rules. Commenters argue that such exemptions waive only the requirements of section 182(b)(1) to contribute to specific annual reductions, not the requirement that conformity SIPs contain information showing the maximum amount of motor vehicle NO<sub>X</sub> emissions allowed under the transportation conformity rules and, similarly, the maximum allowable amounts of any such NO<sub>X</sub> emissions under the general conformity rules. The commenters admit that, in prior guidance, EPA has acknowledged the need to amend a drafting error in the existing transportation conformity rules to ensure consistency with motor vehicle emissions budgets for NO<sub>X</sub>, but want EPA in actions on NO<sub>X</sub> exemptions to explicitly affirm this obligation and to also avoid granting waivers until a budget controlling future  $NO_X$  increases is in place.

## EPA Response

With respect to conformity, EPA's conformity rules 3 4 provide a NO<sub>X</sub> waiver if an area receives a section 182(f) exemption. In its Federal Register Notice entitled "Conformity; General Preamble for Exemption From Nitrogen Oxides Provisions," 59 FR 31238, 31241 (June 17, 1994), EPA reiterated its view that, in order to conform, nonattainment and maintenance areas must demonstrate that the transportation plan and TIP are consistent with the motor vehicle emissions budget for NO<sub>X</sub>, even where a conformity  $N\bar{O}_X$  waiver has been granted. Due to a drafting error, that view is not reflected in the current transportation conformity rules. As the commenters correctly note, EPA states in the June 17th notice that it intends to remedy the problem by amending the conformity rule. EPA has begun the process to do so. Although that notice specifically mentions only requiring consistency with the approved maintenance plan's NO<sub>X</sub> motor vehicle emissions budget, EPA also intends to require consistency with the attainment demonstration's NO<sub>X</sub> motor vehicle emissions budget. The commenter suggests that EPA should delay action on the NO<sub>x</sub> exemption request until the rulemaking that amends this portion of the transportation conformity rule has been finalized. However, EPA believes that, despite the error in the rule, it has consistently made it clear that the intent of the statute and of the rule requires the transportation plan and TIP to

demonstrate consistency with the  $NO_X$ motor vehicle emissions budget, even where a waiver has been granted. Moreover, this exemption is being processed under section 182(f)(3), which requires EPA to act within 6 months on the petition. EPA does not believe it is appropriate to delay acting on petitions to wait for the rule to be amended, especially given the short timeframe within which that action is expected to occur.

## Comment 5

Comments were received saying the CAA does not authorize any waiver of the  $NO_X$  reduction requirements until conclusive evidence exists that such reductions are counter-productive.

## EPA Response

EPA does not agree with this comment since it ignores Congressional intent as evidenced by the plain language of section 182(f), the structure of the Title I ozone subpart as a whole, and relevant legislative history. By contrast, in developing and implementing its NO<sub>x</sub> exemption policies, EPA has sought an approach that reasonably accords with that intent. Section 182(f), in addition to imposing control requirements on major stationary sources of NO<sub>X</sub> similar to those that apply for such sources of VOC, also provides for an exemption (or limitation) from application of these requirements if, under one of several tests, EPA determines that in certain areas NO<sub>X</sub> reductions would generally not be beneficial. In subsection 182(f)(1), Congress explicitly conditioned action on NO<sub>X</sub> exemptions on the results of an ozone precursor study required under section 185B. Because of the possibility that reducing  $NO_X$  in a particular area may either not contribute to ozone attainment or may cause the ozone problem to worsen, Congress included attenuating language, not just in section 182(f) but throughout the Title I ozone subpart, to avoid requiring NO<sub>X</sub> reductions where it would be nonbeneficial or counterproductive. In describing these various ozone provisions (including section 182(f)), the House Conference Committee Report states in pertinent part: "[T]he Committee included a separate NO<sub>X</sub>/VOC study provision in section [185B] to serve as the basis for the various findings contemplated in the NO<sub>X</sub> provisions. The Committee does not intend NO<sub>X</sub> reduction for reduction's sake, but rather as a measure scaled to the value of NO<sub>X</sub> reductions for achieving attainment in the particular ozone nonattainment area." H.R. Rep. No. 490, 101st Cong., 2d Sess.

257-258 (1990). As noted in response to an earlier comment by these same commenters, the command in subsection 182(f)(1) that EPA "shall consider" the 185B report, taken together with the timeframe the Act provides both for completion of the report and for acting on NO<sub>X</sub> exemption petitions, clearly demonstrate that Congress believed the information in the completed section 185B report would provide a sufficient basis for EPA to act on NO<sub>X</sub> exemption requests, even absent the additional information that would be included in affected areas' attainment or maintenance demonstrations. However, while there is no specific requirement in the Act that EPA actions granting NO<sub>X</sub> exemption requests must await "conclusive evidence", as the commenters argue, there is also nothing in the Act to prevent EPA from revisiting an approved NO<sub>X</sub> exemption if warranted due to better ambient information.

In addition, the EPA believes (as described in EPA's December 1993 guidance) that section 182(f)(1) of the CAA provides that the new NO<sub>X</sub> requirements shall not apply (or may be limited to the extent necessary to avoid excess reductions) if the Administrator determines that *any one* of the following tests is met:

(1) in any area, the net air quality benefits are greater in the absence of  $NO_X$  reductions from the sources concerned;

(2) in nonattainment areas not within an ozone transport region, additional NO<sub>X</sub> reductions would not contribute to ozone attainment in the area; or

(3) in nonattainment areas within an ozone transport region, additional  $NO_X$  reductions would not produce net ozone air quality benefits in the transport region.

Based on the plain language of section 182(f), EPA believes that each test provides an independent basis for receiving a full or limited NO<sub>X</sub> exemption.

Only the first test listed above is based on a showing that  $NO_X$  reductions are "counter-productive." If one of the tests is met (even if another test is failed), the section 182(f)  $NO_X$ requirements would not apply or, under the excess reductions provision, a portion of these requirements would not apply.

## Comment 6

Commenters raised specific issues about the adequacy of the DRCOG 2015 Interim Regional Transportation Plan to ensure health standards when considered in relation to approval of the NO<sub>x</sub> waiver. They further stated that

<sup>&</sup>lt;sup>3</sup> "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved under Title 23 U.S.C. of the Federal Transit Act," November 24, 1993 (58 FR 62188).