

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B108, Washington, DC 20460; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814-2308, or by e-mail at powers.marilyn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On November 12, 2002 (67 FR 68542), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of Virginia's NO_x Budget Trading Program, with the exception of its NO_x allowance banking provisions, for which EPA proposed conditional approval. The formal SIP revision was submitted by the Virginia Department of Environmental Quality (VADEQ) on June 25, 2002 to address the requirements of the NO_x SIP Call Phase I. Virginia's SIP revision to address the NO_x SIP Call Phase I consists of the addition of 9 VAC Chapter 140, part I—NO_x Budget Trading Program. Detailed descriptions of this SIP revision, the general NO_x SIP Call requirements, and EPA's rationale for approving Virginia's NO_x Budget Trading Program while conditionally approving the program's allowance banking provisions were provided in the November 12, 2002 NPR and will not be restated here. The terms of the conditional approval require that Virginia revise its banking provision to amend the flow control trigger date from 2006 to 2005, and submit the amendment as a SIP revision within one year from the effective date of today's final rulemaking action.

On May 13, 2003, the VADEQ submitted a letter to EPA committing to adopt the necessary regulatory amendment to 9 VAC 5 Chapter 140 to change the flow control date from 2006 to 2005. In the May 13, 2003 letter, the VADEQ also commits to submit this regulatory amendment as a SIP revision as expeditiously as possible but no later than one year from the effective date of EPA's final conditional approval of its NO_x Budget Trading Program's allowance banking provisions. The May 13, 2003 letter from the Commonwealth

has been included in the administrative record (docket) of this final rulemaking.

Six comment letters were received; all comments pertained to EPA's proposed conditional approval of Virginia's NO_x allowance banking provisions. The comments opposed EPA's requirement that full approval of these provisions is conditioned upon Virginia revising the flow control trigger date from 2006 to 2005. A summary of the comments and EPA's responses is provided in Section II below.

II. Public Comments and EPA Responses

Comment: All commenters disagreed with EPA's proposed approval of Virginia's NO_x SIP Rule conditioned on adoption of a 2005 flow control date. The commenters expressed support for the 2006 flow control date currently in Virginia's rule.

EPA's Response: The NO_x SIP Call includes a limitation (referred to as "flow control") on the use of banked allowances for compliance with the requirement to hold allowances covering emissions. EPA rejects the commenters' claims and maintains that approval of Virginia's NO_x SIP Call rule should be conditioned on establishing 2005 as the earliest ozone season (referred to as the "flow control date") for which the limitation on use of banked allowances may be triggered.

First, allowing 2006 to be the flow control date in Virginia could result in an unfair advantage for units in the Commonwealth over units in other states with an earlier flow control date. EPA has approved NO_x Budget Trading Program rules under the NO_x SIP Call for 15 other states and the District of Columbia. None of the approved rules provide for a flow control date later than 2005.¹ The flow control limitation on

¹ In approving trading program rules for Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, New Jersey, New York, and Rhode Island, EPA approved flow control dates of 2004. The NO_x SIP Call established May 1, 2003 as the commencement date for the NO_x Budget Trading Program and required the flow control provisions to apply starting in the second year (2004) of the program. 40 CFR 51.121(b)(1)(ii) and (b)(2)(ii)(E). EPA's approval of the 2004 flow control date was based on the NO_x SIP Call. (EPA notes that it erroneously approved 2005 as the flow control date for Pennsylvania, whose program also begins in 2003.) Subsequently, the United States Court of Appeals for the District of Columbia Circuit established May 31, 2004 as the commencement date for the NO_x Budget Trading Program, and so 2005 became the second year of the program, and the mandated flow control date, for state trading programs starting in 2004. While § 51.121 and Part 96 were not revised, EPA has implemented the new flow control date through the notice and comment rulemakings for approval of the SIPs. EPA approved 2005 as the flow control date for states (*i.e.*, Alabama, Illinois, Indiana, Kentucky, North Carolina, South Carolina, and

use of banked allowances is triggered for an upcoming ozone season if the total amount of banked allowances held in allowance accounts as of the allowance transfer deadline (November 30 or, if it is not a business day, the next business day) for the prior ozone season exceeds 10 percent of the total trading budgets for all state programs for the upcoming ozone season. For the 2005 ozone season, banked allowances held for Virginia's units or by Virginia companies as of November 30, 2004 could be a contributing factor for triggering flow control in 2005 for all states with trading programs that are in effect. If Virginia units were to be a factor in triggering flow control in 2005, but would not be subject to the flow control limitation on use of banked allowances in 2005, those Virginia units would have an unfair advantage over units in the other states with a flow control date earlier than 2006.²

Further, should a 2006 flow control date be approved for Virginia, this would allow some companies to circumvent the earlier flow control dates established by other states. A company with affected units in both Virginia and a state with an earlier flow control date would be particularly advantaged in this regard. Such a company could circumvent the earlier flow control date by exchanging banked allowances held for its units in the state with the earlier flow control date for 2005 allowances held for its units in Virginia. All of these banked allowances could be used in Virginia in 2005 without application of flow control. However, a company with only units in states with earlier flow control dates could also circumvent, to some extent, the flow control provisions of those states. To the extent that the latter company could purchase 2005

West Virginia) whose programs begin in 2004. EPA also has outstanding a proposed approval of a 2005 flow control date for Tennessee and a proposed approval for Ohio with the understanding that a 2005 flow control date will be adopted.

² Although EPA approved several state trading programs with a 2004 flow control date (*see n.1*), those states will not be disadvantaged by the fact that the other states have a 2005 flow control date. This is because 2005 is the earliest year that flow control is likely to be triggered for states with a 2004 flow control date. For 2004, the calculation for triggering flow control is the total number of banked allowances in accounts as of December 1, 2003 (*i.e.*, only the unused allowances allocated for 2003 plus the compliance supplement pool allowances for those states with trading programs beginning in 2003) divided by the total trading budgets for the states with programs in effect in 2004 (*i.e.*, virtually all states in the NO_x SIP Call region). Because, for this calculation for 2004, the number of states reflected in the numerator is so much smaller than the number of states reflected in the denominator, 2005 is effectively the flow control date for all states whose programs begin in 2003.