

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, USEPA 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. USEPA has already withdrawn the Section 126 findings for Connecticut, Maryland, New Jersey, and New York on that basis. USEPA 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. 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 (and echoed in the December 1999 response-to-comments document) for Part 97 concerning the flow control date, USEPA concludes that such discussion is not complete and is no longer applicable. In the January 18, 2000 Part 97 preamble, USEPA 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. 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 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 USEPA 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. 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 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 were less than the total number of regular allowances allocated by states participating in the OTC.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 in the Section 126 trading program (or for that matter the NO_x SIP Call trading program).

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 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, USEPA retained the full ozone season trading budget for 2004 reflecting 5 months of emissions, an effective increase of about 20%.

EPA finds it 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 Ohio and Virginia, no state's NO_x SIP Call rule used a 2006 flow control date, and the Ohio and Virginia NO_x SIP Call rules with a 2006 flow control date were not promulgated until mid-2002.

Finally, in the January 18, 2000 Part 97 preamble, USEPA 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 discussion in section 1 above. The Part 97 preambles also did not address the issue of consistency with the general objective under the Clean Air Act for expeditious as practicable achievement of attainment. See discussion in section 4, below. In short, the rationale for extending the flow control date stated in the January 18, 2000 Part 97 preamble is not applicable here.

3. Although a 2005 flow control date may have the effect of reducing the value of some allowances in the

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.*