

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 93

[FRL-]

Conformity; General Preamble for Exemption From Nitrogen
Oxides Provisions
June 17, 1994; Page 31238

AGENCY: Environmental Protection Agency (EPA).

ACTION: General preamble for future proposed rulemakings.

SUMMARY: This General Preamble clarifies how EPA believes that nonclassifiable (i.e., submarginal, transitional, and incomplete/no data) ozone nonattainment areas which are outside the Northeast ozone transport region and have ambient monitoring data demonstrating attainment of the national ambient air quality standard for ozone may be exempted from the conformity rules' nitrogen oxides (NOx) requirements. This notice also references a recent memorandum which states EPA's preliminary interpretation for such ozone nonattainment areas which are classified as marginal or above.

Clarification of EPA policy for areas with monitoring data which demonstrates attainment is particularly important because many areas already have such data and appear to qualify for exemption from the conformity NOx requirements.

In order to avoid repetition, this General Preamble

describes guidance on NOx exemptions with respect to the transportation conformity rule. However, this guidance for

transportation conformity is intended to also apply with respect to general conformity.

This General Preamble explains EPA's policy generally for future notice-and-comment rulemakings taking action on requests for NOx exemptions for specific areas. It contains EPA's preliminary interpretations of relevant provisions of the Clean Air Act and the conformity rules. The interpretations contained herein are not binding as a matter of law until final rulemaking action is taken on each specific area. Opportunity for public comment on NOx exemption determinations made by EPA will be provided separately for each area during these individual rulemakings.

FOR FURTHER INFORMATION CONTACT: For issues related to transportation conformity, Kathryn Sargeant, Emission Control Strategies Branch, Emission Planning and Strategies Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. (313) 668-4441. For issues related to redesignation, David Cole, (919) 541-5565, and for issues related to general conformity and NOx RACT and NSR, Doug Grano, (919) 541-3292, Ozone/CO Programs Branch (MD-15), Air Quality Management Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

Note: In accordance with 1 CFR 5.9(c), this document is published in the Proposed Rules category.

I. Background

A. Transportation Conformity Rule

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, as amended in 1990.

Conformity to an implementation plan is defined in the Clean Air Act as conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards. In addition, Federal activities may not cause or contribute to new violations of air quality standards, exacerbate existing violations, or interfere with timely attainment or required interim emission reductions towards attainment. The transportation conformity final rule establishes the process by which the Federal Highway Administration and the Federal

Transit Administration of the United States Department of Transportation and metropolitan planning organizations determine the conformity of highway and transit projects. Under the rule, conformity applies in nonattainment and maintenance areas.

The transportation conformity rule requires ozone nonattainment and maintenance areas to perform a regional emissions analysis of motor vehicle NOx emissions in order to determine the conformity of transportation plans and programs. This analysis must demonstrate that the NOx emissions which would result from the transportation system if the proposed transportation plan and program were implemented are within the total allowable level of NOx emissions from highway and transit motor vehicles ("motor vehicle emissions 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 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 previously applicable transportation plan and program were

implemented. Furthermore, the regional emissions analysis must show that emissions from the transportation system if the transportation plan and program were implemented would be lower than 1990 levels by any nonzero amount.

The transportation conformity rule as currently written provides for an exemption from these requirements with respect to NOx if the Administrator determines under section 182(f) of the Clean Air Act that additional reductions of NOx would not contribute to attainment. This exemption is explicitly referred to and is described in similar language in §51.394(b)(3)(i) (the "Applicability" section of the rule) and in the preamble (58 FR 62197, November 24, 1993). The language is repeated in the provisions of the rule regarding the motor vehicle emissions budget test (§51.428(a)(1)(ii)) and the "build/no-build" test (§§51.436(e), 51.438(e)), although Clean Air Act section 182(f) is not specifically mentioned.

Section 182(f) of the Clean Air Act contains requirements for--and in some cases, exemptions for--major stationary NOx sources in marginal and above ozone nonattainment areas and in an ozone transport region. EPA guidance for application of section 182(f) in these areas is briefly described and referenced in the next section of this preamble. Because the transportation conformity rule covers all nonattainment areas--including nonclassifiable ozone

nonattainment areas (i.e., submarginal, transitional, incomplete/no data areas) that are not necessarily covered under section 182(f)--corresponding guidance is needed for applying in these nonclassifiable ozone nonattainment areas the section 182(f) NOx exemption referenced in the transportation conformity rule. This guidance is described below (section II, "EPA Policy") and is consistent with the existing guidance that applies to the marginal and above areas outside an ozone transport region. The substantive test for a NOx exemption is the same in both sets of areas, but in nonclassifiable ozone nonattainment areas the effect of a NOx exemption is limited solely to the issue of whether such areas may be exempted from meeting the NOx requirements of the transportation conformity rule.

B. General Conformity

On November 30, 1993 (58 FR 63214), EPA published the general conformity final rule, entitled "Determining Conformity of General Federal Actions to State or Federal Implementation Plans." This action was required under section 176(c)(4) of the Clean Air Act, as amended in 1990.

Like the transportation conformity rule, the general conformity rule exempts an area from considering NOx emissions if the area has been exempted under section 182(f) of the Clean Air Act (see definition of "precursors of a

criteria pollutant," 58 FR 63248).

In order to avoid repetition, this General Preamble describes guidance on NOx exemptions with respect to the transportation conformity rule. However, this guidance for transportation conformity is intended to also apply with respect to general conformity.

C. Section 182(f) of the Clean Air Act

Section 182(f) of the Clean Air Act requires states to apply the reasonably available control technology (RACT) and new source review (NSR) requirements that apply to major stationary sources of volatile organic compounds to major stationary sources of NOx as well. NOx RACT is required in moderate and above ozone areas, as well as in all areas within an ozone transport region. NOx NSR regulations are required in marginal and above ozone areas, as well as in all areas within an ozone transport region.

Clean Air Act section 182(f)(1)(A) states that, for nonattainment areas not within an ozone transport region (as established under Clean Air Act section 184), these NOx requirements shall not apply if the Administrator determines that additional reductions of NOx would not contribute to attainment of the national ambient air quality standard (NAAQS) for ozone in the area. Furthermore, for areas within an ozone transport region, section 182(f)(1)(B)

states that these stationary source NOx requirements shall not apply if additional NOx reductions would not produce net ozone air quality benefits in the region.

EPA issued limited guidance on section 182(f) exemptions in a September 17, 1993 memo from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, to the Regional Air Division Directors entitled, "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992." EPA issued more extensive guidance in a December 1993 document entitled, "Guideline for Determining the Applicability of Nitrogen Oxide Requirements under Section 182(f)." Most recently, EPA has clarified and, in part, revised its guidance in a May 27, 1994 memorandum from John S. Seitz, Director of the Office of Air Quality Planning and Standards, to Regional Air Division Directors, "Section 182(f) NOx Exemptions--Revised Process and Criteria." All of these guidance documents are available by request from the contacts listed above.

Taken together, these guidance documents state that if an area (not within an ozone transport region) has attained the ozone standard, as demonstrated by adequate monitoring data consistent with EPA guidance, it is clear that

additional NOx reductions would not contribute to attainment. Therefore, such an area would meet the test under section 182(f)(1)(A) for an exemption from NOx NSR and RACT requirements.

II. EPA Policy

A. Transportation Conformity and Section 182(f) Exemptions

The transportation conformity rule states that its NOx provisions do not apply when the Administrator has determined under section 182(f) of the Clean Air Act that "additional reductions of NOx would not contribute to attainment." Although two other passages of the transportation conformity rule use this language (which is borrowed from section 182(f)(1)(A)'s test for areas outside an ozone transport region) without specifically referring to section 182(f), EPA believes there is no appropriate basis to interpret this identical language differently under the transportation conformity rule than under the Clean Air Act. Consequently, EPA believes this common language should be interpreted similarly for purposes of both section 182(f) and conformity NOx exemptions. Therefore, EPA is providing guidance which would exempt nonclassifiable ozone nonattainment areas outside an ozone transport region from the conformity rule's NOx provisions on the same substantive

basis as the applicable section 182(f) test.¹

The transportation conformity rule applies to all nonattainment and maintenance areas, and does not

¹ As explained in footnote 6 of the May 27, 1994 memorandum from John Seitz, referenced above, for purposes of the NOx exemption test, EPA is interpreting the term "contribute to attainment" to mean that the State (or petitioner) need only show whether additional NOx reductions would contribute to attainment, not whether such reductions would contribute to attainment and maintenance. EPA believes that Congress could reasonably have believed it appropriate to require that States impose reasonably available control technology (RACT) and new source review (NSR) requirements on NOx sources for areas in nonattainment, but that the States could be left to decide for themselves whether to impose these NOx controls or other measures for maintenance purposes, even if these controls could "contribute" to maintenance. EPA believes this rationale also applies in the conformity context, where EPA believes it is reasonable to allow States that have attained the NAAQS to decide for themselves how best to ensure maintenance of the standard. And, as explained below, EPA has conditioned the monitoring-based section 182(f) and conformity exemptions on continued monitoring data that do not show violations of the NAAQS. This will provide an additional incentive for States to track NOx emissions (and limit such emissions, where necessary) to ensure that future violations do not occur.

EPA notes that its conclusion regarding the relevance of maintenance may well be different for other Clean Air Act provisions where the test is whether emissions reduction measures are "necessary" for attainment, even if maintenance is not explicitly mentioned. See section 211(c)(4)(C) (allowing States to overcome federal preemption of State fuel controls where "necessary" to achieve a NAAQS) and section 184(c) (providing for EPA approval of ozone transport commission recommendations of additional control measures "necessary" to bring any area in the region into attainment). It may make less sense to disregard maintenance to disallow more stringent fuel controls under section 211 or to disapprove additional controls under section 184 where these measures not only contribute to but are "necessary" for maintenance. The rationale that the State might appropriately retain discretion to choose other options to ensure maintenance makes less sense when the specific measures in question are "necessary."

distinguish between nonclassifiable nonattainment and other nonattainment areas. Consequently, EPA interprets the transportation conformity rule's reference to the need for nonattainment areas to obtain a section 182(f) exemption in order to be relieved of the NOx conformity requirements to include nonclassifiable ozone nonattainment areas (i.e., submarginal, transitional, incomplete/no data areas), even though such areas are not subject to Clean Air Act section 182(f) itself. This means that ozone nonattainment areas, including nonclassifiable ozone nonattainment areas, can only be exempted from the NOx provisions of the transportation conformity rule if EPA determines that the area satisfies the substantive test required for an areawide section 182(f) exemption, through a process similar to that required for section 182(f) exemptions which are not related to conformity.

Thus, for nonclassifiable ozone nonattainment areas outside the Northeast ozone transport region, EPA will consider requests for determinations that additional NOx reductions would not contribute to attainment if such areas already have air quality data that demonstrate attainment of the ozone standard, that are consistent with 40 CFR part 58 requirements, and that are recorded in EPA's Aerometric Information Retrieval System (AIRS). Once made, this determination would relieve an area of the transportation

conformity rule's NOx provisions. A more thorough explanation of the conditions and process for obtaining the 182(f) exemption is given in the May 27, 1994 Seitz memorandum.

B. Condition on NOx Exemptions for Areas Outside the Ozone Transport Region With Monitoring Data Demonstrating Attainment

If a NOx transportation conformity exemption request is based solely on monitoring data demonstrating attainment, EPA's approval of the exemption, if otherwise warranted, will be granted on a contingent basis, i.e., the exemption would last for only as long as the area's monitoring data continues to demonstrate attainment. If subsequently it is determined that the area has violated the standard, the exemption, as of the date of the determination, would no longer apply. EPA would notify the state that the exemption no longer applies, and would also provide notice to the public in the Federal Register. Existing transportation plans and TIPS and past conformity determinations will not be affected by a determination that the NOx exemption no longer applies, but new conformity determinations would have to observe the NOx requirements of the conformity rule. The State must continue to operate an appropriate air quality monitoring network, in accordance with 40 CFR part 58, to

verify the attainment status of the area. The air quality data relied on for the above determinations must be consistent with 40 CFR part 58 requirements and other relevant EPA guidance and recorded in AIRS.

C. Areas Inside an Ozone Transport Region

Section 182(f) of the Clean Air Act provides a different test for exempting areas in an ozone transport region from NO_x requirements (see section I.C. of this preamble). In particular, that test requires a demonstration that shows additional NO_x reductions would not produce net ozone benefits in the transport region as a whole. Since the requirement for meeting this test is substantially different from that needed to meet the contribute-to-attainment test in section 182(f)(1)(A), and since the language in the conformity rule clearly does not reflect the language of the test provided for areas in an ozone transport region, the determination of how such areas would qualify for an exemption from the rule's NO_x requirements merits more consideration before EPA can issue appropriate guidance. Today's guidance therefore applies only to NO_x exemptions for areas outside the Ozone Transport Region.

As noted previously, requests for conformity NO_x exemptions must consider the nonattainment area as a whole.

With respect to transportation conformity, NOx exemptions will not be granted for portions of nonattainment areas. Therefore, nonattainment areas with portions both inside and outside the Ozone Transport Region will be treated for purposes of such exemption requests as areas inside the Ozone Transport Region, and for the present time, will not be eligible for an exemption based on monitoring data as described in this notice.

EPA will give further consideration to areas in the Ozone Transport Region, and if EPA does propose to exempt some of these areas, they will be addressed in state-specific rulemaking notices unless another general preamble providing guidance for such areas is published first.

III. Process for Receiving a NOx Exemption Based on Monitoring Data for Nonclassifiable Areas

EPA believes that section 182(f) sets up two separate procedures by which EPA may act on NOx exemption requests. Subsections 182(f)(1) and (2) direct that action on NOx exemption determination requests should take place "when [EPA] approves a plan or plan revision." This language 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, subsection 182(f)(3) provides

that "person[s]"² may petition for a NOx determination "at any time" after the ozone precursor study required under section 185B of the Act is finalized³, and gives EPA a limit of six months after filing to grant or deny such petitions. Although subsection 182(f)(3) references section 182(f)(1), EPA believes that paragraph (f)(3)'s reference to paragraph (f)(1) encompasses only the substantive tests in paragraph (f)(1) (and, by extension, paragraph (f)(2)), not the requirement in paragraph (f)(1) for EPA to grant exemptions only when acting on plan revisions.

Accordingly, petitions submitted under subsection 182(f)(3) are not required to be submitted as state implementation plan (SIP) revisions. Consequently, the state is not required under the Act to hold a public hearing in order to petition for an areawide NOx exemption determination under section 182(f)(3) (see Clean Air Act sections 110(a)(1) and (2)). For similar reasons, if the state is submitting an areawide petition under subsection 182(f)(3), it is unnecessary to have the Governor submit the petition. However, because of the need for consistency with the AIRS data and the requirements of 40 CFR Part 58, EPA

². Section 302(e) of the Act defines the term "person" to include states.

³. The final section 185B report was issued July 30, 1993.

believes that, particularly in cases where the NOx exemption request (including a request for exemption from the NOx requirements of the conformity rules) is based on monitoring data, if such data is contained in a petition submitted by a person other than the state, the petition should be coordinated with the state air agency. Lack of endorsement by the state air agency will require more scrutiny by EPA, and therefore EPA's processing of the petition will likely take more time.

EPA will grant or deny a petition for an areawide NOx transportation conformity exemption through a full rulemaking process. This may involve a direct final rule or a notice of proposed rulemaking followed by a final rule. Either process allows opportunity for public comment. For areas which are relying on monitoring data which demonstrates attainment, the notice and comment will provide opportunity for comment on the preliminary interpretations contained in this General Preamble. These rulemakings will also offer opportunity for comment on the appropriateness of using monitoring data which is consistent with the requirements in 40 CFR part 58 and consistent with the data recorded in AIRS as the basis of EPA's approval and rescission of the contingent NOx exemption. If EPA issues a final rulemaking concluding that it will use such air quality monitoring data in making subsequent determination

that an area has violated the standard, no further notice and comment will be required in order to rescind the NOx exemption in the event that such data subsequently indicates that a violation has occurred.

EPA is preparing a delegation of authority to Regional Administrators to make determinations under section 182(f) for areas which are outside the Ozone Transport Region and which have three years of monitoring data demonstrating attainment. This delegation would allow the rulemaking for 182(f) determinations to be conducted by EPA's regional offices.

IV. Effect of a NOx Transportation Conformity Exemption on Transportation Planning

This section applies to both classified and nonclassifiable areas.

Once EPA makes a finding under a separate notice which grants a NOx transportation conformity exemption, an area is relieved of the transportation conformity rule's requirements for regional analysis of NOx emissions.

However, EPA plans to amend the transportation conformity rule to require that once an area's maintenance plan is approved, any previously approved NOx conformity exemption no longer applies. The area must then demonstrate as part of its conformity determinations that the

transportation plan and TIP are consistent with the motor vehicle emissions budget for NOx where such a budget is established by the maintenance plan. As currently written, none of the transportation conformity rule's NOx requirements would ever apply to an area once such an area had received a NOx transportation conformity exemption.

EPA believes that it is crucial for maintenance areas to demonstrate consistency with the maintenance plan's motor vehicle NOx emissions budget because that budget represents the level of motor vehicle NOx emissions needed for continued maintenance. However, the maintenance plan's NOx motor vehicle emissions budget for the purposes of transportation conformity will not necessarily require annual NOx emission reductions throughout the ten-year period.

EPA intends to promptly amend the conformity rule as stated above, so that NOx motor vehicle emissions budgets in maintenance plans will begin to apply at the time or shortly after those plans are approved.

V. Administrative Requirements

A. Executive Order 12866

Under Executive Order 12866, 58 Federal Register 51,735 (October 4, 1993) the Agency must determine whether the

regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

Whenever EPA is required by section 553 of the Administrative Procedures Act or any other law to publish general notice and proposed rulemaking for any proposed rule, EPA shall propose and make available for public comment an initial regulatory flexibility analysis.

The regulatory flexibility requirements do not apply for this General Preamble because it is not a regulatory action in the context of the Administrative Procedures Act or the Regulatory Flexibility Act.

DATE: _____

Carol M. Browner, Administrator