

allowances and sell banked allowances, it could also avoid the application of the flow control limitation in 2005. In short, allowing a 2006 flow control date for Virginia would allow erosion of the effectiveness of flow control for states with a flow control date before 2006 and would provide for an unfair advantage to some companies.³

Comment: A number of commenters asserted that the 2006 flow control date adopted by Virginia is supported by the rationale in the preamble of the January 18, 2000 Section 126 rule (Part 97), the accompanying December 1999 response-to-comments document, and the preamble of the April 30, 2002 revision of Part 97 for extension of the flow control date. Commenters also stated that the possibility of different dates under different programs would not affect the trading program and that Part 96 should not be relied on for determination of approvability of the flow control date.

EPA's Response: EPA first notes that, at the time Part 97 was promulgated, the potential existed that a number of states would be subject to the trading program under Section 126 as well as that a number of states would be subject to the trading program under the NO_x SIP Call. This was due to uncertainty as to whether all states would be able to establish SIP approved programs under the NO_x SIP Call. While the NO_x SIP Call established statewide NO_x emissions budgets, it allowed states the flexibility to adopt whatever NO_x control measures were shown to meet their respective budgets (including the option of participating in the NO_x Budget Trading Program based on the model rule in Part 96). The states in the NO_x SIP Call region chose to adopt, or are in the process of adopting, trading programs based on Part 96. As long as a state fully meets its obligations under the NO_x SIP Call, EPA does not intend to apply the Section 126 rule to units in that state. The existing rule provision withdrawing the Section 126 findings for any state is keyed to the NO_x SIP Call compliance date of 2003. EPA has already withdrawn the Section 126 findings for Connecticut, Maryland, New Jersey, and New York on that basis. EPA has proposed to revise the Section 126 rule to withdraw the Section 126 findings for states with a May 31, 2004 compliance date. 65 FR 16644 (Apr. 2, 2003). In short, Part 97 (including the later flow control date of 2006) will likely no longer apply to any states in

the NO_x SIP Call region.⁴ Only the NO_x SIP Call and Part 96 will likely be applicable.

Moreover, in light of this change in circumstances and upon reconsideration of the discussion in the January 18, 2000 and April 30, 2002 preambles for Part 97 (and echoed in the December 1999 response-to-comments document) concerning the flow control date, EPA concludes that such discussion is not complete and is no longer applicable. In the January 18, 2000 Part 97 preamble, EPA stated that it was extending the flow control date to 2005 in response to some sources' concern "regarding the feasibility of installing the NO_x control equipment required . . . without any risk to electricity reliability" and their resulting concern that "there would not be enough allowances for compliance in the initial years of the Federal NO_x Budget Trading Program" under Part 97. See 65 FR 2674, 2717 (Jan. 18, 2000). That preamble explained that those concerns had been "heightened" by the triggering of an analogous flow control requirement in the second year of the Ozone Transport Commission (OTC) NO_x trading program, the predecessor program in the Ozone Transport Region. *Id.*

However, the basis for any potential need for allowances to supplement the trading budget in the initial years of the NO_x SIP Call and Section 126 trading programs is that some units might experience difficulties in installing NO_x emission controls (e.g., selective catalytic reduction (SCR) before the commencement of the programs and might need to use additional allowances to cover their emissions in the initial years of the programs until the installations are completed. [See 63 FR 57356, 57428–32 (Oct. 27, 1998)] explaining that EPA addressed these concerns in establishing the compliance deadline, banking as limited by flow control, and the compliance supplement pool of 200,000 additional allowances]. The triggering of flow control in the second year (2000) of the OTC program provides no basis for "heightened" concern that units under the Section 126 program or the NO_x SIP Call program might have difficulties in installing NO_x controls and thus in meeting the compliance deadline. The OTC flow control was triggered in 2000

because of the presence of extra allowances (in addition to the amount allocated for 1999) awarded in 1999 for early reductions and because OTC units were able to install sufficient NO_x controls to meet the OTC program's 1999 compliance deadline. This is demonstrated by the fact that without the 24,635 early reduction allowances, the bank would not have exceeded 10% of the total trading budget and so would not have triggered flow control;⁵ and the fact that, in 1999, total emissions for units participating in the OTC program were less than the total number of regular allowances allocated by states participating in that program.⁶ Thus, contrary to the January 18, 2000 Part 97 preamble, the triggering of flow control in 2000 in the OTC program does not provide a logical basis for concluding that there will be a greater level of control-installation difficulties than already addressed in the NO_x SIP Call (which has a 2005 flow control date) and that the flow control date should therefore be extended to 2006.⁷

Further, there is an additional factor that was not considered in the January 18, 2000 and April 30, 2002 Part 97 preambles and that affects the applicability of the preamble rationale for the flow-control-date extension to the NO_x SIP Call. The likelihood of there being insufficient allowances in the initial years of the NO_x SIP Call trading program has been reduced because, in addition to the compliance supplement pool (which was considered in the January 18, 2000 Part 97 preamble and represents about 1/3 of the trading budget), the availability of allowances in those years has been effectively augmented by U.S. Court of Appeal's extension of the commencement of the program from May 1, 2003 to May 31, 2004. See *Michigan v. EPA*, 213 F.3d

⁵ The allowance bank as of November 30, 1999 equaled 43,585 allowances. If the 24,635 early reduction allowances had not been provided, the bank would have been 18,950 allowances, which would have been less than the flow control trigger level of 10% of the 2000 trading budget (i.e., 10% of 195,401 allowances or 19,540 allowances). See 1999 and 2000 OTC NO_x Budget Program Compliance Reports (March 27, 2000 and May 9, 2001).

⁶ Total emissions in 1999 for participating units in the OTC program were 174,843 tons, as compared to a total trading budget in 1999 of 194,103 allowances for participating states. *Id.*

⁷ The January 18, 2000 Part 97 preamble also stated that the 2006 flow control date "gives sources greater assurance that they will be able to use compliance supplement pool allowances for compliance and before such allowances expire." 65 FR 2717. As discussed in a subsequent comment, it is unlikely that compliance supplement pool allowances will expire before being used for compliance. Units in states with a 2005 flow control date can use all such allowances in 2004, before flow control applies.

³ Companies in states with a 2004 flow control date are not similarly disadvantaged by the 2005 flow control date for the remaining states. See n. 2.

⁴ EPA has proposed, but not finalized, revisions to the NO_x SIP Call concerning its application to Georgia and Missouri. All other states in the NO_x SIP Call region either have approved programs or are in the process of developing programs meeting NO_x SIP Call requirements. It seems likely that all states that are subject to the NO_x SIP Call will meet its requirements. In any event, Part 97 does not apply to Georgia and Missouri.