February 14, 2002

Mr. Michael P. Kenny
Executive Officer
California Air Resources Board
1001 I Street
Sacramento, California 95812

Dear Mr. Kenny:

We have found adequate for transportation conformity purposes the motor vehicle emission budgets in the San Francisco Bay Area Ozone Attainment Plan for the 1-Hour National Ozone Standard (October 24, 2001). As a result of our adequacy findings, the Regional Transportation Commission and the Federal Highway Administration must use these budgets in future conformity analyses once the findings become effective.

On November 30, 2001, the Air Resources Board submitted the San Francisco Bay Area ozone attainment plan to EPA. The plan identifies regional motor vehicle emission budgets as 164 tons of volatile organic compounds (VOC) and 270.3 tons of nitrogen oxides (NOx) per day for the year 2006. We announced receipt of the plan on the Internet and requested public comment by January 7, 2002. We received 10 comment letters during the comment period.

This letter transmits our decision that the ozone plan is adequate for transportation conformity decisions. After reviewing the plan, we have preliminarily determined that it provides for attainment of the 1-hour ozone standard in the San Francisco Bay Area. We have detailed our adequacy findings in the enclosures as well as responded to the comments that we received as a result of the web posting. A copy of this letter and its enclosures will soon be posted on the Internet at http://www.epa.gov/otaq/traq. We will also announce the adequacy findings in the Federal Register. The findings will become effective 15 days after the Federal Register announcement.

If you have any questions regarding these adequacy findings, please contact Ginger Vagenas at (415) 972-3964 or Amy Zimpfer at (415) 947-4146.

Sincerely,

Jack P. Broadbent
Director, Air Division

Enclosures (2)

cc: See next page

cc: Dennis Scovill, FHWA
Leslie Rogers, FTA
Ellen Garvey, BAAQMD
Steven Heminger, MTC
Eugene Leong, ABAG

Enclosure 1

Transportation Conformity Adequacy Review

Revised San Francisco Bay Area Ozone Attainment Plan for the 1-Hour National Ozone Standard

Adopted October 24, 2001, Submitted November 30, 2001

TRANSPORTATION REVIEW CRITERIA		IS CRITERION SATISFIED?	REFERENCE IN SIP DOCUMENT/COMMENTS
Sec. 93.118(e)(4)(i)	The plan was endorsed by the Governor (or designee) and was subject to a public hearing by the State.	Y	The November 30, 2001 transmittal letter submitting the plan was sent by ARB's Executive Officer, Michael P. Kenny, the governor's designee. Documentation accompanying the describes both state and local level public hearings.
Sec. 93.118(e)(4)(ii)	The plan was developed through consultation with federal, state and local agencies; full implementation plan documentation was provided to EPA and EPA's stated concerns, if any, were addressed.	Y	Documentation accompanying the plan describes an extensive public and agency outreach effort. See Staff Report (ABAG, BAAQMD, MTC), October 17, 2001. EPA received copy of the plan and EPA's comments were addressed.
Sec. 93.118(e)(4)(iii)	The motor vehicle emission budgets are clearly identified and precisely quantified.	Y	The motor vehicle budgets are clearly identified and precisely quantified on page 30.

TRANSPORTATION REVIEW CRITERIA		IS CRITERION SATISFIED?	REFERENCE IN SIP DOCUMENT/COMMENTS
Sec. 93.118(e)(4)(iv)	The motor vehicle emissions budgets, when considered together with all other emission sources, are consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given plan).	Y	EPA has preliminarily concluded that the submitted SIP demonstrates attainment in the Bay Area by 2006 and that the MVEBs are consistent with that demonstration.
Sec. 93.118(e)(4)(v)	The plan shows a clear relationship between the emissions budgets, control measures and the total emissions inventory	Y	The emission inventory for all point, area and motor vehicle for 2006 is described in Table 4, Emission Inventories. The control strategy is set out in Section 5 of the plan and in Appendix B. Tables 10 and 11 provide the emission reductions from the control strategy for VOC and NOx. Budgets are calculated as 2006 emission inventory minus reductions from control strategy.

TRANSPORTATION REVIEW CRITERIA		IS CRITERION SATISFIED?	REFERENCE IN SIP DOCUMENT/COMMENTS
Sec. 93.118(e)(4)(vi)	Revisions to previously submitted control strategy or maintenance plans explain and document any changes to any previous submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see 93.101 for definition), and reasons for the changes (including the basis for any changes to emission factors or estimates of vehicle miles traveled).	Y	Budgets submitted in the 1999 Ozone Attainment Plan were disapproved. See 66 FR 38340 (September 20, 2001). Previously approved budgets from the 1994 Ozone Maintenance Plan are not revised by the submitted budgets. See page 30.
Reviewers: David Jesson, Frances Wicher, Karina O'Connor, Carol Bohnenkamp, Mark Brucker, Ginger Vagenas, Richard Grow			Date of Review: 2/13/02

Enclosure 2

Responses to Comments on the Adequacy of the VOC and NOX Transportation Conformity Budgets Contained in San Francisco Bay Area Ozone Attainment Plan

I. Administrative Requirements For Making Adequacy Findings

EPA reviews the adequacy of the motor vehicle emission budgets ("MVEB") in accordance with the procedures and criteria of the Transportation Conformity Rule contained in 40 CFR Part 93, Sections 118 (e) (4) through (e) (5), and the guidance contained in the May 14, 1999 EPA Guidance Memorandum from Gay MacGregor to Regional Air Directors entitled, "Conformity Guidance on the Implementation of the March 2, 1999 Conformity Court Decision."

On November 30, 2001, the California Air Resources Board submitted the Revised San Francisco Bay Area Ozone Attainment Plan for the 1-Hour National Ozone Standard (adopted October 24, 2001) to EPA. This plan contains an attainment demonstration and identifies regional motor vehicle emission budgets in tons of volatile organic compounds (VOC) and nitrogen oxides (NOx) for year 2006.

On November 9, 2001, we announced receipt of the plan on EPA's web site at www.epa.gov/otaq/traq, for the purpose of opening a 30-day public comment period on the adequacy of the budgets. On December 7, 2001, we posted additional information related to the motor vehicle emissions budgets and extended the comment period to January 7, 2002.

In response to the posting, we received 10 comment letters, 6 from environmental or transportation advocacy groups and four from California air districts.

The following section summarizes the public comments and EPA's responses. This TSD will be an attachment to the letter from EPA to Air Resources Board informing the State of our adequacy findings on the budgets for San Francisco Bay Area. We will then publish a Federal Register notice announcing our adequacy findings. The effective date of the adequacy findings will be 15 days after the publication date of that Federal Register notice. The letter to ARB and the document will be posted on EPA's website at www.epa.gov/otaq/traq.

II. Public Comments Received on the Budgets and EPA's Responses

A. EPA's Adequacy Process
B. SIP Submission
C. State and Local Adoption Process
D. EMFAC
E. 93.118(e) Criteria
F. Environmental Justice

A. EPA's Adequacy Process

Comment: Several commenters assert that a determination by EPA that a motor vehicle emissions budget (MVEB) is "adequate" for transportation conformity is a rule as defined in the federal Administrative Procedures Act (APA) (5 U.S.C. § 551(4)) and previous court decisions; therefore, EPA must undertake notice-and-comment rulemaking pursuant to the APA before finding the MVEBs in the 2001 Plan adequate. Commenters also contend that a simple notice that EPA will be making an adequacy determination is not sufficient and that EPA must propose action and state the technical bases for it, especially in this case where there has been "serial rulemaking" and (the commenters assert) insufficient information has been made available at the state level to allow the adequacy process to move forward without notice-and-comment rulemaking. In a similar vein, commenters also contend that an adequacy determination is a SIP approval and note that a court has recently found that SIP approvals are informal rulemakings governed by the APA, citing Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001).

Response: EPA conducted its adequacy determination on the MVEBs in the Bay Area Ozone Attainment Plan (2001 Plan) pursuant to its regulations governing adequacy at 40 CFR 93.118(e) and applicable Agency guidance. EPA established its adequacy regulations through notice-and-comment rulemaking in 1997. *See* proposed rule at 61 FR 36111 (July 9, 1996) and final rule at 62 FR 43780 (August 15, 1997). EPA issued its adequacy guidance in May 1999 in response to a D.C. Circuit Court decision remanding 93.118(e)(1) to EPA. *See* memorandum, "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision," from Gay MacGregor, Director, Regional and State Programs Division, Office of Mobile Sources, to Directors, Regional Air Programs, May 14, 1999.

In the preamble to the 1997 regulations, EPA clarified in its response to comments that it would be conducting adequacy determinations through informal adjudication procedures and not through APA rulemaking. *See* 62 FR 43780, 43782-3. EPA stated in its 1997 rulemaking that adequacy determinations "are only administrative reviews and not substantive rules." *Id.* EPA clarified that in lieu of notice-and-comment rulemaking on individual adequacy determinations, it was establishing the criteria for determining adequacy in the conformity rules and was requiring that in making an adequacy determination EPA must review comments submitted to the states and the states' responses thereto. EPA's May 1999 guidance also requires EPA to consider public

comments submitted during EPA's adequacy process after the plan is submitted. We have reviewed the MVEBs in the Bay Area 2001 Plan against the criteria in 93.118(e)(4) and have found that they meet them. We have also reviewed the Bay Area's response to comments made on the plan and believe that it adequately addresses the concerns raised in those comments.

Under the APA, there are two basic methods by which an agency may act: rulemaking and informal adjudication. Except where directed by statute, an agency has discretion to choose between the two. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *see also Coos-Curry Electric Cooperative Inc. v. Jura*, 821 F.2d 1341, 1346 (9th Cir. 1987) (agency possessed discretionary authority to formulate guidelines governing certain decisions through case-by-case process rather than through formal rulemaking).

With respect to adequacy determinations, EPA has chosen to proceed via informal adjudication rather than rulemaking. *See* 62 FR 43780, 43782-83, (stating that adequacy determinations "are only administrative reviews and not substantive rules" and "are merely administrative applications of established criteria to emissions budgets"). It thus applies its established adequacy criteria (which were adopted only after full notice-and-comment rulemaking) to MVEBs on a case-by-case basis. This process allows EPA to make prompt interim adequacy determinations while a full plan is still under review, which in turn allows state or local transportation agencies to make their own conformity determinations and move forward with transportation planning while EPA continues the lengthier SIP approval process.

Nothing in either the CAA or the APA requires EPA to conduct adequacy determinations through notice-and-comment rulemaking. EPA acted reasonably in choosing to conduct such determinations through informal adjudications. Adequacy determinations are factual determinations applying pre-established criteria to a specific area, and do not create new legal obligations. Courts have clarified that actions need not be conducted through rulemaking simply because they affect individual rights. *See Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

The commenters claim that an adequacy finding is a "rule" (and therefore requires notice-and-comment rulemaking) because (1) it "implements or interprets law or policy;" (2) it "binds [EPA] and the state by prescribing a legally binding limit on emissions;" and (3) it is effectively an "approval" of a portion of a SIP.

The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). Substantive rules create new law, or impose new rights or duties above and beyond what existing statutory or regulatory provisions already require. Thus, as Ninth Circuit has recognized, "[r]ulemaking ordinarily involves broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Natural Resources Defense Council Inc. v. United States Environmental Protection Agency*, 966 F.2d 1292, 1309 (9th. Cir. 1992) ("*NRDC*").

Under this standard, an adequacy determination is not a rule. Rather, it is a factual determination based on the standards set out in 40 CFR § 93.118(e)(4)-(5). Although the adequacy criteria themselves were established as a rule, EPA's application of those standards in a particular case does not create new law or policy. In making an adequacy determination, EPA simply applies pre-established criteria to determine whether an MVEB is adequate such that the budget may be used in making subsequent conformity determinations. The applicable laws and policies have already been established by Congress and through EPA's rules implementing the CAA. Adequacy determinations thus are not rules and are not subject to notice-and-comment requirements. *See NRDC* at 1309 (decision to approve group industrial discharge permit application focused on specific and discrete factual question, and therefore was not a rule or otherwise subject to notice-and-comment requirements).

Certain aspects of the adequacy rules at 93.118(e) relating to use of budgets that EPA had not affirmatively found adequate were challenged in court and subsequently remanded to EPA for further rulemaking in *Environmental Defense Fund v. EPA, et al.*, 167 F.3d 641 (D.C. Cir. 1999) ("*EDF*"). However, the court remanded only 93.118(e)(1), which contained the offending provision and did not remand either 93.118(e)(4), which establishes the criteria for finding budgets adequate or 93.118(e)(5) which requires EPA to review state-level comments and responses. Thus, it has been plain as a matter of regulation since promulgation of EPA's adequacy rules in 1997 that adequacy determinations would not be conducted through notice-and-comment rulemaking. Further, subsequent to the 1999 court case, EPA reconsidered at a policy level the prior decision to rely only on a review of state-level comments as required by the conformity rule, in response to concerns expressed by the litigant in that case. EPA determined that although it would continue to complete adequacy determinations through informal adjudication pursuant to the rule, it would provide for an informal 30 day public comment process to be conducted through an electronic website. This process, developed in conjunction with the litigant, is outlined in May 1999 guidance. EPA has consistently implemented this guidance in making adequacy determinations since 1999 and is doing so in this case as well.

Commenters argue that the adequacy determination "binds" EPA and the State by establishing limits on motor vehicle emissions. Initially, even if it were true that an adequacy determination had some binding effect, that fact alone would not make the adequacy determination a rule. *See Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987) (rejecting argument that for purposes of determining notice-and-comment requirement, court should look to impact of rule)*; Alcaraz v. Block*, 746 F.2d 593, 613-14 (9th Cir. 1984) (fact that regulations may have altered administrative duties does not make them substantive rules subject to notice-and-comment procedure); *see also Fertilizer Institute v. United States Environmental Protection Agency*, 935 F.2d 1303, 1308 (D.C. Cir. 1991) (fact that agency action may affect actions of parties does not make that action a substantive rule).

More to the point, an adequacy determination does not in itself impose any obligations – it simply indicates EPA's interim determination that the MVEBs that the state has established are adequate, so that state and local agencies may use those budgets as necessary in their transportation planning. Nor does a single adequacy finding have any impact, or set any

precedent, beyond the Bay Area. Future adequacy determinations both in the Bay Area and elsewhere will still be made on a case-by-case basis, using the statutory and regulatory criteria that have already been established. A single adequacy finding thus is not a "rule" subject to notice-and-comment requirements.

Commenters cite the recent decision of *Hall v. EPA*, 273 F.3d 1146 (9th. Cir. 2001), which states that EPA's approval of revisions to a SIP is an informal rulemaking subject to notice-and-comment requirements. *Hall*, 273 F.3d at 1161. The commenters are mistaken, however, in characterizing an adequacy determination as an "approval" of a portion of a SIP. An adequacy finding is not a SIP approval and the adequacy process is separate from the notice-and-comment rulemaking process conducted by EPA to approve or disapprove SIP revisions.[1] EPA's adequacy findings are determinations that submitted budgets are consistent with attainment, maintenance and/or reasonable further progress (RFP) for conformity purposes, as applicable. The rulemaking process to approve or disapprove SIP revisions involves a more detailed examination of the technical analyses submitted by the state to demonstrate attainment and compliance with other applicable CAA requirements. EPA's actual approval or disapproval of the budgets into the SIP occurs when we have completed our full rulemaking process on the relevant plan and have either approved or disapproved it as a SIP revision.

Moreover, EPA's finding that the Bay Area MVEBs are adequate does not in any way constrain EPA's action on the plan as a whole. EPA remains free to approve or disapprove the SIP regardless of any prior adequacy finding. Additionally, if EPA disapproves the SIP submission, that disapproval will generally override the adequacy finding unless EPA makes further findings (through notice-and-comment rulemaking) that would allow continued use of the budget. See 62 FR 43780, 43782; 40 CFR 93.120(2) and (3).

Comment: Several commenters contend that an MVEB from an unapproved SIP, even if found adequate, cannot be used for transportation conformity purposes because the CAA's conformity provisions in section 176(c) require conformity to be made only against an approved SIP.

Response: EPA's 1997 conformity rule and 1999 guidance make clear that where no prior budget

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[1] Unlike SIP approvals, *see generally* 40 C.F.R. Part 52, individual adequacy determinations are not codified in the Code of Federal Regulations. Notice of such determinations is published only in the Federal Register. This is a strong indication that EPA does not regard individual adequacy determinations as rules. *See American Portland Cement Alliance v. Environmental Protection Agency*, 101 F.3d 772, 776 (D.C. Cir. 1996) (noting that publication of substantive rules in CFR is "not just a matter of agency convention," since CFR must contain all Federal regulations of general applicability and legal effect; fact that determination was not published in CFR was therefore an indicator that it was not a regulation.) EPA's characterization of adequacy determinations, while not dispositive, is a relevant factor in determining the nature of such determinations. *See Metropolitan School District Of Wayne Township v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992).

has been approved for a certain year and CAA requirement, conformity will be measured against submitted budgets that EPA has found adequate, even prior to EPA approval of such budgets. This provision of EPA's rule has been established since 1997 and, other than the provisions concerning budgets that EPA has not affirmatively found adequate, was not disturbed by the court's review of the rule in *EDF*. *See* 40 CFR 93.109(c), 93.118(b) and 93.118(e). In *EDF*, the court ruled that EPA must review and subsequently find adequate submitted budgets prior to their use in a conformity determination. The court did not, however, address those provisions in the conformity rule that allow the use of submitted budgets in a conformity determination before a SIP is approved. In fact, the court recognized that the statute does not dictate how conformity should be determined if the approved SIP does not contain applicable budgets. *See EDF* at 650. In addition, the use of adequate budgets as a standard for measuring conformity in the absence of applicable approved budgets has also recently been noted with approval by another appellate court. *See 1000 Friends of Maryland v. Browner*, 265 F.3d 216 (4th Cir. 2001) (EPA use of submitted and not yet approved budget is not inconsistent with section 176(c) of the Act).

Comment: Several commenters contend that EPA should accept the MVEBs in the Bay Area's ozone plan only at the time it takes action on the full plan because the CAA does not appear to authorize acceptance of a MVEB separate from the SIP approval and because there are grave concerns regarding the approvability of the attainment demonstration (from which the MVEBs are derived). One commenter believes that EPA's early acceptance of the MVEBs will prejudice its final action on the overall plan.

Response: There is nothing in the CAA that bars finding MVEBs in submitted but not yet approved SIPs adequate for transportation conformity purposes and then requiring their use in subsequent conformity findings where there is not an already SIP-approved MVEBs. Moreover, EPA's process of making adequacy findings in advance of SIP approval and allowing these adequate budgets to be used has been endorsed by the courts. *See EDF* and *1000 Friends of Maryland.*

As will be discussed below in the responses to other comments, EPA has performed an initial evaluation of the 2001 Plan and has preliminarily found that its MVEBs are consistent with its attainment demonstration and that this demonstration appears to be acceptable. As part of the action on the overall plan, EPA will undertake a more detailed and thorough examination of the technical analyses supporting the 2001 Plan's attainment demonstration and provide the public with further opportunity to comment. EPA's actual approval or disapproval of the budgets into the SIP will occur only once it has completed the full rulemaking process on the relevant plan.

As noted previously, EPA's finding that the MVEBs in the 2001 Plan are adequate does not in any way constrain its final action on the 2001 Plan as a whole. EPA remains free to disapprove any or all parts of the plan regardless of this affirmative adequacy finding. See 62 FR 43780, 43782. Moreover, if EPA disapproves the plan, that disapproval will override this finding unless EPA makes further findings (through notice-and-comment rulemaking) that would allow continued use of the budget. *Id*. Thus, this adequacy finding does not prejudice EPA's future action on the 2001 Plan nor does it assure that the plan's adequate MVEBs will be approved.

Comment: One commenter alleged that a member of the public submitted a request for a copy of the 2001 Plan within the 15 day window and that EPA neither acknowledged that request nor provided the requested information. The commenter stated that EPA has a duty to provide that information and to restart the comment clock.

Response: EPA guidance governing adequacy determinations provides that the public comment period for adequacy determinations commences immediately upon the website posting. If the state has not made the plan available on its website and someone requests a copy of the SIP submittal within 15 days of EPA's posting notification, the guidance states that the 30 day comment period will begin on the date that EPA mails the requested materials.

EPA received one request for a copy of the 2001 Plan. The request was dated December 20, 2001, 41 days after the date of EPA's posting notification. EPA sent the requested information to the commenter, both by regular mail and by registered priority mail. The package sent by registered mail was returned to EPA as "unclaimed." In the case of the Bay Area plan, California did make the plan available on its website, so an extension of the comment period was unnecessary. Further, the request was received well outside of the 15 day window that, in cases where the plan is not electronically available, EPA would be required to restart the comment period.

Comment: EPA's reliance on web-posting is a misreading of the May 14, 1999 MacGregor guidance and as implemented by EPA has a discriminatory impact since it disproportionately excludes low income communities and communities of color from participation in what should be a pubic process.

Response: As discussed above, EPA's adequacy MVEB adequacy determinations are not rules and do not require notice-and-comment rulemaking. Even though public notice is not required, EPA recognizes that there is significant public interest in adequacy determinations. EPA worked with the Environmental Defense Fund (EDF) to develop the current adequacy process. EDF expressed a preference for web posting on the basis of their belief that it provides the most efficient means for notifying the public.

In addition to the web posting, EPA took a number of steps to ensure that stakeholders would be aware of the posting and have the opportunity to provide comment on the adequacy of the Bay Area motor vehicle emissions budgets.

November 7, 2001:	EPA posted notification of the 30-day comment period regarding the adequacy of the Bay Area MVEBs (parallel process)
November 11, 2001:	EPA contacted interested parties including state, local, and federal agencies, and environmental groups by email to notify them of the posting.
November 30, 2001:	EPA received the Bay Area ozone attainment plan submittal from ARB.
December 7, 2001:	EPA extended comment period for an additional 30 days, made more information available via the website, and mailed hard copies of the ozone attainment plan submittal and EMFAC materials to the environmental

groups: TRANSDEF (Marc Chytilo, Robert Yuhnke, David Schonbrunn; Earthjustice (Kristen Tobey); Golden Gate University Environmental Law and Justice Clinic (Helen Kang); Communities for a Better Environment (Richard Drury). EPA also notified state, local, and federal agencies, and the groups listed above by telephone of the 30-day extension to the comment period.

EPA believes that this process properly implements the May 1999 guidance and provides notice as broadly as would be provided through a rulemaking process.

B. SIP Submission

Comment: The 2001 Plan contains substantial defects, errors, and omissions that directly affect the technical foundation (e.g., emissions inventories, control strategies, and attainment demonstration) upon which MVEB adequacy is reviewed. The MVEB relies extensively upon the 2001 Plan's contents to assure conformity, and EPA must rely on the 2001 Plan in fulfilling its "affirmative responsibility" of § 176(c)(1)(B) conformity. If the 2001 Plan is fundamentally flawed, such as possessing an inadequate attainment demonstration, inaccurate mobile sources emissions inventories, employing an insufficient Reasonably Available Control Measures (RACM) analysis leading to the omission of legally required Transportation Control Measures (TCMs), the precise MVEB is no longer accurate. Reliance upon a specific MVEB when EPA is aware of known technical flaws in the underlying 2001 Plan is inherently arbitrary.

Response: The provisions under 40 CFR 93.118(e) set out the criteria EPA must use to determine budget adequacy. Notably, the criteria do not include a requirement that EPA approve the entire SIP submittal, though they do provide for a preliminary review of the submitted plan. The preamble to EPA's 1997 conformity rule provides, "EPA cannot ensure that a submitted SIP is consistent with RFP, attainment, or maintenance until EPA has completed its formal review process and the SIP submittal has been approved through notice-and-comment rulemaking. Although the minimum criteria for adequacy allow EPA to make a cursory review of the submitted MVEBs for conformity purposes, EPA recognizes that other elements must also be in the SIP submittal for it to ultimately be approved. Therefore, a budget that is found adequate in the 45-day review period could later be disapproved when reviewed with the entire SIP submission." *See* 62 FR 43782, col. 1, August 15, 1997. EPA finds that the MVEBs in the Bay Area Air Quality Management District's (BAAQMD's) ozone attainment plan meet the criteria of 93.118(e) and therefore finds the budgets adequate for conformity purposes.

EPA concludes that the State and BAAQMD have met the necessary requirement for the Agency to preliminarily determine that the 2001 Plan and the associated commitments demonstrate attainment. As a result, EPA finds that the MVEBs are consistent with the submitted attainment demonstration and is adequate. Because EPA is only preliminarily concluding that the attainment demonstration is sufficient for purposes of finding the budgets adequate without completing rulemaking at this time on the attainment demonstrations, EPA believes that it need

only address general comment about the appropriate tests for approving attainment demonstrations at this time and preliminarily determine that they were properly applied in this case. Detailed analysis of the attainment demonstration and specific comments on application of appropriate requirements will be fully addressed in subsequent rulemaking on approvability of the 2001 Plan.

The adequacy process is separate from the notice-and-comment rulemaking process conducted by EPA to approve or disapprove the plan as a SIP revision. The rulemaking process to approve or disapprove the plan as a SIP revision involves approval of their associated control strategies and a more detailed examination of the technical analyses submitted by the state to demonstrate attainment. Therefore, EPA's adequacy findings are that submitted budgets are consistent with attainment, maintenance, and/or ROP for conformity purposes. EPA's actual approval or disapproval of the budgets into the SIP occurs when we have completed our full rulemaking process on the relevant ROP, attainment, or maintenance plan and have either approved or disapproved it as a SIP revision. The adequacy process considers certain criteria specified in 40 CFR 93.118 in order to allow the use of these submitted budgets in conformity determinations while EPA is completing its formal review process to determine whether to approve the ROP or attainment plans as SIP revisions. Comments on EPA's determination that specific aspects of the SIP submission appear to be approvable will be addressed below with comments on specific substantive issues.

Comment: The 2001 Plan lacks essential information that is necessary to determine if the MVEB is adequate under EPA's criteria. The 2001 Plan is incomplete in many important respects: late and partial submittal of EMFAC documentation; emissions reductions shortfall; inadequate RACM analysis; failure to identify potential or actual supplemental control strategies and to adopt some control strategies that are shown to be available; withholding of the Central California Ozone Study (CCOS) data; failure to address effect and control of transported air pollutants. The public cannot be expected to comment on the MVEB adequacy until the SIP, upon which the MVEB relies, is complete and made available to the public. EPA cannot make findings on the issue of MVEB adequacy when some of the central and foundation SIP elements are not provided and others remain highly questionable. EPA's preamble to the 1997 conformity regulations, addressing MVEB adequacy process stated "SIP development must be documented. Any technical support information needed to review the adequacy of the SIP must be submitted to EPA" and, implicitly, made available to the public, before MVEB adequacy can be assessed. 62 FR 43780, 43781/3, 8/15/1997.

Response: The preamble to EPA's 1997 conformity rule provides that, "[t]he conformity adequacy review is separate from EPA's completeness review of a submitted SIP for the purposes of SIP processing." EPA's adequacy process, as noted in the May 14, 1999 guidance memorandum, is separate from the SIP completeness review and uses different criteria. The guidance states that, "[a]lthough the minimum criteria for adequacy allow EPA to make a cursory review of the submitted control strategies, demonstrations, and motor vehicle budgets for conformity purposes, EPA recognizes that other elements must also be in the SIP for it to ultimately be approved" (p. 5). EPA has used the adequacy criteria contained in 40 CFR

93.118(e)(4) to determine whether the MVEBs are adequate. SIP completeness determinations are made separately from adequacy determinations and are governed by 40 CFR 51.103 and part 51, App. V.

EPA's SIP approval process requires a more detailed examination of the 2001 Plan's control measures and technical analysis than the conformity adequacy process. However, the 2001 Plan does provide the information necessary for the preliminary assessment of the measures and attainment analysis that is required for the adequacy determination. The 2001 Plan does include supporting documentation. In some areas mentioned by the commenters (e.g., relating to CCOS data), EPA does not believe that the data are fully available at this time nor are they germane either to the adequacy of the budget or to the attainment demonstration in the 2001 Plan.

Comment: A commenter provided extensive comments on the inventory's inaccuracies: flare emissions are underestimated; leaking valve emissions are under-reported; PRV liftings are underestimated; poor enforcement of existing regulations mean additional emissions, power generating emissions are increasing. The commenter stated that this represents a pattern and practice of ignoring evidence indicating inventory underestimation by the District, which means a need for EPA to provide a detailed, methodological reassessment of the entire inventory before it approve any technically justifiable MVEB based on that inventory.

Response: CAA section 172(c)(3) requires nonattainment plans to include a comprehensive, accurate and current inventory of actual emissions from all sources. The purpose of this inventory is to provide a benchmark for attainment planning, and it is often referred to as a baseline inventory.

EPA will determine whether or not the 2001 Plan's emissions inventory is fully approvable during rulemaking on the SIP submission. Preliminarily and for purposes of the MVEB adequacy process, EPA believes that the 2000 baseline emissions inventory contained in section 3 of the 2000 Plan satisfies the requirements of CAA section 172(c)(3). It is a seasonal inventory (typical summer day) representing emissions when ozone levels are at their highest. It is based on actual emissions in 2000 and addresses the full spectrum of stationary, mobile and miscellaneous sources of VOC and NOx in the Bay Area. The inventory appears to contain the most accurate and current information available, as it employs the Bay Area-EMFAC 2000 model (the most current model available for use in the Bay Area), it reflects additional emissions resulting from changes in the energy industry; and it incorporates newly calculated flare emissions. The inventory also takes into account growth in sources as well as effectiveness of regulations adopted as of December 31, 2000.

Comment: The 2001 Plan contains no vehicle miles traveled (VMT) or vehicle trip data, even though these issues have been hotly contested in the technical subcommittees that led to the 2001 Plan's adoption, nor does the 2001 Plan quantify emission reductions from the State's mobile source control measures and from proposed TCMs.

Response: The 2001 Plan indicates that Bay Area VMT estimates for calendar year 2000 are

based on the ARB VMT estimation methodology using mileage accrual rates derived from Smog Check odometer data and Department of Motor Vehicle vehicle populations. ARB's VMT methodology results in VMT estimates about 22 percent higher than Metropolitan Transportation Commission (MTC) estimates and are similar to estimates developed by Caltrans. This methodology resulted in total VMT for the year 2000 of 159,642,000 miles. The VMT by county is displayed, along with other statistics, in Table 2 of the 2001 Plan. These data were combined with growth rates provided by MTC to estimate VMT for the year 2006. VMT totals for 2006 by county are show in the table below, which has been available on ARB's website for the 2001 Plan (http://arbis.arb.ca.gov/sip/basip01/bay_area_2006_activity_data-on-road.pdf) since 12/7/01. At the same site are discussions of how the ARB model's light-duty automobile weekday activity estimates were developed, and how model-year specific trips per day are distributed among 24-hour time periods.

Total On-Road Vehicle Miles Traveled (VMT) estimates by county (Calendar Year [CY] 2006)

Alameda	35,205,000
Contra Costa	26,701,000
Marin	7,197,000
Napa	3,443,000
San Francisco	13,129,000
San Mateo	22,835,000
Santa Clara	47,336,000
Solano	7,403,000
Sonoma	10,215,000
Total Air Basin	173,464,000

Section 9.0 of the EMFAC2000 Technical Support Document (TSD) identifies which of the State's recently adopted regulations are incorporated in SF Bay Area-EMFAC2000. The State has made the TSD available to the public. The model includes emission reduction benefits from the following regulations, which were adopted since the completion of ARB's previous motor vehicle emission model, MVEI7G:

- Supplemental Federal Test Procedure
- Low Emission Vehicle (LEV) II
- Near Zero Evaporative Standards
- New On-Road Motorcycle Standards
- Off-Cycle Nitrogen Oxide (NOx) Mitigation
- New Exhaust Emissions Standards for Urban Transit Buses

In addition to the controls listed above, SF Bay Area-EMFAC2000 also reflects controls adopted between the development of the MVEI7F and MVEI7G models. Again, the ARB has made available this information to the public. Finally, the 2001 Plan includes enforceable commitments by ARB and the co-lead agencies (BAAQMD, MTC, and the Association of Bay Area Governments) to reduce volatile organic compound (VOC) emissions by 4 tpd from improvements to the smog check program (p. 40), and to reduce NOx emissions by 0.7 tpd and

VOC emissions by 0.5 tpd from 5 TCMs (pp. 29-30 and 38-39). Thus, the SIP quantifies the emission reductions from mobile source measures and TCMs.

Comment: Commenters argue that the SIP submittal is not complete as defined under 40 CFR 51.112. In order to demonstrate that its control strategy is adequate, the 2001 Plan should include, "a description of dispersion models used to project air quality and evaluate control strategies," and "a summary of the computations, assumptions, and judgements used to determine the degree of emissions . . . that will result from the implementation of control strategies."

Response: Although the commenter refers to the SIP submission as not being "complete" because it allegedly does not comply with 40 CFR 51.112, that regulation does not address completeness (which is addressed in 40 CFR 51.103 and part 51, App. V), but rather the components of a modeling demonstration. These criteria will be fully reviewed in determining whether to approve the SIP submission. As provided elsewhere, EPA is not fully reviewing the submission for approvability at this time and need not do so prior to determining that the budget is adequate. EPA preliminarily concludes for purposes of this adequacy determination that the submission includes all data required by 51.112 to support a modeling demonstration.

Comment: Commenters contend that the attainment assessment fails to demonstrate attainment. This was specifically cited by EPA as one basis for EPA's disapproval of the 1999 SIP and its MVEB. 66 Fed. Reg. 48341/2. No new information that overcomes the problems that were known to be associated with the 1999 SIP MVEB and attainment assessment has been identified; indeed, new information concerning the adequacy of the attainment assessment has exposed the shortfall in required emissions reductions and the entire 2001 Plan was required to rely upon a flimsy weight of evidence justification to support the District's contention that the 2001 Plan would actually provide for attainment. Under the circumstances, EPA is no more justified in relying on the attainment assessment to provide assurances of future attainment than it was in considering the 1999 SIP submittal.

Response: The plan submittal contains simplified modeling assessments, using the relevant available data, which is admittedly limited in the period before the CCOS field study can be employed in a more sophisticated Urban Airshed Modeling (UAM) analysis.[2] The limitations of

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[2] EPA modeling guidance provides that states may rely on a modeled attainment demonstration supplemented with additional evidence to demonstrate attainment. The modeling analysis for the Bay Area is governed by 40 CFR 51, Appendix W (6.0 Models of Ozone, Carbon Monoxide and Nitrogen Dioxide), which reads 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

the existing modeling assessment are a direct result of sparse input data, and these limitations are acknowledged in this plan. The State has made enforceable commitments to submit a SIP revision by 4/15/04 using the CCOS to reassess attainment needs, and to adopt any additional measures needed to provide for attainment by the deadline. For purposes of determining the adequacy of the transportation budget, EPA relies on the information provided in the plan relating to the calculation of the existing attainment target, the demonstration that specified levels of motor vehicle emissions and non-motor vehicle emissions are sufficient to meet this target and comport with the effect of adopted and committed controls on baseline emissions, and the commitment to conduct and submit an enhanced modeling exercise and plan update by a specified date.

The attainment demonstration in section 4 of the 2001 Plan contains two modeled analyses (an updated 1995 ozone isopleth analysis and a 2000 ozone isopleth analysis), a rollback analysis, and supplemental emissions and ozone trends information. EPA's evaluation of the attainment demonstration is based on the modeled 2000 ozone isopleth analysis and the supplemental trends information. The results of the rollback method are not being considered because the analysis is empirically/mathematically derived and is independent of model estimates or observed air quality and emissions changes (Section 14 of Appendix W).[3] EPA is also not considering the 1995 Ozone Isopleth Analysis because it is essentially the same analysis, but with updated emissions information, that EPA disapproved as part of the 1999 San Francisco Bay Area Ozone Attainment Plan that failed to provide for attainment.

The 2000 ozone isopleth diagram was generated from photochemical modeling of a September 1989 ozone episode. The isopleth contours were scaled to reflect the 2000 base year design value of 139 parts per billion (ppb). This update provides the basis for improving the attainment analysis in the 1999 plan. The Bay Area plotted on the isopleth diagram the baseline emissions for 2000 and the projected 2006 attainment year emissions, taking into consideration current growth and controls (local, State and Federal). According to the plotted isopleth diagram, the difference between the 2006 projected year emissions and the attainment level of emissions is a shortage of 39 tpd of VOC reductions and 1 tpd NOx reductions. However, the 2001 Plan includes new measures that are expected to reduce VOC emissions by 12.7 tpd and NOx emissions by .7 tpd. After taking these additional reductions into account, the analysis shows a shortfall in VOC reductions of approximately 26 tpd.

As with other predictive tools, there are inherent uncertainties associated with modeling and its results. For example, there are always uncertainties in some modeling inputs, such as the meteorological and emissions data bases for individual days and in the methodology used to assess the severity of an exceedance at individual sites. In addition to these inherent uncertainties, the

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data bases are insufficient for refined modeling.

[3] See discussion of simple rollback versus proportional rollback in 66 FR 650, January 3, 2001.

Bay Area identifies four separate concerns with the 2000 ozone isopleth analysis (2001 Plan, pp. 19-20) that increase the level of uncertainty. EPA's 1996 modeling guidance recognizes such modeling limitations and provides a means for considering other evidence to help assess whether attainment by the NAAQS is likely. The process by which this is done is called a weight of evidence (WOE) determination.

EPA believes the evidence included in the plan supports the conclusions derived from the 2000 isopleth analysis; i.e., more VOC reductions are needed for attainment. The precursor concentration trends analysis shows that ambient NOx levels are actually below the inventory estimates during a critical time period for ozone formation (6-9 a.m.) Due to the scavenging effect that NOx can have on ozone in the Bay Area, the difference in NOx levels suggests that additional VOC reductions are needed for attainment. In any case, the evidence suggest that, more likely than not, further VOC emissions reductions are needed for attainment.

Because of the technical uncertainties, the Bay Area's 2001 Plan contains a commitment to "conduct a mid-course review[4] by December 15, 2003 that will include an evaluation of the modeling from the CCOS and the latest technical information (inventory data, monitoring, etc.) to determine the level of emission reductions needed to attain the one-hour ozone standard. Should the mid-course review show that more, equal, or fewer reductions are necessary, the co-lead agencies and ARB commit to submit to U.S. EPA by April 15, 2004 a SIP revision that includes a revised reduction calculation and any additional control measures needed for attainment." (2001 Plan, Section 4, p. 22) EPA believes this commitment adequately addresses any technical uncertainty associated with the attainment demonstration.

Comment: One of the commenters filed a Public Records Act request with the BAAQMD to review the technical studies, memoranda, and calculations that the District used to develop the ozone sensitivity diagrams presented in figures 3 and 6 and revised figure 6. The commenter stated that the BAAQMD responded that such written documentation was not available. In the absence of reasonable documentation it is not possible for the public or other reviewers to ascertain the technical adequacy of the ozone attainment assessment. See Cal. Public Resources Code sections 21092 (a), (b); 14 Cal. Code Regs section 15072; Emmington v. Solano county Redevelopment Agency, 195 Cal.App.3d 491, 502-503 (1987) (emphasizing the importance of ensuring that the public can obtain and review documents on which agencies rely for

[4] A mid-course review (MCR) is a reassessment of modeling analyses and more recent monitored data to evaluate the progress of implementing the plan so that adjustments can be made to ensure the plan is successful. The MCR is intended to reflect the reality that modeling techniques and inputs are uncertain. The mid-course review also creates an opportunity to consider additional information closer to the attainment date. EPA believes that a commitment to perform a MCR is a critical element of any attainment demonstration that relies on uncertain modeling results and a WOE analysis. In order to allow for approval of the attainment demonstration SIP for the Bay Area, the 2001 Plan contains a commitment to perform a mid-course review at a midpoint prior to the attainment date.

environmental conclusions). Until such information is made available to the public by the agencies in sufficient time, there should be no approval of the 2001 Plan.

Response: The Bay Area employed a simplified assessment based on an analysis of a 1989 field study that was modified to take into account recent ambient concentrations. This simplified assessment, reflected in the isopleths, is based on UAM modeling. The CCOS currently under way will provide the data necessary for a more detailed modeling analysis. This information will be available in time for the Bay Area to use it in its mid-course review. For the purpose of the MVEB adequacy determination, however, we can preliminarily assess the modeling effort by relying on information previously available to the public. This information includes the following reports: "Photochemical Model Sensitivity Test of the Effects of NOx Controls for Non-Utility Boilers on Ambient Ozone Concentrations," Martien Umeda Demandel and Tom Parardi (BAAQMD TM92004, December 1992); "Evaluation of the 1995 and 1996 Ozone Seasons with a Summary of the 1997 Season in the San Francisco Bay Area (BAAQMD, October 1997); "Preliminary Evaluation of the 1995 Ozone Season in the San Francisco Bay Area" (BAAQMD, May 1996); and BAAQMD Emission Trends Reports (issued annually). These documents are available at the BAAQMD Library and some of them are also available at the BAAQMD website (www.baaqmd.gov).

Comment: The Commenter stated that the attainment demonstration is flawed, needs competent data and modeling, and support for the adequacy of isopleths, NOx v. VOC tradeoff, weight of evidence, and boundary conditions.

Response: The plan submittal contains a simplified modeling assessment, with an explanation and documentation of the modeling approach (2001 Plan, pp. 14-22), using the relevant available data, which is sparse in the period before the CCOS field study can be employed in a more sophisticated UAM analysis. The limitations of the existing modeling assessment are acknowledged in the plan, and are the direct result of the shortage of key input data pending completion of the new model. For purposes of determining the adequacy of the transportation budget, EPA believes that the modeling approaches employed in the 2001 Plan provide for a reasonable approximation of the attainment target, and selection of the highest attainment target from the analyses reduces the potential for underestimation of reduction requirements (2001 Plan, p. 22). The 2001 Plan also includes a demonstration that specified levels of motor vehicle emissions and non-motor vehicle emissions are sufficient to meet this target and are consistent with reductions from baseline emissions attributable to adopted and committed controls. Finally, the 2001 Plan includes a commitment to conduct and submit an enhanced modeling exercise and attainment demonstration update by a specified date.

Comment: Commenters contend that any EPA approval of the 2001 Plan should, and presumably will be conditional upon the proper and timely identification and adoption of additional control strategies to accomplish attainment by the 2006 final deadline. EPA's protocols for demonstrating attainment examine air quality monitoring data in the 3 years leading up to the attainment date. Thus, the emissions reductions and resulting improved air quality must be accomplished no later than spring 2004 to have "clean" air quality data in the

years 2004, 2005 and 2006. EPA must condition SIP approval upon a much more aggressive emissions reductions program, thereby affecting the MVEBs.

Response: In accordance with the Agency's interpretation of the CAA requirement that plans "provide for attainment" by the attainment date, the State needs to show that its SIP submittal includes sufficient emission reductions in effect by the start of the smog season in the attainment year (in this case, 2006) to ensure that no more than one exceedance at any monitor will occur in that year. See e.g., 66 FR 57160 (Nov. 14, 2001); 66 FR 586 (Jan. 3, 2001); 66 FR 54666 (Oct. 30, 2001).

In addition to committing to achieve the 26 tpd of VOC reductions needed for attainment based on the current attainment demonstration, the co-lead agencies and ARB committed to submit to EPA by April 15, 2004 a SIP revision that includes a revised reduction calculation and any additional control measures needed for attainment based on the mid-course review in 2003. (*See* 2001 Plan, pp. 22-24). Thus, the Bay Area has 2 years to develop and adopt the additional measures to be included in the 2004 submittal, and an additional 2 years to implement the measures fully to provide for attainment by the 2006 deadline. In view of the difficulty of developing additional control measures for an area where stringent measures are currently in place, EPA believes that this schedule and deadline are appropriate and adequate to enable the Bay Area to provide for expeditious attainment. As discussed, EPA also believes that the MVEBs are consistent with that demonstration.

Comment: Waiting to develop and adopt needed control regulations until after the updated 2004 SIP revision is approved could jeopardize attaining the standard by 2006. The Bay Area plan states (on page 23), "Reductions from the new measures in the Plan will not occur until the later years of the planning period because the time needed to develop and adopt measures, and the additional time needed for the regulatory community to install and operate the required controls." Thus, the identified motor vehicle emission budgets when considered together with all other emissions sources may not be consistent with applicable requirements for RFP or attainment, and should be deemed inadequate for transportation conformity purposes, as specified in 40 CFR 93.118(e)(4)(iv).

Response: EPA does not agree with the commenter, since the responsible agencies have committed to develop and adopt the needed control measures no later than the 2004 plan submittal date, and to revise the MVEBs in the same submittal if the new control measures affect the MVEBs. As discussed above, the CAA requirement that the plan "provide for attainment" requires that all reductions needed for attainment must be achieved by the start of the ozone season in the attainment deadline year; therefore, adoption of the measures in March 2004 is not too late to provide for attainment by 2006.

Comment: The 2001 Plan does not contain an acceptable demonstration of reasonable further progress since it does not include, in its VOC inventory projections (shown in Table 4 and Figure 8 of the 2001 Plan), the additional 26 tons per day of VOC reductions that will be necessary to achieve attainment by 2006. Without including enforceable measures that

demonstrate attainment by the applicable deadlines, the Agencies cannot claim that the 2001 Plan will achieve reasonable further progress towards attainment of air quality standards.

Response: Reasonable further progress (RFP) is defined by the CAA as "annual incremental reductions in emissions of the relevant air pollutant. . . as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment. . .by the applicable date." (CAA section 171(1).) Although the 2001 Plan contains a very brief discussion of RFP (three short paragraphs on p. 33) and tables of annual emissions reductions, the State's submission of the 2001 Plan does not indicate that the plan is being submitted to address the RFP requirements (ARB Adoption Resolution 01-27, p. 7). For this reason and because the 2001 Plan identifies MVEBs only for the attainment year (2006), EPA is interpreting the 2001 Plan as simply an attainment demonstration plan. EPA believes that the Agency can act on plans addressing attainment demonstrations in the absence of plan provisions meeting the RFP requirements. As discussed elsewhere, EPA concludes that the plan contains enforceable commitments sufficient to provide the emission reductions required for attainment by the 2006 deadline and consistent with the MVEBs.

Comment: It is illegal to provide credit toward an attainment demonstration for measures that have not been approved by EPA into the SIP.

Response: EPA is not providing credit for any measures that have not been approved into the SIP. Rather, EPA is approving the attainment demonstration based upon approved measures plus an enforceable commitment to adopt measures to fill the remaining shortfall. Further, EPA notes that the conformity rules specifically allow emission reduction credit to be taken for purposes of conformity determinations for any regulatory measures that have been either adopted by the enforcing jurisdiction, included in the applicable implementation plan, contained in a written commitment in the submitted implementation plan, or promulgated by EPA as a federal measure. See 40 CFR 93.122(a)(3). As part of the Agency's adequacy determination, EPA finds that the budget is consistent with attainment and that the 2001 Plan measures meet the requirements of the conformity rule. For the reasons stated above, EPA concludes that it is appropriate to allow credit in the 2001 Plan for the 26 tpd VOC shortfall commitment.

Comment: Commenters argue that the mobile source emissions reductions lack enforceability. The State has not submitted many of the rules and other mobile source control strategies to EPA for federal approval and thus federal enforceability. Thus the MVEB is not "consistent with and clearly related to" the mobile source control strategies, because the State could change its mobile source control strategies without EPA approval or public recourse and significantly change the date and magnitude of mobile source-based projected emissions reductions without revising the MVEB.

Response: With respect to the State's mobile source rules, the California fuels regulations and I/M regulations have been submitted and approved as part of the SIP following their adoption, while the State's motor vehicle and nonroad emissions regulations undergo a waiver process under the provisions of CAA Title II, which allow California an opportunity to set its own emissions

standards for motor vehicles in lieu of the Federal Motor Vehicle Control Program, and to set emissions standards for certain types of nonroad engines in addition to, or in lieu of, applicable Federal standards. If California changes its regulations it can lead to a loss of its current waiver from the federal standards issued under Title II of the Act. In the absence of waivers, the corresponding Federal mobile source standards would apply within California and would produce approximately equivalent emission reductions in the period of time extending to the Bay Area attainment year (2006). Therefore, EPA does not deem it necessary under CAA Section 110(a)(2)(A) for the California program to be included in the SIP for the Bay Area.

Moreover, California has made federally enforceable commitments to achieve specific emission reductions (e.g., in the 1994 ozone SIP for California) from particular mobile source control measures, including those listed on p. 26 of the 2001 Plan. The 2001 plan includes specific enforceable commitments (e.g., pp. 24 and 33) to achieve the target emission reductions for the new control measures described on pages 36-47 of the plan. The plan budget is, and must remain, consistent and clearly related to the State's motor vehicle regulations and other measures as reflected in the motor vehicle emissions modeling and the strategies in the plan.

Comment: Several commenters argue that, to the extent that the MVEBs rely on the attainment plan's assumptions, including the "black box" of reductions and committal measures, it cannot be approved by EPA because it is not supported by an enforceable and legitimate overall pollution control strategy in the 2001 Plan. The Agencies' promise to adopt control measures in the future is not a permissible substitute for a currently complete attainment demonstration or for adopted, currently enforceable control measures. EPA does not have statutory authority to allow these Agencies to defer submittal of control measures required for attainment, nor does EPA have authority to accept commitments to adopt control measures in the future in lieu of submission of actual, currently adopted enforceable measures.

Response: The 2001 Plan relies on reductions from existing measures, new measures and an enforceable commitment to adopt additional measures needed for attainment. According to the modeling analysis, reductions from new and existing measures are not sufficient to attain the 1-hour ozone standard. The estimated shortfall is approximately 26 tpd of VOC reductions. In July 2001, the co-lead agencies and CARB notified EPA that they were unable at this time to identify and therefore adopt additional programs that would reduce VOC emissions sufficient to fill the shortfall.

After reviewing measures included in other SIPs as well as measures recommended by the public, the agencies concluded that the Bay Area has already adopted, or is committing to adopt, essentially all VOC measures currently in place in other areas of the country. Furthermore, the agencies concluded that the Bay Area has regulated all VOC sources down to the major source limits that apply in the one extreme area in the country – the South Coast. The agencies indicated that adopting measures to fill the 26 tpd shortfall would require future study. Thus, the agencies made an enforceable commitment as part of their 2001 Plan to adopt and submit measures to fill this shortfall.

EPA believes – consistent with past practice – that the CAA allows approval of enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures.[5] Once EPA determines that circumstances warrant consideration of an enforceable commitment, EPA believes that three factors should be considered in determining whether to approve the enforceable commitment: (1) whether the commitment addresses a limited portion of the statutorily- required program; (2) whether the state is capable of fulfilling its commitment; and (3) whether the commitment is for a reasonable and appropriate period of time.

EPA's approach here of considering enforceable commitments that are limited in scope is not new. EPA has historically recognized that under certain circumstances, issuing full approval may be appropriate for a submission that consists, in part, of an enforceable commitment. *See* e.g., 62 FR 1150, 1187 (Jan. 8, 1997) (ozone attainment demonstration for the South Coast Air Basin and other California nonattainment areas); 65 FR 18903 (Apr. 10, 2000) (revisions to ozone attainment demonstration for the South Coast Air Basin); 63 FR 41326 (Aug. 3, 1998) (federal implementation plan for PM-10 for Phoenix); 48 FR 51472 (state implementation plan for New Jersey).

Nothing in the Act speaks directly to the approvability of enforceable commitments.[6] However, EPA believes that its interpretation is consistent with provisions of the CAA. For example, section 110(a)(2)(A) provides that each SIP "shall include enforceable emission limitations and other control measures, means or techniques...as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirement of the Act." Section 172(c)(6) of the Act requires, as a rule generally applicable to nonattainment SIPs, that the SIP "include enforceable emission limitations and such other control measures, means or techniques . . . *as may be necessary or appropriate* to provide for attainment . . . by the

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[5] These commitments are enforceable by the EPA and citizens under, respectively, sections 113 and 304 of the CAA. In the past, EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments. See, e.g., American Lung Ass'n of N.J. v. Kean, 670 F. Supp.1285 (D.N.J. 1987), aff'd, 871 F.2d 319 (3rd Cir. 1989); NRDC, Inc. v. N.Y. State Dept. of Env. Cons., 668 F. Supp. 848 (S.D.N.Y.1987); Citizens for a Better Env't v. Deukmejian, 731 F. Supp. 1448, recon. granted in part, 746 F. Supp. 976 (N.D. Cal. 1990); Coalition for Clean Air v. South Coast Air Quality Mgt. Dist., No. CV 97 - 6916 - HLH, (C.D. Cal. Aug. 27, 1999). Further, if a state fails to meet its commitments, EPA could make a finding of failure to implement the SIP under CAA Section 179(a), which starts an 18-month period for the State to correct the nonimplementation before mandatory sanctions are imposed.

[6] Section 110(k)(4) 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. Rather than enforcing such commitments against the State, the Act provides that the conditional approval will convert to a disapproval if "the State fails to comply with such commitment."

applicable attainment date . . . " (Emphasis added.) The emphasized terms mean that enforceable emission limitations and other control measures do not necessarily need to generate reductions in the full amount needed to attain. Rather, the emissions limitations and other control measures may be supplemented with other SIP rules - for example, the enforceable commitments in the 2001 Plan - as long as the entire package of measures and rules provides for attainment.

Because EPA can approve a SIP based on enforceable commitments, EPA may also determine that an MVEB is adequate for a plan that contains enforceable commitments. EPA will address the approvability of the Bay Area commitments at such time as it proposes action on the 2001 Plan. For purposes of the MVEB adequacy determination, EPA concludes that these enforceable commitments to achieve the remaining reductions provide a basis for approval of the SIP submission. EPA further believes that the remaining emission reductions covered by the commitment (currently estimated to be 26 tpd of VOC) could be achieved by measures that would not change the level of motor vehicle emissions in the MVEBs (e.g., by stationary source controls, such as a VOC declining cap). Thus, EPA believes that the Bay Area can fill this shortfall with measures that will not affect any highway construction that could be allowed by the current budget. Even if the commitment is fulfilled by motor vehicle measures that lower the MVEBs, EPA believes that the area could still demonstrate attainment taking into account emissions associated with any highway projects allowed under the current budget. Moreover, the co-lead agencies and ARB have committed to revise the MVEBs if the specific measures selected affect the MVEBs (2001 Plan, p. 23).

Finally, the conformity rule has always provided for SIPs to be used for conformity purposes even where all measures are not fully adopted in enforceable form, provided there are written commitments to such measures. For example, 40 CFR 93.120(a) allows the budgets in a disapproved SIP to be used for conformity purposes if the disapproval is accompanied by a protective finding, i.e., if the SIP includes written commitments to adopt control measures sufficient to satisfy the emissions reductions requirements for attainment, even if the control measures are not already adopted in enforceable form. See 62 FR 43796, first column, for more details. Because the conformity rule clearly envisions that budgets can be used for conformity even if they are based on commitments rather than fully adopted and enforceable measures, EPA believes it is appropriate to find the budget in the Bay Area SIP adequate for conformity purposes.

Comment: Commenters assert that the "black box" type control strategy employed by the Bay Area is reserved by the Clean Air Act for nonattainment areas with "extreme" classifications. The CAA does not allow a nonattainment area with a moderate classification to use a "black box" as part of its emission control strategy. The EPA should remand the conformity budgets back to ARB for clarification of where the 26 tons per day of emissions reductions will occur. Rather than identifying and adopting sufficient emission reductions to accomplish attainment the District and ARB elected to defer further emission reductions into the future. This contradicts EPA's own responses to the public's comments on the 1999 SIP, where EPA stated that "[a]ny future attainment demonstration will have to include sufficient control measures to reduce updated projections of motor vehicle emissions, and could include innovative control strategies

as necessary to demonstrate attainment."

Response: For ozone extreme areas, CAA Section 182(e)(5) expressly provides for the use of long-term enforceable commitments which anticipate the development of new technology or control techniques. Under this provision, the commitments could extend for 10 or more years. However, EPA does not believe that this provision, which applies exclusively to extreme areas, is the only basis for approving enforceable commitments under the CAA. Rather, as explained above, EPA has a long history of accepting shorter term enforceable commitments where circumstances warrant the consideration of such commitments. Thus, the Bay Area did not submit, and EPA will not review, the commitment under CAA Section 182(e)(5), and EPA will review it under the more general provisions of the CAA that allow for the use of enforceable commitments in limited circumstances. As provided above, EPA believes that enforceable commitments for a limited portion of the emission reductions needed for attainment are appropriate under circumstances that warrant the use of such a commitment.

The great bulk of further emission reductions needed for attainment come from stringent regulations already fully adopted in regulatory form by the State or the Federal government. This is reflected in the Bay Area planning inventory, which incorporates future year emission reductions from all regulations adopted as of December 31, 2000. Table 4 of the 2001 Plan shows that these regulations will reduce on-road motor vehicle VOC emissions from 227.0 tpd in 2001 to 168.5 tpd in 2006, off-highway mobile source emissions from 67.3 tpd to 54.0 tpd, and consumer products emissions from 52.2 tpd to 46.4 tpd for the same period. These sharp reductions take into account substantial growth in population and activity levels. Fully adopted BAAQMD regulations contribute additional reductions in VOC emissions from industrial and commercial sources, whose emissions are reduced from 171.2 tpd in 2001 to 157.0 tpd in 2006. Enforceable BAAQMD commitments to adopt 7 new measures will deliver an additional 8.2 tpd of VOC emission reductions by 2006, and improvements to the smog check program will achieve 4 tpd of reductions by the attainment deadline.

EPA believes that the 2001 Plan does not conflict with EPA's position, quoted by the commenter, in response to a public comment on the 1999 Plan. The 2001 plan relies on a narrow commitment to achieve 26 tpd of VOC. This is a relatively small amount of the total reductions needed for attainment. This plan provision is appropriate since the State and the co-lead agencies have adopted (or enforceably committed in this plan to adopt) many strict controls, and the agencies need additional time to consider technologies that are still in the developmental stages. Therefore, EPA has determined that it is appropriate to consider an enforceable commitment for the remaining necessary reductions.

Comment: A number of commenters contend that the 2001 Plan does not provide for RACM because: 1) the 2001 Plan fails to include a specific measure that the commenter believed is RACM for the Bay Area; 2) the plan fails to provide adequate support for not including a measure as RACM; or 3) the plan fails to analyze a measure suggested in public comments as a potential RACM by either not addressing the measure at all or not correctly describing the suggested measure. Many of these commenters contend that these failures are most significant

for TCMs. One commenter also contends that because the plan does not provide for RACM, its attainment demonstration is not approvable.

Response: As we have noted before, a finding of adequacy is not a finding that the SIP submission is fully approvable. The adequacy review is a cursory review process that occurs before EPA undertakes the much more detailed and thorough evaluation necessary to support the approval or disapproval (through notice-and-comment rulemaking) of a SIP revision under CAA section 110(k)(3). It is a process that is focused on whether the MVEBs are part of an overall strategy that is consistent with the area's attainment and RFP needs and meets conformity's purpose of preventing new or worsened violations. As a result, EPA needs only to make a preliminary determination that the plan provides for RACM as required by CAA section 172(c)(1) before it can find MVEBs adequate for conformity purposes.

CAA Section 172(c)(1) requires nonattainment area plans to provide for the implementation of all RACM as expeditiously as practicable. EPA's principal guidance interpreting the Act's RACM requirement is found in the General Preamble at 57 FR 13498, 13560 (April 16, 1992). We interpret section 172(c)(1) to impose a duty on states to consider all available control measures (including those raised in public comments) and to adopt and implement such measures that are reasonably available for implementation in the particular nonattainment area. Under this interpretation, a state does not need to adopt measures that are technologically or economically infeasible for the area or would not contribute to expeditious attainment of the applicable standard in the area.[7]

Because of the short time period available for making an adequacy determination, EPA has here concentrated its initial review on determining whether the 2001 Plan's RACM analysis evaluates a broad and representative range of measures that address the principal emission sources in the area; whether it generally provides reasonable justifications for excluding measures identified as potential RACM; whether the State has addressed all categories of measures raised in public comment; and whether there is any substantive evidence that the State has failed to evaluate potential RACM that could contribute to more expeditious attainment.

The 2001 Plan includes an extensive analysis of potential stationary source and transportation control measures. See 2001 Plan, Appendix C. This analysis covers a broad range of potential RACM such as controls in the California Clean Air Plan, controls in place in the

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[7] In 1999, EPA reaffirmed its position on this topic in the memorandum, "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas," John S. Seitz, Director, Office of Air Quality Planning and Standards, dated November 30, 1999. In this memorandum, we state that in order to determine whether a state has adopted all RACM necessary for attainment and as expeditiously as practicable, the state will need to provide a justification as to why measures within the arena of potential reasonable measures have not been adopted. The justification would need to support that a measure was not reasonably available for that area.

South Coast, TCMs listed in CAA section 108(f), smart growth measures, and transportation pricing measures. It also includes measures suggested in public comments on the plan. When viewed in combination with the area's existing measures and strategies and those newly adopted for the plan, the RACM analysis includes measures for all the area's non-trivial sources of emissions.

For each identified potential RACM, the plan evaluates its technological and economic feasibility as well as (qualitatively or quantitatively) its potential to reduce emissions in the Bay Area prior to the attainment date. For each measure evaluated, the plan provides for the adoption of the measure, the inclusion of the measure as a further study measure, or a justification for not including the measure in the plan.

Based on its initial evaluation, EPA preliminarily concludes that the 2001 Plan presents a sound RACM analysis. It generally provides a reasonable and adequately supported justification for rejecting an identified measure as not being RACM. In regards to further study measures, EPA agrees that establishing future study measures is an appropriate way to move forward on measures that lack sufficient information to support a definitive RACM determination at this time. While a number of commenters claimed that the plan did not address or incorrectly characterized a measure suggested during the public comments process on the plan, we found no persuasive evidence that significant unique measures (as opposed to variations of those that were evaluated) that are reasonable and would likely result in more expeditious attainment were excluded.[8]

Once EPA has completed the adequacy process, it will then begin the detailed and thorough evaluation of the plan necessary before it can act on the plan under CAA section 110(k)(3). During that evaluation, it will consider and address in more detail the specific concerns raised by commenters on aspects of the 2001 Plan's RACM analysis.

Comment: The Bay Area must be held accountable to the same smog check requirements as apply in the San Joaquin Valley. Smog Check II is a reasonably available control measure, and implementation of this measure is necessary for the Bay Area to demonstrate reasonable progress toward attainment. Since the control measure is not in the 2001 Plan, the budgets are

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[8] As with the RACM requirement, our adequacy criteria do not require that EPA definitively conclude that the MVEBs provide for attainment as expeditiously as practicable. In order for the budgets to be adequate for conformity purposes, EPA must simply conclude that the SIP submission appears to provide for timely attainment, and could meet this test where the SIP provides for attainment by the applicable attainment date. The cursory adequacy review does not provide an opportunity for us to review and consider all possible measures that could have been adopted to achieve attainment more expeditiously. For the purposes of the adequacy review, which is less extensive than our approval/disapproval action, we consider that the MVEBs do not delay timely attainment as long as they are consistent with a control strategy that provides for attainment by the applicable attainment date, and the SIP appears to have considered all categories of potential RACM.

therefore too high to meet the 40 CFR 93.118(e)(4)(iv) requirement that the MVEBs, when considered together with all other emission sources, be consistent with reasonable further progress.

Response: The CAA does not require that the Bay Area 2001 Plan include the enhanced motor vehicle inspection and maintenance program that is mandated for urbanized areas within the San Joaquin Valley under CAA Section 182(c)(3) because the Bay Area is not a serious nonattainment area. EPA has preliminarily concluded that the 2001 Plan adequately addresses the RACM requirement by including, among other measures, MS-1 (Improved Motor Vehicle Inspection and Maintenance Program: Liquid Leak Inspection and Improved Evaporative System Test), which is scheduled for adoption in 2002 and implementation in 2002-3, and which must achieve 4 tpd VOC emission reduction by 2006. Moreover, the 2001 Plan is an attainment plan and the MVEBs in the 2001 Plan are only for the attainment year (2006). Thus, the emissions reduction schedule for interim years need not be addressed for purposes of determining the budget adequacy. EPA will act on the RFP requirement for the Bay Area in the future.

Comment: The 2001 Plan contains a series of five "new" transportation control measures (TCMs). These TCMs are projected to generate cumulative emissions reductions of 0.5 tpd VOC and 0.7 tpd NOx between 2000 and 2006 (Table 8, page 29) but no emissions reductions are attributed to any individual TCM. As such, there is no precise quantification of the benefits of these TCMs, if any.

Response: Since the emission reductions associated with most TCMs (e.g. demand management TCMs) are interdependent, it is not unusual for the impacts of TCMs to be assessed on a cumulative basis. This is particularly the case when, as here, the total emission reductions from the measures are small. As discussed in later comments and responses, the 2001 Plan provides an enforceable commitment to implement the TCMs to reduce VOC by emissions by 0.5 tpd and NOx emissions by 0.7 tpd between 2000 and 2006. The effectiveness of the TCMs in meeting these commitments will be documented in future conformity determinations and in the mid-course review.

Comment: TCMs A and B appear entirely conditional upon state and matching funding, respectively, and thus commenters anticipate that MTC will contend that they are unenforceable. TCM C is conditional upon certain CEQA parameters, making the TCM potentially conditional, speculative and creating potential problems with enforcement.

Response: The responsible agencies (including MTC) have enforceably committed to achieve the emission reduction targets through adoption and implementation of the controls, and the plan includes commitments for specific initial actions by MTC (see 2001 Plan, Table 8 and pp. 38-39). As is typical of TCMs, accomplishment of the associated emission reductions will require that the agencies secure whatever funding is necessary for implementation on a continuing basis in annual and semi-annual funding decision making. Once approved into the SIP, the commitments and the measures will be federally enforceable and not contingent upon securing funding. As mentioned above, the effectiveness of the TCMs in meeting these commitments will be tracked and

documented in future conformity determinations and in the mid-course review. In acting on the approvability of the SIP submission, EPA will consider fully the extent to which funding assurances for the TCMs are sufficient to meet the requirements of CAA Section 110(a)(2)(e).

Comment: TCM E is a form of double counting, since it seeks to receive emissions reductions credit for emissions that the MTC travel model does not include in the model in the first place.

Response: The 2001 Plan indicates that the emissions reductions associated with TCM E are not accounted in the baseline and that the reductions "represent new credits" (p. 39). It is EPA's understanding that the projected baseline emissions inventory includes emissions from auto trips to the airport, but these emissions are not specifically disaggregated in the MTC travel model. TCM E would reduce these auto trips through operation of the BART mass transit system extension to the San Francisco International Airport. EPA agrees that credits from the measure would be invalid if reductions from the TCM are already factored into the projected baseline emissions inventory or if the automobile emissions affected by the TCM are part of this baseline inventory. In acting on the SIP submission, EPA will examine the 2001 Plan assumptions in determining whether TCM E is approvable. However, for purposes of the MVEB adequacy determination, EPA believes that the small reductions assigned to the 5 TCMs could be achieved without any credit from TCM E.

Comment: The 2001 Plan and its TCM RACM analysis fail to address the recent order finding that MTC has failed to implement TCM 2 from the 1982 SIP in the Bayview Hunters Point case. This clearly evidences the 2001 Plan's incompleteness - when a prior SIP commitment remains unfulfilled yet there is no treatment of the emissions inventory ramifications nor the actions necessary to remedy that failure.

Response: The budgets in the 2001 Plan reflect MTC and ARB's best professional estimates of projected motor vehicle emissions for the 2006 attainment year, taking into account an increase in transit ridership, premised upon MTC's prior interpretation of the requirements of TCM2. Should the increase in transit ridership actually be greater than projected as a result of the recent Court decision on TCM2 implementation, then presumably more emission reductions would be achieved than are now calculated to be required for attainment. It is premature at this time to require that the 2001 Plan and budget address the various possible motor vehicle emission impacts of TCM2 implementation in light of the fact that the Court did not provide a remedy for past implementation failures but rather referred the parties to a magistrate to develop one. EPA will review the adequacy of the plan with respect to TCM RACM requirements as part of plan approvability. Further, once an implementation remedy is in place, it will have to be taken into account in future conformity determinations.

Comment: The MVEBs revise the Bay Area's SIP and are therefore subject to the Act's limiting criteria for SIP revisions. (The Administrator shall not approve a revision if it would interfere with attainment and RFP or any other applicable requirement. 42 U.S.C. section 7401(l)) The MVEBs interfere with attainment because they do not account for MTC's failure to implement TCM 2 requiring an increase in public transit ridership by 15% over 1983 levels. Because TCM

2 is an unachieved goal in the Bay Area's SIP, affecting the Bay Area's timely attainment of the CAA's standards, the MVEBs' failure to account for MTC's non-implementation of TCM 2 constitutes an illegal interference with attainment.

Response. EPA has preliminarily determined that the Bay Area plan demonstrates timely attainment and does not violate section 110(l) of the CAA. We are not at this time taking action on the submitted plan and are not revising TCM 2, which stays as it is in the SIP. Considering the emissions from TCM 2 as projected in the SIP, EPA is making a determination that the MVEBs in the Bay Area's ozone attainment plan are consistent with timely attainment and thus adequate for conformity purposes.

Comment: In light of the premature adoption of the 2001 RTP, EPA cannot ignore the features of the 2001 RTP in its analysis. Specifically, EPA must consider MTC's failure to implement TCM #2, which would directly reduce the MVEBs, and the VMT/VT growth projections, which enable generous growth in both VMT and vehicle trips. These two factors demonstrate that MTC has failed in its essential mission of developing a RTP that contributes to the necessary emissions reductions to accomplish expeditious attainment.

Response: Since CARB did not include any impacts from TCM2 in their estimates of VMT, VMT/VT are accurately estimated in the baseline and future. This is appropriate, since the State does not yet know if and how TCM2 will actually be implemented. Any new VMT/VT reductions from TCM2 implementation, not currently used by the 2001 Plan to reach attainment, will provide additional reductions for the Bay Area. Updated estimates of VMT/VT will be used in the mid-course update to the SIP when we have more current information on how the area will meet the TCM2 commitment. EPA is not reviewing the RTP but rather the submitted plan, and the submitted plan makes appropriate predictions of future VMT based on the current RTP.

Comment: EPA transport guidance clearly states that an upwind area must include those measures that are necessary for a downwind area to attain expeditiously. Smog Check II should therefore be implemented in the Bay Area in time to assist downwind air basins to attain the federal one-hour ozone standard by their 2005 attainment date. Smog Check II would cost-effectively help mitigate air pollutant transport from the Bay Area to the Sacramento Region.

Response: Under CAA Section 110(a)(2), States were required to submit SIPs addressing certain enumerated requirements. States generally submitted those SIPs in the 1970s and EPA approved them. Since that time, Congress has added additional statutory requirements such as requirements of section 172 which are the focus of this action. In reviewing whether a SIP meets the requirement for which it was submitted – here the requirement that the Bay Area demonstrate how it will attain the 1-hour ozone standard – EPA does not evaluate whether the SIP submission in conjunction with the approved SIP meets all other requirements of the Act. Thus, while EPA does interpret CAA section 110(a)(2)(A) to require States to address intrastate and interstate transport, EPA does not need to determine whether the State has regulated emissions from the Bay Area for purposes of transport in determining whether the submission provides for attainment in the Bay Area. To the extent that emissions from the Bay Area significantly contribute to nonattainment or

maintenance of the ozone standard in downwind areas, the State will need to address those contributing emissions in the context of an attainment demonstration for the downwind area.

Based on its air quality status the Bay Area is only required to have a basic inspection and maintenance program (I/M) program. The I/M program implemented in the Bay Area has all the features of California's enhanced Smog Check II program except for the test-only component, which is prohibited by state law, and dynamometer exhaust gas testing. The program is thus more stringent than a basic I/M program. The Bay Area plan identifies a 4.0 tons/day reduction in emissions in 2006 due to improvements to the I/M program, namely the liquid leak inspection, which has already been implemented by the Bureau of Automotive Repair, and the required improved evaporative system check. The plan also includes a measure to further study potential improvements to the Smog Check program in the Bay Area to identify new elements that may be determined to be effective in reducing VOC emissions.

Comment: The conformity budget violates §§ 176(c)(1)(A) and (B) of the CAA because it will cause or contribute to violations , exceedences, and the severity of air pollution problems in the downwind areas. Therefore conformity emission budgets are not consistent with the plan requirements of the CAA. EPA transport guidance (64 FR 57, page 14443, 3/25/99) clearly states that an upwind area must include those measures that are necessary for a downwind area to attain expeditiously. EPA interprets CAA 107(a) and 110(a)(1) to require SIP revisions to address intrastate transport. See 9/1/94 Guidance Memo issued by Mary Nichols, e.g., under section 110(a)(2)(D)(i)(I) each state's SIP is to prohibit "consistent with the provisions of [title 1]," emissions that will "contribute significantly to nonattainment in ... any other state. The EPA interprets section 110(a)(2)(A) to incorporate the same requirement in the case of intrastate transport." EPA has developed specific guidance for NOx control measures in which it states that an area must include NOx measures that would benefit a downwind area even if there may be a disbenefit to the area implementing the control measure. The Bay Area 2001 Plan is incomplete and inadequate because it fails to mitigate the transport of pollutants from the Bay Area to the San Joaquin Valley and Sacramento air basins. The 1994 Sacramento Air Basin Attainment Plan for Ozone assumed that the Bay Area would be in compliance with the NAAQS in 2005, the attainment date for the Sacramento region. Instead, BAAQMD has submitted an attainment plan for 2006. The EPA cannot approve a SIP revision that interferes with the attainment deadline of the Sacramento region. See CAA §110(l).

Response: Compliance with the Agency's effectuating regulations constitutes compliance with the CAA. Thus, if the MVEBs satisfy the applicable conformity regulations (40 CFR 93.118), EPA concludes that it meets the general mandate of the Act with respect to conformity. *See 1000 Friends of Maryland v. Browner,* 265 F.3d 216 (4th Cir. 2001)*; Sierra Club v. Atlanta Regional Commission*, No. 1:01-CV-0428-BBM, (N.D. Ga. Jan. 18, 2002). There is no independent obligation for attainment demonstrations to meet 176(c)(1). That provision applies only to conformity determinations by federal agencies, not to EPA approval of attainment demonstrations.

In the context of our action on the attainment demonstration, we will consider whether the submittal complies with section 110(l). For the purposes of adequacy determinations EPA only

needs to consider whether the plan submission is consistent with attainment for the area for which it was submitted. 40 CFR 93.118(e)(4)(iv).

C. State and Local Adoption Process

Comment: Commenters note that there is pending litigation in the San Francisco Superior Court, alleging that the plan was illegally approved by the BAAQMD in violation of the California Environmental Quality Act, and by ABAG and MTC in violation of the California Health and Safety Code (CHSC). Commenters also claim that the ARB approved the plan in violation of the CHSC, the California Administrative Procedures Act, and California's Brown Act . Until the claims are resolved, EPA should withhold approval on any aspect of the attainment plan because, as a revision to the SIP, the plan does not pass muster under the CAA if its approval was improper under California law. SIP completeness requires evidence that the State followed all State procedural requirements, which has been challenged. Finally, approval of any part of the Attainment Plan, including the MVEBs, interferes with "applicable requirements" of the CAA because the Act does not allow adoption of an Attainment Plan that cannot be carried out under state law.

Response: The pendency of claims against State and local agencies for alleged violations of State law does not preclude EPA from accepting the submitted plan and budget. Moreover, the State has certified that the public involvement and adoption process for this plan satisfy applicable Federal requirements for SIPs, and EPA has preliminarily concluded that the plan adoption did, in fact, comply with applicable CAA provisions.

D. EMFAC

Comment: The commenter does not see the need for a commitment to defer the submission of future emission factor (EF) models by the ARB. EF models should be submitted to U.S. EPA for approval through the normal course of EF model and air quality plan development. Santa Barbara used EMFAC 2001 because it was the most recent version of the motor vehicle model available before the conclusion of their planning process and had been formally approved by the ARB. The commenter states that this model is a substantial improvement over past models and objects to any delay in the processing of the Santa Barbara 2001 plan based on an intention to delay the submittal of EMFAC 2001. Given the improvements in EMFAC 2001 over EMFAC 2000 it would seem prudent to accelerate the introductions of EMFAC 2001 rather than delay it.

Response: ARB is currently in the process of finalizing EMFAC2001 or its successor for use in the development of SIPs and conformity determinations across California. We understand that ARB does not currently plan to submit EMFAC2001 or its successor for approval until early 2003. (See 67 FR1465). EPA is not requiring ARB to wait until that time, rather we just recognize that is their schedule. This will allow ARB time to refine and perform additional quality control on EMFAC2001 before it is released for statewide use. Once these refinements are incorporated and

EMFAC2001 or its successor is released, ARB and the BAAQMD have committed to update the budgets as part of the mid-course review SIP revision in April 2004. We understand that the next EMFAC model will correct the technical limitations of the EMFAC2000 model. We will work with ARB, the local air districts and Metropolitan Planning Agencies to identify the most effective emission factor modeling approach for each plan that has been adopted or that is currently in development.

Comment: Santa Barbara has worked long and hard to achieve the federal ozone standard and does not wish to see redesignation deferred due to unnecessary administrative delays. The delay implied by the 11/30/01 letter from ARB concerning the release of EMFAC 2001 could inappropriately subject Santa Barbara County to a plan revision and reclassification to severe non-attainment status (CAA 175A(d) and 181(b)(2)).

Response: Santa Barbara is commended for their work in effectively reducing ozone. The comment is not, however, germane to the Bay Area adequacy determination. We anticipate that the State will submit air quality data showing that ozone levels in Santa Barbara meet the standard, and that the State will request that EPA issue a finding that the area has attained the standard. Following a review of the air quality data, we anticipate making such a finding. Once such a finding is made, Santa Barbara would no longer be subject to severe area reclassification. EPA can make a finding of attainment separate from our analysis of the attainment or maintenance plan that Santa Barbara has submitted to ARB. Thus, EPA does not anticipate any adverse impact to Santa Barbara resulting from the timing of the release of EMFAC 2001.

Comment: The EMFAC policy fails because ARB states it does not intend to develop other SIPs using EMFAC 2000 yet EMFAC 2001 is not available for use in future California SIP submittals that are due. The San Joaquin Valley's Ozone Attainment Demonstration SIP and Ozone Rate of Progress (ROP) SIP for 2002 and 2005 are all due May 31, 2002 and have used EMFAC2000 for the past year for inventory and modeling work. If EPA continues the use of this proposed EMFAC policy with its use of EMFAC2000 limited only to the Bay Area, it is preventing the San Joaquin Valley from being able to submit either an attainment demonstration plan or a ROP plan in 2002. EPA must expand the use of EMFAC2000 model for use in SIP submittals that are due this year.

Response: As mentioned previously, we understand that ARB does not currently plan to submit EMFAC2001 or its successor for approval until early 2003 so that they can refine and perform additional quality control on it before it is released for statewide use. We also understand that the San Joaquin Valley Air Pollution Control District's pending submittal will likely not include an attainment demonstration because the District has publically acknowledged that the area can not demonstrate attainment by 2005 and, as a result, is considering a voluntary bump-up to extreme. If the District chooses this option, they will likely not need to develop an attainment demonstration using the EMFAC model in 2002. However, we understand the need to resolve the EMFAC issue so that the area can develop and submit ROP plans for 2002 and 2005. We will work with ARB and the San Joaquin Valley District to resolve the EMFAC issue such that it will enable them to meet the CAA requirements and deadlines for submittal of the ROP plans in a fair and equitable

manner. Finally, we note that the comment is not germane to the Bay Area adequacy determination.

Comment: Notice-and-comment rulemaking is required for approval of EMFAC model.

Response: EPA does not complete notice-and-comment rulemaking procedures at the federal level when new emission factor models are available for use in state implementation plan development or conformity determinations. EMFAC2000 was developed in a 3-year process subject to public review and comment at the state level during three workshops held in 1998, 1999 and 2000. During that comment period, ARB received comments from the public and affected agencies that were incorporated into the development of EMFAC2000. EPA's conformity rule, which has been final since 1993, makes clear at 40 CFR 93.111(b) that EPA will announce the availability of new models through Federal Register notification without notice-and-comment rulemaking.

Comment: While the 2001 Plan reports specific numbers for the MVEBs, the various known errors and flaws in EMFAC2000 preclude any certainty or precision to that quantification. ARB has prepared, but is withholding a subsequent version of the EMFAC model, EMFAC2001 which was employed in the development of the Santa Barbara County Maintenance Plan. EMFAC2001 allows a more robust quantification of MVEBs through more refined inputs. Even though EMFAC2000 could have been corrected to reflect the most recent data and more accurate modeling protocols, it apparently does not.

Response: Plans are based on the information available at the time they are developed. Once a plan has been submitted, EPA does not generally require plan elements such as emissions inventories and attainment demonstrations to be revisited and updated in response to new information. There will always be situations when new, better information is on the horizon. EMFAC2000 was the latest emission factor model available for use when the Bay Area 2001 Plan was developed. In general, the quality of technical data and analyses techniques will continually improve, but for the Bay Area's 2001 Plan development process, it did not make sense to wait for EMFAC2001 to begin work, particularly in light of Bay Area's commitment to update its SIP with EMFAC2001 as part of its mid-course review in April 2004. Although EPA recognizes the technical limitations in EMFAC2000, EPA believes EMFAC2000 was the best model available when Bay Area created its plan and that it was a vast improvement over prior models.

The emission factors used in the SF Bay Area-EMFAC2000 emission factor model represent a major improvement over emission factors used in older models such as MVEI7F and MVEI7G. SF Bay Area-EMFAC 2000 exhaust hydrocarbon emission rates are significantly higher than the emission rates included in the older models. The increase in exhaust hydrocarbon rates is mainly a result of the following changes:

- More accurately reflecting real-world driving by using the Unified Cycle (UC) driving cycle rather than the Federal Test Procedure (FTP);
- Using new speed adjustment factors to better reflect how emissions change as average driving speeds change;

- Representing 45 model years rather than only 35;
- Updates to the low emission vehicle and zero emission vehicle (ZEV) emissions and implementation schedules; and
- Incorporating new vehicle test data.

Evaporative hydrocarbon emission rates in SF Bay Area-EMFAC 2000 are also significantly higher than the older models' emission rates. The most important changes causing the increase in evaporative hydrocarbon emission rates include:

- Higher hot soak emission rates, especially for older catalyst-equipped vehicles;
- Higher running loss emission rates, based on new data; and
- Including emissions for vehicles with liquid fuel leaks.

Emission rates for NOx are also significantly higher in the SF Bay Area-EMFAC2000 than in the older models. The increased estimates of NOx emission rates are primarily due to the following changes:

- Inclusion of "Heavy-duty off-cycle NOx" from dynamometer testing, rather than engine tests from the older emission models (i.e., NOx emissions that were not represented in the certification driving cycle); and
- Incorporation of new vehicle test data for catalyst equipped passenger cars and light trucks.

Even with these improvements, we believe that EMFAC2001 or its successor will contain additional refinements and information addressing technical limitations in EMFAC2000 that the Bay Area should incorporate into the ozone plan. Therefore, once EMFAC2001 is approved for California, the Bay Area must incorporate it into a revised attainment demonstration in the April 2004 mid-course review. EPA understands that California will not be submitting EMFAC2001 or its successor model for EPA approval until early 2003, so that ARB's submission of the mid-course review using the newly available model will occur within one year of EPA's approval of EMFAC2001 or a successor model. (67 FR 1464)

Comment: EMFAC2000 has known flaws that misstate the emissions inventory. The State has yet to provide a detailed accounting of the exact basis and foundation of EMFAC2000 and its inputs, many of which have been the subject of considerable debate and discussion among agency staff and the public. For example, commenters question whether the speed bucketing is correct – the previous versions of the travel model and EMFAC capped average speeds at 65 mph. Actual highway speeds typically exceed this rate, causing substantially greater "real world" emissions than predicted by the model. EMFAC2000 fails to include or reflect visitor travel (from vehicles not registered in the Bay Area) and relies on crude estimates of commercial travel, which have in the past been grossly underestimated by MTC's travel model. Based on the information that was submitted, it appears that EMFAC2000 numbers have considerable deviations from the actual emissions inventory, and thus fail to meet the 93.118(e)(4)(v) criteria. ARB has adopted revised regulations that make the basic emissions rates in EMFAC2000 obsolete, affecting urban busses, heavy duty diesel and gas trucks, ZEVs, and the drastic weakening of the Enhanced Inspection

and Maintenance program that was integrated into EMFAC2000. EMFAC2000 misstates diurnal emissions flux, hot soak emissions, starting emissions, heavy duty gas vehicle emissions rates, LEV-II/Tier II effects, Mexican vehicle emissions rates and chronic unregistered vehicles. Each such change has statistically or empirically significant changes to the emissions inventory upon which the MVEB is based. Correcting these errors dramatically affects the MVEB.

Response: At the time that EMFAC2000 was developed by the State, ARB was in the initial stages of developing annual updates to the EMFAC model. As discussed in an earlier response, EMFAC2000 contains many significant model improvements and represents a major model update for California. When EMFAC2000 was completed, ARB began work on a 'scenario generator' for the next EMFAC update. The scenario generator, which allows air districts and MPOs to update some of the data (e.g. VMT data) hard coded into EMFAC2000, is the major significant feature in EMFAC2001 that separates it from EMFAC2000. After developing the scenario generator, ARB began updating the data within EMFAC (e.g. county specific vehicle registration data) to refine the overall emission factor estimates. In the course of making these refinements to EMFAC, ARB discovered the 'coding error' and corrected the error. Since most of these changes were incorporated into EMFAC after the 2001 Plan development process was well underway, ARB decided to move forward with the conservative emission estimates[9] used in the Bay Area 2001 Plan with the intention to update the SIP after EMFAC2001 is completed. Since the Bay Area used the best model available at the time and has committed to update its SIP once the new model is available, EPA believes it is appropriate to find the budgets based on EMFAC2000 adequate at this time.

Both SF Bay Area-EMFAC2000 and the current draft version of EMFAC2001 use speed correction factors that represent emissions at various average speeds. For example, the speed correction factor for the 65 miles per hour speed bin represents the emissions for a trip that is traveled at an average speed of 65 mph. Thus, this correction factor represents the effects of travel at speeds both lower and higher than 65 mph. The ARB typically obtains the percent of total VMT by 5 mph speed bin (speed distributions) from the local transportation planning agency. In the case of the Bay Area, this data was obtained from the MTC BAYCAST travel demand model, which represents the best local data available. Similar to other travel demand models throughout the state, BAYCAST only produces speed distributions based on average link speed up to the 65 mph speed bin. The speed distributions obtained from MTC for use in SF Bay Area EMFAC2000

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[9] Emission factors from EMFAC2000 are significantly higher than the emission rates included in older models (EMFAC7F and EMFAC7G). Also a coding error in the algorithm for diurnal evaporative emissions results in an over estimation of about 3.6% of the on-road mobile source portion of the inventory. In comparison, the emission rates in EMFAC2001 were updated using new data, correction of errors, and inclusion of new regulations. These changes resulted in lower VOC and NOx emissions. In addition, ARB performed a check of the EMFAC2000 results by running the data through the EMFAC2001 model. They found that the Bay Area shortfall was reduced from 26 to 10 tons with EMFAC2001. Thus, more controls were needed to show attainment with EMFAC2000.

for the 2001 Plan are available on the ARB website: http://www.arb.ca.gov/sip/basip01.htm

The new controls adopted since SF Bay Area-EMFAC 2000 was developed are reflected in both the 2001 Plan's emissions inventory and MVEBs through the use of off-model control factors. The standard approach for reflecting the latest information on the effectiveness of controls is through off-model adjustments. While the new programs are reflected, it is important to note that the emissions impacts are extremely small in the Bay Area's attainment year of 2006 since these programs depend on fleet turnover to accumulate substantial benefits.

Regarding the Enhanced Inspection and Maintenance (I/M) Program, the motor vehicle emission model assumptions about this program are not relevant for the 2001 Plan or its emissions budgets since the Enhanced I/M program is not applicable in the Bay Area. Improvements to the Enhanced I/M program and its characterization in the emission models do not affect the Basic I/M program that is being implemented in the Bay Area.

Comment: EPA's reliance on the EMFAC2000 emissions factors model is arbitrary and capricious. Commenters remain at a loss to understand the precise inputs that are reflected in the Bay Area version of EMFAC2000 that is utilized for this SIP action and MVEBs. ARB's own information indicates that EMFAC2000 has numerous technical flaws and errors. EPA's Notice of Availability" of EMFAC2000 and the December 7, 2001 Larson memo also acknowledged that technical errors and limitations exist for EMFAC2000, although EPA fails to identify what those technical limitations and errors actually are, and whether the errors identified in the May 2001 EMFAC2001 workshop have been in part corrected in the Bay Area custom EMFAC2000 version submitted as part of (or in accompaniment with) the 2001 Plan. While justification may exist for EPA to employ the EMFAC2000 model, it is not clear what that justification is, what the problems are, whether they may or may not be corrected or compensated for, and generally an explanation of why the use of a known flawed methodology is not arbitrary. See Appalachian Power Co. v. EPA, 251 F. 3d 1026, 1034-35 (D.C. Cir. 2001) ("this court cannot excuse the EPA's reliance on a methodology that generates apparently arbitrary results where, as here, the agency has failed to justify its choice"). In the absence of a "reasoned explanation for its choice," id., 251 F. 3d at 1035, commenters and California Air Pollution Control Districts are hamstrung. While we could submit this comment on the MVEBs, the opportunity is not meaningful since we have no choice but to speculate as to the rationale and basis for EPA's action. As in Appalachian Power Co., id., the basis for budget calculations are not clear, and, just as the public is in the dark, the Courts lack a basis upon which to perform meaningful review. Commenters also complained that, while some information was publicly available regarding EMFAC2000, information on the SF-Bay Area EMFAC2000 was insufficient or provided after close of public comment opportunities.

Response: The credibility of the mobile source inventory, which is used as the basis for the MVEBs and is produced by the SF Bay Area-EMFAC2000, is best addressed in terms of how well it represents real world vehicle emissions.

SF Bay Area-EMFAC2000 relies heavily on empirical motor vehicle emission data to

develop the emission factors in the model. On-road surveillance and instrumented vehicle studies, as well as in-use vehicle dynamometer testing for both the light duty passenger and heavy duty truck fleets are conducted on an on-going basis. Correction factors for parameters such as vehicle speeds, ambient temperatures, fuel types, and starts are developed based on empirical data as well, contributing to an emission factor model based heavily on real-world vehicle emissions. In addition, SF Bay Area-EMFAC2000 relies on the most recent activity data (VMT and speed distributions) available during SIP development. More detailed information about the methods and data sources used in model development can be found in the technical support documentation for EMFAC2000.

The coding error in SF Bay Area-EMFAC2000 involves a miscoding in the algorithm for diurnal evaporative emissions for temperatures less than 70 degrees Fahrenheit. In the model's source code, an addition sign was used instead of a multiplication sign. This caused an overestimation of ROG diurnal evaporative emissions in the SF Bay Area-EMFAC2000. Although this error is contained in the SF Bay Area-EMFAC2000, it does not have a substantive impact on conformity with the MVEBs because the error will be consistently reproduced in each conformity analysis. The magnitude in tons of the diurnal evaporative emission coding error varies slightly with calendar year, but is about six tons. In terms of the impact on the inventory, for CY2006, the coding error accounts for an overestimation of the total ROG inventory of about 1.3 percent. This is an overestimation of about 3.6 percent of the on-road mobile source portion of the inventory. This technical issue will be fixed in the 2004 SIP revision and should not alter the focus of control strategies in the interim. The model over-predicts emissions and therefore, if the Bay Area can show attainment with this budget, they should be able to show attainment when the numbers are adjusted using EMFAC 2001.

The only difference between EMFAC2000 and the SF Bay Area-EMFAC2000 is the use of updated planning assumptions (VMT and VMT by speed) in SF Bay Area-EMFAC2000 to support the 2001 Plan. The 2001 Plan discusses the change in the source of the VMT estimates and provides the actual VMT estimates used to project the motor vehicle inventory in the plan. ARB also detailed the VMT inputs used to calculate the 2006 emissions and budget in a document entitled “SF Bay Area-EMFAC2000 2006 Activity Data” that is posted on ARB’s website at http://www.arb.ca.gov/sip/basip01.htm. Thus, full support for the SF Bay Area EMFAC2000 was in the record during the time of the adequacy comment period.

Table 1 details the changes that occurred between the officially released EMFAC2000 (version 2.02r) and the SF Bay Area-EMFAC2000. These changes included updating vehicle miles traveled (VMT) and the percentage of daily VMT broken down into five mile per hour speed bins (also referred to as VMT-speed distributions). Table 2 quantifies the relative contributions of these VMT and speed effects to the total inventory difference. These are summer ozone episodic inventories and use EMFAC’s subarea run option.

Table 1
VMT, Speed Distribution, and Emission Estimate Changes
EMFAC2000 vs. SF Bay Area-EMFAC2000 for the SF Bay Area Air Basin

CY 2006*	EMFAC2000	SF Bay Area-EMFAC2000	Difference	% Difference
VMT	127192	173464	46272	36%
ROG (tpd)	176.4	168.5	-7.9	-4%
NOX (tpd)	207.1	271.0	63.9	31%

*For calendar year (CY) 2006, Metropolitan Transportation Commission (MTC) provided the Air Resources Board (ARB) with CY2005 speed distributions. Per agreement with MTC, SF Bay Area-EMFAC2000 uses CY2005 distributions for CY2004 and beyond.

ARB approved EMFAC2000 VMT used MTC's estimate of VMT at the time EMFAC2000 was being developed. SF Bay Area-EMFAC2000 used ARB's VMT estimate based on smog check odometer and instrumented vehicle studies along with MTC's current VMT growth rate. The CY2006 VMT for the Bay Area in SF Bay Area-EMFAC2000 is 36 percent higher than EMFAC2000. Thus, the SF Bay Area version uses more current VMT estimates.

Table 2 illustrates the incremental effect of the VMT-speed distribution changes and the VMT changes. The VMT-speed distribution effect significantly reduces reactive organic gases (ROG), with little affect on oxides of nitrogen (NOx). ROG and NOx react to the speed changes differently because of the different shapes of the speed correction factor (SCF) curves. Additionally, ROG is composed of exhaust and evaporative emissions, and only the ROG exhaust is affected by speed. Similarly, VMT only affects exhaust and the running loss portion of ROG. The increase in absolute VMT increases the inventories of both ROG and NOx, with NOx affected to a larger degree.

Table 2
Effects of Updating VMT-Speed Distributions and VMT on
SF Bay Area-EMFAC2000

	ROG (tpd)	NOX (tpd)
Calendar Year	2006	2006
Impact* of the VMT-speed distribution changes	-13.4	-2.3
Impact* of the VMT changes	5.5	66.2
Net impact from both changes	-7.9	63.9

*The emissions difference between EMFAC2000 and the SF Bay Area-EMFAC2000 due to each change in tons per day.

The technical support documentation transmitted to the EPA on November 30, 2001 for the SF Bay Area-EMFAC2000 is a subset of the EMFAC2000 technical support documentation, and only excludes information that does not pertain to the San Francisco Air Basin. The technical algorithms and methodologies are identical in the two documents. The technical support documentation for SF Bay Area-EMFAC2000 is located at:

http://www.arb.ca.gov/sip/basip01/emfactsd/emfactsd.htm The technical support documentation for EMFAC2000 is located at: http://www.arb.ca.gov/msei/doctabletest/doctable_test.html This data was publically available during the adequacy comment period.

E. 93.118(e) Criteria

93.118(e)(4)

Comment: Commenters contend that the MVEBs do not satisfy EPA's criteria concerning adequacy. Specifically, they allege that the requirements under 40 CFR Part 93.118(e)(4)(iii) (iv), (v), and (vi) are not met.

Response: The California Air Resources Board submitted an ozone attainment plan for the Bay Area on November 30, 2001, that established MVEBs for transportation conformity purposes. EPA's regulations identify the criteria to judge the adequacy of the submitted MVEBs (40 CFR 93.118(e)(4)). EPA interprets the general adequacy criteria with respect to the Bay Area attainment demonstration submissions as follows:

- *93.118(e)(4)(iii): The 2001 Plan must explicitly quantify the MVEB for NOx and VOC.* The 2001 Plan provides an explicit MVEB for VOC and NOx. See page 30 of the Bay Area 2001 ozone attainment plan.
- *93.118(e)(4)(iv): The MVEBs, when considered together with all other emission sources, must be consistent with attainment.* EPA has preliminarily concluded that the submitted plan demonstrates attainment in the Bay Area by 2006, and the MVEBs are consistent with that demonstration.
- *93.118(e)(4)(v) The budgets must be consistent with and clearly related to the emission inventory and the control measures in the submitted SIP*. EPA interprets this to mean that the budgets must come from the local nonattainment area motor vehicle emission inventory for the year that the SIP is demonstrating attainment, and that the MVEBs must reflect the appropriate and up-to-date projections of motor vehicle emissions for the attainment year. The local motor vehicle emissions inventory that establishes the budgets must include the effects of all motor vehicle controls that will be in place by the attainment year. EPA finds that the budgets are consistent and clearly relate to the emission inventory and the control measures in the submitted SIP for which specific emission reductions are claimed. One commenter opined that some portion of the 26 tons per day reduction commitment should be assigned to the proposed MVEBs. However, until the State and the Bay Area determine which measures will address the shortfall, EPA cannot require them to change the MVEBs. We can find the attainment MVEBs adequate now for transportation conformity purposes because the budgets will not interfere with the area's ability to adopt additional measures to attain. The only measure that has been identified so far as having the potential to fill the shortfall is a declining emissions cap on stationary sources. With such a measure EPA believes the Bay Area could demonstrate attainment notwithstanding any highway construction allowed under the current budgets. Should the Bay Area adopt

additional measures that affect the on-road motor vehicles emissions budgets rather than a declining cap, they have committed in the plan to submit revised budgets to EPA (p. 23, 2001 Plan). The fact that the budgets may be revised does not imply that the area can not show attainment with the current budgets. EPA concludes that the Bay Area can adopt sufficient controls to demonstrate attainment with any highway construction allowed under the current budget and therefore the budgets are consistent with attainment and are adequate.

- *93.118(e)(4)(vi) Explanation and documentation of revisions to previously submitted plans is required.* EPA disapproved the 1999 ozone attainment plan. See 66 FR 38340 (September 20, 2001). Previously approved budgets from the 1994 ozone maintenance plan are not revised by the submitted budgets. EPA interprets 40 CFR 93.118(e)(4)(vi) as requiring the state to specify new control measures that are submitted, quantify reductions from such measures, and submit commitments to implement such measures (62 FR 43781-2). The plan identifies new measures and associated reductions, the budget is consistent with these reductions, and the plan has met this criterion.

Our preliminary conclusion is that the 2001 Plan satisfies these requirements. The 2001 Plan demonstrates attainment by 2006 and the Bay Area MVEB meets the requirements of 93.118(e)(4) and, therefore, are adequate for conformity purposes.

Comment: Once BAAQMD conducts the necessary studies to accurately determine the existing levels of pollution in the Bay Area and finds that our pollution levels are actually much worse than previously thought, BAAQMD will be forced to scramble to find additional pollution reduction strategies . By then the Bay Area's mobile source reduction strategy will be firmly cemented by approval of the MVEBs and the implementation of a regional transportation plan that stems from that MVEBs and related conformity determination. To compensate for the uncertainty in the plan's estimates of currently levels of pollution in the Bay Area, approval of the MVEBs should be held off until an accurate baseline determination is made. Or, at the very least, the MVEBs must be adjusted to provide a cushion to address all potential uncertainties in current inventory estimate, rendering EPA's anticipated approval of the current MVEBs and subsequent conformity determination premature under the CAA.

Response: EPA's preliminary finding is that the Bay Area plan is based on a proper inventory, shows attainment, and includes contingency measures for any shortfall. The CAA does not authorize EPA to disapprove a SIP because it fails to establish a "safety margin." Instead, the CAA requires that the SIP provide for attainment and include contingency measures to be triggered when an area fails to meet progress or attainment requirements. The 2001 Plan includes contingency measures, and the 2004 SIP update must also contain such provisions. Also, EPA concludes that the Bay Area can fill the shortfall in emissions reductions with measures that will not limit highway construction under the current budgets. As a result, EPA believes the current budgets are adequate.

93.118(e)(5)

Comment: Several commenters noted that 40 CFR Part 93.118(e)(5) requires that EPA "review the State's compilation of public comments and responses to comments." They allege that in some cases the Bay Area's compilation of comments excluded, mischaracterized, or failed to adequately address comments that they had submitted. Commenters contend that EPA should perform its own independent evaluation and review of the comments, the state's compilation of comments and compilation of responses, and the responses themselves, including consideration of whether the state (and locals) accurately compiled the public comment received.

Response: 40 CFR 93.118(e)(5) requires that "[b]efore determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's *compilation* of public comments and response to comments that are *required to be submitted* with any implementation plan." Emphasis added. The preamble to the August 15, 1997 conformity rule reflects this requirement. It provides that "[p]rior to EPA determining the adequacy of a submitted SIP budget, EPA will also review ... the state's responses to public comment received. This documentation is required to be included in the SIP package when it is submitted to EPA for its review." 62 FR 43782. EPA has reviewed the compilation of comments and responses submitted with the plan and concludes that the compilation is satisfactory for purposes of the adequacy determination. Nothing in the responses causes us to conclude that the budgets are not adequate. In EPA's review of the plan for approvability, EPA will again examine the comments and responses relating to individual SIP provisions, such as the RACM requirement.

EPA also notes that the comment review provision in 93.118(e)(5) pre-dates the advent of the web posting process now employed for adequacy determinations. This provision of the regulation was established when the only opportunity for public comment occurred during the state adoption process. The preamble to the August 15, 1997 rulemaking, which did not provide for public comment directly to EPA, states that "EPA also agrees that the public should be given the opportunity to comment on the adequacy of a submitted SIP.... However, because the state already holds a public hearing on the draft SIP before submitting it to EPA, EPA believes the public has sufficient opportunity to comment at the state level on the adequacy of the budgets contained in the 2001 Plan. EPA believes the rule now addresses commenters' concerns by requiring EPA to review and consider the compilation of public comment that the state is already required to include with any SIP submission." See 62 FR 43782. However, on May 14, 1999 EPA issued guidance that set forth a new adequacy process that provides for direct public involvement in EPA's adequacy determinations through the web posting process. We note that EPA's current adequacy determination process allows the public to comment directly to EPA, and commenters have done so in this case. Therefore, EPA concludes that its review of the Bay Area's compilation of comments and responses satisfies EPA's rules.

93.118(e)(6)

Comment: A commenter notes that 40 CFR Part 93.118(e)(6) imposes a requirement that, when the SIP has not yet been acted upon by EPA, the MPO and DOT must certify that they are each unaware of any information that would indicate that emissions consistent with the MVEB would cause or contribute to any new violation of any standard, increase the frequency or severity of

any existing violation, or delay timely attainment of the standard or any interim emissions reduction milestone. These agencies have not done so, and cannot do so, as they possess ample evidence that MVEB emissions could, and probably will, cause, contribute, and/or exacerbate NAAQS violations. The commenter contends that the District did not perform required technical analysis and therefore neither MTC nor DOT may make the necessary certification.

Response: 40 CFR 93.118(e)(6) provides that conformity determinations made by the MPO and DOT using MVEBs that are part of a plan that has not yet been approved will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the MVEBs will cause or contribute to violations of standards, increase severity of standard violations, or delay attainment. Such conformity determinations only take place after a budget is found adequate by EPA and are not relevant to our budget adequacy determinations. Therefore, this comment is not germane to EPA's adequacy review and is more appropriately made in the conformity process. Section 93.118(e)(6) is not applicable to EPA adequacy determinations.

F. Environmental Justice

Comment: One commenter noted that public outreach is a cornerstone of environmental justice, and emphasized the importance of responses to comments in that context.

Response: EPA agrees that meaningful public involvement is essential to environmental justice. EPA believes that meaningful public participation includes: (1) an affirmative effort to seek out and facilitate the involvement of those potentially affected; (2) a commitment by decision makers to seriously consider the input of the public; and (3) communication to the public as to how their advice was or was not used in decision making.[10] EPA is committed to working with the co-lead agencies involved in the planning process to facilitate such public involvement and to ensure that the transportation planning decisions are made after meaningful public involvement and careful consideration of those comments.

Comment: One commenter contends that basic fairness and environmental justice principles require the Bay Area to reduce the burden it is placing on the health and welfare of San Joaquin Valley residents. The Bay Area has approximately double the average income of the San Joaquin Valley residents and if the 25,000 square mile Valley were a state, it would be the poorest in the Union, except Mississippi. The San Joaquin Valley also has a large Latino population. Thus, as a matter of environmental justice, EPA cannot in good faith approve a 2001 Bay Area Ozone Plan that does not mitigate the grave injustice caused by the thousands of tons of air pollution that the upwind Bay Area annually sends to the San Joaquin and Sacramento Valleys.

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[10] See, e.g., Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, US EPA, Office of Federal Activities, April, 1998.

Response: The question of whether the plan must mitigate transport of emissions from the Bay Area is addressed above. In short, the State is responsible for amending SIPs in upwind and downwind areas, as appropriate, to address the impacts of transport when those impacts have been adequately quantified. EPA encourages the State and local agencies to consider EJ issues in determining the geographic responsibilities for achieving any necessary additional emission reductions.

Comment: Commenters raised concerns that the size of the MVEBs will promote transportation planning decisions that have a disproportionately adverse impact on people with low incomes and people of color in the Bay Area. One commenter alleges that the failure to require adequately stringent budgets denies minority and low income individuals benefits in terms of access, mobility and relief from adverse public health effects due to poor air quality and toxics. The commenter adds that the submitted plan suffers from weaknesses due to the failure of the state and local agencies to meet their obligation under Title VI of the Civil Rights Act, which is to ensure that their programs do not rely on criteria that deny benefits based on race. Instead the state and local planners have refused to apply available criteria (in meeting federal RACM, TCM, and attainment demonstration requirements) which would protect against these effects.

Response: Title VI of the Civil Rights Act applies to actions of recipients of federal money, such as the co-lead agencies. Specifically, Title VI prohibits recipients of federal money from discriminating against persons on the basis of color, race or national origin. Title VI prohibits both intentional discrimination and unintentional discrimination (i.e., discriminatory effects). Unintentional discrimination may be demonstrated if it can be shown that a recipient administers its programs in a way that results in a discriminatory effect. Federal agencies, such as EPA, are not subject to Title VI. Rather, federal agencies are subject to Executive Order 12,898. While there are differences between Title VI and the Executive Order, both are tools to help ensure that all communities and persons live in a safe and healthful environment. Neither Title VI nor the Executive Order are implicated by this action, which consists of a determination that the motor vehicle emissions budgets meet the criteria of 40 CFR 93.118(e) and are consistent with attainment. In our action on the submitted plan, we will address the EJ issues raised by the commenters.