

663 (D.C. Cir. 2000), *cert. den.*, 121 S. Ct. 1225 (2001) (August 30, 2000 order amending June 22, 2000 order lifting stay of state's SIP submission deadline). Under the Court's decision, the first year for state trading programs commencing in 2004 includes only 4 months (May 31-September 30, 2004). Despite this, EPA retained the full ozone season trading budget for 2004 reflecting 5 months of emissions, an effective increase of about 20%.

Finally, one utility claimed that the 2005 flow control date will "seriously impair the construction schedules to which * * * sources have already committed" and "could compromise their ability to achieve compliance during 2005." The commenter alleged that "[u]tilities * * * have been planning outages and related construction activities based on the submittals by the state * * *" However, the commenter failed to provide any support for these speculative claims, for example, by discussing any specific unit's NO_x control construction schedule, showing that such schedule requires reliance by the owner or operator on the use of banked allowances for compliance for 2005, and showing that such schedule and such reliance were based on there being a 2006 flow control date.

Moreover, it is difficult to see how companies could have reasonably relied on a 2006 flow control date in scheduling installation of controls. First, since 1998, the NO_x SIP Call has called for a 2004 (or 2005, after the Court-mandated compliance date delay) flow control date and every state has been developing, through a public notice and comment procedure, NO_x SIP Call rules aimed at avoiding application of the Section 126 rule with a later flow control date. Second, the January 18, 2000 Part 97 preamble reiterated that the NO_x SIP Call continued to have a 2005 flow control date. *See* 65 FR 2718. Third, except for Virginia and Ohio, no state's NO_x SIP Call rule used a 2006 flow control date, and the Virginia and Ohio NO_x SIP Call rules with a 2006 flow control date were not promulgated until mid-2002. In short, commenters fail to show that the rationale for extending the flow control date stated in the January 18, 2000 Part 97 preamble is applicable here or that utilities reasonably relied on such an extension in the NO_x SIP Call in setting compliance schedules.

Commenters also noted that, in the January 18, 2000 Part 97 preamble, EPA stated that a "one-year difference" in flow control dates for sources subject to the NO_x SIP Call and Section 126 trading programs "will not interfere

with the trading of NO_x allowances" and that there is "no need to restrict trading between" sources in the two programs. 65 FR 2718; *see also* 67 FR 21522, 21526 (April 30, 2002). However, neither the January 18, 2000 nor the April 30, 2002 Part 97 preamble considered the problems discussed above that can result from some States having a later flow control date than other States. *See* response to comment concerning the potential for unfair advantage for some companies and the potential for erosion of the earlier flow control date provisions. The Part 97 preambles also did not address the issue of consistency with the general objective under the Clean Air Act of expeditious as practicable achievement of attainment. *See* response to comment concerning availability of 2006 date for any of the NO_x SIP Call states.

Comment: A number of commenters stated that revision of the Virginia rule to require a 2005 flow control date could have the effect of "deeply discounting" the compliance supplement pool should flow control be triggered in 2005.

EPA's Response: The compliance supplement pool may be used in the first two years of a state NO_x SIP Call trading program, and the compliance supplement pool allowances are treated as banked allowances for purposes of triggering and applying flow control. 40 CFR 51.121(b)(2)(iii)(D) and (E). While compliance supplement pool allowances in states with trading programs beginning in 2003 or 2004 may be subject to flow control in 2005, a unit has the flexibility to use those allowances for compliance before 2005 in lieu of regular allowances and thereby to avoid application of flow control to the compliance supplement pool allowances. EPA recognizes, of course, that such a strategy may result in regular allowances (*i.e.*, those allocated for 2003, in states with programs beginning in 2003, and for 2004) being banked and subject to flow control. However, whether compliance supplement pool or regular allowances are subject to flow control, that result was intended under the NO_x SIP Call.

In the NO_x SIP Call, EPA noted that banking of allowances may "inhibit or prohibit achievement of the desired emissions budget in a given [ozone] season" since the use of banked allowances for compliance for a specific ozone season may result in total emissions for affected units exceeding the trading budget for that ozone season. *See* 63 FR 25902, 25935 (May 11, 1998). The trading budget reflects the emission reductions mandated, and found to be highly cost effective, under the NO_x SIP

Call in order to prevent significant contribution to nonattainment in downwind states. Flow control addresses the potential problem caused by banking by continuing to allow banking but discouraging the "excessive use" of banked allowances for compliance. *Id.*; *see also* 63 FR 57473. Excessive use of banked allowances is discouraged by requiring that banked allowances above a certain amount be used on a 2-allowances-for-1-ton-of-emissions basis. All other allowances are used for compliance on a 1-for-1 basis. Because of this difference in use for compliance, commenters apparently are claiming that application of flow control "discounts" the allowances subject to flow control.

However, the NO_x SIP Call not only required SIPs to include the flow control provisions, but also required that these provisions apply starting in the second year of the program, which was 2004 in the NO_x SIP Call and which became 2005 for many states after the Court's order delaying the commencement of the trading program. In short, the "deep discount" claimed by the commenters results from the intentional curbing under the NO_x SIP Call of excessive use of banked allowances and so that claim is not a basis for allowing a 2006 flow control date.⁸

Comment: A number of commenters believe that the 2006 date should be available to any of the NO_x SIP Call states.

EPA's Response: EPA disagrees. First, allowing all states to use 2006 as the flow control date would be contrary to the NO_x SIP Call, which, as discussed above, requires the flow control provisions to apply starting in the second year of the program.

Second, the Clean Air Act rests on an "overarching" principle that the national ambient air quality standards (NAAQS) be achieved as expeditiously as possible. *See* 63 FR 57449. For example, under section 181 of the Clean Air Act, the "primary standard

⁸ Some commenters made a related claim that a 2005 flow control date will discourage early reductions as compared to a 2006 flow control date. However, in establishing flow control in the NO_x SIP Call, EPA balanced the considerations for and against flow control, including the impact on early reductions, and determined a 2005 flow control date should be established. As discussed above, EPA maintains that the determination (and the underlying balancing of these considerations and the underlying rationale) in the Section 126 rule to set a later flow control date are not applicable here. Further, even with the possibility of triggering flow control in 2005, there is still an incentive to make early reductions and obtain compliance supplement pool allowances since, under flow control, the use of banked allowances for compliance is not barred but rather is on a 2-for-1 basis.