

attainment date for ozone shall be as expeditiously as practicable but not later than [certain statutorily prescribed attainment dates].” 42 U.S.C. 7511; *see also* 42 U.S.C. 7502(a)(2)(A). As discussed above, the state trading budgets under the NO_x SIP Call reflect the emission reductions mandated under the NO_x SIP Call in order to prevent significant contribution to nonattainment in downwind states. Flow control reduces the likelihood of total emissions in any given ozone season in the NO_x SIP Call region exceeding the total of the state trading budgets by more than 10% and in that way promotes achievement of attainment as expeditiously as practicable. The later the flow control date, the greater the number of ozone seasons that lack this provision preventing, or at least minimizing, excessive use of banked allowances and total emissions in excess of the state budgets. Moreover, emission reductions in 2005 and 2006 may both help some nonattainment areas achieve attainment and help some areas achieve reasonable further progress toward attainment. *See* 63 FR 57449–50.⁹ The NO_x SIP Call balanced various factors, including the potential benefits of banking and the potential problems from excessive banking, and determined that flow control protection should begin in the second year of the trading program. *See* 63 FR 25934–44; and 40 CFR 51.121(b)(2)(iii)(D) and (E).¹⁰ Allowing a later flow control date would run contrary to the overarching objective of expeditious as practicable attainment.¹¹

Comment: A number of commenters suggested that if EPA continues to apply

the NO_x SIP Call to Georgia and Missouri, and sets dates for the commencement of their emission control requirements (such as a trading program based on Part 96), those states will have flow control dates later than 2005 and that this supports allowing Virginia to have a flow control date later than 2005.

EPA's Response: EPA rejects this claim as entirely speculative. In addressing whether and, if so, how to apply the NO_x SIP Call to Georgia and Missouri, EPA will address how to handle the flow control requirements and will take into account the problems discussed above that would result from some states having later flow control dates than other states.

III. Final Action

EPA is approving the Commonwealth of Virginia's Regulation for Emissions Trading, 9 VAC Chapter 140, part I—NO_x Budget Trading Program submitted as a SIP revision on June 25, 2002, with the following exception: the provisions of Virginia's NO_x allowance banking regulation set forth in 9 VAC 5–140–550 are conditionally approved. Except as noted, EPA is approving Virginia's NO_x Budget Trading Program because it substantively satisfies the requirements of the NO_x SIP Call Phase I. For Virginia's NO_x allowance banking provisions to become fully approvable, Virginia must correct the deficiency identified in this action and submit the change as a SIP revision within one year from the effective date of today's action. Because the VADEQ has begun the regulatory process to change the flow control trigger date from 2006 to 2005, and has provided a written commitment to EPA that the so revised regulation will be submitted as a SIP revision within the one year deadline, EPA will record, as soon as practicable after EPA's conditional approval becomes effective, the allowance allocations provided under Virginia's rule. If Virginia fails to fulfil its commitment, the conditional approval of the allowance banking provisions will convert to a disapproval, and EPA will, at that time, address the effect of that disapproval on the Commonwealth's NO_x Budget Trading Program.

IV. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative

burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1997, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *” The opinion concludes that “[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1997 opinion states that the quoted language renders this statute inapplicable to

⁹ EPA notes that the NO_x SIP Call covers a larger number of states, and its emission limitations are aimed at preventing significant contribution to a larger number of states with nonattainment areas, than the Section 126 rule.

¹⁰ In the January 18, 2000 Part 97 preamble, EPA stated that adoption of the third year of the program as the flow control date “strikes an appropriate balance” between concerns over the feasibility of installing controls by May 1, 2003 and the environmental goal of the program. 65 FR 2717. This is echoed in the December 1999 response-to-comments document (at 71), which stated that a 2006 flow control date will not “jeopardize the environmental goal” of this program. 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. *See, e.g.*, n.8.

¹¹ Commenters' claim that, since EPA does not expect flow control to be triggered in 2005, the potential effect of a 2006 flow control date on expeditious attainment should be ignored. This claim is without merit. Despite EPA's expectations, there is the potential for flow control to be triggered in 2005. In fact, commenters stated that they believe that such triggering in 2005 is “relatively likely”; indeed, if they did not believe it might occur, they would not be objecting to a 2005 flow control date.