

Jefferson, Orleans, St. Bernard, St. Charles, St. James, and St. Mary in Louisiana. The 182(f) exemption will be conditioned upon the area's monitoring data continuing to demonstrate attainment after the exemption has been granted. If the EPA later determines that an above mentioned parish has violated the ozone standard, the 182(f) exemption will be rescinded for that parish. Past conformity determinations and transportation plans would not be affected, but new conformity determinations would then be subject to the NO<sub>x</sub> provisions of the conformity rule.

The EPA has reviewed this request for exemption from the NO<sub>x</sub> provisions of the Federal transportation conformity rule for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The EPA has determined that this action conforms with those requirements.

#### Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, the EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, under 5 U.S.C. 605(b), the EPA may certify that the rule will not have a significant impact on a substantial number of small entities (see 46 FR 8709). Small entities include small businesses, small not-for-profit enterprises, and governmental entities with jurisdiction over populations of less than 50,000.

Because an exemption from the Federal transportation conformity rule does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 3, 1995. Filing a petition for reconsideration of this final rule by the Administrator does not affect the finality of this rule for purposes of judicial review; nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### Executive Order

The Office of Management and Budget has exempted this action from review under Executive order 12866.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental regulations, Reporting and recordkeeping, Ozone, Volatile organic compounds.

Dated: January 13, 1995.

**Barbara J. Goetz,**  
*Acting Regional Administrator.*

40 CFR part 52 is amended as follows:

#### PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401-7671q.

#### Subpart T—Louisiana

2. Section 52.992 is added to read as follows:

##### § 52.992 Area-wide nitrogen oxides exemptions.

(a) The Louisiana Department of Environmental Quality submitted to the EPA on August 5, 1994, a petition requesting that the nonclassifiable ozone nonattainment areas in the State of Louisiana be exempted from the requirement to meet the NO<sub>x</sub> provisions of the Federal transportation conformity rule. The exemption request was based on monitoring data which demonstrated that the National Ambient Air Quality Standard for ozone had been attained in this area for the 3 years prior to the petition. The parishes for which the NO<sub>x</sub> exemption was requested include: Beauregard, Grant, Lafayette, Lafourche, Jefferson, Orleans, St. Bernard, St. Charles, St. James, and St. Mary. The EPA approved this exemption request on March 2, 1995.

(b) [Reserved].

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#### 40 CFR Part 52

[TX-44-1-6797; FRL-5144-8]

#### Transportation Conformity; Approval of Petition for Exemption From Nitrogen Oxides Provisions, Victoria County, Texas

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA is approving a petition from the State of Texas

requesting that Victoria County, an incomplete data ozone nonattainment area, be exempted from the requirement to perform the oxides of nitrogen (NO<sub>x</sub>) portion of the build/no-build test required by the new Federal transportation conformity rule. This petition for exemption was submitted on May 4, 1994.

**EFFECTIVE DATE:** This action will become effective on March 2, 1995.

**ADDRESSES:** Copies of the State's petition and other information relevant to this action are available for inspection during normal hours at the above location and at the following locations:

U.S. Environmental Protection Agency, Region 6, Air Programs Branch (6T-A), 1445 Ross Avenue, suite 700, Dallas, Texas 75202-2733.

Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M. Street, SW., Washington, DC 20460.

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, P.O. Box 13087, Austin, Texas 78711-3087.

Anyone wishing to review this petition at the US EPA office is asked to contact the person below to schedule an appointment 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mick Cote, Planning Section (6T-AP), Air Programs Branch, U.S. Environmental Protection Agency, telephone (214) 665-7219.

#### SUPPLEMENTARY INFORMATION:

##### Background

The transportation conformity final rule, entitled "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. or the Federal Transit Act," was published in the **Federal Register** on November 24, 1993 (58 FR 62188). This action was required under section 176(c)(4) of the Clean Air Act (CAA) as amended in 1990.

The transportation conformity rule requires each ozone nonattainment area and maintenance area to perform a regional analysis of motor vehicle volatile organic compound and NO<sub>x</sub> emissions from any planned transportation project. This analysis must demonstrate that the emissions which would result from the proposed transportation system if the transportation plan were implemented are within the total allowable level of emissions described in the motor vehicle emissions budget.

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<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> exemptions.

On August 12, 1994, EPA announced its direct final approval of the NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> exemptions are provided for in two separate parts of the CAA, section 182(b)(1) and section 182(f). Because the NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> requirements, exemptions from the NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub>

exemption requests. The language in subsection 182(f)(1), which indicates that the EPA should act on NO<sub>x</sub> 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<sub>x</sub> 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]"<sup>1</sup> may petition for a NO<sub>x</sub> determination "at any time" after the ozone precursor study required under section 185B of the Act is finalized,<sup>2</sup> 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<sub>x</sub> generating activities in relevant nonattainment and maintenance areas. However, EPA's conformity rules explicitly provide that these NO<sub>x</sub> 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<sub>x</sub> requirements of the conformity rule, EPA notes that this issue has previously been raised in a formal petition for reconsideration of

<sup>1</sup> Section 302(e) of the Act defines the term "person" to include States.

<sup>2</sup> The final section 185B report was issued July 30, 1993.

EPA's final transportation conformity rule and in litigation pending before the U.S. Court of Appeals for the District of Columbia Circuit on the substance of both the transportation and general conformity rules. The issue, thus, is under consideration within EPA, but at this time remains unresolved. Additionally, subsection 182(f)(3) requires that NO<sub>x</sub> exemption petition determinations be made by the EPA within 6 months. The EPA has stated in previous guidance that it intends to meet this statutory deadline as long as doing so is consistent with the APA. The EPA, therefore, believes that until a resolution of this issue is achieved, the applicable rules governing this issue are those that appear in EPA's final conformity regulations, and EPA remains bound by their existing terms.

*Comment:* Three years of "clean" data fail to demonstrate that NO<sub>x</sub> reductions would not contribute to attainment. EPA's policy erroneously equates the absence of a violation for one three-year period with "attainment."

*Response:* The EPA has separate criteria for determining if an area should be redesignated to attainment under section 107 of the CAA. The section 107 criteria are more comprehensive than the CAA requires with respect to NO<sub>x</sub> exemptions under section 182(f).

Under section 182(f)(1)(A), an exemption from the NO<sub>x</sub> requirements may be granted for nonattainment areas outside an ozone transport region if EPA determines that "additional reductions of NO<sub>x</sub> would not contribute to attainment" of the ozone NAAQS in those areas. In some cases, an ozone nonattainment area might attain the ozone standard, as demonstrated by 3 years of adequate monitoring data, without having implemented the section 182(f) NO<sub>x</sub> provisions over that 3-year period. The EPA believes that, in cases where a nonattainment area is demonstrating attainment with 3 consecutive years of air quality monitoring data without having implemented the section 182(f) NO<sub>x</sub> provisions, it is clear that the section 182(f) test is met since "additional reductions of NO<sub>x</sub> would not contribute to attainment" of the NAAQS in that area. The EPA's approval of the exemption, if warranted, would be granted on a contingent basis (i.e., the exemption would last for only as long as the area's monitoring data continue to demonstrate attainment).

*Comment:* Comments were received regarding exemption of areas from the NO<sub>x</sub> requirements of the conformity rules. They 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>. However, the commenters want EPA in actions on NO<sub>x</sub> exemptions to explicitly affirm this obligation and also to avoid granting waivers until a budget controlling future NO<sub>x</sub> increases is in place.

*Response:* With respect to conformity, EPA's conformity rules<sup>3,4</sup> provide a NO<sub>x</sub> waiver if an area receives a section 182(f) exemption. In its "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 to Federal requirements, 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 NO<sub>x</sub> 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 stated in the June 17th notice that it intends to remedy the problem by amending the conformity rule. 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. However, the exemptions were submitted pursuant to section 182(f)(3), and EPA does not believe it is appropriate to delay the statutory deadline for acting on these petitions until the conformity rule is amended. As noted earlier in response to a previous issue raised by these commenters, this issue has also been raised in a formal petition for reconsideration of the Agency's final transportation conformity rule and in

litigation pending before the U.S. Court of Appeals for the District of Columbia Circuit on the substance of both the transportation and general conformity rules. This issue, thus, is under consideration within the Agency, but at this time remains unresolved. The EPA, therefore, believes that until a resolution of this issue is achieved, the applicable rules governing this issue are those that appear in the Agency's final conformity regulations, and the Agency remains bound by their existing terms.

### Final Action

The EPA has evaluated the State's exemption request for consistency with the CAA, EPA regulations, and EPA policy. The EPA believes that the exemption request and monitoring data qualifies Victoria County, Texas, as a "clean data area". This final action on the State of Texas' NO<sub>x</sub> exemption petition for Victoria County is unchanged from the August 12, 1994 direct final approval action. In addition, the EPA has determined that the exemption request meets the requirements and policy set forth in the General Preamble for NO<sub>x</sub> exemptions from the build/no-build test for transportation conformity, and today is approving Texas' request for exemption from the NO<sub>x</sub> build/no-build test of transportation conformity for Victoria County. The section 182(f) exemption will be conditioned upon the area's monitoring data continuing to demonstrate attainment after the exemption has been granted. If the EPA later determines that Victoria County has violated the ozone standard, the section 182(f) exemption will be rescinded. Past conformity determinations and transportation plans would not be affected, but new conformity determinations would then be subject to the NO<sub>x</sub> provisions of the conformity rule.

The EPA has reviewed this request for exemption from the NO<sub>x</sub> provisions of the Federal transportation conformity rule for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The EPA has determined that this action conforms with those requirements.

### Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, the EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, under 5 U.S.C. 605(b), the EPA may certify that the rule will not have a significant impact on a substantial number of small entities (see

<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).

<sup>4</sup> "Determining Conformity of General Federal Actions to State or Federal Implementation Plans; Final Rule," November 30, 1993 (58 FR 63214).

46 FR 8709). Small entities include small businesses, small not-for-profit enterprises, and governmental entities with jurisdiction over populations of less than 50,000.

Because an exemption from the Federal transportation conformity rule does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 3, 1995. Filing a petition for reconsideration of this final rule by the Administrator does not affect the finality of this rule for purposes of judicial review; nor does it extend the time within which a petition for judicial review may be filed, or postpone the effectiveness of this rule. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### Executive Order

The Office of Management and Budget has exempted this action from review under Executive Order 12866.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental regulations, Reporting and recordkeeping, Ozone, Volatile organic compounds.

Dated: January 13, 1995.

Barbara J. Goetz,

Acting Regional Administrator.

40 CFR part 52 is amended as follows:

#### PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401-7671q.

#### Subpart SS—Texas

2. Section 52.2308 is amended by adding paragraph (c) to read as follows:

#### § 52.2308 Area-wide nitrogen oxides (NO<sub>x</sub>) exemptions.

\* \* \* \* \*

(c) The Texas Natural Resource Conservation Commission submitted to the EPA on May 4, 1994, a petition requesting that the Victoria County incomplete data ozone nonattainment area be exempted from the requirement

to meet the NO<sub>x</sub> provisions of the Federal transportation conformity rule. The exemption request was based on monitoring data which demonstrated that the National Ambient Air Quality Standard for ozone had been attained in this area for the 35 months prior to the petition, with the understanding that approval of the State's request would be contingent upon the collection of one additional month of data. The required additional month of verified data was submitted later and, together with the data submitted with the State's petition, demonstrated attainment of the NAAQS for 36 consecutive months. The EPA approved this exemption request on March 2, 1995.

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#### 40 CFR PART 52

[WI43-01-6261a; AMS-FRL-5139-1]

#### Clean Air Act Approval and Promulgation of Employee Commute Options Program; Wisconsin

**AGENCY:** Environmental Protection Agency (EPA)

**ACTION:** Direct final rule.

**SUMMARY:** The EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Wisconsin on November 15, 1993 for the purpose of establishing an Employee Commute Options (ECO) program in the Milwaukee, severe-17, ozone nonattainment area. Wisconsin submitted the SIP to satisfy the provisions of the Clean Air Act (Act), that require that an ECO Program be established for employers with 100 or more employees for the purpose of reducing the number of vehicle trips being made to the worksite during the peak commuting period. The rationale for the approval is set forth in this document; additional information is available at the address indicated below. **DATES:** This final rule is effective April 3, 1995 unless someone submits adverse comments by March 2, 1995. If the effective date is delayed, timely notice will be published in the **Federal Register**.

**ADDRESSES:** Copies of the SIP revision and EPA's technical support documents are available at the following address: United States Environmental Protection Agency, Region 5, Air and Radiation Division, Air Toxics and Radiation Branch, Regulation Development Section, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Written comments can be mailed to: Carlton Nash, Chief, Regulation Development Section (AT-18J), Air Toxics and Radiation Branch, Air and Radiation, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** John M. Mooney, (312) 886-6043. Anyone wishing to come to the Region 5 offices should contact John M. Mooney first.

#### SUPPLEMENTARY INFORMATION:

#### I. Background

Implementation of the provisions of the Act will require employers with 100 or more employees in the seven county Milwaukee Severe-17 ozone nonattainment area to participate in a trip reduction program. The concerns that lead to the inclusion of this Employee Commute Options (ECO) provision in the Act are that more people than ever before are driving and they are driving longer distances. The increase in the number of drivers and the increase in the number of vehicle miles traveled (VMT) currently offset a large part of the emissions reductions achieved through the production and sale of vehicles that operate more cleanly. It is widely accepted that shortly after the year 2000, without limits on increased travel, the increased emissions caused by more vehicles being driven more miles under more congested conditions will outweigh the benefits derived from the fact that each new vehicle pollutes less, resulting in an overall increase in emissions from mobile sources. The ECO provision in the Act outlines the requirements for a program designed to minimize the use of single occupancy vehicles in order to gain emissions reductions beyond those obtained via stricter tailpipe and fuel standards.

Section 182(d)(1)(B) of the Act requires that employers submit their compliance plans to the State 2 years after the SIP revision is submitted to EPA. These employer developed compliance plans are designed to convincingly demonstrate an increase in the average passenger occupancy (APO) rates of employees who commute to work during the peak period by no less than 25 percent above the average vehicle occupancy (AVO) of the nonattainment area. These compliance plans must "convincingly demonstrate" that the employers will meet the target no later than 4 years after the SIP is submitted. The target APO must be at least 25 percent higher than the AVO for the nonattainment area.

On November 15, 1993 the State of Wisconsin submitted a SIP revision to