

May 27, 1994

MEMORANDUM

SUBJECT: Section 182(f) Nitrogen Oxides (NO_x) Exemptions--
Revised Process and Criteria

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides and Toxics Management
Division, Regions I and IV
Director, Air & Waste Management Division, Region II

Director, Air, Radiation and Toxics Division, Region
III
Director, Air & Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region
VI
Director, Air & Toxics Division,
Regions VII, VIII, IX, and X

This memorandum revises the process the Environmental Protection Agency (EPA) currently intends to follow for granting exemptions from control requirements for NO_x under section 182(f) of the Clean Air Act (Act).¹ It also revises certain guidance previously issued concerning NO_x exemptions for areas outside the ozone transport region that have air quality monitoring data showing attainment.²

¹"Guideline for Determining the Applicability of Nitrogen Oxide Requirements under Section 182(f)," from John S. Seitz, Director, Office of Air Quality Planning and Standards, to the Regional Division Directors, December 16, 1993, Chapter 2, Administrative Procedures.

²"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," from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, to the Regional Division Directors, September 17, 1993 [NO_x reasonably available control technology (RACT) discussion on pages 4-5] and December 1993 guideline at section 4.4.

The guidance in this memorandum applies to marginal and above ozone nonattainment areas because the section 182(f) exemption is directed at major NO_x stationary sources only in marginal and above ozone nonattainment areas. The guidance does not address nonclassifiable ozone nonattainment areas (i.e., transitional, submarginal, or incomplete/no data areas). However, the EPA's conformity rules^{3,4} also reference the section 182(f) exemption process as a means for exempting affected areas from NO_x conformity requirements.⁵ Moreover, under these rules, conformity applies in all nonattainment and maintenance areas, including the nonclassifiable nonattainment areas. Therefore, corresponding guidance is needed for the application of the section 182(f) NO_x exemption referenced in the conformity rules in these nonclassifiable areas. The guidance document entitled "Conformity; General Preamble for Exemption from Nitrogen Oxides Provisions," to be published in the Federal Register, addresses how EPA generally intends to act on requests for NO_x conformity exemption determinations for those areas, and should be consulted for those purposes along with this guidance.

Ozone nonattainment areas that are granted areawide section 182(f) exemptions under the approach described in this memorandum will also be exempt from the NO_x conformity requirements. However, since the conformity requirements apply on an areawide basis, a section 182(f) exemption for an individual source (or group of sources) within the nonattainment or maintenance area would not provide a sufficient basis to exempt the entire

³"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).

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

⁵The section 182(f) exemption is explicitly referred to and is described in similar language in 40 CFR 51.394(b)(3)(i), the "Applicability" section of the transportation conformity rule, and in the preamble (see 58 FR 62197, November 24, 1993). The language is repeated in the provisions of the rule regarding the motor vehicle emissions budget test [section 51.428(a)(1)(ii)] and the "build/no-build" test [sections 51.436(e), 51.438(e)], although section 182(f) of the Act is not specifically mentioned. In the general conformity rule, the section 182(f) NO_x exemption is referred to in section 51.852 (definition of "Precursors of a criteria pollutant") and is discussed in the preamble (see 58 FR 63240, November 30, 1993).

nonattainment or maintenance area from the NO_x conformity requirements.

Section 182(f) requires States to apply the same requirements to major stationary sources of NO_x as are applied to major stationary sources of volatile organic compounds. The requirements are RACT and new source review (NSR). The NO_x RACT is required in ozone nonattainment areas classified as moderate and above, as well as in all areas within an ozone transport region. The NSR rules are required in ozone nonattainment areas classified as marginal and above, as well as all areas within an ozone transport region. Section 182(f) also specifies circumstances under which the new NO_x requirements would be limited or would not apply.

Under section 182(f)(1)(A), an exemption from the NO_x requirements may be granted for nonattainment areas outside an ozone transport region if EPA determines that "additional reductions of [NO_x] would not contribute to attainment" of the ozone NAAQS in those areas. The EPA has indicated 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_x provisions, it is clear that this test is met since "additional reductions of [NO_x] would not contribute to attainment" of the NAAQS in that area. Under this revised guidance, a State may submit a petition for a section 182(f) exemption based on air quality monitoring data showing attainment of the ozone NAAQS without also having to submit a redesignation request or a maintenance plan with that petition.^{6,7} 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).

If it is subsequently determined by EPA that the area has

⁶For purposes of the NO_x exemption test in section 182(f)(1)(A) for areas outside an ozone transport region, EPA is interpreting the term "contribute to attainment" to mean that the State (or petitioner) need only show whether additional reductions of NO_x would contribute to attainment of the ozone NAAQS, and not whether such reductions would contribute to attainment and maintenance.

⁷The section 182(f) exemption does not affect EPA's requirements for maintenance plans; the maintenance plan required for redesignation must still address NO_x in accordance with EPA guidance.

violated the standard, the section 182(f) exemption, as of the date of the determination, would no longer apply. The EPA would notify the State that the exemption no longer applies, and would also provide notice to the public in the Federal Register. A determination that the NO_x exemption no longer applies would mean that the area would thereafter have to address any NO_x NSR or NO_x RACT requirements that may be applicable under section 182(f). Similarly, while existing transportation plans, transportation improvement plans and past conformity determinations would not be affected by a determination that the exemption no longer applies, new conformity determinations would have to observe the NO_x 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 EPA's Aerometric Information Retrieval System (AIRS).

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 believes that section 182(f) sets up two separate procedures by which the Agency may act on NO_x exemption requests. Section 182(f)(1) and (2) direct that action on NO_x 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, section 182(f)(3) provides that "person[s]"⁸ may petition for a NO_x determination "at any time" after the ozone precursor study required under section 185B of the Act is finalized,⁹ and gives EPA a limit of 6 months after filing to grant or deny such petitions. Although section 182(f)(3) references 182(f)(1), there are certain key differences in the language. First, individuals may submit petitions under paragraph (3) "at any time" (i.e., even when there is no plan revision from the State pending at EPA). Second, the specific timeframe for EPA action established in paragraph (3) is substantially shorter than the

⁸Section 302(e) of the Act defines the term "person" to include States.

⁹The final section 185B report was issued July 30, 1993.

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--and more expeditious--from the plan-revision process intended under paragraph (1). Thus, EPA believes that paragraph (3)'s reference to paragraph (1) encompasses only the substantive tests in paragraph (1) [and, by extension, paragraph (2)], not the requirement in paragraph (1) for EPA to grant exemptions only when acting on plan revisions.

The requirements of the APA apply with respect to the type of notice which must be provided regarding EPA action on NO_x exemption determinations. Notice-and-comment rulemaking is required by the APA when EPA action involves not just factual, but also policy and legal considerations that will apply as a general matter and, thus, is legislative in nature. Conversely, when EPA action can properly be described as party specific in nature, involving consideration of primarily factual evidence, notice-and-comment rulemaking is not required by the APA. In such a case, the EPA action could consist of the issuance of an order [see 5 U.S.C. sections 551(4)-(7) and 553]. Given these requirements of the APA, EPA believes that under either of the procedures established in section 182(f), where the request is for an entire area to be exempted from the NO_x requirements, the EPA must go through notice-and-comment rulemaking to grant or deny the petition. Where a petition is submitted for an exemption determination relating to an individual source (or group of sources) under subsection 182(f)(3), EPA may grant or deny the petition through an order transmitted by letter to the affected source (or sources). The EPA will also provide the public with notice in the Federal Register of the receipt and availability of the petition, as well as of the EPA's final determination.

Attachment I of this memorandum is the step-by-step administrative procedure for processing areawide petitions. Attachment II is the procedure for processing petitions relating to an individual source (or group of sources).

Section 182(f)(3) requires that EPA grant or deny a petition, whether areawide or source specific, within 6 months after its filing. Where the rulemaking process is followed (for areawide petitions), EPA is aware that the 6-month requirement may be infeasible in some cases. However, courts have ruled that even in instances, such as the one presented here, where a prescribed timeframe for EPA action apparently conflicts with the requirement to provide the public with adequate opportunity for notice and comment, the notice requirement must be met. Therefore, EPA will process areawide exemption requests by

rulemaking as expeditiously as practicable, with the intent of meeting the 6-month deadline.

As noted earlier, petitions submitted under section 182(f)(3) are not required to be submitted as SIP revisions. Consequently, the State is not required under the Act to hold a public hearing in order to petition for an areawide NO_x exemption determination [see section 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 believes that, particularly in cases where the NO_x exemption request (including a request for exemption from the NO_x requirements of the conformity rules) is based on monitoring data, if such data are contained in a petition submitted by a person other than the State, the petition should be coordinated with the State air agency.

The Federal Register notice of EPA approval or disapproval of a State's petition must be signed by the Administrator. This is not a SIP action or a redesignation action. Consequently, this action is not delegated and must undergo Headquarters review. If some or all types of petition actions become delegated, notification will be provided.

Where there is a conflict, this guidance supersedes guidance contained in EPA's September 17, 1993 memorandum and in sections 2.2 and 4.4 of EPA's December 16, 1993 document. Please contact Doug Grano (919) 541-3292 or Kimber Scavo (919) 541-3354 regarding any questions.

Attachments

cc: Tom Helms
Steve Hitte
Robert Kellam
Phil Lorang
Rich Ossias
Joe Tikvart
Lydia Wegman

bcc: David Cole
Ned Meyer
Carla Oldham
Kathryn Sargeant
John Silvasi

Doug Grano
Annie Nikbakht
Mike Prosper
Kimber Scavo

OAQPS:AQMD:OCMPB:KIMBER SCAVO:JKING:EXT. 3354
DISK: SCAVO.JK FILE: PROCESS. NOX

Attachment I
(Rulemaking for Areawide Petition)¹

- (1) The petition is sent to the appropriate Regional Offices (RO's) and States by the petitioner.
- (2) The RO sends copies of the petition to Headquarters (HQ) Offices for technical and legal review. These offices are: Ozone/Carbon Monoxide Programs Branch, AQMD (Doug Grano); Source Receptor Analysis Branch, TSD (Ned Meyer); Office of Mobile Sources (Kathryn Sargeant); and Office of General Counsel (Mike Prosper). *(The petition should be sent immediately upon receipt.)*
- (3) The RO evaluates the demonstration and makes the initial determination as to whether the petition should be granted or denied along with the supporting rationale. The RO should consult with the above HQ Offices and affected States.
- (4) The RO prepares a Federal Register (FR) notice for the Administrator's signature that proposes to grant or deny the petition. A notice that proposes to grant an exemption on a contingent basis (for areas outside the ozone transport region that have air quality monitoring data showing attainment) must also propose that the exemption would no longer apply if EPA subsequently determines that a violation of the ozone standard has occurred. That proposal must specify that the NO_x requirements of the conformity rules would apply to new conformity determinations, and the amount of time the State would have to submit any applicable section 182(f) NO_x NSR and/or RACT rules in the event that EPA determines at some future time that a violation occurred.

The evaluation under step 3 above must be included in either the FR notice or a technical support document that is included in the docket. *(The RO should prepare and complete the FR proposal within 2 months after receipt, taking into account any HQ comments on the petition or the RO evaluation.)*²

¹This process assumes no delegation to the Regional Administrator.

²Petitions that are based on an area having data indicating that it has already attained the ozone standard should generally be processed in less time.

- (5) The FR proposal is sent to HQ reviewers for concurrence. (*HQ should finish the review within 1 month after receipt.*)
- (6) After any revision and concurrence by HQ reviewers, the FR proposal is sent to the Administrator for signature and is then published. (*There should be at least 1 month for a formal comment period after FR publication.*)
- (7) The RO prepares a FR notice of final rulemaking that addresses comments received and takes final action to grant (fully or on a contingent basis) or to deny the petition. The RO sends the notice to the HQ reviewers noted above under Step 2. (*HQ should finish the review within 1 month after receipt.*)
- (8) After any revision and concurrence by HQ reviewers, the FR final notice is sent to the Administrator for signature and is then published.

Attachment II¹

[Letter of Approval/Denial for Individual Source (or Group of Sources) Petition]

- (1) The petition is sent to the affected States and RO's by the petitioner.
- (2) The RO prepares a FR notice of availability and sends it directly to the FR after Regional Administrator signature. This notice does not indicate EPA's intended action. The EPA notice should solicit comments. However, because the action is not a rulemaking, there is no obligation on EPA's part to respond to the comments when taking final action. The EPA provides affected States a 3-month period to make a recommendation to EPA.
- (3) The RO sends a copy of the petition to the HQ Offices listed in Attachment I, Step 2.
- (4) The RO makes the initial determination as to whether the petition should be granted or denied in consultation with affected States. The determination is incorporated by the RO into a letter for signature of the Administrator, along with the supporting rationale.
- (5) The draft letter is sent to HQ reviewers for concurrence.
- (6) After concurrence by HQ reviewers, the final letter is prepared by the RO and sent to the Administrator for signature ("cc" to the affected States).
- (7) The RO prepares a second FR notice that includes the letter signed by the Administrator to the petitioner and sends the notice directly to the FR after Regional Administrator signature.

¹This process assumes no delegation to the Regional Administrator.