

standard under subpart 2. This option relies on language in the Supreme Court decision, which is described in detail below.

In brief, the option that we are proposing would work as follows:

- First, we would determine which 8-hour areas must be classified under subpart 2. These would be areas with ozone levels that exceed the 1-hour ozone design values that Congress specified in Table 1 of section 181. For the remaining areas, we would have discretion to place them under subpart 1 or subpart 2.

- Second, we would classify all areas. Subpart 2 areas would be classified in the same manner described above under option 1. Options for classifying subpart 1 areas are described below.

(i) *Legal framework for 2-step approach.* Under this approach, we first determine the universe of areas that must be subject to the provisions of subpart 2 and the universe of areas that fall into a “gap” in subpart 2’s classification scheme. Then, we proceed to determine how to classify the areas.

(ii) *Legal framework—Step 1—Which subpart applies for an area?* With respect to the first step, the Supreme Court noted that “to the extent that 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 * * * but less than the approximation of the old standard codified by Table 1 [in section 181(a)].” 121 S.Ct. at 918. Thus, for those areas with a 1-hour ozone design value above the level identified in Table 1 (*i.e.*, 0.121 ppm), Table 1 “specifies” a classification for the area. For those areas, we would not have authority to establish classifications under subpart 1 because section 172(a)(1)(C) prohibits the use of the classification authority in section 172(a)(1)(A) for those areas.¹³ However, for areas with 1-hour ozone design values below 0.121 ppm, Table 1 does not specify a classification, and those areas fall into a gap in the statute. Thus, we must reasonably determine whether such areas should be subject to the planning obligations of subpart 1 or subpart 2. This issue is discussed more fully below under “Rationale for

regulating all “gap” areas under subpart 1 only.”

In summary, under the first step of this approach, we examine each nonattainment area’s most recent 1-hour design value at the time of designation under the 8-hour NAAQS to determine whether the area must be subject to the classification under subpart 2. If an area’s 1-hour design value is 0.121 or higher, then it must be subject to a subpart 2 classification. If its 1-hour design value is lower than 0.121, it falls into a gap and we must determine a reasonable implementation scheme—either subpart 1 or subpart 2—for such area.

(iii) *Legal framework—Step 2—How should areas be classified under subparts 1 and 2?* Under step 2 of this approach, we must determine how to classify areas subject to the classification provisions of subpart 2. For those areas subject to the classification provisions of subpart 2, we believe that it is most reasonable to use the area’s 8-hour design value to determine the appropriate classification. This would be done in the same manner as option 1, proposed above, in which the Table 1 threshold design values are converted from 1-hour values to 8-hour values.

Another option would have been to apply Table 1 as it is written. Some might argue that this approach is better because it is consistent with the design value EPA would use under this option to determine whether Congress mandated that the area be subject to subpart 2. We do not believe that Congress would have intended the use of 1-hour design values for determining the classification “and therefore the control obligations and attainment dates—of 8-hour areas. While we believe it is reasonable to use the 1-hour design values as a barometer of Congress’ intent as to which areas should be subject to the more prescriptive requirements of subpart 2, we do not believe it makes sense to use the 1-hour values to establish each area’s classification under that subpart. The area’s classification identifies the specific control requirements applicable to each area within that classification and the period of time the area has to attain. As enacted, the Table provides that areas having a more significant ozone pollution problem for the 1-hour standard and thus a higher classification are subject to more stringent controls and have a longer period to attain. Because of the different form and averaging times of the 1-hour and 8-hour standards, areas with significant 1-hour problems may not have as significant an 8-hour problem and vice

versa. Using the 1-hour design values to classify areas, therefore, could result in areas with less significant ozone problems being subject to stricter planning obligations (and later attainment dates) than those with a more significant problem. Thus, we believe it is more consistent with Congressional intent to use 8-hour design values as the means for specifying the stringency of controls needed to attain the 8-hour ozone standard and the associated attainment dates. We also believe that this is consistent with the Supreme Court decision, in which the Court recognized that the “1-hour averages” in Table 1 “produce at best an inexact estimate of the new 8-hour averages.” See 121 S.Ct. at 918.

As discussed in the following section, for areas that EPA determines would be subject only to subpart 1, section 172(a)(1)(A) grants EPA discretion to develop a classification scheme.

4. Under Classification Option 2, How Would EPA Classify Subpart 1 Areas?

a. *Background.* As noted above, classification option 2 above could result in a number of areas not being classified under subpart 2. Section 172(a)(1)(A) grants EPA discretion to establish a classification system for areas covered under subpart 1 but does not mandate classifications. Section 172(a)(1)(A) provides that

on or after [the date of designation], the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

Prior to the Supreme Court’s remand of our implementation approach, we had proposed that all 8-hour ozone nonattainment areas be subject only to subpart 1 for purposes of the 8-hour standard, and that areas would be classified as traditional, transitional, or international transport. These classifications were described in our November 17, 1998 draft implementation guidance.¹⁴

Because we are no longer considering an option where all areas would be

¹³ Section 172(a)(1)(C) provides that the provisions of section 172(a) “shall not apply with respect to nonattainment areas for which classifications are specifically provided” in other sections of part D. Similarly, section 172(a)(2)(D) provides that the attainment date provisions in section 172(a)(2) do not apply “to nonattainment areas for which attainment dates are specifically provided” elsewhere in part D.

¹⁴ Proposed Implementation Guidance for the Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS) and the Regional Haze Program. November 17, 1998. Found at: <http://www.epa.gov/ttn/oarpg/t1pgm.html>.