

in 2007, and (2) either properly justify or alter its categorization of cogenerators that sell electricity to the electric grid as EGUs.<sup>5</sup>

On August 24, 2001, the D.C. Circuit Court tolled (suspended) the compliance period for EGUs under the Section 126 Rule as of the May 15, 2001 decision pending EPA's response to the remand related to EGU growth rates. *Appalachian Power v. EPA*, 249 F.3d 1052 (D.C. Cir 2001), Order (August 24, 2001). The EPA issued its response in a notice published on May 1, 2002 (67 FR 21868). Because of the time needed to fully respond to the growth factor remand, the tolling of the compliance period resulted in a delay in the implementation of the Section 126 Rule until the 2004 ozone season. This created a need for EPA to once again harmonize the Section 126 Rule with the NO<sub>x</sub> SIP Call. Therefore, on April 30, 2002, EPA issued a final rulemaking to revise the Section 126 Rule compliance date and other related dates (67 FR 21522). The new compliance date is May 31, 2004, which is the same compliance date for Phase 1 of the NO<sub>x</sub> SIP Call, but slightly more than a year later than the compliance date upon which the Section 126 Rule withdrawal provision was based.

#### **IV. What Is EPA's Proposal To Revise the Section 126 Rule Withdrawal Provision?**

A number of reasons supported structuring the May 25, 1999 Section 126 Rule to provide for an automatic withdrawal of the section 126 findings upon approval of a SIP revision complying with the NO<sub>x</sub> SIP Call. As discussed above, EPA believes it is appropriate, when consistent with the relevant statutory provisions, to structure the Section 126 Rule to allow for State rather than Federal regulation when either would be equally effective in implementing the statutory goal of producing timely emissions reductions. The withdrawal provision also avoids the overlap of the Federal requirements under section 126 and State measures in response to the NO<sub>x</sub> SIP Call. However, due to the changes that have occurred to the Section 126 Rule and the NO<sub>x</sub> SIP Call as a result of court actions, the Section 126 Rule withdrawal provision is now out of date. Therefore, it is necessary to revise and update the withdrawal provision so that it will function as originally intended.

##### *A. What Is EPA's Proposal Related to the SIP Compliance Date?*

As discussed in Section III.A. above, EPA interprets the current Section 126 Rule withdrawal provision to operate only when the SIP has a May 1, 2003 compliance date. Because the Section 126 Rule compliance deadline is now May 31, 2004, a NO<sub>x</sub> SIP to pre-empt or replace the Section 126 Rule requirements would not need to be implemented until May 31, 2004. Therefore, in today's action, EPA is proposing that the section 126 findings for sources in a State will be deemed to be withdrawn, and the corresponding portion of the relevant petition will be denied, if EPA approves a NO<sub>x</sub> SIP that meets the NO<sub>x</sub> SIP Call requirements of 40 CFR 51.121 and 51.122 (or Phase 1 requirements under the circumstances discussed below) by May 31, 2004 rather than by May 1, 2003.

##### *B. What Is EPA's Proposal Related to Withdrawing the Section 126 Rule Based on a Phase 1 SIP?*

The current withdrawal provision requires a State to meet the full NO<sub>x</sub> SIP Call. If a State controls its statewide significant contribution under the NO<sub>x</sub> SIP Call, it necessarily must have addressed the significant contribution from the section 126 sources in that State. This provided the basis for EPA to revoke the section 126 findings and requirements as to those sources.

At the time EPA promulgated the Section 126 Rule, the NO<sub>x</sub> SIP Call had not yet been divided into two phases. Therefore, EPA did not address the question of whether something less than a full NO<sub>x</sub> SIP, that is, a Phase 1 SIP, could adequately substitute for the section 126 requirements. Phase 1 of the NO<sub>x</sub> SIP Call provides around 90 percent of the SIP Call reductions. States are required to achieve the Phase 1 reductions by May 31, 2004, the same compliance date as the Section 126 Rule. In February of this year, EPA proposed the Phase 2 requirements. The Phase 2 compliance date will be established in a future final rule. Because EPA expects that the Phase 2 compliance date will be later than the 2004 ozone season, States will be required to achieve only the Phase 1 reductions in 2004 and not the full NO<sub>x</sub> SIP Call reductions. Therefore, in order to avoid having sources be subject to two different sets of transport requirements in 2004 under the NO<sub>x</sub> SIP Call and the Section 126 Rule, EPA is proposing criteria for withdrawing the Section 126 Rule based on a Phase 1 SIP.

Although the Phase 1 SIP would achieve the vast majority of the SIP Call reductions, there is no guarantee that a Phase 1 SIP would, in all cases, control at least the same amount of emissions as the Section 126 Rule in a State or that the State would choose to regulate all the identified Section 126 sources. Therefore, EPA is not proposing that simply meeting the Phase 1 reductions would provide a basis for automatic withdrawal of the Section 126 requirements. Instead, EPA is proposing that the Section 126 Rule be withdrawn in a State under the more limited circumstances where EPA determines that an approved Phase 1 SIP is requiring at least the same total quantity of emissions reductions from the same group of sources as controlled under the Section 126 Rule by May 31, 2004. In this situation, the SIP would retain the environmental benefits that section 126 would have provided and the section 126 sources would no longer be significantly contributing to downwind nonattainment problems.

The process for withdrawing the Section 126 Rule based on a Phase 1 SIP would differ slightly from the situation where a State adopts a SIP meeting the full NO<sub>x</sub> SIP Call requirements in that a second step would be involved. In the latter case, the Section 126 Rule would be automatically withdrawn upon SIP approval. In the case of the Phase 1 SIP, the Section 126 Rule would be withdrawn upon EPA's determination that the approved Phase 1 SIP regulates the group of section 126 sources to the same or greater stringency as the Section 126 Rule.

Based on the review of SIPs to date, EPA believes it is likely that all of the Phase 1 SIPs from States affected by the Section 126 Rule will regulate all of the section 126 sources to the same stringency as the Section 126 Rule. However, not all of the Phase 1 SIPs have been fully approved yet and one affected State has not yet submitted its SIP. Therefore, EPA is still considering whether there are other circumstances under which it would be appropriate to withdraw the Section 126 Rule. The EPA is soliciting comments on alternative approaches for withdrawing the Section 126 Rule based on an approved Phase 1 SIP.

#### **V. What Is the Current Status of the NO<sub>x</sub> SIPs Under the NO<sub>x</sub> SIP Call and EPA's Proposed Action To Withdraw the Section 126 Rule in a State?**

The January 2000 Section 126 Rule affected sources located in the District of Columbia and the following 12 States: Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North

<sup>5</sup> The EPA is responding to the remand related to the categorization of cogenerators in a rulemaking that was proposed on February 22, 2002 (67 FR 8396).