

**Ozone Implementation Rule:
Proposed Rule Preamble on Implementing the 8-Hour Ozone National Ambient Air
Quality Standard, 68 Fed. Reg. 32,802 (June 2, 2003).**

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I. Introduction.

On June 2, 2003, EPA published in the Federal Register its new plan for implementing the 8-hour national ambient ozone standard. The Agency developed the plan in response to the U.S. Supreme Court's remand of the original 1997 implementation plan to the Agency, in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). Having declared the Agency's original implementation plan unlawful, the Supreme Court told the Agency to reconcile the requirements of Subparts 1 and 2 of Part D of the Clean Air Act in developing a new plan to implement the 8-hour standard. *Id.* at 486.

Clean Air Act Title I Part D, Subpart 1 describes general requirements for nonattainment areas¹ for all national ambient air quality standards (NAAQS).² Part D, Subpart 2 was enacted in 1990 specifically to govern implementation of the ozone NAAQS, and provides mandatory classifications, a shorter time frame for attainment (and only 2 years' allowable extension), and mandatory nonattainment SIP programs. Subpart 1, by contrast, gives EPA considerably more discretion in shaping nonattainment area programs, and allows the extension of attainment dates for up to 12 years after the date of designation.³

EPA's 1997 plan would have implemented the 8-hour standard exclusively under Subpart 1. EPA argued that because some of the details of Subpart 2 are specific to the 1-hour ozone standard, Subpart 2 could only apply to that standard, not the revised 8-hour NAAQS for ozone. The *American Trucking* Court rejected that reasoning, noting that the applicability of Subpart 2 to nonattainment areas under the new standard is "textually explicit," and that the Agency on remand must "develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone

¹ Areas of the country where concentrations of regulated pollutants exceed national ambient air quality standards for those pollutants are called "nonattainment areas." The Clean Air Act requires each state to develop and implement a "state implementation plan" (SIP) – a comprehensive package of pollution control measures covering factories, vehicles, and other activities – designed to reduce emissions enough to bring nonattainment areas into compliance with the national ambient standards. Each state is also responsible for reducing any pollution that contributes to violations of the standards, or diffusing maintaining the standards, in any other downwind areas.

² The so-called 1-hour ozone NAAQS dates from 1979, and allows maximum ozone concentrations of 0.12 parts per million (ppm), averaged over one hour. EPA in 1997 revised the standard to reflect scientific evidence that exposure to lower concentrations of ozone, over longer periods, causes significant health effects. See 62 Fed. Reg. 38,856, 38,863-64 (July 18, 1997). The 1997 ozone NAAQS allows maximum ozone concentrations up to 0.08 ppm, averaged over eight hours.

³ Under a consent decree reached between EPA and nine environmental groups, EPA must promulgate final designations for nonattainment areas under the 8-hour standard by April 15, 2004. *American Lung Ass'n, et al. v. EPA* (D.D.C. No. 1:02CV02239).

NAAQS.” *Id.* at 485, 486. Questions whether or not the ozone NAAQS must be implemented pursuant only to Subpart 2, and if so, how; or whether rules implementing a new ozone standard can be based on the elements of Subpart 1 as well, are among the legal questions raised by the EPA proposal.

EPA offers in the published preamble a series of options for public comment, rather than a proposed rule. Indeed, EPA has not to date published proposed regulatory language. The Agency’s preference is to implement the new standard under Subpart 2 only in areas that are in nonattainment of both the 8-hour and the 1-hour ozone NAAQS, and for Subpart 1 to apply in all other areas. The result would be to offer to areas in nonattainment of the 8-hour standard, but attaining the 1-hour standard, the maximum in terms of program flexibility and time to attain. EPA also favors additional program flexibility and time to attain the standard even for areas it concedes must be governed by Subpart 2.

The overall impression left by the preamble is that the Agency is seeking ways to comply with the Supreme Court’s remand, while at the same time offering maximum flexibility for states. EPA’s preferred approach seems driven less by the need for cleaner air for the betterment of public health and more by the desire to create an outcome giving most nonattainment areas the maximum amount of time to achieve the standard and the most opportunity to avoid local controls or sanctions for failure to attain. In the name of promoting public health through implementing a more protective ozone standard, EPA seeks to minimize the application of Congressionally-mandated programs and requirements for expeditious attainment.

II. How To Comment.

EPA has announced three public hearings on the proposal, scheduled for June 17, 2003, at the Marriott Dallas/Ft. Worth Airport in Irving Texas; June 19, 2003 at the Palace Hotel in San Francisco, and June 27, 2003 at the Holiday In Select Old Town in Alexandria Virginia. To register to testify at any of these hearings, contact Ms. Barbara Bauer at (919) 493-3144 (ext. 188), or at barbara.bauer@pechan.com.

Written comments on the rule are due August 1, 2003, and can be submitted by U.S. mail to: Docket #OAR-2003-0079, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, NW, Room B108, Mail Code: 6102T, Washington, DC 20460. Comments also can be submitted by email to A-and-R-Docket@epa.gov, or by fax to (202) 566-1741.

III. Brief Description of the Published Proposal.

The published proposal consists of a series of narrative options for each relevant step in the implementation process, including area classifications, SIP submittal deadlines, 8-hour standard attainment deadlines, “transition” from the 1-hour to the 8-hour ozone NAAQS, and required planning and control requirements. The Agency

indicates its preference only in certain instances for a particular option presented in a particular subject area.

Although the preamble contains two “integrated frameworks using various options,” these are not put forward as proposed alternative implementation schemes, but only as “illustrative examples” of how the various options could work together in a final scheme. Framework 1 is described as an approach similar to traditional implementation; Framework 2 is “considered more flexible than traditional implementation.” 68 Fed. Reg. at 32,857. Table 5, taken from the pre-publication preamble, illustrates the two frameworks. Table 5 is attached to this memorandum as Appendix 1, and can be found in the Federal Register notice at 68 Fed. Reg. 32,858-59.⁴

While the opening sections of the preamble suggest in passing that EPA will “issue” proposed regulatory text after the Agency has received comment on the preamble “options,” EPA does not state that it will seek public comment on specific regulatory language before issuing a final rule, which the Agency asserts it will do by the end of 2003.⁵ See 68 Fed. Reg. at 32,802/2, 32,808/1. On May 21, 2003, EPA stated in a meeting with environmentalists that proposed rule language might be made available in advance of the hearings, but the Agency did not commit to this.

What follows is a bulleted outline of the major subject area “options” made public by the Agency in the preamble. This memorandum does not express a position on any of the options, nor is it a comprehensive guide to the preamble. We will augment this initial summary with a position paper, prior to the public hearings, and an analysis of proposed specific regulatory language at such time as it becomes available.

A. Non-attainment Area Classifications for the 8-hour Standard.

1. Two Classification Options.

EPA presents two options for the classification of non-attainment areas under the 8-hour standard. EPA “prefers” the second option, but seeks comment on both.

a. Option 1: Subpart 2 Classification. Under Classification Option 1, all areas with data demonstrating nonattainment with the 8-hour standard (regardless of their 1-hour classification) would be classified under Subpart 2 of the Act, and made subject to Subpart 2 requirements.

⁴ The Appendices of the Proposed Rule itself can be helpful to understanding the options proposed: Appendix A to the proposal (68 Fed. Reg. at 32,864-65) provides a matrix comparing Subpart 1 and Subpart 2 requirements; Appendix B (*id.* at 32,865-67) describes the mandatory requirements of Subpart 2 only; Appendix C (*id.* at 32,867) provides a comparison of Transitional NSR and Early Action Compact programs; Appendix D (*id.* at 32,867-68) is a list of acronyms; and Appendix E (*id.* at 32,869-70) describes how conformity, NSR, and PSD would apply under various transition (revocation) options.

⁵ EPA has committed to finalizing the implementation rule by December 2003 largely because it is required to make attainment status designations for the 8-hour standard by April 2004. 68 Fed. Reg. at 32,808/1.

Because Subpart 2 contains earlier deadlines and more stringent SIP requirements, this option would require deeper reductions than Option 2, and would require attainment at least 2 years earlier than would Option 2. Despite this, EPA states that it has “not performed any air quality modeling to determine the increment of air quality benefit from [Option 1] compared to [Option 2].” *See* 68 Fed. Reg. at 32,861/1-2.

To define Option 1, EPA has extrapolated⁶ from Table 1 of § 181(a) to develop ozone concentration levels (“design values”) associated with each Table 1 area class for the 8-hour standard, and also to develop 8-hour required attainment dates for each area class. The Agency has not included a proposed Revised Table 1 in the preamble, including attainment dates. The extrapolated values and dates for the 8-hour standard are:

Area Class	Design Value (ppm ozone)	Attainment Date
Marginal	0.085-0.092	3 years after date of classification
Moderate	0.092-0.107	6 years after date of classification
Serious	0.107-0.120	9 years after date of classification
Severe-15	0.120-0.127	15 years after date of classification
Severe-17	0.127-0.187	17 years after date of classification
Extreme*	≥ 0.187	20 years after date of classification

*EPA states that no areas of the country are currently expected to receive this classification.

b. Option 2. EPA’s Preferred Option: “Gap” Areas Regulated Under Subpart 1.

According to EPA, any area currently attaining the 1-hour standard, but monitoring nonattainment of the 8-hour standard can’t be covered by Subpart 2, because if Table 1 of Subpart 2 is read literally, it does not include design values below 0.121. Those areas would therefore fall into what the agency calls a “statutory gap.” EPA also asserts that “regional modeling” indicates that most of the 8-hour nonattainment areas that are currently attaining the 1-hour standard will attain the 8-hour standard by 2007, based on reductions from the NO_x SIP Call, the Federal Motor Vehicle Emissions Control Program, and “other existing Federal and state control measures, without [the need for] further local controls.” *See* 68 Fed. Reg. at 32,814/3.

EPA therefore prefers that all areas that are attaining the one hour standard, but have data showing nonattainment of the 8-hour standard should be classified under

⁶ EPA calculates Table 1. design values for the 8-hour areas by taking the percentage by which each Table 1 1-hour design value exceed the 1-hour standard, and then applying those percentages to the 8-hour standard. So for example, the original Table 1 design value range for a marginal area under the 1-hour standard is 0.120-0.138, or 0.833-15 percent above the 1-hour ozone NAAQS concentration threshold; applying those percentages to the 8-hour ozone NAAQS concentration threshold of 0.08 ppm yields design values for marginal areas under the 8-hour standard of 0.085-0.092. 68 Fed. Reg. at 32,813 EPA similarly calculates corresponding attainment dates by using the same periods of time after the 1990 enactment date as set forth in §181(a) Table 1, for attainment by each area class, and starting those time periods as of the date of designation/classification of the area, and citing §181(b) of the Act.

Subpart 1 of the Act (which lacks mandatory classifications), and should be subject to the planning requirements⁷ of Subpart 1, not Subpart 2.

2. Proposed Classification Incentive Feature: Applicable Under Both Option 1 and Option 2.

For any area classified under Subpart 2, EPA would classify the area at a lower classification than it would receive based on its monitored ozone concentration levels alone, if the area can demonstrate through modeling that it will attain the 8-hour standard within the deadline for attainment associated with the next lowest classification. So if an area's ozone levels would place it in a moderate classification, it can still get a marginal classification if it submits modeling showing that it will attain the standard within 3 years of its classification date. This would allow the area to escape the more rigorous requirements mandated by the statute for an area with a moderate classification (for example: in moderate areas, new stationary sources must offset their emissions by 1.15:1, while offsets of 1.1:1 are required for marginal areas, see CAA § 182 (a)(4), (b)(5)).

3. Five Percent Rule and Classification Adjustments.

EPA points out that Subpart 2 allows the Administrator to adjust classifications upwards or downwards if the area's design value is within 5 percent of another classification. EPA suggests that downwind Subpart 2 areas will be able to use this provision to seek a lower classification if they can show that additional local controls will not help them reach attainment due to transport from upwind areas.

B. Attainment Dates.

1. For Classification Option 1: attainment dates extrapolated from § 181(a) Table 1 as set out above. For areas seeking the incentive feature, the attainment date would be that associated with the next lowest classification, not the date associated with the area's actual monitored ozone concentrations as of the designation/classification date.

2. For Classification Option 2: attainment dates for areas not attaining either the 1-hour or the 8-hour standard would be those extrapolated from § 181(a) Table 1 and set out above, with the "incentive feature" deadlines as applicable. For areas attaining the 1-hour standard but not the 8-hour standard, attainment dates would be regulated under Subpart 1, which states:

the attainment date . . . shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment . . . except that the Administrator may extend the attainment date . . . for a period no greater than 10 years from the date of designation

⁷ Planning requirements include attainment/maintenance demonstration plans and reasonable further progress demonstration requirements.

as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

CAA § 172(a)(2)(A), 42 U.S.C. §7502(a)(2)(A).⁸

3. Early Action Compacts and Deferred Designation Dates.

Under the Early Action Compact (EAC) concept, EPA has offered certain areas attaining the 1-hour standard, but monitoring 8-hour nonattainment, a deferral of the initial 8-hour nonattainment designation. That deferral would be effective from the April 15, 2004 designation date until 2008, so long as the compact's terms (including voluntary early steps towards 8-hour attainment) are being met. If the EAC area cannot demonstrate that it is in attainment by December 2007, however, then the 8-hour nonattainment designation would become effective in April 2008. 68 Fed. Reg. at 32,860/1.

To the extent that designation dates are deferred (until 2008 under the EACs), the designation deferral also would defer the start of the 8-hour attainment date clock. So for EAC areas not able to demonstrate attainment by the end of 2007, the clock would begin in 2008, rather than 2004, and could run until 2020 (because Subpart 1 allows 5 years to attain, plus a 5 year extension and two possible additional one year extensions). EPA also intends for the 1-hour standard to remain in effect in the EAC areas until one year after the date of 8-hour designation, so revocation (in whole or part, see below) would not occur until 2009 in those areas with EACs. EPA asserts that it will entertain comments on the EAC portion of the proposed implementation rule.

C. “Transition” from the 1-hour to the 8-hour standard: Revocation.

EPA suggests two “options” for the transition between the 1-hour and the 8-hour standard: revocation of the 1-hour standard “in whole” and partial revocation of the 1-hour standard. EPA states that it prefers option 1: revocation in whole.

1. Revocation Option 1: The 1-hour standard and associated designations and classifications would be completely revoked one year after the effective date of the designations⁹ for the 8-hour NAAQS. Some 1-hour SIP provisions would, however continue to apply after the date of revocation, and EPA notes it will need to promulgate anti-backsliding rules applicable to the portions of 8-hour nonattainment areas that were designated nonattainment for the 1-hour standard prior to the revocation.

⁸ Subpart 1 also allows two additional one year extensions, if the state has complied with all requirements for the area, and only a minimal number of exceedances has occurred in each year. CAA § 172(a)(2)(C), 42 U.S.C.7502(a)(2)(C).

⁹ Section 181(a)(1) states that each area designated nonattainment for the pollutant ozone shall be classified at the time of such designation, under Table 1, by operation of law. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). Elsewhere in the preamble, EPA suggests that it intends this provision to apply to its Subpart 2 designations.

2. Revocation Option 2: EPA would retain the 1-hour standard and associated designations and classifications in areas that are in nonattainment of the 1-hour standard, “for limited purposes,” until such time as the areas attain the 1-hour standard, but in no event would areas have to comply with conformity for both standards simultaneously:

- For areas that have been previously designated nonattainment of the 1-hour standard (NA/1) and the 8-hour standard (NA/8), and if the area is NA/1 at the time of 8-hour designation:
 - All Subpart 2 mandates continue to apply as a matter of law, but only in portions of the NA/8 area that was also NA/1.
 - Major NSR applicability requirements (offsets and major source thresholds) continue to apply to the extent that the NA/1 classification is higher than the area’s NA/8 classification on the date of NA/8 classification.
 - Discretionary control measures do not have to be retained, so long as removing them from a SIP will not interfere with attainment or maintenance (see §110(l)).
 - States are obligated to satisfy outstanding ROP requirements under the 1-hour standard, so long as that obligation does not “overlap” with an 8-hour ROP requirement.
- For areas in attainment of the 1-hour standard as of the date of 8-hour designation, but previously NA/1 during some period since 1990, and in NA/8:
 - Same as above, except that the mandatory measures will have been incorporated in 1-hour maintenance plans and thus remain in effect.
- For areas NA/1 or in attainment of the 1-hour standard as of the date of 8-hour designation, but previously NA/1 during some period since 1990, and now in attainment for the 8-hour standard:
 - No nonattainment NSR for either the 8-hour or 1-hour standard.
 - No 1-hour SIP planning (attainment or ROP requirements) as long as the area maintains the 8-hour standard.
 - Maintenance plan obligation only if the area is NA/1 at the time of 8-hour designation.

D. The 8-Hour Standard and New Source Review.

EPA proposes to revise the major NSR requirements that would, if finalized, apply to areas that (a) are subject to Subpart 1 under EPA’s preferred classification scheme, (b) are able to demonstrate that they will attain the 8-hour standard in three years or less, and (c) have submitted an attainment plan that contains additional local control measures. This “transitional program” would apply in the interim period between the designation date and the date that the state amends its SIP either to list new

nonattainment areas or to include Part D provisions for nonattainment areas. Under the proposed transitional program, eligible areas would use a major source emissions threshold of 100 tons per year, would apply BACT rather than LAER, and would not require new emissions sources to obtain offsets.

In addition, EPA is proposing, and requesting comment on, a new concept by which an area that “changes its development patterns such a way that air emissions within the nonattainment area are demonstrably reduced” would be defined as a “Clean Air Development Community” and receive “certain flexibilities in implementing CAA programs” – particularly NSR requirements. 68 Fed. Reg. at 32,849/1. More specifically, EPA is considering two CADC options.

1. Option 1: CADC areas that would otherwise be regulated under Subpart 2 would be subject to Subpart 1 NSR requirements, if (a) the state SIP includes land use restrictions for a nonattainment area that reduce air emissions, and (b) the state demonstrates that air quality would not decrease as a result. In addition, major source thresholds would be lowered “to make them similar to those under the PSD provisions.” 68 Fed. Reg. 32,849/3. Finally, development zones would be created within the CADC and these zones would be allowed to receive NSR offsets from “pools” or “banks” of offsets established by the state. *Id.*

2. Option 2: The CADC concept in this option is limited to the creation of “development incentive zones”. Under this option, the reduced emissions from improved development patterns elsewhere in the state would be used to create offset pools for use by new stationary sources in development zones, industrially zoned areas such as brownfield sites where development is preferred. *Id.* at 32,849-50.

IV. Conclusion.

At this point it is not possible to discern a cogent, preferred framework for the implementation of the 8-hour standard from EPA’s proposal, except to say that the Agency is aiming for maximum “flexibility” and minimum requirements for states with NA/8 areas. The preamble strongly suggests that EPA would prefer to have Subpart 2 classifications (and their more stringent attainment deadlines and required control and planning obligations) apply only to those areas that are nonattainment for the 1-hour ozone standard and also nonattainment for the 8-hour standard. The Agency takes the position that Subpart 2 only applies to areas in nonattainment of the 1-hour standard, as opposed to all areas that are in nonattainment of the NAAQS for ozone.

This memorandum is a very basic summary of the topics covered in the prepublication preamble. We will prepare a more detailed analysis for distribution by mid-June, as well as an outline of the proposed rule language documenting the scheme that EPA actually proposes, at such time as that becomes available.

Appendix 1.

TABLE 5

**8-HOUR OZONE NAAQS IMPLEMENTATION
ELEMENTS/OPTIONS GROUPED INTO FRAMEWORKS FOR PROPOSAL**

(This table only summarizes the options and approaches; the full description of the approach or option in the proposed rulemaking should be consulted)

IMPLEMENTATION ELEMENT	FRAMEWORK 1	FRAMEWORK 2
A. Will subpart 1 or subpart 2 govern classifications?	Classify all areas under subpart 2 using 8-hour design values (Option 1)	Areas with a 1-hour design value \geq 0.121 ppm would be classified under subpart 2 using 8-hour design values. Areas with a 1-hour design value $<$ 0.121 ppm would be covered under subpart 1. (Option 2)
B. Will areas under subpart 1 be classified?	N/A	No classification (Option 1)
C. When may the State treat measures that applied for purposes of the 1-hour standard as contingency measures, consistent with section 110(1)	When the area attains the 8-hour ozone standard and is designated attainment	When the area achieves the level of the 1-hour standard
IMPLEMENTATION ELEMENT	FRAMEWORK 1	FRAMEWORK 2
D.1. How will the 15 percent VOC ROP requirement apply?	All areas classified as moderate or above for the 8-hour NAAQS must achieve a 15 percent reduction in VOC emissions for the first 6 years after the base year (2002) (Option 1).	A moderate area that already achieved a 15 percent VOC reduction for the 1-hour ozone standard would be considered to have met the 15 percent requirement already and may instead implement RFP consistent with section 172(c). An area classified as serious or above that already achieved a 15 percent VOC reduction would be considered to have met the 15 percent requirement so it could choose to achieve an average of three percent per year of VOC or NO _x reductions for the 6-year period. (Option 2)
D.2. What is the baseline year for the emission inventory used for RFP/ROP?	All areas would use a 2002 baseline year for preparation of the emissions inventory.	
D.3. What restrictions on creditable measures for RFP/ROP under the 8-hour standard (subpart 2 areas only) will apply?	All emissions reductions that occur after the baseline emissions inventory year from post-1990 Federal measures and any other measures would be creditable for ROP/RFP, except those specifically prohibited in section 182(b)(1)(D).	
D.4. What will RFP be for	N/A	a. Areas with attainment dates 3

IMPLEMENTATION ELEMENT	FRAMEWORK 1	FRAMEWORK 2
areas classified under subpart 1?		<p>years or less after designation.</p> <p>As with marginal areas, those areas would not be subject to a separate RFP requirement.</p> <p>b. <u>Areas with attainment dates between 3 to 6 years after designation.</u></p> <p>No separate RFP demonstration required except RFP would be met if a State demonstrates emissions reductions needed for attainment would be achieved by the attainment date. (Option 1)</p> <p>c. <u>Areas with attainment dates beyond 6 years after designation.</u></p> <p>The RFP plan submission would be due with the attainment demonstration within 3 years after designation and would need to provide for certain increments of reductions from the baseline emission year out to the attainment year, proportionate to the time between the base year and the attainment year. (Option 1)</p>

IMPLEMENTATION ELEMENT	FRAMEWORK 1	FRAMEWORK 2
D.5. How would the 8-hour ROP requirement fit with the 1-hour ROP requirement?	The area would develop new baseline and new ROP emission reduction targets for the 8-hour standard for the entire area and could drop the 1-hour standard target for any periods that overlap with an 8-hour RFP period.	
E. What's the RACT requirement for areas covered under subpart 1?	N/A	<p>If the area is able to demonstrate attainment of the standard as expeditiously as practicable with emission control measures in the SIP, then RACT will be met, and additional measures would not be required as being reasonably available (Option 2).</p>