Until an attainment demonstration or maintenance plan is approved by the EPA, this emissions analysis must pass the build/no-build test. This analysis must demonstrate that the emissions from the planned transportation project, if implemented, would be less than the emissions without the planned transportation project. Thus, the build/no-build test is intended to ensure that the transportation plan contributes to annual emissions reductions consistent with the CAA until such time as the attainment demonstration or maintenance plan is approved.

On June 17, 1994 (59 FR 31238), the EPA published a national interpretation of transportation conformity and section 182(f) exemptions entitled "Transportation Conformity; General Preamble for Exemption From Nitrogen Oxides Provisions" (General Preamble). This General Preamble clarifies and

interprets how ozone nonattainment areas classified as less than marginal, which have air quality monitoring data demonstrating attainment of the National Ambient Air Quality Standards (NAAQS) for ozone, may be exempted from certain NO_X requirements.

As explained in the General Preamble, the EPA believes that a demonstration of attainment made through adequate air quality monitoring data, consistent with 40 CFR part 58 and recorded in EPA's Aerometric Information Retrieval System (AIRS), can qualify an area as a ''clean data area''. Further, the EPA believes these "clean data areas" can request an exemption from the NO_X provisions of the Federal transportation conformity rule. The section 182(f) exemption will be conditioned upon the area's monitoring data continuing to demonstrate attainment after an exemption is granted. If the EPA determines that an exempted area has violated the ozone standard, the section 182(f) exemption will be rescinded. Any decision to rescind the NO_X exemption would be based on an evaluation of the air quality data recorded in AIRS. Past conformity determinations and transportation plans would not be affected, but new conformity determinations would be subject to the NO_X provisions of the conformity rule.

On May 4, 1994, the State of Texas submitted a petition to the EPA requesting that the Victoria County incomplete data ozone nonattainment area be exempted from the requirement to perform the NO_X portion of the build/no-build test required by the new transportation conformity rule. This exemption request is pursuant to the recently published General Preamble for transportation conformity NO_X exemptions.

On August 12, 1994, EPA announced its direct final approval of the NO_X exemption request from the State of Texas for Victoria County. In that direct final 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, that discussion is incorporated by reference herein. Thus, the public should review the notice of direct final rulemaking for relevant background on this final rulemaking action.

Response to Comments

EPA requested public comments on all aspects of the direct final rulemaking action (59 FR 41408) and comments were received. Therefore the direct final rulemaking was withdrawn and comments applicable to the Victoria County area were considered and are discussed below.

Comment: Certain commenters noted 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 concluded 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 argued 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), the CAA's conformity provisions.

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 Procedures 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 6 months of the petition's submission.

Further, 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]" $^{\scriptscriptstyle 1}$ may petition for a NO $_{\scriptscriptstyle X}$ 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 EPA. The specific timeframe for EPA action established in paragraph (3) is substantially shorter than the timeframe usually required for States to develop and for EPA to take action on revisions to a SIP. These differences strongly suggest that Congress intended the process for acting on personal petitions to be distinct from and more expeditious than the plan-revision process intended under paragraph (1).

The CAA requires conformity with regard to federally-supported NO_X generating activities in relevant nonattainment and maintenance areas. However, EPA's conformity rules explicitly provide that these NO_X requirements would not apply if EPA grants an exemption under section 182(f). In response to the comment that section 182(b)(1) should be the appropriate vehicle for dealing with exemptions from the NO_X requirements of the conformity rule, EPA notes that this issue has previously been raised in a formal petition for reconsideration of

 $^{^{\}rm 1}Section~302(e)$ of the Act defines the term "person" to include States.

 $^{^2}$ The final section 185B report was issued July 30, 1993.