

compliance supplement pool if flow control is triggered in 2005, this does not support allowing the Ohio NO_x SIP rule to have 2006 as the flow control date. At the outset, USEPA notes that 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. USEPA 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, USEPA 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. 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.

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, any reduction in the value of allowances in the compliance supplement pool resulting from a 2005 flow control date results from the intentional curbing under the NO_x SIP Call of excessive use of banked allowances and is not a basis for allowing a 2006 flow control date.⁷

4. USEPA maintains that allowing all states to use 2006 as the flow control date would be inconsistent with the Clean Air Act. The Clean Air Act rests on an “overarching” principle that the national ambient air quality standards (NAAQS) be achieved as expeditiously as possible. 63 FR 57449. For example, under section 181 of the Clean Air Act, the “primary standard 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. 63 FR 57449–50.⁸ 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

⁷ USEPA notes that, 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. Further, in establishing flow control in the NO_x SIP Call, USEPA 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, USEPA 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.

⁸ USEPA 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.

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).⁹ Allowing a later flow control date would run contrary to the overarching objective of expeditious as practicable attainment.

5. If Ohio provides EPA a written commitment to meet the condition for approval of the state’s NO_x SIP Call rule, *i.e.*, to adopt a 2005 flow control date within one year of issuance of EPA’s conditional approval, EPA will record—as soon as practicable after EPA’s conditional approval becomes effective—the allowance allocations provided under Ohio’s rule. If it becomes necessary to disapprove the state’s rule, EPA will have the options of (1) Applying the Section 126 trading program or (2) adopting a trading program through a federal implementation plan. While the Section 126 trading program currently includes a 2006 flow control date, EPA could establish a 2005 flow control date under a federal implementation plan.

IV. USEPA Action

We are giving conditional approval to the Ohio NO_x SIP because it meets the requirements of the USEPA NO_x trading program by meeting Ohio’s NO_x budget. Ohio’s rule mirrors the USEPA model rule for the NO_x SIP Call and the State adequately responded to all of the concerns of stakeholders during the public process. Ohio’s plan is approved with the condition that Ohio EPA will take action to change the date (the flow control date) in OAC 3745–14–06(E)(6) from 2006 to 2005 and submit the change to USEPA for approval by December 26, 2003. If the flow control date is not changed from 2006 to 2005, and Ohio fails to submit the change as a revision to its plan by December 26, 2003, USEPA will remove the approval of Ohio’s NO_x SIP and take subsequent rulemaking action, as necessary. USEPA is publishing this action as a final rule in response to the comment received as a result of the January 16, 2003 final rule which received one comment and the proposed rule (published as a proposal in the event an adverse

⁹ In the January 18, 2000 Part 97 preamble, USEPA 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, USEPA 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.7.