

US EPA ARCHIVE DOCUMENT

**This paper reflects preliminary agency thoughts and ideas and the options presented have not been thoroughly analyzed for legal defensibility**

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### **Flexibility in Mandatory Measures in Subpart 2**

**Issue:** Should prescribed requirements of Subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility to apply equivalent measures, or drop some requirements altogether if in certain narrowly defined circumstances they are determined to be inappropriate?

**Background:**

1. With respect to the requirements of subpart 2, the Supreme Court provided:
  - “The principal distinction between Subpart 1 and Subpart 2 is that the latter eliminates regulatory discretion that the former allowed.”
  - “Whereas Subpart 1 gives the EPA considerable discretion to shape nonattainment programs, Subpart 2 prescribes large parts of them by law. Compare 7502(c) and (d) with 7511a.”
  - “EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.”
2. Mandatory subpart 2 requirements include e.g., NSR size cutpoints, specific ROP requirements (including 15% VOC reduction for moderate areas), size cutpoints for RACT, NOx RACT, Stage II vapor recovery, etc.)—see attached list of examples.
3. EPA is seeking public comments on use of these measures in the context of implementation of the 8-hr ozone standard. For areas to be covered by subpart 2 for some situations, we may want to consider how to adjust or interpret certain subpart 2 requirements for purposes of implementing the 8-hr standard.
4. We may have some limited ability to change or limit subpart 2 controls, but, given the Supreme Court ruling, it does not appear that we can broadly waive those requirements.

**Options**

**Option 1.** Assume no changes can be made to the statutory requirements of subpart 2.

**Option 2.** Identify (if possible) a legal justification to allow areas covered under subpart 2 to substitute measures that will provide equivalent ozone reductions.

**Option 3.** Identify (if possible) a legal justification to allow EPA to determine on a case-by-case basis which of the mandatory control measures under subpart 2 can be waived by the State in preparation of its attainment demonstration. The area would still have to provide controls

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sufficient to attain the standard by the attainment date for its classification.

**Option 4.** Review each of the individual control requirements in subpart 2 to determine what, if any flexibility may be provided for that specific requirement (e.g., can the 15% VOC reduction requirement be deemed to have been met for areas that have already achieved a 15% reduction in VOC reductions for the 1-hour standard? For serious and above areas, can EPA determine that onboard vapor recovery is in widespread use and thus, under section 202(a)(6) revise or waive the stage II requirement for those areas?)

**Link to Other Issues:**

The resolution of this issue on whether EPA has flexibility to adjust or interpret certain subpart 2 requirements has implications for the reasonable further progress requirements (e.g., how to implement the requirement for the 15 percent VOC requirement for the first 6 years of a plan).

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**COMPARISON OF SUBPART 1 & 2 REQUIREMENTS**  
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ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
Attainment Dates  For all areas, attainment should occur as expeditiously as practicable, but no later than specified time frame	Up to 5 years after nonattainment designation; may extend up to 10 years based on specified considerations	Marginal	3 years from CAAA enactment
		Moderate	6 years from CAAA enactment
		Serious	9 years from CAAA enactment
		Severe-15	15 years from CAAA enactment
		Severe-17	17 years from CAAA enactment
		Extreme	20 years from CAAA enactment
Reasonable Further Progress	“annual incremental emission reductions” (nothing more specific)	Marginal	none
		Moderate	15% VOC within 6 years of enactment

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
		Serious	+ 3% per year of VOC/NOx from years 7-9 of CAAA enactment
		Severe-15	+3% per year of VOC/NOx from years 9-15 of CAAA enactment
		Severe-17	+ 3% per year of VOC/NOx from years 9-17 of CAAA enactment
		Extreme	+ 3% per year of VOC/NOx from years 9-20 of CAAA enactment
Milestone Compliance Determination	Not required as such; contingency measures supposed to be implemented upon failure to meet RFP	Marginal/moderate	no further requirement
		Serious & above	requires MCD to be made following milestone; failing area must elect one of: 1. bump up 2. implement contingency measures 3. economic incentive

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
Attainment demonstration	EPA sets date which can be no later than 3 years after designation	Marginal	none
		Moderate	none explicit (but EPA interpreted requirement)
		Serious	4 years from CAAA enactment
		Severe	4 years from CAAA enactment
		Extreme	4 years from CAAA enactment

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
NSR and RACT major source applicability	100 TPY	Marginal	100 TPY
		Moderate	100 TPY
		Serious	50 TPY
		Severe	25 TPY
		Extreme	10 TPY
NSR offsets	>1 to 1	Marginal	1.1 to 1
		Moderate	1.15 to 1
		Serious	1.2 to 1
		Severe	1.3 to 1
		Extreme	1.5 to 1
NSR permits	Permits required		<p>construction permits for new or modified major stationary sources</p> <p>pre-1990 permit program corrections</p>
Bump-up to higher classification	NA	All except severe & extreme	required to bump-up to higher classification if area doesn't meet attainment. date

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
NOx control for RACT	no specificity	Moderate & above (& marginal areas (as well as attainment areas) in OTC)	Requirements under this subpart for major stationary VOC sources (NSR & RACT) also apply to all major NOx sources, unless EPA approves NOx waiver
NOx control for NSR	no specificity	Marginal & above	
Emission inventory	Required in nonattainment area; no updates required; no emission statements required	All	Comprehensive emissions inventory within 2 years of enactment; update every 3 years (until area attains). Annual emissions statements from VOC and NOx stationary sources
RACM/RACT	general requirement for RACM/RACT	Marginal & above	Pre-1990 RACT fix-up
		Moderate & above	RACT for all CTG sources and all other major sources

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
I/M	Nothing specified?	Marginal	Pre-1990 corrections to previously required I&M programs immediately upon CAAA enactment
		Moderate	Basic I&M
		Serious & above	Enhanced I&M within 2 years of CAAA enactment
Conformity	required	All	No additional specificity
Stage II vapor recovery (VOC)	not specified	Moderate & above serious, severe and extreme	Stage II for gas stations within 2 years

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
Consequences of failure to attain	EPA to specify additional requirements; up to 10 more years to attain	Marginal, moderate and serious  Severe and extreme	Bump-up for failure to attain  Fee system; continued ROP; possible stricter NSR major source cut offs
Maintenance	Requirement for maintenance plans for areas redesignated from nonattainment to attainment	All	no additional specificity
Contingency measures	required for failure to make RFP or attainment		
Enhanced monitoring (PAMS)	N/A	Serious & above	Ambient ozone precursor monitoring (VOC and NOx)
VMT demo (& TCMs if needed)	N/A	Serious & above	Demonstration of whether current aggregate vehicle mileage, emissions, congestion levels are consistent with attainment demo

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
Clean fuels program (if needed)	N/A	Serious & above	Certain percentage of fleet vehicles for 1998 and higher to be clean vehicles and use alternative fuels
Reformulated Gas*	N/A	Severe & above	Prohibition of sale of gas that has not been reformulated to be less polluting
* required under sect. 211(k)(10)(D), which requires the use of RFG in 9 covered areas, and areas that are bumped up to Severe under section 181(d)			
TCMs to offset growth in VMT emissions	N/A	Severe & above	Enforceable transportation control strategies and TCMs to offset any growth in emissions in VMT

ELEMENT	SUBPART 1	SUBPART 2	
		Classification	Requirement
<p>Clean Fuels for Boilers</p> <p>TCMs during heavy traffic hours</p> <p>New Technologies</p>	<p>N/A</p>	<p>Extreme areas</p>	<p>Use of clean fuels or advanced technology for certain boilers that emit more than 25 TPY of NOx</p> <p>TCMs during periods of heavy traffic that reduce use of high polluting or heavy-duty vehicles</p> <p>New or future technologies for emission reductions</p>