

progress for any air quality standard or other applicable requirement of the Act.

**5. How Will EPA Ensure That the Public Knows Which Areas Must Continue Provisions Under the 1-Hour SIPs if EPA Revokes the 1-Hour Standard?**

EPA would promulgate regulatory provisions identifying the obligations to which areas remain subject, and identifying the areas. If EPA ultimately chooses to revoke the 1-hour standard and the associated designations and classifications shortly after designations for the 8-hour standard (as proposed below), EPA would ensure that there are provisions in the Code of Federal Regulations (CFR) that continue to define the boundaries for those areas. The reason for this is that boundaries for 8-hour ozone nonattainment areas may not be coextensive with those for the 1-hour standard, and EPA would need to make clear which areas or portions of areas must continue to implement obligations due to their 1-hour classification.

*D. Should Prescribed Requirements of Subpart 2 Apply in all 8-Hour Nonattainment Areas Classified Under Subpart 2, or Is There Flexibility in Application in Certain Narrowly Defined Circumstances?*

**1. Background**

The 1990 CAA Amendments overhauled the CAA's requirements for ozone nonattainment areas and, in doing so, specified new mandatory measures for many areas. The new approach embodied in subpart 2 was to classify areas according to the severity of their pollution. Areas with more serious ozone pollution were allowed more time to meet the standard—but were required to adopt more numerous and stringent measures depending on their classification. Congressional proponents of this approach argued that specifying mandatory measures in the statute was necessary because States and EPA, prior to 1990, had failed to ensure that SIPs achieve steady reasonable progress in reducing emissions or to require readily available measures that were cost effective and needed to meet the standard.

Mandatory subpart 2 requirements for moderate and higher-classified areas include, for example, specific ROP requirements (including a 15 percent VOC reduction for moderate and above areas), basic I/M programs, a requirement that sources subject to NSR obtain emissions offsets at a ratio of 1.15-to-1, and RACT for NO<sub>x</sub> sources as well as VOC sources. Serious and severe areas are subject to additional measures

such as further ROP requirements, applicability of NSR to smaller sources, enhanced I/M, and applicability of RACT to smaller sources. (Appendix A presents a summary comparison of measures under subparts 1 and 2.)

For the proposed 8-hour ozone implementation strategy, EPA has examined the issue of mandatory measures from both legal and policy standpoints. EPA's legal view is guided by the Supreme Court decision. The Court held that Congress drastically limited EPA's discretion on whether the mandatory requirements of subpart 2 will apply to 8-hour areas by concluding that the classification scheme of subpart 2 applied for purposes of a revised ozone NAAQS. *ATA I*, 175 F3d at 1048–1050.

As discussed elsewhere, the Supreme Court decision states that subpart 2 provides for classification of areas under the 8-hour standard. With respect to the requirements of subpart 2, the Supreme Court stated, “The principal distinction between Subpart 1 and Subpart 2 is that the latter eliminates regulatory discretion that the former allowed.” *Whitman* 121 S.Ct. at 918. The Court went on to state, “Whereas Subpart 1 gives EPA considerable discretion to shape nonattainment programs, Subpart 2 prescribes large parts of them by law.” *Id.* The Court also stated, “EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Id.* 918–919.

Once an area is classified under subpart 2, the subpart 2 requirements apply. EPA may have some limited ability to change or limit subpart 2 controls, consistent with the statutory language, but EPA cannot broadly waive those requirements. For example, EPA may have some flexibility to modify regulatory requirements for programs such as NSR (discussed elsewhere in this proposed rulemaking). Furthermore, subpart 2 provides discretion to EPA in implementing certain provisions already, such as waivers for stage II vapor recovery, NO<sub>x</sub> RACT and NO<sub>x</sub> NSR. In addition, case law may provide EPA with some flexibility to waive federally applicable requirements on a case-by-case basis where application of those requirements would produce an “absurd result.”

With respect to policy considerations, some commenters at public meetings or in written submissions to EPA have expressed the view that mandatory measures are needed to ensure actions are taken, but a number of commenters have raised concerns. These include whether mandated VOC controls will be appropriate for all areas in the future,

and whether mandatory measures are appropriate in areas projected to attain in the near term. A number of commenters recommended that EPA allow for flexibility in implementing the 8-hour ozone standard and not require mandatory measures, such as local VOC measures, where they would not be very effective in achieving attainment of the standard. In many cases, particularly for areas that would be new nonattainment areas under the 8-hour standard, region wide NO<sub>x</sub> controls and national controls on mobile sources are predicted to greatly reduce the areas' ozone levels and to bring many into attainment without additional local emission controls.

Although a number of comments were received on the issue of flexibility, many commenters on this issue took the position that they would prefer areas to be classified under subpart 1 rather than subpart 2. Some commenters did recommend that EPA make the argument that new information about the relative benefits of NO<sub>x</sub> and VOC control would lead to allowing more tailored controls for a number of areas, rather than the one-size-fits-all approach of subpart 2. However, commenters did not suggest how the CAA could be interpreted to allow the flexibility they were advocating for the mandatory requirements of subpart 2. Other commenters argued that the subpart 2 measures are mandatory under the CAA for areas classified under subpart 2 and that the CAA does not provide flexibility to waive those requirements.

Regarding the VOC/NO<sub>x</sub> issue, we observe that scientific understanding of ozone pollution and the impact of control strategies has improved over time. Prior to 1990, the main focus of ozone control strategies was VOC control. Since then, scientific studies have more clearly recognized the role of NO<sub>x</sub>, biogenic emissions, and transport of ozone and NO<sub>x</sub> in ozone nonattainment. In response, EPA's ozone strategy for the 1-hour standard evolved to put greater emphasis on controlling NO<sub>x</sub> in addition to VOC and to require control of NO<sub>x</sub> emissions that contribute to interstate ozone problems.

We recognize that the relative effectiveness of VOC and NO<sub>x</sub> controls will vary from area to area, depending significantly upon VOC/NO<sub>x</sub> ratios in the atmosphere. Current scientific information shows that VOC reductions will reduce ozone in urban areas and in other areas where there is excess NO<sub>x</sub> available for reaction. Ozone levels in areas that are less urban and have lower NO<sub>x</sub> emissions, or that have high biogenic VOC levels, may be more sensitive to NO<sub>x</sub> control and less