conformity rule requires regional emissions analysis of motor vehicle NO_x emissions for ozone nonattainment and maintenance areas in order to determine the conformity of transportation plans and programs to implementation plan requirements. This analysis must demonstrate that the NO_x emissions which would result from the transportation system if the proposed transportation plan were implemented are within the total allowable level of NO_x emissions from highway and transit motor vehicles ("the emission budget") as identified in a submitted (or approved) attainment demonstration or maintenance plan. Until an attainment demonstration (or for nonclassifiable areas a maintenance plan) is approved by the EPA, the regional emissions analysis of the transportation system must also satisfy the "build/no-build" test. That is, the analysis must demonstrate that emissions from the transportation system, if the proposed transportation plan and program were implemented, would be less than the emissions from the transportation system if only the previous applicable transportation plan and program were implemented. Furthermore, the regional emissions analysis must show that emissions from the transportation system, if the transportation plan or program were implemented, would be lower than 1990 levels.

With respect to the NO_X requirements of the conformity rules, DRCOG submitted a NO_X exemption petition on May 25, 1994 and submitted supporting documentation via a letter dated August 1, 1994. Ambient air quality data provided with the DRCOG petition showed no violations of the ozone NAAQS during the three-year period from 1991 through 1993. Further, the Colorado Air Pollution Control Division (APCD) provided additional air quality data for the same time period supporting DRCOG's position that there were no violations.

On March 23, 1995, EPA announced its proposed approval of the NO_X exemption request for the nonclassifiable ozone nonattainment area of the Denver metropolitan area (56 FR 15269). In that proposed rulemaking action, EPA described in detail its rationale for approving this NO_X exemption request, considering the specific factual issues presented. Rather than repeating that entire discussion in this document, it is incorporated by reference here. Thus, the public should review the notice of proposed rulemaking for relevant background on this final rulemaking action.

II. Response to Comments

The EPA requested public comments on all aspects of the proposed action to approve the section 182(f) petition for the Denver metropolitan area. The EPA received six letters of support.

The EPA received four adverse comment letters and one letter requesting a clarification. One of the adverse letters was signed by three environmental groups and contained comments objecting to the EPA's general policy on section 182(f) exemptions. This group of three requested that their letter be included in each EPA rulemaking action for section 182(f) petitions. One of the four adverse comment letters was received on August 5, 1994, prior to publication of the EPA proposed approval rulemaking. EPA also received one letter that was not adverse but asked that the impact of granting an ozone NO_X exemption be made clearer. EPA is responding to all of these comments in the final rulemaking.

Comment 1

Certain commenters argued that NO_X exemptions are provided for in two separate parts of the CAA, section 182(b)(1) and section 182(f). Because the NO_X exemption tests in subsections 182(b)(1) and 182(f)(1) include language indicating that action on such requests should take place "when [EPA] approves a plan or plan revision," these commenters conclude that all NO_x exemption determinations by the EPA, including exemption actions taken under the petition process established by subsection 182(f)(3), must occur during consideration of an approvable attainment or maintenance plan, unless the area has been redesignated as attainment. These commenters also argue that even if the petition procedures of subsection 182(f)(3) may be used to relieve areas of certain NO_X requirements, exemptions from the NO_X conformity requirements must follow the process provided in subsection 182(b)(1), since this is the only provision explicitly referenced by section 176(c)(3)(A)(iii), the CAA's conformity provisions.

EPA Response

Section 182(f) contains very few details regarding the administrative procedure for acting on NO_X exemption requests. The absence of specific guidelines by Congress leaves EPA with discretion to establish reasonable procedures, consistent with the requirements of the Administrative Procedure Act (APA).

The EPA disagrees with the commenters regarding the process for

considering exemption requests under section 182(f), and instead believes that subsections 182(f)(1) and 182(f)(3) provide independent procedures by which the EPA may act on NO_X exemption requests. The language in subsection 182(f)(1), which indicates that the EPA should act on NO_X exemptions in conjunction with action on a plan or plan revision, does not appear in subsection 182(f)(3). And, while subsection 182(f)(3) references subsection 182(f)(1), the EPA believes that this reference encompasses only the substantive tests in paragraph (1) [and, by extension, paragraph (2)], not the procedural requirement that the EPA act on exemptions only when acting on SIPs. Additionally, paragraph (3) provides that "person[s]" (which section 302(e) of the CAA defines to include States) may petition for NO_X exemptions "at any time," and requires the EPA to make its determination within six months of the petition's submission. These key differences lead EPA to believe that Congress intended the exemption petition process of paragraph (3) to be distinct and more expeditious than the longer plan revision process intended under paragraph (1)

Section 182(f)(1) appears to contemplate that exemption requests submitted under these paragraphs are limited to States, since States are the entities authorized under the Act to submit plans or plan revisions. By contrast, section 182(f)(3) provides that "person[s]" may petition for a NO_X determination "at any time" after the ozone precursor study required under section 185B of the Act is finalized,2 and gives EPA a limit of 6 months after filing to grant or deny such petitions. Since individuals may submit petitions under paragraph (3) "at any time", this must include times when there is no plan revision from the State pending at

ΞPA.

In regard to the comment concerning the appropriate Act authority for granting transportation-related NO_X waivers, the EPA agrees, with certain exceptions, that section 182(b)(1) is the appropriate authority under the Act for waiving the transportation conformity rule's NO_X "build/no build" and "less-than-1990" tests, and is in the process of amending the rule to be consistent with the statute. However, the EPA believes that this authority is only applicable with respect to those areas that are subject to section 182(b)(1).

¹Section 302(e) of the Act defines the term 'person' to include States.

²The final section 185B report was issued July 30, 1993