissions when CARB updated its mobile source model. Also raised was a concern that the inventory was not sufficiently ''current'' to be approvable.

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

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

In short, we found nothing in our review to suggest that the inventory was inconsistent with EPA inventory guidance, ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' (EPA 454/R–99–006, April 1999). Nevertheless, since the Bay Area will have to submit a new plan in response to the disapproval and finding of failure to attain, there will need to be a new emissions inventory to support that plan.

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

Response: EPA does not judge the adequacy of emissions inventories on NOV statistics. In many cases, the issuance of a large number of NOVs indicates a healthy enforcement program. Moreover, many NOVs are written for non emissions-related violations (*e.g.,* recordkeeping) or for extremely minor emissions violations; therefore unresolved NOVs are not a good gauge for the effectiveness of a rule or regulatory program. The BAAQMD's enforcement process is to cite violations on site (sometimes multiple NOVs at a site daily). Compliance is demanded within fifteen to twenty days or further NOVs are issued until the problem is corrected. (BAAQMD Enforcement Division Policies and Procedures Manual, Notice of Violation Guidelines, pp. 5–6.) Violations are often bunched and then settled as a group for a particular facility; hence, it is not uncommon at any moment in time to find many seemingly ''unaddressed'' NOVs. Information about specific NOVs and a facility's current compliance status is available from the BAAQMD.

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

F. Comments on Proposed Approval of Reasonable Further Progress Demonstration

Comment: Counsel for Our Children's Earth and Communities for a Better Environment opined that, unless EPA makes a finding as to why the Bay Area failed to attain the ozone standard, it is arbitrary to assume that the adopted measures were as effective as promised in the SIP. The commenter asserts that continuing exceedances (particularly in 1998—after three years of plan

implementation) is evidence that the measures were not as effective as promised and that RFP did not occur.

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

G. Comments on Proposed Approval of Control Measures

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

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

H. Comments on Proposed Approval of Contingency Measures

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

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

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

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

I. Comments on Environmental Justice

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

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

J. Comments on Proposed Finding of Failure to Attain

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

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

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

would affect the basis for EPA's final rule determining that the Bay Area should implement the 1-hour standard under subpart 1, the Agency will reconsider its position with respect to the Bay Area at that time.

K. Comments on Consequences of Partial Disapproval

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

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

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

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

L. Comments on Requirement for a New Plan

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

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

Comment: A number of commenters suggested that EPA should exercise its CAA section 179(d)(2) authority to prescribe control measures. Specific suggestions include measures that target stationary sources located within low income communities of color; public transit measures; measures that address issues such as urban sprawl, land use, and growth in vehicle miles traveled; and any other measures identified through public comment.

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

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

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

III. Final Action

EPA is finalizing the partial approval/partial disapproval of the 1999 Plan and the finding of failure to attain without any changes from the March 30, 2001 proposal.

A. Plan Elements Approved

EPA is approving the following portions of the 1999 Plan: The baseline emissions inventory; the RFP demonstration through 2000; the commitment to achieve 11 tons per day of additional VOC reductions from implementation of new control measures (see Table 1 below); and contingency measures for failure to attain in 2000 (see Table 2 below). EPA has determined that these plan elements meet the requirements of CAA section 172(c), EPA guidance and EPA's final redesignation rulemaking (63 FR 37258, July 10, 1998). EPA is also approving the removal of TCMs 6, 11, 12, and 16 (see Table 3 below) from the SIP for ozone purposes as EPA has concluded that the removal is consistent with sections 110(l) and 193 of the CAA.

TABLE 1.—NEW BAY AREA MEASURES

VOC Measure (BAAQMD Regulation Number)	Adoption date	Implementation date	Estimated VOC Reduction (tpd), 1995–2000
SS–01: Can and Coil Coating (8–11)	11/19/97	1/1/98, 1/1/2000	0.35
SS–02: Equipment Leaks at Refineries and Chemical Plants (8–18)	1/7/98	1/7/98	1.20
SS–03: Pressure Relief Devices (8–28)	12/17/97, 3/18/98	7/1/98	0.13
SS–04: Solvent Cleaning (8–16)	9/16/98	9/1/99	2.10
SS–05: Graphic Arts Operations (8–20)	3/2/99	7/1/99, 1/1/2000	0.80
SS–06: Polystyrene Manufacturing (8–52)	1999	6/2000	0.26
SS–07: Organic Liquid Storage: Low Emitting Retrofits for Slotted Guide Poles (8–5)	1999	6/2000	0.48
SS–08: Gasoline Dispensing Facilities (8–7)	1999	6/2000	3.20
SS–09/SS–10: Prohibit Aeration of Petroleum Contaminated Soil or Industrial Sludge at Landfills (8–40)	1999	6/2000	2.68
MS–01: Electric Golf Carts: Require New Golf Cart Purchases to be Electric (ARB State Rule)	1994	3/2000	0.1

TABLE 2.—BAY AREA CONTINGENCY MEASURES

Adopted Control Measure (BAAQMD Regulation or State/Federal Measure)	Estimated VOC Reductions (tpd)			Estimated NO_X Reductions (tpd)		
	2001	2002	2003	2001	2002	2003
Gasoline Dispensing Facilities (8–7)	0.5	0.9	1.1	.....	.....	.....
Graphic Arts Printing and Coating Operations (8–20)	0.8	0.7	0.7	.....	.....	.....
Aeration of Contaminated Soil and Removal of Underground Storage Tanks (8–40)	0.5	1.0	1.5	.....	.....	.....
On Road motor Vehicles—Light and Medium Duty Cars and Trucks (ARB)	14.4	26.8	39.1	16.8	26.4	35.3
On Road Motor Vehicles—Heavy Duty Trucks (ARB)	0.1	0.5	0.7	3.3	5.0	6.7
Off Road Mobile Sources (ARB)	0.1	0.1	0.2	3.8	7.8	9.5
Gasoline-Powered Recreational Boats—Exhaust Emission Standards (EPA)	0.7	1.6	3.6	(.1)	(.1)	(.2)
Stationary Internal Combustion Engines (9–8)	.....	.....	.....	1.0	1.0	0.9
Stationary Gas Turbines (9–9)	.....	.....	.....	0.9	0.9	0.8
Glass Melting Furnaces (9–12)	.....	.....	.....	0.2	0.2	0.1

TABLE 3.—TCMS DELETED FROM THE SIP

TCM 6 ..	Construction of Guadalupe light rail in Santa Clara County and design work for the North Concord BART extension and Warm Springs extension.
TCM 11	Gasoline Conservation Awareness Program (GasCAP).
TCM 12	Santa Clara Commuter Transportation Program.
TCM 16	Construction of BART extension to Colma.

B. Plan Elements Disapproved

EPA is disapproving the attainment assessment in the 1999 Plan because monitored air quality indicates that the attainment projections were not realized; that is, the area failed to attain the ozone NAAQS by November 15, 2000 (CAA section 172(c)(1)). This disapproval does not include a protective finding for the motor vehicle emissions budget because the budget is not consistent with attainment. EPA is also disapproving the RACM demonstration as not meeting the requirements of CAA section 172(c)(1) for the reasons explained above.

C. Finding of Failure To Attain

EPA is finding, pursuant to CAA section 179(c), that the Bay Area failed to attain the federal 1-hour ozone standard by its November 15, 2000 attainment deadline.

D. Consequences of Final Action

The effective date of the final disapproval starts an 18-month clock for the imposition of sanctions pursuant to CAA section 179(a) and 40 CFR 52.31, and a 2-year clock for EPA to promulgate a FIP under CAA section 110(c)(1). The disapproval also activates a conformity freeze under 40 CFR 93.120(a)(2). 62 FR 43796, August 15, 1997. The sanctions and FIP clocks can be stopped once the State corrects the 1999 Plan deficiencies and EPA approves the revisions. The freeze will be lifted once EPA receives an approvable budget and finds it adequate.

In response to the finding of failure to attain, the State is required to submit a SIP revision for the Bay Area to EPA by September 20, 2002 (CAA section 179(d)(1)) that meets the requirements of CAA sections 110 and 172 and provides for attainment ''as expeditiously as practicable'' but no later than September 20, 2006.

IV. Administrative Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), EPA is required to determine whether regulatory actions are significant and therefore should be subject to Office of Management and Budget (OMB) review, economic analysis, and the requirements of the Executive Order. The Executive Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may meet at least one of the four criteria identified in section 3(f), including, under paragraph (1), that the rule may ''have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity,

competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities.''

The Agency has determined that the determination of nonattainment and SIP approval and disapproval would result in none of the effects identified in section 3(f) of the Executive Order. The determination of nonattainment is a factual finding based upon air quality considerations and does not, in and of itself, impose any new requirements on any sectors of the economy. SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements but simply act on requirements that the State is already imposing. This SIP disapproval will not change existing requirements and does not impose any new requirements. Therefore, these actions cannot be said to impose a materially adverse impact on state, local, or tribal governments or communities.

B. Executive Order 13211

These actions are not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because they do not constitute a significant regulatory action under Executive Order 12866.

C. Executive Order 13045

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. These actions are not subject to Executive Order 13045 because they are not economically significant regulatory actions as defined by Executive Order 12866.

D. Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. The SIP approval and disapproval do not affect any existing requirements or impose any new requirements. The determination of nonattainment is a factual determination and does not directly regulate any entity.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements but simply act on requirements that the State is already imposing. The determination of nonattainment is only a factual determination, and does not directly regulate any entities. See 62 FR 60001, 60007–8, and 60010 (November 6, 1997) for additional analysis of the RFA implications of attainment determinations.

EPA's disapproval does not affect any existing requirements applicable to small entities. Any pre-existing federal requirements remain in place after this disapproval. Federal disapproval of the state submittal does not affect state enforceability. Moreover, EPA's disapproval of the submittal does not impose any new Federal requirements.

Therefore, pursuant to 5 U.S.C. 605(b), I certify that today's final rule does not have a significant impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

F. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to state, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

As discussed above, the finding of nonattainment is a factual determination based upon air quality considerations and does not, in and of itself, impose any new requirements. The SIP approval simply acts on pre-existing requirements under State or local law, and imposes no new requirements. The SIP disapproval will not change existing requirements and imposes no new requirements. Thus, these actions do not constitute a Federal mandate, as defined in section 101 of the UMRA, because they do not impose an enforceable duty on any entity.

G. Executive Order 13132

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the proposed regulation.

This determination of nonattainment, SIP approval and disapproval will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because the actions do not, in and of themselves, impose any new requirements on any sectors of the economy, and do not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, the requirements of section 6 of the Executive Order do not apply to these actions.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's actions do not involve technical standards and do not require the public to perform activities conducive to the use of voluntary consensus standards.

I. Submission to Congress and Comptroller General

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

J. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 28, 2001.

Christine Todd Whitman,

Administrator.

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

PART 52—[AMENDED]

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

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

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(283) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(283) San Francisco Bay Area Ozone Attainment Plan for the 1-Hour National Ozone Standard, June 1999, was submitted on August 13, 1999 by the Governor's designee.

(i) Incorporation by reference.

(A) Bay Area Air Quality Management District.

(*1*) Tables 10 and 12 of the San Francisco Bay Area Ozone Attainment Plan for the 1-Hour National Ozone Standard, June 1999, which detail the commitment to adopt and implement any combination of new control measures to achieve 11 ton per day reduction in VOC emissions by June 2000.

(*2*) Contingency measures, Table 18, ''Post-Attainment Year (2000–2003) Inventory Reductions Reflected in the SIP''.

2. Section 52.223 is amended by adding paragraph (e) to read as follows:

§ 52.223 Approval status.

* * * * *

(e) The Administrator approves the following portions of the 1999 Ozone Attainment Plan for the San Francisco Bay Area submitted by the California Air Resources Board on August 13, 1999: the 1995 baseline emissions inventory, the reasonable further progress demonstration, and the deletion of transportation control measures #6 and #16.

3. Section 52.237 is amended by adding paragraph (a)(6) to read as follows:

§ 52.237 Part D disapproval.

(a) * * *

(6) The attainment assessment, motor vehicle emissions budgets, and Reasonably Available Control Measure (RACM) portions of the San Francisco Bay Area Ozone Attainment Plan for the 1–Hour National Ozone Standard, June 1999.

[FR Doc. 01–22125 Filed 9–19–01; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–4121a; FRL–7059–5]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; NO_X RACT Determinations for the Latrobe Steel Company in the Pittsburgh-Beaver Valley Area; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to receipt of a letter of adverse comment, EPA is withdrawing the direct final rule to approve a revision to establish reasonably available control technology (RACT) requirements for the Latrobe Steel Company, a major source of nitrogen oxides (NO_X) located in the Pittsburgh-Beaver Valley ozone nonattainment area. In the direct final rule published on August 10, 2001 (66 FR 42123), EPA stated that if it received adverse comment by September 10, 2001, the rule would be withdrawn and not take effect. EPA subsequently received adverse comments from the Citizens for Pennsylvania's Future (PennFuture). EPA will address the comments received in a subsequent final action