

demonstrate such progress, but reasonably concludes that the states must have some time in which to actually develop and implement the measures to achieve such ROP. EPA has addressed similar issues on several occasions in the past when areas for various reasons have not timely submitted progress SIPs, and when the date for achieving progress had passed prior to EPA action on a progress SIP. EPA has routinely concluded in these circumstances that the area should demonstrate the required ROP as expeditiously as practicable once the statutory date for achieving such ROP had passed. *See, e.g.*, 65 FR 31485 (May 18, 2000), 63 FR 28898 (May 27, 1998), 62 FR 31343 (June 9, 1997). Even though, as the commenter points out, there is no provision in the statute expressly addressing the situation where an area has failed to timely submit a progress SIP, EPA must fill the statutory gap where such SIPs are submitted after the date for achieving progress, and EPA has reasonably done so in this case by following its past practice of requiring such SIPs to demonstrate ROP as expeditiously as practicable. Although no court has directly addressed the issue of the propriety of this “as expeditious as practicable” standard, courts have addressed other issues concerning ROP plans submitted after the statutory date for achieving ROP, which have demonstrated ROP as expeditiously as practicable, without expressing any concern with that standard. *See, e.g., Sierra Club v. EPA*, 252 F.3d 943 (8th Cir. 2001) (Court upheld calculation methods used in 15 percent ROP plan submitted three years after statutory date demonstrating achievement of ROP seven years after statutory date).

The commenter indicates that the only statutory provision allowing less than a nine percent reduction by 2002 is CAA section 182(c)(2)(B)(ii). However, the commenter misconstrues that section which provides for areas to demonstrate that they have adopted various feasible measures in exchange for achieving a less than nine percent reduction. Although this provision would remain available to the Washington area states should they be unable to demonstrate the required average annual three percent reduction after November 15, 1996, through the attainment date of November 15, 2005, EPA did not propose to allow the states to show less than the nine percent reduction. EPA merely acknowledged in the proposal that the statutory date for achieving the nine percent reduction had passed and that in such event the

states should demonstrate the full nine percent reduction as expeditiously as practicable.

The commenter also objects to the observed stringency of the “as expeditious as practicable” standard, citing a case involving the 1987 attainment date in the 1977 version of the Clean Air Act, in which the court held that once an attainment date has passed an area must demonstrate attainment “as soon as possible with every available control measure.” *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir. 1990). However, that case was interpreting EPA’s 1981 guidance on planning for post-1987 attainment, in which EPA had indicated that areas which could not attain by 1987 should identify all “measures possible in a longer time frame that, together with the measures already evaluated, will result in attainment as quickly as possible after 1987.” 46 FR 7186, 7188 (January 22, 1981). Subsequent to the *Delaney* opinion, EPA published a **Federal Register** notice in which it clarified that the agency never intended that its 1981 guidance be interpreted to require the imposition of draconian control measures, nor to require immediate attainment after 1987 if only such measures could produce it. 55 FR 38326 (September 17, 1990). To avoid future misinterpretation of this guidance, EPA then revoked those aspects of the 1981 guidance requiring the use of “all possible measures” after 1987. *Id.*, at 38327. The EPA instead concluded that Federal and State post-1987 planning should attain the standard “as expeditiously as practicable,” as required by section 172(a)(2). EPA concluded that the statute does not require measures that are absurd, unenforceable, or impracticable, and thus that, after 1987, EPA would equate its interpretation of the Ninth Circuit’s standard in *Delaney* of attainment “as soon as possible” absent absurd, impossible, or unenforceable measures with the statutory test of attainment “as expeditiously as practicable.” *Id.* This is the interpretation EPA has consistently held since that time, as noted in the various **Federal Register** actions mentioned above where areas have missed statutory deadlines for attainment or ROP.

Moreover, EPA notes that one court, while finding *Delaney* not precisely on point for its purpose of fashioning a remedy in a citizen’s enforcement action, nevertheless made some instructive observations on the relationship between the two standards. The Court noted that: “[A]lthough the *Delaney* opinion utilized the ‘as soon as possible’ standard employed by EPA

guidelines, it did not do so out of rejection of the ‘practicable’ standard or out of concern that the two standards differed. Rather it simply had no occasion to compare them. Indeed the *Delaney* court appeared to blur them when it criticized Arizona for rejecting measures without demonstrating that such measures were ‘impracticable’ or unreasonable.” *Citizens for a Better Environment v. Deukmejian*, 746 F. Supp. 976, 985 (N.D. Cal. 1990). The Court went on to observe that: “As a practical matter, however, no Court will use its equitable powers to impose remedies that are irrational, albeit ‘possible.’ Thus as long as time is considered paramount, and the term ‘practical’ is strictly construed in keeping with the purposes of the Act, the ‘as expeditiously as practicable’ standard should yield no less results than an ‘as soon as possible’ standard.” *Id.*

The Court concluded that “when properly interpreted, there is no practical difference between the two standards.” *Id.* EPA agrees with this assessment.

The commenter further complains that EPA’s standard does not impose any particular deadline, and that it is too vague and undefined. However, the standard is the very one established in the statute for attainment of the standard, and years of experience in implementation of the statute has provided EPA and the states sufficient familiarity with the standard. Finally, the commenter notes that the states have already submitted ROP plans which the D.C. Circuit has allegedly found deficient for failure to include progress through 2002, thus warranting disapproval. As we stated previously this claim is not relevant to the proposed action, which was for reclassification of the Washington area concurrent with the establishment of a reasonable deadline for submitting SIP revisions. The commenter’s contention that the ROP submissions are inadequate for not having ROP for 2002 and 2005 also ignores the fact that reclassification is occurring in 2003, and thus it is impossible for the State to meet the 2002 milestone date. Refer to the discussion in the preceding section entitled “Severe Area SIP Revision Submittal Schedule” regarding the impossibility of meeting deadlines that have already passed, and the ROP discussion regarding the Washington area’s post-1999 ROP obligation that appears elsewhere in this document.

The severe area ROP plan will also have to provide for the second increment of post-1999 ROP for the period 2002 to 2005 and thus must