

problems by avoiding measures that may be unreasonable for an area. We have spent a large amount of time investigating possible legal theories and policy options to find flexibility within the statute, as interpreted by the Supreme Court. We have also had the benefit of ideas and recommendations from many interested stakeholders, who also have spent much time developing their own theories and ideas. Based on these efforts, we believe that we have developed options for an implementation program that are workable under the constraints of the CAA. Nonetheless, we recognize that those constraints will still require a number of areas to adopt certain control measures that may not be as effective as others in achieving the 8-hour ozone standard. We are soliciting any further ideas for addressing this situation.

To describe our proposed frameworks for implementing the 8-hour ozone standard, it is necessary to examine all the components or elements of the process used to implement the standard. Therefore, the issues and options that we are proposing that deal with the aspects of preparing SIPs for the standard are presented below individually. Following that, we present two possible alternative frameworks that blend one or more options from each of the elements to illustrate how they may work in conjunction with each other. We are soliciting comment on the options presented for the individual elements, and also on how the options can be grouped into a consolidated implementation framework.

The proposal below describes only those options or approaches we are proposing. We considered a number of other options and approaches for the elements discussed below. These other options that were considered but are not being proposed are described in a separate document available in the docket.¹⁰

A. How Will EPA Reconcile Subparts 1 and 2? How Will EPA Classify Nonattainment Areas for the 8-hour Standard? What Attainment Dates Would Apply?

1. Statutory Framework and Supreme Court Decision

The CAA contains two sets of requirements—subpart 1 and subpart 2—that establish requirements for State plans implementing the national ozone

air quality standards in nonattainment areas. (Both are found in title I, part D.) Subpart 1 contains general requirements for SIPs for nonattainment areas for any pollutant—including ozone—governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment SIPs.

Throughout this proposed rulemaking, we repeatedly discuss whether an area is subject to the planning requirements of subpart 1 or subpart 2. This language is convenient shorthand for purposes of this proposal. Actually, if an area is subject to subpart 2 requirements, it is also subject to subpart 1 requirements. In some cases, subpart 1 and subpart 2 requirements are inconsistent or overlap. To the extent that subpart 2 addresses a specific planning obligation, the provisions in subpart 2 control. For example, under section 182(b), moderate areas are subject to 15 percent ROP requirements rather than the more general RFP requirements of section 172(c)(2). However, moderate areas remain subject to the contingency measure requirement of section 172(c)(9), as that requirement is not addressed for moderate areas in subpart 2.¹¹

When we published the 8-hour ozone standard on July 18, 1997, we indicated that we anticipated that States would implement that standard under the less prescriptive subpart 1 requirements. More specifically, we provided that areas designated nonattainment for the 1-hour ozone standard would remain subject to the subpart 2 planning requirements for purposes of the 1-hour standard until such time as they met that standard. But those areas and all other areas would only be subject to subpart 1 for purposes of planning for the 8-hour ozone standard.

As noted above, in February 2001, the Supreme Court ruled that the statute was ambiguous as to the relationship of subparts 1 and 2 for purposes of implementing the 8-hour NAAQS. However, the Court also ruled that our implementation approach, which provided no role for subpart 2 in implementing the 8-hour NAAQS, was unreasonable. *Id.* Specifically, with respect to classifying areas, the Supreme Court stated:

[D]oes subpart 2 provide for classifying nonattainment ozone areas under the revised standard? It unquestionably does.

Whitman, 121 S.Ct. at 917.

However, despite recognizing that subpart 2 does provide classifications applicable for the 8-hour standard, the Supreme Court also recognized that the subpart 2 classification scheme, specified in section 181, did not entirely fit with the revised 8-hour standard and left it to EPA to develop a reasonable resolution of the roles of subparts 1 and 2 in implementing a revised ozone standard. *Id.* at 482–486.

In particular, the Court noted three portions of section 181—the classification provision in subpart 2—that it indicated were “ill-fitted to implementation of the revised standard.”

- First, the Court recognized that 1-hour design values used for establishing the classifications in Table 1 in section 181 “would produce at best an inexact estimate of the new 8-hour averages * * *” 121 S.Ct. at 918.

- Second, the Court recognized that the design values in Table 1 start at the level of the 1-hour NAAQS—0.12 ppm. The Court noted that “to the extent the new ozone standard is stricter than the old one, * * * the classification system of Subpart 2 contains a gap, because it fails to classify areas whose ozone levels are greater than the new standard (and thus nonattaining) but less than the approximation of the old standard codified by Table 1.” *Id.*

- Third, the Court recognized that “Subpart 2’s method for calculating attainment dates—which is simply to count forward a certain number of years from November 15, 1990 * * * seems to make no sense for areas that are first classified under a new standard after November 15, 1990.” More specifically, the Court recognized that attainment dates for marginal (1993), moderate (1996), and serious (1999) areas had passed. *Id.* at 483–484.

2. EPA’s Development of Options

In light of the Supreme Court’s ruling, we examined the statute to determine the manner in which the subpart 2 classifications should apply for purposes of the 8-hour ozone NAAQS. We paid particular attention to the three portions of section 181 that the Supreme Court noted were ill-fitted for implementation of the revised 8-hour standard. We examined those provisions in light of the legislative history and the overall structure of the CAA to determine what Congress intended for purposes of implementing a revised, more stringent ozone standard. We believe that we need to take a narrow reading consistent with what we believe Congress intended. Consistent with those principles, we developed several options.

¹⁰ Additional Options Considered for “Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard.” U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC. March 2003.

¹¹ State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule.” April 16, 1992 (57 FR 13498 at 13501 and 13510).