

withdrawal of the January 16, 2003 direct final approval noting that an adverse comment was received and that USEPA would address the concerns and the comments from AEP. The withdrawal was published on March 17, 2003, (68 FR 12590).

The comments from AEP included a letter and an attachment which detailed the following: USEPA's Section 126 rule establishes 2006 as the flow control date for sources subject to that rule and AEP does not believe the change (of the flow control date in the Ohio rule to 2005) is required by any provision of federal law; different flow control dates will exist in different States; and USEPA should make a very limited change to the model budget trading rule to revise the flow control date to 2006. The attachment to the letter addressed the proposed rules for the State of Virginia but, the issue of flow control date is shared by both Virginia and Ohio. The AEP letter also states that it prefers to see the Ohio rule retain the 2006 flow control date in order to retain the value of early reduction credits. AEP noted that it anticipates that the issue can be fully explored in any subsequent rulemaking procedure by Ohio EPA.

III. Response to Public Comment

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 from affected units. The NO_x SIP Call requires that second year of the program be the earliest year (referred to as the "flow control date") for which flow control may be triggered. Specifically, 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). 40 CFR 51.121(b)(1)(ii) and (2)(ii)(E). 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 the second year of the program—and the mandated flow control date for state trading programs starting in 2004—became 2005. While § 51.121 and Part 96 were not revised, USEPA has implemented the new flow control date through the notice and comment rulemakings for approval of the SIPs.

Allowing the use of 2006 as the flow control date (as in the version of Ohio's rule reviewed here) would be contrary to the NO_x SIP Call. The SIP Call requires the flow control provisions to apply starting in the second year of the program. USEPA will not approve this

2006 date and is conditioning approval of Ohio's rule on the change of the flow control date to 2005, the second year of the Ohio NO_x trading program. USEPA is taking this position for several reasons.

1. Allowing 2006 to be the flow control date in Ohio could result in an unfair advantage for units in that state over units in other states with an earlier flow control date. USEPA 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 provides for a flow control date later than 2005.² The flow control limitation on 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 Ohio's units or by Ohio 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 Ohio units were to help trigger flow control in 2005 but would not be subject to the flow control limitation on use of banked allowances in 2005, this would give Ohio units an unfair advantage over units in the other states with a flow control date earlier than 2006.³

² In approving trading program rules for Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, New Jersey, New York, and Rhode Island, USEPA 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. USEPA's approval of the 2004 flow control date was based on the NO_x SIP Call. (USEPA notes that it erroneously approved 2005 as the flow control date for Pennsylvania, whose program also begins in 2003.) When the United States Court of Appeals made May 31, 2004 the commencement date for the NO_x Budget Trading Program, 2005 became the second year for state trading programs beginning in 2004. USEPA approved 2005 as the flow control date for states (*i.e.*, Alabama, Illinois, Indiana, Kentucky, North Carolina, South Carolina, and West Virginia) whose programs begin in 2004. In addressing whether and, if so, how to apply the NO_x SIP Call to the remaining states in the NO_x SIP Call region, USEPA will address how to handle the flow control requirements and will take into account the problems discussed in this section that would result from some states having later flow control dates than other states.

³ Although USEPA 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

Further, should a 2006 flow control date be approved for Ohio, this would allow some companies to circumvent the earlier flow control dates established by other states. A company with affected units in both Ohio 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 Ohio. All of these banked allowances could be used in Ohio 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 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 Ohio would allow erosion of the effectiveness of flow control for states with a flow control date before 2006 and would give an unfair advantage to some companies.⁴

2. The fact that Part 97 in the Section 126 program established 2006 as the flow control date does not support allowing 2006 as the flow control date in Ohio's NO_x SIP Call rule. USEPA first notes that, at the time Part 97 was promulgated, there existed the potential for a number of states to have their units subject to the trading program under Section 126 as well as a number of states to have their units governed by trading programs under the NO_x SIP Call. This was due to uncertainty as to whether all states would be able to establish an approved program 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 (including the option of participating in the NO_x Budget Trading Program based on the model rule in Part 96) were shown to meet their respective budgets. The states in

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.

⁴ 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.