

conclude that the subpart 2 classifications, with their associated attainment dates, should not apply for the 8-hour standard. The Supreme Court, however, rejected a conclusion that the subpart 2 classifications do not apply, although it noted that the attainment dates “seem[] to make no sense” for areas classified under a new standard after November 15, 1990. 121 S.Ct. at 918.

We believe that applying the attainment dates as expressly provided under Table 1 would produce absurd results. For example, a strict application of Table 1 would result in areas classified as marginal for the 8-hour NAAQS as having an attainment date of November 15, 1993 and areas classified as moderate as having an attainment date of November 15, 1996. Since these dates have long passed, it makes no sense to establish them as the applicable dates.

Many provisions of the CAA, however, indicate what Congress’ intent was in setting attainment dates. For example, section 181(b), provides that for areas designated attainment or unclassifiable for ozone immediately following enactment of the 1990 CAA Amendments and subsequently redesignated to nonattainment, the attainment date would run from the date the area is classified under subpart 2.¹⁹ Thus, if an area designated as attainment for the 1-hour ozone standard in 1990 were redesignated to nonattainment for the 1-hour ozone standard in January 2002 and classified as moderate, the area’s attainment date would be 6 years following January 2002, *i.e.*, January 2008. Similarly, section 172(a)(2) provides for attainment dates to be calculated from the time the area is designated nonattainment. We believe that Congress would have intended for areas designated nonattainment and classified under subpart 2 for the 8-hour standard to have attainment periods consistent with those in Table 1 (*e.g.*, 3 years for a marginal area, 6 years for a moderate area, etc.), but running from the date the area is designated and classified for purposes of the 8-hour NAAQS. We are proposing for areas classified under subpart 2, the period for attainment (running from date of designation/classification) would be:

- Marginal—3 years.

- Moderate—6 years.
- Serious—9 years.
- Severe—15 or 17 years.
- Extreme—20 years (no areas

currently expected to be in this category for the 8-hour ozone standard).

Note that the CAA requires each area to demonstrate attainment as expeditiously as practicable, regardless of maximum statutory periods.

Most SIP submittal dates in subpart 2 run for a fixed period from the date of enactment of the 1990 CAA, which was also the date of designation and classification by operation of law for most subpart 2 areas. Under section 181(b)(1), the statute provides that any fixed dates will be extended by operation of law to a period equal to the length of time between that date of enactment and the date an area is subsequently designated and classified. Thus, unless EPA has reason to create a different time period, either as explained specifically below or in any subsequent specific rulemaking applicable to a particular subpart 2 requirement, subpart 2 SIP submittals will be due as a general matter by the same period of time after designation and classification under the 8-hour standard as provided in subpart 2 for areas designated and classified at the time of enactment of the 1990 CAA.

For areas classified under subpart 1, attainment dates would be set under section 172(a)(2)(A), which provides that the SIP must demonstrate attainment as expeditiously as practicable, but no later than 5 years after designation or 10 years after designation if the severity of the area’s air pollution and the availability and feasibility of pollution control measures indicate more time is needed.

Note that in determining whether an area actually attains the NAAQS at the time of the attainment date, EPA would use the ambient air quality data for the three ozone seasons prior to the attainment date. As an example, if the effective date of the nonattainment designations is May 15, 2004, the maximum attainment date for an area classified marginal would be May 15, 2007. In this example, EPA would consider the 8-hour ozone data for the three previous ozone seasons—2004, 2005 and 2006.

2. How Will EPA Address the Provision Regarding 1-Year Extensions?

Both subpart 1 and subpart 2 provide for two brief attainment date extensions for areas in limited circumstances where they do not attain by their attainment date. Section 172(a)(2)(C) (under subpart 1) provides for EPA to extend the attainment date for 1 year if the State

has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and no more than a minimal number of exceedances of the relevant NAAQS has occurred in the area in the attainment year. No more than two 1-year extensions may be issued under this subparagraph for a single nonattainment area. Section 181(a)(5) (under subpart 2) contains a similar provision, but instead of allowing a “minimal” number of exceedances, it provides for only one exceedance of the standard in the year preceding the extension year. This reflects the form of the 1-hour ozone standard, which is exceedance-based. The 8-hour ozone standard, however, is not an exceedance form of standard, but rather a concentration-based standard.²⁰ We have issued guidance on the portion of these two provisions relating to the State’s compliance with all requirements and commitments pertaining to the area in the applicable implementation plan.²¹ However, for purposes of section 181(a)(5), we need to determine a reasonable interpretation in light of the fact that the statute, as written, does not fit the form of the 8-hour standard. Because Congress has addressed this issue elsewhere in the statute, we believe it is reasonable to adopt that formulation. Therefore, we would apply the same test under subparts 1 and 2 for determining whether to grant a 1-year extension, *i.e.*, whether there was a minimal number of exceedances. For both subparts, we propose to interpret this to mean for the 8-hour standard, the area would be eligible for the first of the 1-year extensions under the 8-hour standard if, for the attainment year, the area’s 4th highest daily 8-hour average is 0.084

²⁰ See 40 CFR 50.9(a); the 1-hour standard for ozone “* * * is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (235 µg/m³) is equal to or less than 1 in order for the area to be considered attaining the standard, as determined by Appendix H to this part.” Thus, the 1-hour standard is an “exceedance” based standard, since the number of exceedances of the standard (yearly average over 3 years under appendix H) must be equal to or less than 1. In contrast, see 40 CFR 50.10(b); the 8-hour standard for ozone is “* * * met at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, as determined in accordance with Appendix I to this part.” Thus, this is a concentration-based standard, because meeting the standard is determined by calculating the concentration, not the number of exceedances as under the 1-hour standard.

²¹ Memorandum of February 3, 1994, from D. Kent Berry re: “Procedures for Processing Bump Ups and Extension Requests for Marginal Ozone Nonattainment Areas.” U.S. Environmental Protection Agency, Research Triangle Park, North Carolina.

¹⁹ Section 181(b) provides that “any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the CAAA of 1990 and the date the area is classified under this paragraph.” Under section 181(b), the date of classification is the same as the date of redesignation to nonattainment.