

a State took timely action under the NO_x SIP Call. This gave upwind States the flexibility to address the ozone transport problem themselves, but would not delay implementation of the NO_x transport remedy beyond the May 1, 2003 Section 126 Rule compliance date.³ This was a practical way to address the overlap between the actions that would be required under the NO_x SIP Call and under the rulemaking on the section 126 petitions. (The basis for the withdrawal provision is discussed below in section III.A. For a more detailed discussion of the basis for harmonizing the two rules and the interplay of the underlying statutory provisions, see the May 25, 1999 final rule.)

The NO_x SIP Call originally required States to submit their NO_x SIPs to EPA by September 30, 1999. On May 25, 1999, in response to a request by States challenging the NO_x SIP Call, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or the court) issued a stay of the SIP submission deadline pending further order of the court. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir., 2000), *cert. denied*, 121 S. Ct. 1225 (2001) (order granting stay in part). Inasmuch as the compliance date is linked with the SIP submission date, the stay created uncertainty regarding the compliance date. Because there was no longer a schedule for the NO_x SIP Call, and therefore, no assurance that transport would be addressed by May 1, 2003, EPA no longer had a basis for deferring action under the Section 126 Rule. Therefore, in a final rule published on January 18, 2000, EPA moved forward to make the findings with respect to the 1-hour ozone standard and activate the control requirements under the Section 126 Rule (65 FR 2674).⁴ However, the Section 126 Rule continued to contain a provision (§ 53.34(i)) whereby the section 126 requirements would be automatically withdrawn for sources in a State if EPA approved a State's SIP that provided for the NO_x SIP Call emission reduction requirements by May 1, 2003.

III. Why Does the Section 126 Rule Withdrawal Provision Need To Be Revised?

A. Under What Circumstances Does the Section 126 Rule Withdrawal Provision Currently Operate?

Section 52.34(i) of the Section 126 Rule currently provides that:

* * * a finding [under the Section 126 Rule] as to a particular major source or group of stationary sources in a particular State will be deemed to be withdrawn, and the corresponding part of the relevant petition(s) denied, if the Administrator issues a final action putting in place implementation plans that comply with the requirements of §§ 51.121 and 51.122 [the NO_x SIP Call] of this chapter for such State.

As discussed in the Section 126 Rule (65 FR 2682–2684), the premise for the automatic withdrawal provision was that once a SIP (or Federal implementation plan (FIP)) controls the full amount of significant contribution from a State, the section 126 sources in that State could no longer be significantly contributing to downwind nonattainment, and hence the basis for the section 126 findings would no longer be present. Further, the provision would ensure that the downwind petitioning States receive the emission reduction benefits they are entitled to under section 126 by May 1, 2003, which was then the compliance date, either under the Section 126 Rule or under a Federally enforceable SIP or FIP (65 FR 2684). Thus, EPA's rationale for adopting the automatic withdrawal provision depended upon a May 1, 2003 compliance date for sources under the SIP that would substitute for the control remedy under the Section 126 Rule. Accordingly, EPA interpreted section 52.34(i) to apply only where EPA approves a SIP revision (or promulgates a FIP) meeting the full requirements of the NO_x SIP Call and including a May 1, 2003 compliance date for sources (See 65 FR 2683). The automatic withdrawal provision does not address any other circumstances.

B. How Have Court Actions Affected the Circumstances Upon Which the Section 126 Rule Withdrawal Provision Was Based?

Both the NO_x SIP Call and the Section 126 Rule were challenged in court. As a result of court actions, certain circumstances upon which the Section 126 withdrawal provision was based have changed—the deadlines for the NO_x SIP Call and the Section 126 Rule have been delayed and the SIP Call has been divided into 2 phases (known as Phase 1 and Phase 2).

1. Court Actions on the NO_x SIP Call

On March 3, 2000, a panel of the D.C. Circuit largely upheld the NO_x SIP Call but remanded a few issues to EPA for further consideration. (See *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir., 2000), *cert. denied*, 121 S. Ct. 1225 (2001).) As discussed in section II above, during the litigation, the court issued a stay of the SIP submission deadline. On June 22, 2000, in response to a motion by EPA, the court lifted the stay and established a new SIP submission date of October 30, 2000. On August 30, 2000, the D.C. Circuit ordered that the deadline for implementation of the NO_x SIP Call be extended from May 1, 2003 to May 31, 2004. The NO_x SIP Call then had a later compliance date and was no longer harmonized with the Section 126 Rule.

As a result of the court decision, EPA divided the NO_x SIP Call into two phases. Phase 1 represents the portion of the rule that was upheld by the court and accounts for approximately 90 percent of the total emissions reductions called for by the original NO_x SIP Call. The court-established SIP submission date and compliance date apply to Phase 1. Phase 2 of the NO_x SIP Call is addressing issues remanded by the court. The EPA proposed the Phase 2 requirements on February 22, 2002 (67 FR 8396). The SIP submission date and compliance date for the Phase 2 will be established through that rulemaking action.

The EPA promulgated the January 2000 Section 126 Rule at the time when the NO_x SIP Call stay was in place. In the preamble to the rule, EPA noted that if EPA prevailed in the NO_x SIP Call litigation, the court or EPA would need to establish a new deadline for SIP submission and the delay from the original September 1999 SIP deadline could require a shift in the date for achieving the NO_x SIP Call emissions reductions beyond May 1, 2003 (65 FR 2683). The EPA indicated that when and if such a situation were to arise, EPA would address through rulemaking the effects of the new NO_x SIP Call deadline on the Section 126 withdrawal provision.

2. Court Actions on the Section 126 Rule

On May 15, 2001, the court ruled on a number of challenges to EPA's Section 126 Rule. See *Appalachian Power v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). The court largely upheld the Section 126 Rule, but remanded two issues to EPA. The court directed EPA to: (1) Properly justify either the current or a new set of EGU heat input growth rates to be used in estimating State heat input

³ This approach of "harmonizing" the Section 126 Rule and the NO_x SIP Call was provided as a rulemaking option in a consent decree developed by the petitioning States and EPA.

⁴ Because of the stay on the Section 126 Rule with respect to the 8-hour standard, EPA did not make findings under the 8-hour standard at that time. EPA plans to complete its actions on the 8-hour petitions in a future rulemaking.