GOLDEN GATE UNIVERSITY

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

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By email on 8/15/03 to: vagenas.ginger@epa.gov

Re: EPA Proposed Approval of 2001 San Francisco Bay Area Ozone Attainment Plan & Interim Final Determination that Deficiencies Have Been Corrected and Stay and Deferral of Sanctions

Dear Ms. Vagenas:

The Environmental Law and Justice Clinic ("ELJC") at Golden Gate University School of Law submits these comments on behalf of Our Children's Earth Foundation ("OCE") and Bayview Hunters Point Community Advocates ("Bayview Advocates") (collectively "Commenters"). OCE is a non-profit organization dedicated to protecting the public, and specifically children, from the health impacts of pollution and other environmental hazards and to improving the environment for the public benefit. Bayview Advocates is a grassroots organization that works in the Bayview Hunters Point community of San Francisco to ensure environmental justice and promote economic alternatives that contribute to the development of environmentally safe neighborhoods and livelihoods. The ELJC is a public interest legal clinic that provides legal and technical assistance and education on environmental justice issues to San Francisco Bay Area residents, community groups, and public interest organizations.

We submit these comments regarding two actions by U.S. Environmental Protection Agency ("EPA")—(1) EPA's proposed "Approval and Promulgation of Ozone Attainment Plan, State of California, San Francisco Bay Area," 68 Fed. Reg. 42174 (July 16, 2003), a proposed approval of the revised Bay Area SIP/2001 San Francisco Bay Area Ozone Attainment Plan to attain the 1-hour ozone national ambient air quality standard ("2001 Ozone Plan"), and (2) EPA's "Interim Final Determination that State of California has Corrected Deficiencies and Stay and Deferral of Sanctions; San Francisco Bay Area," 68 Fed. Reg. 42171 (July 16, 2003). These comments are timely as the deadline for submission of comments on these proposed actions is August 15, 2003. Commenters also join in the comments submitted on these actions by Marc Chytilo, Esq., on behalf of TRANSDEF, Communities for a Better Environment, and OCE.

I. Introduction

More than 30 years after passage of the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, ("CAA" or "Act"), unsafe levels of ozone continue to threaten the health of San Francisco Bay Area residents, with the most severe impacts on the most vulnerable populations. Like every plan

submitted previously, the Bay Area 2001 Ozone Plan fails to demonstrate attainment with the federal 1-hour ozone standard, falling short by at least 26 tons per day of additionally required reductions. Rather than disapproving the deficient Plan, however, EPA proposes its approval. EPA's justification for its proposed action is flawed and inconsistent with the Act as well as its prior rulemaking.

EPA must reject further delay. The Clean Air Act mandates that EPA disapprove the Bay Area's deficient 2001 Ozone Plan. As a result of the State of California's failure to correct the deficiencies identified by EPA in 2001 in a revised Plan by October 22, 2002, see 66 Fed. Reg. 48340 (Sept. 20, 2001), sanctions should be imposed pursuant to the Act.

II. Background

A. General Requirements—State Implementation Plans

Under the Act, states have primary responsibility for achieving and maintaining attainment with the federal health-based standards for priority pollutants—the national ambient air quality standards ("NAAQS"). *See generally*, 42 U.S.C. § 7410. The Act requires each state to adopt, and submit to EPA for approval, a plan for the implementation, maintenance, and enforcement of NAAQS, known as State Implementation Plans ("SIPs").

Among other things, SIPs must contain enforceable measures and strategies to ensure that each region attains the NAAQS by the applicable attainment deadline. *See* CAA § 110, 42 U.S.C. § 7410. Specifically, SIPs must "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 requirements of th[e] Act." 42 U.S.C. § 7410 (a)(2)(A). Federal regulations require that each SIP demonstrate that its provisions are adequate to achieve timely attainment and maintenance of the NAAQS. *See, e.g.*, 40 C.F.R. § 51.112(a). A SIP must provide for attainment with the primary NAAQS "as expeditiously as practicable." 40 C.F.R. § 52.20(a). Thus, the very purpose of the SIP is to ensure that each air quality control region has conducted sufficient planning to achieve attainment with the federal standards, and has adopted enforceable provisions required to attain the NAAQS by the applicable deadlines.

SIPs approved by the EPA become federal law. Thus, violations of SIP requirements applicable to individual sources of air pollution and government agencies are subject to enforcement by the United States and its citizens. *See generally* 42 U.S.C. §§ 7413 and 7604. In addition, if EPA disapproves part of a SIP and a State fails to correct the deficiencies, EPA must promulgate a federal implementation plan ("FIP") within two years of the disapproval. 42 U.S.C. § 7410(c).

B. The Bay Area's Repeated Failures to Attain the Ozone Standard

Unsafe levels of ozone persist in the San Francisco Bay Area more than 30 years since passage of the Clean Air Act. Over these three decades, the local agencies responsible for protecting our air quality have devised one inadequate plan after another in their unsuccessful efforts to eliminate this public health risk. The Bay Area has exceeded the national ozone standard in 34

of the 35 years since it was promulgated by the EPA. Not surprisingly, the San Francisco Bay Area has yet to meet a single deadline set under the Clean Air Act for attainment of the NAAQS for the 1-hour federal ozone standard.

After the Bay Area missed its first deadline for attaining the standard in 1975, the region was in 1978 formally designated by EPA as a nonattainment area—a designation that, except for an erroneous and quickly reversed designation to attainment, continues to this day. *See generally* 66 Fed. Reg. 17379 (Mar. 30, 2001). The Bay Area missed its most recent deadline for attainment—the fourth consecutive deadline missed—on November 15, 2000. 66 Fed. Reg. 48340 (Sept. 20, 2001). The State of California was required to submit a new plan for attainment no later than September 20, 2002. *Id.* The Bay Area currently remains a nonattainment area for the 1-hour federal ozone standard. 40 C.F.R. § 81.305.

C. Specific Nonattainment Area Requirements

For areas designated "nonattainment" for NAAQS, SIPs must comply with all applicable requirements specific to nonattainment areas. *See* 42 U.S.C. §§ 7410(a)(2)(I), 7502 (c)(1). In nonattainment areas, the SIP must provide for "the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the [NAAQS]." 42 U.S.C. § 7502(c)(1). Nonattainment SIPs must include "enforceable emission limitations, and other such control measures, means or techniques . . . as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment" of the standard by the applicable deadline. 42 U.S.C. § 7502(c)(6). Moreover, nonattainment SIP provisions must require "reasonable further progress" towards attainment. 42 U.S.C. § 7502(c)(2).

III. The Bay Area 2001 Ozone Plan Fails to Demonstrate Attainment with the Federal 1-Hour Ozone Standard, as the State Of California Failed to Adopt and Submit a Revised SIP that Contains Adopted and Enforceable Measures Sufficient to Achieve Attainment

A. The Agencies' Promise to Conduct a "Mid-Course Review" and Adopt Control Measures in the Future Is *Not* a Permissible Substitute for a Full Attainment Demonstration, or for Adopted, Enforceable Measures to Achieve Attainment

EPA proposes to approve the Bay Area 2001 Ozone Plan submitted by the State of California,[1] even though it is "still not sufficient to attain the 1-hour ozone standard." 68 Fed. Reg. at 42179. The Plan contains an "estimated shortfall" in ozone-precursor reductions of approximately 26

[1] The co-lead agencies for the 2001 Ozone Plan are the Bay Area Air Quality Management District ("BAAQMD"), the Metropolitan Transportation Commission ("MTC") and the Association of Bay Area Governments. The Plan was approved and submitted to U.S. EPA by the California Air Resources Board ("CARB") (collectively "agencies").

tons per day ("tpd"). *Id.* However, contrary to the requirements of the Act, EPA proposes to approve the Plan, including promises or "commitments" by the co-lead agencies to: (1) conduct further study on specific control measures and the feasibility of their implementation; (2) conduct a "mid-course review" by December 15, 2003 to determine the attainment inventory; (3) adopt additional, unspecified control measures "as needed to attain the standard by 2006;" (4) adopt a revised SIP/ozone plan by March 2004 that includes the new, unidentified control measures and a revised attainment target; and (5) submit the revised SIP to EPA by April 15, 2004, that demonstrates attainment by September 20, 2006. [2] *See id.* at 42175, 42178.

1. *Promises to Adopt Enforceable Measures Are Not Equivalent to Adoption of Enforceable Measures*

"Nonattainment area implementation plans must contain provisions that: 1) provide for the implementation of all reasonably available control measures as expeditiously as practicable [and] provide for attainment of the national ambient air quality standards; 2) require reasonable further progress; and 3) include other control measures, means or techniques . . . as well as schedules and timetables for compliance, as may be necessary and appropriate to provide for attainment of such standard in such area by the applicable attainment date." *Ober v. U.S. EPA*, 84 F.3d 304, 308 (9th Cir. 1996) (citations omitted) (citing 42 U.S.C. §§ 7502(c)(1), (2), (6)). Thus, EPA cannot approve SIP pollution control measures without demonstrating that attainment will be achieved. "The ultimate question to be resolved by the Agency … [is] whether the plan submitted will provide for attainment of the national standards by specified future dates." *Abramowitz v. U.S. EPA*, 832 F.2d 1071, 1078 (9th Cir. 1987); *see also Hall v. U.S. EPA*, 273 F.3d 1146, 1157 (9th Cir. 2001), as amended by 2001 U.S. App. LEXIS 26411 (9th Cir. Dec. 11, 2001) ("The objective of EPA's analysis is to determine whether 'the ultimate effect of a State's choice of emission limitations is compliance with [NAAQS],'" (citing *Train v. NRDC*, 421 U.S. 60, 79 (1975)).

EPA has clearly stated what constitutes "enforceable measures:"

> Measures are enforceable when they are duly adopted, and specify clear, unambiguous, and measurable requirements. A legal means for ensuring that sources are in compliance with the control measure must also exist in order for a measure to be enforceable. . . . A regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit.

57 Fed. Reg. 13498, 13568 (April 16, 1992) (General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990) (citing section 110(a)(2), 42 U.S.C. § 7410(a)(2)).

[2] In July 2001, state agencies notified EPA they were unable to identify any additional measures sufficient to meet the 26 tpd shortfall. In its proposed approval, EPA concluded "it is appropriate to consider enforceable commitments for the remaining necessary reductions" while the agencies further study potential measures. 68 Fed. Reg. at 42179.

Federal regulations governing the State's adoption and submittal of SIPs accordingly require control measures to be enforceable, shown in part by "[e]vidence that the State has adopted the plan in the State code or body of regulations." *See* Appendix V to 40 C.F.R. Part 51, § 2.1(b), Criteria for Determining the Completeness of Plan Submissions. In fact, the control strategies in the SIP must describe the responsible agency's enforcement methods, including "[p]rocedures for monitoring compliance with each of the selected measures." 40 C.F.R. § 51.111.

The 2001 Ozone Plan fails to include enforceable measures sufficient to achieve attainment, falling short by at least 26 tpd of needed reductions in ozone precursor emissions . Clearly, measures are not "enforceable" if they have not yet been adopted or submitted for inclusion in the SIP. EPA proposes to approve the Plan's commitment to further study 11 specific control measures "that are not currently reasonably available but may become so in the future." 68 Fed. Reg. at 42176. EPA proposes to approve this promise under section 110(k)(3) of the CAA "as strengthening the SIP." *Id.* However, section 110(k)(3) does not allow the SIP to be approved unless the SIP as a whole complies with all applicable requirements; rather, section 110(k)(3) requires EPA to *disapprove* those parts of the SIP that do not comply with all applicable requirements.[3]

EPA attempts to further justify its proposed approval of the agencies' commitment to study the 11 specific control measures as "enforceable" by EPA and citizens under sections 113 and 304 of the Act. 68 Fed. Reg. at 42179, n.14. However, a "commitment" to "study" control measures is equivalent to a *promise* to study measures, which is *not* an enforceable commitment, but rather a promise to study an enforceable commitment. In other words, the promise to *study* control measures may be enforceable, but *not* the control measures themselves.[4] Unlike measures that may require only "study," measures adopted and approved in the SIP are required to be *implemented*, with enforceability ensured by the Act. *See* 42 U.S.C. §§ 7410(a)(2)(C), 7413, 7604.

In addition, EPA proposes to approve the Plan even though it fails to specifically *identify* other measures that may be necessary to achieve attainment. The agencies' promises to conduct a "mid-course review" and adopt corrective measures in 2004 to account for the 26 tpd deficiency

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[3] *See* 42 U.S.C. § 7410(k)(3) ("If a portion of the plan revision meets all the applicable requirements … [EPA] may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of [the Act] until [EPA] approves the entire plan revision as complying with the applicable requirements of [the Act].")

[4] Should the State break its promise to study the measures, EPA says it could find the State has failed to implement the SIP under section 179(a) of the CAA, beginning an 18-month period for the State to correct the problem before mandatory sanctions are imposed. 68 Fed. Reg. at 42179, n.14. Under the circumstances, however, this line of reasoning and resulting delay are inappropriate as well as inconsistent with the Act's mandate. As discussed throughout these comments, the State has yet to submit a SIP that corrects deficiencies previously identified by EPA and demonstrates attainment. Sanctions should have *already* been imposed as a result of EPA's prior disapproval of the Bay Area ozone plan and the State's failure to correct these deficiencies in the 2001 Ozone Plan. *See* 66 Fed. Reg. 48340; *see also* Section IV of this letter.

do not relieve the agencies' existing obligation to prepare an acceptable attainment demonstration and submit a control strategy consisting of currently enforceable control measures. The agencies' promise to adopt or not adopt future measures based on the outcome of the Central California Ozone Study ("CCOS") and other further study is not a legally acceptable substitute for submission of a complete attainment demonstration specifically describing how the agencies' adopted control strategy will achieve attainment by Clean Air Act deadlines.

2. The Act Does Not Authorize the Agencies' Promises to Adopt Commitments

EPA proposes to approve the agencies' promises under sections 110(a)(2)(A) and 172(c)(6) of the Act, 42 U.S.C. §§ 7410(a)(2)(A), 7502(c)(6). *See* 68 Fed. Reg. at 42179, n.15 (citing nearly identical provisions requiring the SIP to "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 attain the 1-hour ozone standard by the appropriate date required by the Act). EPA states these provisions show that "Congress understood that all required controls might not have to be in place before a SIP could be fully approved." *Id.* However, EPA's interpretation directly contradicts the plain language of the statute.

The Act does not authorize EPA's approval of the agencies' promises to adopt enforceable measures in the future. *See* Section III.A.1 of this letter. EPA's reliance on sections 110(a)(2)(A) and 172(c)(6) of the Act is misplaced as these sections do not allow approval of plans that fail to include enforceable measures sufficient to achieve attainment. Clearly, the SIP must identify specific "control measures, means or techniques" on which the agencies will rely to attain the 1-hour ozone standard, as well as the "schedules and timetables" with which the state must comply to attain the standard.[5] Thus, before the Plan can be approved, it must demonstrate attainment and identify the specific means by which the Bay Area will achieve attainment by the required date. EPA therefore lacks statutory basis for its proposed approval.

EPA also proposes to approve the agencies' promises as meeting section 172(c)(1) of the Act, 42 U.S.C. § 7502(c)(1), which requires nonattainment SIPs to demonstrate attainment and implementation of all Reasonably Available Control Measures ("RACMs") "as expeditiously as practicable." In this case, EPA uses three criteria for acceptance of state commitments: "(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." *See* 68 Fed. Reg. at 42179-80.

However, EPA's rationale is flawed because the Act does not grant EPA authority to defer *any* portion of the agencies' obligation to submit—and for EPA to approve—a SIP that provides for attainment. *See*, e.g., 42 U.S.C. §§ 7410, 7502(c)(1). That the "commitments" potentially

[5] While a SIP may contain a control strategy not specifically identified or described in the federal regulations that govern SIP adoption and submittal, *see* 40 C.F.R. Part 51, a SIP containing such a strategy *must* provide for attainment and maintenance of the federal standard. 40 C.F.R § 51.101(e). The Bay Area 2001 Ozone Plan does not demonstrate attainment.

address a "limited" portion of the nonattainment SIP does not authorize deferral of the agencies' obligations under the Act.

3. There Are No Circumstances that Warrant EPA's Approval of the Promises

Even if Commenters assume EPA is correct to believe the Act "allows for enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures," EPA cannot satisfy its three criteria for acceptance of these commitments. *See* 68 Fed. Reg. at 42179-80.

First, it is currently impossible to determine exactly what portion of the nonattainment SIP the "commitments" address. The agencies and EPA admit they do not know exactly what level of reductions are required for attainment, or what measures will be necessary to achieve the goal. For example, the "mid-course" review and corrections are proposed to allow the agencies further time to assess what reductions are needed. In addition, the agencies and EPA agree the emissions inventory may underestimate emissions and may need correction. *See* 68 Fed. Reg. at 42175.

With regard to the second factor of "whether the state is capable of fulfilling its commitment," there is no substantial evidence to support EPA's conclusion that it is "confident that CARB and the co-lead agencies will be able to meet the 26 tpd commitment." 68 Fed. Reg. at 42180. While the agencies have adopted some of the measures identified in the Plan, and the frequency of ozone exceedances has decreased, this provides no assurance the agencies will be able to devise *new* ways to additionally reduce emissions to compensate for the deficiency. Considering that the agencies have not acted under the threat of sanctions to expeditiously adopt and implement new measures to ensure the required reductions within the statutorily required period, there is no reason to believe they will do so now. Moreover, EPA's refusal to impose sanctions for this failure consistent with its prior rulemaking is unacceptable. *See* Section IV of this letter.

Third, EPA proposes to approve the "commitments" for "a reasonable and appropriate period of time," as EPA concluded that 2006 is "the most expeditious attainment date practicable." 68 Fed. Reg. at 42180. As discussed throughout these comments, further delay is neither appropriate nor reasonable under the circumstances. While Commenters are aware of the agencies' challenge to develop additional regulations to control VOC sources, as well as the time involved for adoption of such measures, the agencies have refused to include a number of control measures that could have already provided significant reductions. *See, e.g.*, Section III.B of these comments; *see also* Letter to Ginger Vagenas, U.S. EPA, from Will Rostov, Communities for a Better Environment, August 15, 2003. For instance, there is no sufficient reason why—after Bay Area's repeated failure to attain the 1-hour ozone standard and given the double threat of federal sanctions and promulgation of a federal implementation plan—the agencies have not yet adopted a "declining VOC cap applicable to stationary sources." *See* 68 Fed. Reg. at 42180. EPA acknowledges this particular measure could be adopted "if necessary." *Id.*

The agencies have reneged on all previous commitments to attain and maintain the ozone standard. In fact, Bay Area has repeatedly and consistently defaulted on its obligation to adopt a

plan that will achieve attainment, and it now seeks—and EPA proposes to approve—yet additional time to delay action. The circumstances in the Bay Area do not warrant "enforceable commitments" to attempt to demonstrate attainment in yet another revised plan. There is no justification for further delay.

Finally, EPA relies on its "past practice" as justification for its proposed approval of the agencies' "commitments." *See* 68 Fed. Reg. at 42179, fn.14. However, if these "past practices" have no statutory basis and may in fact be erroneous, EPA cannot rely on cases in which it may have approved "enforceable commitments" in the past, no matter how many times it has done so. Because the Act is clear, EPA's interpretation will not be upheld if it is "plainly erroneous" or "inconsistent" with the Act. *See, e.g., Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 907 (7th Cir. 1990) (citations omitted).

4. EPA's Proposed Approval is Inconsistent with EPA Policy Guidance

EPA has developed technical guidance for areas that submit attainment demonstrations relying on "weight-of-evidence" determinations.[6] Related EPA guidance provides that nonattainment areas using long-term projections commit to performing a "mid-course review" ("MCR") to assess the extent to which modifications to controls may be needed, due to the "uncertainty" of modeling. *See id.* EPA believes that "a commitment to perform MCR is a critical element in any attainment demonstration that employs a long-term projection period and relies on a weight of evidence test." *Id.* According to EPA, "mid-course review provides for an opportunity to assess if a nonattainment area is or is not making sufficient progress toward attainment of the one-hour ozone standard." *Id.* MCR must use the most recent data "to assess *whether the control measures relied upon in a SIPs attainment demonstration* have resulted in adequate improvement of the ozone air quality." *Id.* (Emphasis added.) If EPA determines that sufficient progress is not being made as a result of the State's implementation of control measures, it may require the State to revise the SIP with a "near-term" or "longer-term" correction, which may include the adoption of new control measures. *Id.*

Here, however, EPA proposes to allow the agencies' reliance on MCR *not* "to assess whether the control measures relied upon in a SIPs attainment demonstration" are achieving sufficient progress toward attainment, but to determine how the agencies may eventually demonstrate attainment in the future. More specifically, MCR here allows the agencies additional time to determine the attainment inventory, and what additional control measures must be adopted to reach this target. Thus, MCR is proposed here *not* to check attainment progress against inherently uncertain long-term projections, but to *further delay the implementation of as yet unspecified control measures*.

In sum, EPA may not approve the attainment demonstration in the 2001 Ozone Plan, as it is not based on adopted, enforceable control measures that require emission reductions sufficient to

[6] *See* "Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration," from Lydia N. Wegman, J. David Mobley, to Air Division Directors, U.S. EPA, Regions I-X (March 28, 2002).

achieve attainment. *Hall v. U.S. EPA*, 2001 U.S. App. LEXIS 26411 (9th Cir. Dec. 11, 2001) ("EPA must determine the extent of pollution reductions that are required and determine whether the emission reductions effected by the proposed revisions will be adequate to the task."); *see also NRDC v. U.S. EPA*, 22 F.3d 1125 (D.C. Cir. 1994). "Enforceable commitments" to conduct a "mid-course review" and adopt future corrective measures based on further study are not a permissible substitute for a full attainment demonstration, or for adopted, enforceable measures to achieve attainment. Because the agencies failed to adopt enforceable control measures sufficient to achieve the additionally required 26 ton-per-day reduction in ozone precursor emissions , EPA cannot approve the Bay Area 2001 Ozone Plan.

B. The Plan Fails to Provide for "the Implementation of All Reasonably Available Control Measures As Expeditiously As Practicable" and Attainment as Required

Section 172(c) of the Act mandates that SIPs in nonattainment areas "provide for the implementation of all reasonably available control measures as expeditiously as practicable . . . and shall provide for attainment of the [primary NAAQS]." *See* 42 U.S.C. § 7502(c)(1); 40 C.F.R. § 52.20(a). EPA proposes to approve the agencies' demonstration of "reasonably available control measures" ("RACMs"), even though it does not comply with the law. Moreover, the Plan fails to demonstrate that the proposed attainment date of 2006 represents the earliest practicable attainment date. *See* 42 U.S.C. § 7502(a)(2).

First, EPA lacks the statutory authority to allow the agencies to defer submittal of RACMs required for attainment. EPA may not approve "commitments" to adopt control measures in the future in lieu of submission of actual, currently adopted enforceable measures. *See, e.g.*, 42 U.S.C. § 7410(a)(2)(A); *see also* Section III.A of this letter. Deferring the adoption of unspecified control measures is inconsistent with the requirements of the Act.

Second, EPA has not provided sufficient justification to approve the agencies' rejection of RACMs proposed by public commenters. *See* Bay Area 2001 Ozone Plan, Appendix C. EPA interprets the RACM requirement as requiring states to adopt only technologically and economically feasible measures that would advance attainment by at least one year; states must also justify why potential measures have not been adopted. 68 Fed. Reg. at 42176. EPA concluded the agencies' justification for not including measures raised by the public was "reasonable" and "adequately supported," finding "no persuasive evidence that the plan excludes significant unique measures . . . that are reasonable and would likely result in more expeditious attainment," stating that some public comments were too "general" to be worthy of analysis. *Id.*

As justification for rejecting specific potential RACMs for stationary sources, the BAAQMD used a *de minimis* standard to avoid adoption and implementation of demonstrably available measures determined by the BAAQMD to be "impracticable." *See* 2001 Ozone Plan, Appendix C. Neither agencies nor EPA can escape the Act's central requirements discussed above through a *de minimis* rationale in the name of administrative necessity or trivial benefit. Congress has clearly spoken to this issue and the requirement that nonattainment SIPs must "provide for the implementation of all reasonably available control measures as expeditiously as practicable . . .

and shall provide for attainment of the [primary NAAQS]." *See* 42 U.S.C. § 7502(c)(1).[7] The Act does not explicitly contain a *de minimis* exception. *See, e.g., Public Citizen v. Young*, 831 F.2d 1108, 1111-1122 (D.C. Cir. 1987).

Moreover, any purported burden or inconvenience to industry from being subject to enforceable SIP emission limitations and control measures is not a justification for invoking the *de minimis* doctrine, so as to escape the Act's clear prohibitions and requirements. It is hardly an "absurd or futile" result for some small portion of entities to comply with the same statutory and regulatory requirements as other industries in the State, and every other SIP-regulated entity in the country, which have been subject to enforceable SIP requirements as long as there have been SIPs. *See NRDC v. U.S. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992).[8]

Finally, EPA failed to demonstrate that it conducted any form of independent analysis of the agencies' claims regarding cost-effectiveness or minimal benefit of potential RACMs. EPA has the burden to justify its conclusion that the agencies' claims of trivial value or administrative burden are proper. *Alabama Power Co., et al. v. U.S. EPA*, 636 F.2d 323, 360 (D.C. Cir. 1979); *see also Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001). Before approving the agencies' rejection of these control measures, EPA must "(1) demonstrate that it has examined relevant data, and (2) provide a satisfactory explanation for its rejection of [the] proposed RACMs and why they, individually and in combination, would not advance the [Bay Area's] attainment date." *See Sierra Club v. U.S. EPA*, 314 F.3d 735, 745 (5th Cir. 2002); *see also Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001) (citations omitted). EPA's proposed approval of the RACM demonstration fails to meet this burden, as it simply defers to the agencies' analysis and conclusion of what measures should be deemed "reasonably available." *See* 68 Fed. Reg. 42177 (July 16, 2003).

Furthermore, EPA has not demonstrated that the proposed attainment date of 2006 represents the earliest practicable attainment date. Neither the agencies nor EPA have explained how the measures proposed by public commenters *in combination* would not advance attainment. In fact, measures dismissed as *de minimis* were considered in isolation, without analysis of cumulative emissions reductions that would result from a combination of potential measures. It is likely that the control measures rejected by the agencies could have a cumulatively considerable impact on

[7] In addition, in Clean Air Act provisions ranging from section 110 to 113 to 304 to sections 501-504, Congress has been clear that all emission limitations, control measures, and applicable requirements of an implementation plan must impose binding legal compliance obligations upon sources, which obligations are subject to enforcement by the State, EPA, and the public. There is nothing in the Act or its legislative history suggesting Congressional intent to depart from the Act's consistent structural requirement for enforceability against polluting sources.

[8] In *NRDC*, the Court questioned the applicability of the *de minimis* doctrine where the gains from application of the statute were weighed against administrative burdens to the regulated community, and stated that the implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine.

emission reductions. Indeed, since the agencies contend they are unable to identify alternative measures reasonably available or necessary to achieve attainment, the collective significance of measures rejected as "*de minimis*" may be critical for achieving attainment as collectively they may exceed the agencies' own *de minimis* standard. EPA must assess and explain why the rejected measures "individually and in combination" would not advance attainment. In the absence of such indication, EPA's approval of the agencies' rejection of the proposed measures as *de minimis* is improper. *See Alabama Power Co.*, 636 F.2d at 360; *Sierra Club*, 314 F.3d at 745; *see also Ober*, 243 F.3d at 1195; *Environmental Defense Fund v. EPA*, 82 F.3d 451, 467 (D.C. Cir. 1996).

Given the Bay Area's repeated inability to attain the 1-hour standard, the agencies cannot afford to ignore *any* reasonable available measure to reduce emissions of VOCs if the Bay Area is to attain the national ozone standard set by EPA to protect public health. Available measures that would provide *any* significant contributions to the required reductions, alone or in combination with other measures, should be included in the Plan. Further delay is not justifiable under the circumstances, particularly as there are measures currently available now that could be included for more "expeditious" attainment.

In addition to the RACMs rejected by the agencies, the BAAQMD should have adopted and included rules to control emissions of ozone precursors from mobile sources. Obvious areas of regulation include motor vehicle fleets and motor vehicle idling. In addition to reducing ozone precursors, such rules would result in reductions of toxic air emissions, such as diesel exhaust, and would therefore benefit low-income and people of color communities, who are disproportionately and adversely impacted by mobile source pollution.[9] For instance, following are two specific rules the BAAQMD should adopt:

Fleet Rules. According to the Plan, on-road motor vehicles contribute about 52% of all smog-forming NOx and about 41% of reactive organic compounds in the Bay Area. It is incumbent on the BAAQMD to reduce ozone precursors from mobile sources where possible, particularly in the face of the BAAQMD's assertion that it cannot further reduce emissions from stationary sources. As the BAAQMD is well aware, the South Coast Air Quality Management District ("SCAQMD") adopted a set of fleet rules as early as three years ago to address its

[9] Diesel particulate matter is the most significant individual toxic air pollutant in the Bay Area, accounting for fully seventy-three percent (73%) of the air-borne cancer risk in 2000. *See* Status Report: BAAQMD Toxic Air Contaminant Control Program (December 2001) (available at http://www.baaqmd.gov/permit/toxics/report). The California Air Resources Board ("CARB") has formally designated particulate emissions from diesel-fueled vehicles as a Toxic Air Contaminant. Because diesel exhaust particles and gases are suspended in the air, all people are exposed to them. However, diesel exhaust pollution disproportionately impacts people living and working in urban and industrial areas, particularly those living or working near roads and freeways, truck loading and unloading operations and railway lines. Recognizing this fact, the SCAQMD promulgated a series of fleet rules as part of its environmental justice initiative. *See* http://www.aqmd.gov/ej/ej_original10.htm (last accessed August 7, 2003). The fleet rule initiative also includes Rule 431.2 to regulate sulfur content of fuel, which BAAQMD should also consider.

nonattainment problem. *See* SCAQMD Rule 1191 (Clean On-Road Light- and Medium-Duty Public Fleet Vehicles), Rule 1192 (Clean On-Road Transit Buses), Rule 1193 (Clean On-Road Residential and Commercial Refuse Collection Vehicles), Rule 1194 (Commercial Airport Ground Access), Rile 1195 (Clean On-Road School Buses), Rule 1196 (Clean On-Road Heavy-Duty Public Fleet Vehicles), and Rule 1186.1 (Alternative-Fuel Sweepers).[10] Each of these rules mandates that covered local fleet operators that purchase or replace fleet vehicles acquire only those specific motor vehicles that the SCAQMD has designated as meeting its standards and requirements. The Ninth Circuit upheld these rules, holding they were not preempted by the Clean Air Act because they are not standards relating to the control of emissions from new motor vehicles or new motor vehicle engines. *See Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 309 F.3d 550 (9th Cir. 2002).[11]

Idling Rules. Anti-idling rules applicable to vehicles are transportation control measures ("TCMs") specifically contemplated by the Clean Air Act. *See* 42 U.S.C. § 7408(f). Idling of all vehicles contributes to mobile source pollution, with truck idling receiving the most attention in the recent years. EPA, for example, recently completed its truck idling test program and concluded that idling trucks consume, annually, over 950 million gallons of diesel fuel and emit 200,000 tons of oxides of nitrogen, as well as over 10 million tons of carbon dioxide.[12] In recognition of the problems caused by idling, states, including California, have enacted laws to reduce emissions from idling.[13] Some of those anti-idling rules are contained in SIPs. *See id.* The BAAQMD should have adopted and included an anti-idling rule in the SIP as well.

Additionally, as noted by commenter OCE in prior comments, another way to reduce NOx and VOC emissions is to require that all emission reduction credits ("ERCs") issued by the BAAQMD fulfill the criterion of being "surplus" at the time of their use. This may be accomplished by adjusting all ERCs for reasonably available control technology ("RACT") at their time of use.

Finally, the agencies must implement and enforce compliance with the control measures already in place. For example, after failing to implement TCM-2—a measure to increase regional public

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[10] *See* http://www.aqmd.gov/rules/rulesreg.html (last accessed August 7, 2003).

[11] Not only is there no federal preemption, but state law actually requires the Bay Area to adopt fleet rules to meet state plan requirements. Because the Bay Area is classified as a serious nonattainment area under California law, state law *requires* the BAAQMD to include "measures to achieve the use of a significant number of low-emission motor vehicles by operators of motor vehicle fleets," to the extent necessary to meet state plan requirements. *See* Cal. Health & Safety Code § 40919(a)(4) ("[e]ach district with serious air pollution *shall* . . . .") (emphasis added).

[12] *See* Emission Facts, Impacts of Truck Idling on Air Emissions and Fuel Consumption, U.S. EPA, Air & Radiation, EPA420-F-03-002 (Feb. 2003), available at http://www.epa.gov/otaq/retrofit/documents/f03002.pdf (last accessed August 7, 2003).

[13] *See* Summary of State Anti-Idling Regulations, EPA420-S-03-002 (Feb. 2003), available at http://www.epa.gov/otaq/retrofit/documents/s03002.pdf (last accessed August 7, 2003).

transportation ridership by 15% above 1982-83 levels—the agencies were subject to litigation and a Court order to implement this control measure. *See Bayview Hunters Point Cmty. Advocates, et al. v. MTC, et al*., 177 F. Supp. 2d 1011, 1029-32 (N.D. Cal. 2001).

For the reasons discussed above, the Plan's RACM demonstration should be rejected.

C. The Plan's Emissions Inventory is Inaccurate

The Plan's emissions inventory is inaccurate and may drastically underestimate precursor emissions. Section 172(c)(3) of the CAA requires the Bay Area nonattainment SIP to include "a comprehensive, accurate, current inventory of actual emissions from all sources" of ozone in the region. 42 U.S.C. 7502(c) As both EPA and the agencies admit, however, the emissions inventories contained in the Bay Area 2001 Ozone Plan may have "underestimated" the emissions from certain sources. *See* 68 Fed. Reg. 42175 (July 16, 2003). Nevertheless, EPA proposes to approve the inventories, provided that potential inaccuracies are "corrected" with the 2004 Plan revision. *Id.* This is inconsistent with the CAA mandate requiring "a comprehensive, accurate, current inventory of actual emissions from all sources" of ozone in the region. 42 U.S.C. 7502(c). Moreover, this is contrary to common sense, which dictates that planning for ozone attainment requires a reliable means of determining the levels of past, current and future emissions.

In addition, the emissions inventory may also present an unrealistic picture of the levels of reductions required for attainment, as the category of planning allowances for NOx emission reduction credits ("ERCs") and interchangeable ERCs ("IERCs") appears to be at great odds with the tons of ERCs and IERCs actually generated and used. *See* 2001 Ozone Plan, "Baseline Emissions Inventory Projections, 1995-2006 Planning Inventory," Table 4 (see "Banked Emissions" and "Alternative Compliance Allowances"). For example, the Plan contains an allowance of 7.6 tpd of ERCs and 10.2 tpd of IERCs for NOx in 2002, for a total of 6497 tons per year. *See id.* However, BAAQMD data indicates that only a small fraction of this is actually generated and used. The planning figures relied upon in the attainment assessment are thus inconsistent with actual practice. This may create a misleading appearance regarding the levels of VOC reductions required for attainment. The disparity between the planning allowance used in modeling and actual generation and use should be analyzed to determine whether this has a significant effect on the projected attainment date.

The Plan also fails to demonstrate the impact of growth and changes in the operation of stationary sources that could undermine planned reductions. For example, BAAQMD has grossly underestimated the impact of deregulation on power plant emissions, as now plants are being constructed and are operated at a far higher capacity. The Plan's inventory fails to take into account significant increasing emissions from power plants.

In its prior disapproval of the 1999 attainment assessment, EPA acknowledged it shared several concerns raised by commenters regarding the flawed assessment, including: its failure to include all available data, its underestimate of the impact of energy deregulation on power plant emissions, and reliance on projections for motor vehicle emissions that assumed large reductions

that have not been realized. 66 Fed. Reg. 48340-41 (Sept. 20, 2001). Nevertheless, at the time, EPA stated it need not "determine whether these concerns provide independent bases for disapproval," as it already disapproved the assessment on the basis of monitoring data. *Id.* Although EPA stated it would reconsider these points when it reviewed "future plans and plan revisions," EPA now fails to consider whether these issues have been adequately addressed in the 2001 Ozone Plan.

D. The 2001 Ozone Plan Does Not Provide an Adequate Demonstration of Reasonable Further Progress

"The term 'reasonable further progress' means such annual incremental reductions in emissions of the relevant air pollutant . . . for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." 42 U.S.C. § 7501. The 2001 Ozone Plan fails to acceptably demonstrate reasonable further progress ("RFP") as it does not include the additional 26 tpd of additional VOC reductions that are necessary to achieve attainment. Without including enforceable measures that demonstrate attainment by the applicable deadlines, the agencies cannot claim that the Plan will achieve RFP towards attainment. Moreover, any attempt by the agencies to show RFP is clouded by the inadequate emissions inventory that underestimates the level of reductions required for ozone attainment by the Bay Area, as discussed above.

The Bay Area's "Reasonable Further Progress Report" dated April 10, 2003, claims RFP toward attaining the ozone standard. While some of the measures identified in the Plan have been adopted and there have been fewer exceedances of the 1-hour standard, there is still no assurance the agencies will be able to expeditiously reach attainment without including measures to eliminate the 26 tpd short-fall in the attainment inventory. Because the Plan fails to address this deficiency, it cannot show reasonable further progress towards attainment.

E. The Bay Area 2001 Ozone Plan Violates State Law

EPA cannot approve the 2001 Ozone Plan if it violates California law. Under the federal regulations governing the State's adoption and submittal of SIPs, the agencies must include "[e]vidence that the State has followed all of the procedural requirements of the State's laws and constitution in conducting and completing adoption/issuance of the plan." *See* Appendix V to 40 C.F.R. Part 51, §§ 2.1(c), (e), Criteria for Determining the Completeness of Plan Submissions.

The agencies' adoption of the 2001 Ozone Plan is the subject of litigation over the agencies' failure, among other things, to properly comply with the procedural requirements of the California Health and Safety Code and the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 *et seq.*, ("CEQA"). *See Communities for a Better Environment, et al. v. BAAQMD, et al.*, Civil No. 323849 (S.F. Sup. Ct., July 25, 2003). The Superior Court of San Francisco recently held that the Plan violated California Health and Safety Code section 40233, which outlines specific procedures for the agencies' adoption, implementation and enforcement of transportation control measures for the attainment of state and federal ambient air quality standards. *id.* The agencies were ordered by the Court to address the deficiencies in the 2001

Ozone Plan that EPA now proposes to approve. Specifically, the agencies must, within 60 days, develop a draft plan for public review that will reduce VOC emissions by the 26 tpd shortfall for attainment with the federal 1-hour ozone standard.[14] *See id.*

In its proposed approval, EPA stated it was aware of the pending litigation, and that "[p]rior to taking final action on the plan, [EPA] will evaluate the decision of the Court . . . to determine what effect, if any, it has on our rulemaking." 68 Fed. Reg. 42182, n.20 (July 16, 2003). EPA should review the Court's decision in this case. EPA should disapprove the Plan on the basis that it violates California law.

IV. EPA's Interim Final Determination that the State Has Corrected Deficiencies Such That Sanctions Should Be Stayed and Deferred is Inappropriate

A. Background

The Clean Air Act mandates that the sanctions prescribed by section 179 "shall apply" to a State that has failed to correct SIP deficiencies previously identified by EPA within 18 months. *See* 42 U.S.C. § 7509(a). Therefore, EPA's disapproval of the Bay Area's 1999 Ozone Plan under section 172(c)(1) of the Act due to deficient demonstrations of attainment and RACMs, *see* 66 Fed. Reg. 48340 (Sept. 20, 2001), triggered a clock for the imposition of offset sanctions 18 months after the effective date, and highway sanctions 6 months thereafter. *See id.; see also* 42 U.S.C. § 7509(b); 40 C.F.R. § 52.31.

EPA has now made an "interim final determination" that the State of California has corrected the deficiencies previously identified by EPA in its disapproval of the 1999 Plan, for which the sanctions clock began on October 22, 2001. *See* 68 Fed. Reg. 42171 (July 16, 2003). EPA's action, already in effect, serves to "stay the imposition of the offset sanctions and defer the imposition of the highway sanction" until EPA takes final action on the 2001 Plan. *Id.*

As discussed above, the state agencies have failed to correct the deficiencies previously identified by EPA. The 2001 Ozone Plan fails to demonstrate attainment and fails to provide an RACM demonstration. EPA has based its determination on an erroneous standard that has no basis in the Act. EPA's refusal to enforce its prior rulemaking by imposing sanctions would be arbitrary and capricious and otherwise inconsistent with the law.

B. EPA Should *Not* Stay and Defer Offset and Highway Sanctions, as the State of California Failed to Correct The Deficiencies Previously Identified by EPA

As discussed in these comments, the State of California has yet to submit an ozone plan (or SIP revision) that corrects deficiencies previously identified by EPA and demonstrates attainment.

[14] The Court also found that, in adopting the 2001 Ozone Plan, the agencies violated CEQA in limiting the Petitioners' ability to provide public comment regarding certain control measures. As a result, the agencies were ordered to prepare an environmental impact report ("EIR") pursuant to CEQA for two specific control measures. *See id.*

Section 172(d) of the Act requires that nonattainment SIP revisions required as a result of EPA's finding of inadequacy must correct the deficiencies identified by EPA and meet all of the requirements of section 110.[15] 42 U.S.C. § 7502(d).

Notwithstanding these requirements, EPA proposes to approve the 2001 Ozone Plan, "indicating that it is *more likely than not* that the State has corrected the deficiencies that started the sanctions clocks." 68 Fed. Reg. 42171 (July 16, 2003) (emphasis added). EPA concluded that until it takes final action on the Plan, "it is not in the public interest to initially impose sanctions or to keep applied sanctions in place when the State has most likely done all it can to correct the deficiencies that triggered the sanctions clocks." 68 Fed. Reg. 42171 (July 16, 2003).

EPA's use of a "more likely than not" standard for determining that California may have corrected its deficient Plan is inappropriate for at least two reasons. First and foremost, the standard is contrary to the Act. The standard does not appear anywhere in the Act or in EPA's implementing regulations, and has no statutory basis. EPA appears to have simply created the "more likely than not" standard in a 1994 preamble to regulations implementing 42 U.S.C. § 7509 (the sanctions provision), which it cites as "authority" for its later use of the standard. In other words, the "standard" is not an adopted rule, as it was not adopted pursuant to the required public notice and comment period. Consequently it does not have the force of a rule. Second, EPA's finding that the state has "more likely than not" corrected the Plan's deficiencies is not acceptable as it does not satisfy the statutory requirement that the deficiencies must in fact be corrected. *See* 42 U.S.C. §§ 7509, 7502(d); 40 C.F.R. §52.31.

Sanctions should already be imposed as a result of EPA's prior disapproval of the 1999 Ozone Plan and the State's failure to correct these deficiencies in the 2001 Ozone Plan. 66 Fed. Reg. 48340 (Sept. 20, 2001). Because the 2001 Plan remains deficient, EPA should remove the stay and deferral and re-impose sanctions pursuant to 40 C.F.R. § 52.31(d).

Commenters also object to EPA's reliance on the "good cause" exception to the 30-day public notice requirement of the Administrative Procedure Act, ("APA") 5 U.S.C. 553(d)(1). EPA has determined that "notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest." 68 Fed. Reg. 42171 (July 16, 2003). As discussed above, EPA's "interim final determination" that the agencies have corrected the deficiencies previously identified by EPA is erroneous and inappropriate. EPA fails to meet the "good cause" exception of the APA. The Clean Air Act and the public interest require expedient attainment of the federal 1-hour ozone standard. EPA should remove the stay and deferral and re-impose sanctions pursuant to 40 C.F.R. § 52.31(d).

[15] In addition, the revision "shall include additional measures as [EPA] may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any other non-air quality and other air quality-related health and environmental impacts." 42 U.S.C. § 7509(d).

C. EPA Must Promulgate a FIP by October 22, 2003 as the State of California Failed to Correct Deficiencies Identified by EPA

Under section 110(c)(1) of the Act, EPA must promulgate a federal implementation plan ("FIP") within two years after finding that a State's submitted SIP is incomplete, or after EPA "disapproves a [SIP] submission in whole or in part, unless the state corrects the deficiency, and [EPA] approves the plan or plan revision." 42 U.S.C. § 7410(c).

The effective date of EPA's disapproval of the Bay Area's 1999 Ozone Plan, *see* 66 Fed. Reg. 48340 (Sept. 20, 2001), triggered a 2-year clock for EPA to promulgate a FIP for the Bay Area's attainment of the federal 1-hour ozone standard. Accordingly, EPA must promulgate a FIP by October 22, 2003.

V. Environmental Justice

The Bay Area's repeated failure to attain the federal 1-hour ozone standard has serious human health and societal costs.[16] The human health and associated societal costs from ozone pollution are well-known and documented by EPA:

> A large body of evidence shows that ozone can cause harmful respiratory effects, including chest pain, coughing and shortness of breath, which affect people with compromised respiratory systems most severely. When inhaled, ozone can cause acute respiratory problems; aggravate asthma; cause significant temporary decreases in lung function of 15 to over 20 percent in some healthy adults; cause inflammation of lung tissue, produce changes in lung tissue and structure; may increase hospital admissions and emergency room visits; and impair the body's immune system defenses, making people more susceptible to respiratory illnesses.

66 Fed. Reg. 5002, 5012 (Jan. 18, 2001). Ozone pollution is particularly harmful to the most vulnerable segments of our population: children, the elderly and people with respiratory ailments. *Id.* In addition, low-income communities and communities of color may also be disproportionately impacted by ozone pollution due to increased susceptibility.

Ozone has severe impacts on millions of Americans with asthma. *See id.* The impacts of ozone on "asthmatics are of special concern particularly in light of the growing asthma problem in the United States and the increased rates of asthma-related mortality and hospitalizations, especially in children in general and black children in particular." 62 Fed. Reg. 38856, 38864 (July 18, 1997). Asthma is one of the most common and costly diseases in the United States. In 1998, the

[16] The Bay Area's inability to attain the current ozone standard is particularly alarming in light of EPA's 1997 finding that the current standard is inadequate to protect the public from the wide-ranging health impacts of ozone. 62 Fed. Reg. 38856 (July 18, 1997). As a result, EPA has adopted new, more stringent ozone standards, which were upheld by the U.S. Supreme Court against industry challenge. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001).

cost of asthma to the U.S. economy was estimated at $11.3 billion. 66 Fed. Reg. at 5012. On average, for example, "15 people died every day from asthma in 1995." *Id.*

The health and societal costs of asthma are significant here in California. Approximately 2.2 million Californians suffer from asthma.[17] In 1997 alone, nearly 39,708 residents, including 16,705 children, were admitted to California hospitals because of asthma. Asthma is now the leading cause of hospital admissions of young children in California. *Id.* Combined with very real human suffering is the huge financial drain of asthma hospitalizations on the state's health care system. The cost of these hospitalizations in 1997 was nearly $350,000,000, with nearly a third of the bill paid by the State Medi-Cal program. *Id.* at 4. Moreover, with asthma-related health problems a leading cause of school absenteeism,[18] the children suffering from a life-long health affliction are also denied the same level of education as healthy children.

In the Bay Area, African-American children are disproportionately affected by asthma. Whereas the statewide asthma hospital discharge rate was 216 per 100,000 children between 1995 and 1997, the rate for African-American children was 678 per 100,000. In the four most populous counties—Alameda, Contra Costa, San Francisco, and Santa Clara counties—asthma hospitalization rates were 935, 530, 664, and 352 per 100,000, respectively.[19]

Many sources of pollution in the Bay Area—both stationary and mobile—disproportionately impact communities of color and low-income neighborhoods. Thus, control measures intended to reduce regional ozone levels will, in many cases, also provide additional benefits to these communities by decreasing localized concentrations of other priority and toxic air pollutants. Several control measures previously suggested by public commenters yet rejected by the agencies for inclusion in the Plan, such as BAAQMD Rules 9-10 and 9-11, involve refineries and utilities, which are sited in predominantly communities of color and low income neighborhoods. EPA should therefore give close scrutiny to the BAAQMD's attempts to shield these industries from federal enforcement. In addition, the TCMs would also provide an additional benefit to low-income communities and communities of color, by providing greater access to improved public transportation systems. Under these circumstances, and given the Bay Area's historical inability to attain the federal 1-hour ozone standard, EPA should use its authority to ensure that the Bay Area 2001 Ozone Plan addresses environmental justice concerns.

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[17] *See* California Department of Health Services, *California County Asthma Hospitalization Chart Book*, Aug. 2000.

[18] The President's Task Force on Environmental Health Risks and Safety Risks reported that asthma is a leading cause of school absenteeism and that approximately 10 million school days are missed annually due to asthma. (A revised May 2000 report, *Asthma and the Environment: A Strategy to Protect Children*, is available at http://www.epa.gov/children/whatwe/fin.pdf.)

[19] *See* California Department of Health Services, *California County Asthma Hospitalization Chart Book*, Aug. 2000.

EPA is obligated by the Executive Order on Environmental Justice and by its own regulations to use its authority to address disproportionate impacts on minority populations.[20] "Environmental Justice is the fair treatment[21] and meaningful involvement[22] of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[23] According to EPA policy, "environmental justice is achieved when everyone, regardless of race, culture, or income, enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."[24]

To this end, EPA should require the agencies to include in the 2001 Ozone Plan information regarding the unequal distributional impacts of Bay Area's nonattainment of the federal 1-hour ozone standard. The agencies should identify and assess the disproportionate impacts of ozone pollution on low income communities and communities of color, given their proximity to both mobile and stationary sources. In addition, the Plan should include an assessment of the impacts of the Bay Area's nonattainment on ozone transport to other regional air basins, particularly in low-income areas and communities of color.

VI. Conclusion

In sum, EPA must reject further delay by the agencies to act expeditiously to further control ozone precursor emissions. EPA must follow the mandate of the Clean Air Act and disapprove

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[20] Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit federal agencies from providing financial assistance to recipients that discriminate on the basis of race, color or national origin. Additionally, under California law, the state agencies must ensure the "fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." Cal. Gov. Code § 65040.12(e).

[21] "*Fair treatment* means that no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies." *See* http://www.epa.gov/compliance/environmentaljustice/index.html.

[22] "*Meaningful involvement* means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected." *See* http://www.epa.gov/compliance/environmentaljustice/index.html.

[23] EPA policy states that "environmental justice is the goal to be achieved for all communities and persons." *See* http://www.epa.gov/compliance/environmentaljustice/index.html.

[24] *See* EPA Environmental Justice Program, http://www.epa.gov/compliance/environmentaljustice/index.html.

the 2001 Ozone Plan. Moreover, EPA should impose offset sanctions, consistent with its prior rulemaking. Finally, EPA must promulgate a FIP by October 22, 2003.

Thank you for the opportunity to submit comments on this important matter. Please do not hesitate to contact me if you have any questions regarding this correspondence.

Sincerely,

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