6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 97**

**[FRL-7203-2]**

**Section 126 Rule: Revised Deadlines**

**AGENCY**: Environmental Protection Agency (EPA).

**ACTION**: Final rule.

**SUMMARY**: In today's action, EPA is revising the compliance date and other related dates for sources subject to a final rule published on January 18, 2000, known as the Section 126 Rule. The EPA promulgated the rule in response to petitions submitted by four Northeastern States under section 126 of the Clean Air Act (CAA) for the purpose of mitigating interstate transport of nitrogen oxides (NOx) and ozone. Nitrogen oxides are one of the main precursors of ground-level ozone pollution. The Section 126 Rule requires electric generating units (EGUs) and non-electric generating units (non-EGUs) located in 12 States and the District of Columbia to reduce their NOx emissions through a NOx cap-and-trade program.

Originally, EPA harmonized the Section 126 Rule with

a related ozone transport rule, known as the NOx State implementation plan call (NOx SIP Call), by establishing the same compliance date, May 1, 2003. A court action subsequently delayed the NOx SIP Call compliance deadline until May 31, 2004. More recently, on August 24, 2001, the court temporarily tolled (suspended) the Section 126 Rule compliance date for EGUs pending EPA's resolution of an issue remanded by the court related to EGU growth factors. On **[INSERT SIGNATURE DATE OF "Notice in Response to Court Remand on NOx SIP Call and Section 126 Rule"]**, EPA issued its response to the growth factor remand. That action reactivated the compliance period for EGUs after nearly a year delay. Therefore, with this final rule, EPA is resetting the EGU compliance date and other related dates, such as the monitoring certification date. The EPA is also resetting the dates for non-EGU sources to match the new dates for EGUs. The new compliance date is May 31, 2004. In general, other related dates are extended by one year from the original deadlines. Today's rule once again aligns the Section 126 Rule with the NOx SIP Call.

**DATES**: This final rule is effective **[INSERT DATE OF PUBLICATION]**.

**ADDRESSES**: Documents relevant to this action are available for inspection at the Docket Office, located at 401 M Street SW, Room M-1500, Washington, DC 20460, between 7:30 a.m. and 5:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT**: Questions concerning today's action should be addressed to Carla Oldham, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539-02, 4930 Old Page Road, Research Triangle Park, NC, 27711, telephone (919) 541-3347, e-mail at oldham.carla@epa.gov.

**SUPPLEMENTARY INFORMATION**:

**Availability of Related Information**

The official record for the Section 126 Rule, as well as the public version, has been established under docket number A-97-43. A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as confidential business information, is available for inspection from 7:30 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in ADDRESSES

at the beginning of this document. In addition, the Federal Register rulemaking actions and associated documents are located at http://www.epa.gov/ttn/rto/126.

The EPA has issued a separate rule on NOx transport entitled, "Findings of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," (known as the NOx SIP Call). The rulemaking docket for the NOx SIP Call (Docket No. A-96-56) contains information and analyses that EPA has relied upon in the section 126 rulemaking, and hence documents in that docket are part of the rulemaking record for this rule. Documents related to the NOx SIP call rulemaking are available for inspection in docket number A-96-56 at the address and times given above.

**Outline**

## I. What is the Background on the Relationship Between the Section 126 Rule and the NOx SIP Call?

### A. How Did EPA Originally Harmonize the Section 126 Rule and the NOx SIP Call?

In the past several years, EPA has been engaged in two separate rulemakings to address the interstate ozone transport problem in the eastern half of the United States. These rules, known as the NOx SIP Call and the Section 126 Rule, both require reductions in NOx emissions, which are precursors to ground-level ozone formation.

On October 27, 1998 (63 FR 57356), EPA promulgated the NOx SIP Call thereby requiring 22 Eastern States and the District of Columbia to reduce statewide NOx emissions to a specified level. The rule established dates by which the States must submit and implement their NOx reduction plans. Originally, EPA established the compliance date as May 1, 2003. The primary statutory provision for this rule is CAA section 110(a)(2)(D)(i), under which, in general, each SIP is required to include provisions to assure that sources within the State do not emit pollutants in amounts that significantly contribute to nonattainment or interfere with maintenance problems downwind.

In 1997, while EPA was in the process of developing the NOx SIP Call, eight Northeastern States submitted petitions under section 126 of the CAA seeking to

mitigate significant interstate transport of NOx and ozone. Section 126 refers to State obligations under CAA section 110(a)(2)(D)(i) as does the NOx SIP Call. Section 126 authorizes a State to request EPA to make a finding that any major source or group of stationary sources in upwind States are significantly contributing to nonattainment, or interfering with maintenance, in the petitioning State. If EPA makes such a finding, EPA is authorized to establish Federal emission limits for the affected sources. The petitions requested that EPA make such findings for EGUs and other industrial sources in about 30 States.

On May 25, 1999 (64 FR 28250), EPA issued a final rule on the section 126 petitions. The EPA determined that large EGUs and large industrial boilers and turbines (non-EGUs) in 12 States and the District of Columbia were significantly contributing to nonattainment problems in four of the petitioning States under the 1-hour ozone national ambient air quality standard. The Section 126 Rule overlaps considerably with the NOx SIP Call. Both the section 126 petitions and the NOx SIP Call were based on much the same set of facts regarding the same pollutants. All of the sources affected by the Section

126 Rule are located in States that are covered by the NOx SIP Call.

When EPA issued the May 25, 1999 Section 126 Rule, there was an existing requirement under the NOx SIP Call for States to reduce their NOx emissions and an explicit and expeditious schedule to do so. Therefore, EPA was able to coordinate, or harmonize, the Section 126 Rule with the NOx SIP Call. The EPA established the same compliance date, May 1, 2003 for both rules. In addition, EPA concluded that it was appropriate to structure its action on the section 126 petitions to give a State the opportunity to address its NOx transport first under the NOx SIP Call before EPA would directly regulate sources in the State under the Section 126 Rule. Under this approach, EPA gave upwind States an opportunity to address the ozone transport problem themselves, but did not delay implementation of the NOx transport remedy beyond May 1, 2003. Thus, in the May 25, 1999 Section 126 Rule, EPA made technical determinations as to which sources were significantly contributing but deferred making the Section 126 findings, which would trigger the control requirements, as long as States and EPA stayed on track to meet the NOx

SIP Call obligations. Where a State submitted and EPA approved a NOx SIP fully meeting the NOx SIP Call, the Section 126 Rule for sources in that State would automatically be withdrawn. (See 64 FR 28271-28274; May 25, 1999). Therefore, in this particular context in which EPA promulgated the NOx SIP Call and acted on the section 126 petitions within the same time frame, the Federal Section 126 Rule would not go into place unless States failed to control their NOx transport. This was a practical way to address the overlap between the actions that would be required under the NOx SIP Call and under the rulemaking on the section 126 petitions. The basis for harmonizing the two rules and the interplay of the underlying statutory provisions are discussed at length in the May 25, 1999 final rule.

**B. How Did Court Actions Affect the Harmonization of the Section 126 Rule and the NOx SIP Call?**

**1. Court Actions on the NOx SIP Call**

The NOx SIP Call originally required States to submit their NOx SIPs to EPA by September 30, 1999. On May 25, 1999, in response to a request by States challenging the NOx SIP Call, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or the

court) issued a stay of the SIP submission deadline pending further order of the court. Michigan v. EPA, 213 F.3d 663 (D.C. Cir., 2000), cert. denied, 121 S. Ct. 1225 (2001), No. 98-1497 order (May 25, 1999) (order granting stay in part). Inasmuch as the compliance date is linked with the SIP submission date, the stay created uncertainty regarding the compliance date. Because there was no longer a schedule for the NOx SIP Call, EPA no longer had a basis for deferring action under the Section 126 Rule. Therefore, in a final rule published on January 18, 2000, EPA moved forward to make the findings and activate the control requirements under the Section 126 Rule (65 FR 2674).

However, the Section 126 Rule continued to contain a provision whereby the section 126 requirements would be automatically withdrawn for sources in a State if EPA approved a State's SIP that provided for the NOx SIP Call emission reduction requirements by the May 1, 2003 compliance date.

On March 3, 2000, a panel of the D.C. Circuit largely upheld the NOx SIP Call in Michigan v. EPA, 213 F.3d 663 (D.C. Cir., 2000), cert. denied, 121 S. Ct. 1225 (2001). Subsequently, on April 11, 2000, EPA filed a

motion with the court to lift the stay of the SIP submission date. In response, on June 22, 2000, the court ordered that EPA allow the States 128 days from the June 22, 2000 date of the order to submit their SIPs. Therefore, SIPs in response to the NOx SIP Call were due October 30, 2000.[1]

On August 30, 2000, the D.C. Circuit ordered that the deadline for full implementation of the NOx SIP Call be extended from May 1, 2003 to May 31, 2004. This extension was calculated in the same manner used by the court in extending the deadline for SIP submissions, so that sources in States subject to the NOx SIP Call would have 1,309 days for implementing the SIP as provided in the original NOx SIP Call. This action was in response to a motion filed by the industry/labor petitioners.

As a result of this court order, the NOx SIP Call then had a later compliance date than the Section 126 Rule. Thus, where States submitted SIPs with the new 2004 deadline, the Section 126 Rule would have gone into place for a year before the State began controlling its NOx transport under its implementation plan.

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[1]October 30, 2000 was the first business day following the expiration of the 128-day period.

**2. Court Actions on the Section 126 Rule**

On May 15, 2001, the court ruled on a number of challenges to EPA's Section 126 Rule. See Appalachian Power v. EPA, 249 F.3d 1032 (D.C. Cir. 2001). While the court's decision largely upheld the Section 126 Rule, the Court remanded two issues to EPA. The court directed EPA to: (1) properly justify either the current or a new set of EGU heat input growth rates to be used in estimating State heat input in 2007, and (2) either properly justify or alter its categorization of cogenerators that sell electricity to the electric grid as EGUs. The EPA is responding to the remand related to the categorization of cogenerators in a rulemaking that was proposed on February 22, 2002 (67 FR 8396). The EPA's response to the growth factor remand is discussed below in section II.

On August 24, 2001, the D.C. Circuit Court tolled (suspended) the compliance period for EGUs under the Section 126 Rule as of the May 15, 2001 decision pending EPA's response to the growth factor remand. Appalachian Power v. EPA, 249 F.3d 1052 (D.C. Cir 2001), Order (August 24, 2001). The temporary suspension of the compliance period created uncertainty regarding the

ultimate compliance date and also how other related dates in the Section 126 Rule would be affected. Because of the time needed to fully respond to the growth factor remand, the tolling of the compliance period has resulted in a delay in the implementation of the Section 126 Rule until the 2004 ozone season. This has created a need for EPA to once again harmonize the Section 126 Rule with the NOx SIP Call.

**II. What is EPA's Response to the Court Remand on EGU Growth Factors**?

Over the past 8 months, EPA has been developing its response to the court remand on EGU growth factors. The EPA has reviewed information in the rulemaking record and also examined more recent data. The EPA published two notices of data availability that describe the new data and announced their availability in the rulemaking docket (66 FR 40609; August 3, 2001 and 67 FR 10844; March 11, 2002).

The EPA recently completed its response to the remand on EGU growth factors and is publishing the response in the notice section of the Federal Register. (See "Notice in Response to Court Remand on NOx SIP Call and Section 126 Rule".) The response to the remand

notice explains why the growth rates were reasonable, based on the information that was available to EPA at the time EPA promulgated the Section 126 Rule and confirmed by new information on activity to date.

The signature of EPA's response to the EGU growth factor remand constitutes EPA's resolution of the issue. Therefore, in accordance with the August 24, 2001 court ruling, the compliance period for EGUs is no longer tolled (suspended) as of the **[INSERT SIGNATURE DATE OF "Notice in Response to Court Remand on NOx SIP Call and Section 126 Rule"]** signature date of the response to the remand.

## III. What are the New Deadlines for the Section 126 Rule Federal NOx Budget Trading Program?

The EPA promulgated the Federal NOx Budget Trading program under 40 CFR part 97 as the control remedy for sources affected by the Section 126 findings (65 FR at 2727; January 18, 2000). A cap-and-trade program is the most cost-effective approach for achieving the necessary emissions reductions. The trading program sets an emission limitation and compliance schedule for the sources (known as NOx budget units). The emission limitation for each unit is the requirement that the tons

of NOx emitted during the ozone season control period (May 1 - September 30) cannot exceed the amount authorized by the NOx allowances that the unit holds. Allowances are allocated to units subject to the program, and the total number of allowances allocated to all such units for each control period is fixed, or “capped,” at a specified level. The compliance schedule is set by establishing a deadline by which units must begin to comply with the requirement to hold allowances sufficient to cover emissions. Part 97 includes applicability, permitting, allowance, excess emissions, monitoring and reporting, opt-in, and general provisions for the trading program.

Today’s final rule amends the part 97 Federal NOx Budget Trading Program by revising the compliance date and other related dates. As discussed above, EPA is taking today’s action as a result of an August 24, 2001 court decision which temporarily suspended (and as a result, delayed) the Section 126 Rule compliance date. Although the court’s action affected only the compliance deadline, there are other dates in the rule for related requirements that must also be extended because they were established relative to the original compliance deadline.

The new dates are discussed below and shown in the amended regulatory text. Also discussed below are a few dates that EPA is not changing. The dates being revised are summarized in Table 1. The unrevised dates are summarized in Table 2.

**Table 1. Sections of part 97 containing dates that EPA is revising in today's rule.**

| Part 97 Section | | Original Date | Revised Date |
|---|---|---|---|
| §97.4 | Applicability | 2003 | 2004 |
| §97.5 | Retired unit exemption | May 1, 2003 | May 1, 2004 |
| §97.6 | Standard requirements | May 1, 2003 | May 31, 2004 |
| §97.21 | Submission of NOx budget permit applications | January 1, 2000<br>May 1, 2003 | January 1, 2001<br>May 31, 2004 |
| §97.41 | Timing requirements for NOx allowance allocations | 2003 through 2007<br>April 1, 2003 | 2004 through 2007<br>April 1, 2004 |
| §97.42 | NOx allowance allocations | Removes the word five, wherever it appears | |
| §97.43 | Compliance supplement pool | 2001 or 2002<br>February 1, 2003<br>2001 and 2002<br>April 1, 2003<br>May 1, 2003<br>2003 or 2004<br>2004 | 2001 through 2003<br>February 1, 2004<br>2001 through 2003<br>April 1, 2004<br>May 1, 2004<br>2004 or 2005<br>2005 |

| | | |
|---|---|---|
| §97.53 Recordation of NOx allowance allocations | 2003<br>May 1, 2001<br>2004<br>May 1, 2002<br>2005<br>May 1, 2003<br>2006<br>2004 | 2004<br>May 1, 2003<br>2005<br>May 1, 2003<br>2006<br>May 1, 2004<br>2007<br>2005 |
| §97.54 Compliance | 2005 | 2006 |
| §97.70 General requirements | May 1, 2000<br>January 1, 2002<br>May 1, 2002 | May 1, 2001;<br>January 1, 2003<br>May 1, 2003 |
| §97.74 Recordkeeping and reporting | May 1, 2002<br>May 1, 2002 through June 30, 2002 | May 1, 2003<br>May 1, 2003 through June 30, 2003 |
| Appendices A and B | 2003-2007 | 2004-2007 |
| Appendix C | Removes 2003-2007 | |

**Table 2. Sections of Part 97 containing dates that are not changing.**

| Part 97 Section | | Item with dates that are not changing |
|---|---|---|
| §97.2 | Definitions | Definition of fossil fuel fired |
| §97.4 | Applicability | NOx budget unit and NOx budget source descriptions |
| §97.42 | NOx allowance allocations | Baselines used for allocations;<br>Dates related to allocations for control periods after 2007 |
| §97.70 | General Requirements | Monitoring and reporting deadlines for early reduction credits |

**A. <u>What is the Revised Compliance Date</u>?**

For the reasons discussed below, EPA is establishing May 31, 2004 as the new compliance deadline for all sources subject to the Section 126 Rule. The compliance date is established in §97.6(c)(3) Standard Requirements and referenced in the following sections: §97.4(b)(4)(vi) Applicability, §97.5(c)(5) Retired Unit Exemption, §97.21(b) Submission of NOx Budget permit applications, and §97.53 Recordation of NOx allowance allocations.

**1. EGUs**

When the court suspended the compliance period for EGUs (see discussion in section I.2. above), there were 21 months remaining for compliance. The EPA completed its response to the growth factor remand on **[INSERT SIGNATURE DATE OF "Notice in Response to Court Remand on NOx SIP Call and Section 126 Rule"]**. That action officially reactivated the EGU compliance period as of that date. By the time the 21 months remaining expire in January 2004, the 2003 ozone season will have ended. The Section 126 Rule requires NOx reductions only during the ozone season control period of May 1 through September 30. Thus, compliance by January 2004 would not require actual NOx emissions reductions until May 2004. Although

May 1 is the beginning of the ozone season, EPA is establishing May 31, 2004 as the compliance date for EGUs under the Section 126 Rule in order to align that date with the deadline established by the D.C. Circuit for the NOx SIP Call.[2]

There are two primary reasons EPA believes May 31, 2004 is the appropriate compliance date. First, EPA strongly supports addressing ozone transport through State action. As discussed in section I.A., from the beginning it has been EPA's intention to coordinate the NOx SIP Call and the Section 126 Rule because the rules were promulgated at about the same time. The EPA originally established the same compliance date for the rules, May 1, 2003. Then, where a State stayed on track to meet the NOx SIP Call, EPA would automatically withdraw the Federal Section 126 Rule requirements before sources in that State had to comply with the rule. The EPA believes it makes sense to continue this approach because it helps provide States, affected industry, and the public with a better coordinated and simpler program for achieving these emissions reductions. (See

[2]The 2005 control season and all subsequent control seasons will begin on May 1.

discussion below in section V regarding EPA's upcoming rulemaking to revise the Section 126 Rule withdrawal provision.)

Second, EPA believes it would be unnecessarily complicated and confusing for EGUs to be controlled under the Section 126 Rule for just one month (May 1 - May 30, 2004) and then be subject to a potentially different regime under State plans in response to the NOx SIP Call beginning on May 31, 2004. The benefit of controls 1 month earlier would be trivial compared to the potential complexity.

**2. Non-EGUs**

The court's actions related to the EGU growth factors did not address the compliance deadline for non-EGUs subject to the Section 126 Rule. However, EPA is also extending the compliance deadline for non-EGUs until May 31, 2004 to match the new compliance deadline for EGUs. This is in keeping with the original Section 126 Rule which reflected the intention to regulate EGUs and non-EGUs on the same schedule. Non-EGUs are a very small portion of the total group of sources affected by the Section 126 Rule, accounting for about 5 percent of the emissions reductions. An important compliance option for

these generally smaller sources is to purchase emissions credits through trading with large EGUs. The EPA believes the public is best served if the compliance date for non-EGUs is the same as for the much larger category of EGUs. The EPA's goal is to establish the most cost-effective emission control program possible and that necessarily includes trading among all affected sources. If the non-EGU controls were implemented a year earlier than the EGU controls, this would offer less compliance flexibility and would not take advantage of the more efficient outcome that would result if non-EGUs were able to trade with EGUs throughout the NOx SIP Call region. The EPA does not believe it makes sense for this very small portion of affected sources to have to comply at an earlier date with fewer control options.

**B. What Are the Other Revised Dates Related to the Compliance Date?**

**1. Submission of NOx Budget Permit Applications**

Section 97.21 requires the authorized account representative to submit a permit application to the permitting authority at least 18 months (or such lesser time provided by the permitting authority) before the compliance date or the date on which the NOx Budget unit

commences operation. Based on the original May 1, 2003 compliance date, the former situation resulted in a default permit application date of November 1, 2001. Because EPA is revising the compliance deadline to be May 31, 2004, the resulting new default permit application date calculates to be November 30, 2002.

For NOx budget units that commence operation before January 1, 2001, the permit applications must be submitted by at least 18 months (or such lesser time provided by the permitting authority) before May 31, 2004. For NOx budget units that commence operation on or after January 1, 2001, the permit applications must be submitted by at least 18 months (or such lesser time provided by the permitting authority) before the later of May 31, 2004 or the date the unit commences operation.

**2. Timing Requirements for NOx Allowance Allocations**

Section 97.41 specifies the dates by which EPA will determine the NOx allowance allocations for given control periods. Under the Federal NOx Budget Trading Program, EPA will update the NOx allowance allocations every 5 years. Thus, the allocations will be the same each year for a set of 5 control periods. The EPA published the

first set of allocations in Appendices A and B to part 97 (65 FR at 2751; January 18, 2000). Because the Section 126 Rule compliance date is shifting from 2003 to 2004, this first set of allocations will now apply for a 4-year period from 2004-2007 instead of the original 5-year period from 2003-2007. After the initial 4-year period, EPA will continue to determine NOx allowance allocations in 5-year intervals – by April 1, 2005, April 1, 2010, April 1, 2015, and so forth. The first set of allocations for new units from the allocation set-aside will be determined by April 1, 2004.

The title of Appendix C to part 97 showing the trading budgets by State is changed to remove the listed years since they now will not apply until 2004 and, under §§97.40, 97.41, and 97.42, are used in allocating allowances for 2008 through 2012 and beyond.

The allocations and budgets for the first year of the trading program will cover a shorter compliance period because, in 2004, compliance begins on May 31 instead of May 1.

**3. Compliance Supplement Pool**

Section 97.43(a) originally specified that sources may request early reduction credits for certain emissions

reductions made during the 2001 and 2002 control periods. These credits are allocated from the compliance supplement pool (CSP). (See 65 FR 2711; January 18, 2000.) Now that 2003 is no longer a required compliance year, reductions made in 2003 can be considered for early reductions credits. Because 2001 has passed and sources may have already, in good faith, reduced emissions during the 2001 ozone season for purposes of earning early reduction credits, EPA is not simply shifting the early reductions period by 1 year. Instead, EPA is expanding the period during which sources can earn early reductions credits to include 2001 through 2003.

Most of the remaining CSP-related deadlines in §97.43(b)and (c) are extended by 1 year. The early reduction credit request must be submitted by February 1, 2004. After February 1, 2004, EPA will report the total amount of early reduction credits requested by sources in the State. The EPA will determine and announce the NOx allocations by April 1, 2004 and provide an opportunity for public comment. The CSP allocations will be recorded by May 1, 2004. NOx allowances from the CSP may be used for compliance purposes during the 2004 and 2005 ozone control periods.

However, the May 1, 2000 deadline for certification of continuous emission monitoring systems at units which are making early reductions is not changed. This is because it is necessary to establish the level of emissions in 2000, as the baseline used to determine the amount of early reductions in 2001, 2002, and 2003.

**4. Recordation of NOx Allowance Allocations**

Section 97.53 establishes the timing for recording the NOx allowance allocations in the accounts for the NOx budget units. No deadline for recordation of the allowance allocations was established for the first year of the trading program. For later years, the rule required the allowance allocations to be recorded by the start of the ozone control period 3 years in advance of the year for which the allowances were allocated. Thus, originally the rule required the 2004 NOx allowance allocations to be recorded by May 1, 2001 and the 2005 NOx allowance allocations to be recorded by May 1, 2002, and so forth. Because 2004 is now the first year of the program, and because May 1, 2001 is already past, EPA is removing the deadline for recordation for the 2004 control period. The EPA will record the allowances sufficiently in advance for sources to make their

compliance decisions. In addition, because the May 1, 2002 recordation deadline for the 2005 control period is only a few days away, there is not adequate time for EPA to meet that deadline. Therefore, EPA is establishing May 1, 2003 as the recordation deadline for 2005 allowance allocations. As a result, both the 2005 and 2006 NOx allowances will be recorded by May 1, 2003.

Recordation of allocations in compliance accounts or general accounts and allocations to opt-in units addressed under §97.53(e) will start in 2005.

**5. Compliance - Deduction of Banked Allowances**

The Federal NOx Budget Trading Program includes a banking feature to allow sources to save allowances for use in later years. Banking may result in more NOx allowances being used, and therefore more NOx emissions, in one year than in another. Section 97.54(f) provides a flow control mechanism to limit the variability in the time of emissions by establishing a discount rate on the use of banked allowances over a certain level. Under the January 18, 2000 Section 126 Rule, flow control could not be triggered until 2005 (after the first 2 years of the program). In order to continue to allow unrestricted use of allowances during the first 2 years of the program,

this date is being extended by 1 year. Therefore, flow control cannot be triggered until 2006 (i.e., after reconciliation in the 2005 compliance year).

**6. Monitoring**

Sections 97.70 through 74 contain the Monitoring and Reporting requirements. Under §97.70, all the deadlines related to monitoring and reporting are extended by 1 year, except for the deadlines related to earning early reduction credits (see discussion below in section C.1.). Part 97 requires monitoring to begin the start of the ozone season 1 year before the compliance date. Therefore, sources not intending to apply for early reduction credits are now required to meet the certification and other related requirements by May 1, 2003 and begin reporting on that date. The deadline is May 1, rather than May 31, so that units will report emissions for the full control period in 2003. The heat input for the 2003 control period will be used in determining future allowance allocations under Part 97. New sources that commence operation on or after January 1, 2003, are required to meet monitoring and reporting requirements by May 1, 2003 or 90 days after the source commenced operation, whichever is later.

Section 97.74(d) sets out the deadlines for submission of quarterly reports. All deadlines are extended by 1 year.

**C. What Are the Dates that EPA is Not Changing?**

**1. Monitoring and Reporting Deadlines for Early Reduction Credits**

Section 97.70(b)(1) establishes May 1, 2000 as the monitoring certification and reporting deadline for sources that intend to apply for early reduction credits under §97.43. This deadline is not changing because, as discussed above in section III.B.3., EPA is not shifting by 1 year the period during which early reduction credits can be earned. The year 2001 will continue to be the first year during which early reduction credit can be earned, but now the early reductions time period is being expanded through 2003. The 2000 ozone season remains the baseline against which sources who intend to request early reduction credits must demonstrate reductions.

**2. Other Miscellaneous Dates**

There are several other dates in the Section 126 Rule that are not changing. These include: the 1995-1998 baseline period in §97.42(a)(1)(i) used for initial allocations, the 2002-2004 baseline period in

§97.42(a)(1)(ii) for the next set of allocations(which is for 2008-2012), the dates related to allocations for control periods after 2007, and the dates in the definitions of fossil fuel fired and in the applicability provisions in §97.4.

**IV. What are the Rulemaking Procedures?**

The EPA is taking this action as a final rule without prior proposal and public comment because EPA finds that the Administrative Procedure Act (APA) good cause exemption to the requirement for notice-and-comment rulemaking applies here. See 5 U.S.C. 553(b)(3)(B). The EPA believes that providing for notice-and-comment rulemaking before taking this action is impracticable and contrary to the public interest because the time involved would extend beyond critical dates in the Section 126 Rule that EPA is changing.

In particular, when the court temporarily suspended the compliance date for EGUs, it did not suspend the other related dates. The other dates, such as the monitoring certification date, were established by EPA based on the specific timing of the compliance date. Therefore, substantial confusion has resulted for sources as to their obligations to meet the related deadlines.

The current May 1, 2002 monitoring certification deadline is rapidly approaching. The monitoring deadline was set to be 1 year prior to the compliance date. Because the court's action effectively delayed the compliance deadline beyond 2003, similarly the monitoring date should be delayed beyond 2002. In a January 16, 2002 memorandum from John Seitz, Director of the Office of Air Quality Planning and Standards, to EPA Regional Air Directors, EPA announced that it intended to extend the deadlines that are related to the compliance date. However, the sources remain legally subject to the existing deadlines until EPA formally changes those dates. The time needed to complete notice-and-comment rulemaking to revise the dates would extend well beyond the May 1, 2002 monitoring date and would result either in sources making expenditures that are unnecessary at this time or being in violation of existing deadlines until EPA finalized the rule to extend those deadlines. Therefore, EPA believes it would be contrary to the public interest for the existing deadlines to remain in effect while EPA conducted rulemaking to extend the deadlines. In addition, sources need certainty as early as possible regarding their new compliance dates so that

appropriate compliance plans and contractual agreements can be arranged. It would be impracticable to achieve the purpose of immediate clarification regarding sources' obligations, and hence, would also be contrary to the public interest, if this action were delayed by providing for prior public notice-and-comment. This rule does not change what the control requirements are for the affected sources or substantively change the Section 126 Rule in any way. It simply changes several dates by which the requirements must be met, as a result of the court's actions related to the EGU compliance date. Therefore, EPA does not believe that prior proposal is necessary.

Given the need to have the revised dates in place prior to May 1, 2002, for the reasons discussed above, EPA finds good cause to make this rule immediately effective upon publication. The EPA believes this is consistent with 5 U.S.C. 553(d)(1) and (3).

**V. What is the Future Rulemaking on the Section 126 Rule Withdrawal Provision?**

As mentioned above, the Section 126 Rule includes a provision to withdraw the section 126 requirements in a State where the State is fully controlling the NOx transport. The current Section 126 Rule withdrawal

provision is based on the original compliance deadlines in the Section 126 Rule and NOx SIP Call. This provision automatically withdraws the section 126 findings and control requirements for sources in a State if the State submits, and EPA gives final approval to, a SIP revision meeting the full NOx SIP Call requirements, including the originally promulgated May 1, 2003 compliance deadline (40 CFR 52.34(i)). The automatic withdrawal provision does not address any other circumstances.

In particular, the withdrawal provision in its current form would not operate where a State's NOx SIP has the new court-established May 31, 2004 NOx SIP Call compliance deadline. Because the Section 126 Rule compliance deadline is now May 31, 2004, a NOx SIP to pre-empt or replace the Section 126 Rule requirements would not need to be implemented until May 31, 2004. Therefore, in the future, EPA intends to conduct a rulemaking to modify the Section 126 Rule withdrawal provision to take into account the new compliance date for the Section 126 Rule. Revising the Section 126 Rule withdrawal provision will avoid the potential overlap of Federal requirements under the Section 126 Rule and State requirements under the NOx SIP Call.

## VI. What are the Administrative Requirements?

### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

4. Raise novel legal or policy issues arising out

of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Under Executive Order 12866, this final action is not a "significant regulatory action" and is therefore not subject to review by OMB. This rule does not create any additional impacts beyond what were promulgated in the January 2000 Rule. This rule also does not raise novel legal or policy issues. Therefore, EPA believes that this action is not a “significant regulatory action.”

**B. Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rules with “Federal mandates” that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. A “Federal mandate” is defined to include a “Federal

intergovernmental mandate" and a "Federal private sector mandate" (2 U.S.C. 658(6)). A "Federal intergovernmental mandate," in turn, is defined to include a regulation that "would impose an enforceable duty upon State, local, or tribal governments," (2 U.S.C. 658(5)(A)(i)), except for, among other things, a duty that is "a condition of Federal assistance" (2 U.S.C. 658(5)(A)(I)). A "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector," with certain exceptions (2 U.S.C. 658(7)(A)).

The EPA has determined that this action does not include a Federal mandate that may result in estimated costs of $100 million or more for either State, local, or tribal governments in the aggregate, or for the private sector. This Federal action does not impose any new requirements, as discussed above. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, would result from this action.

Because the Agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute (see section IV of this preamble], it is not subject to sections 202 and 205 of the Unfunded

Mandates Reform Act of 1995 (UMRA)(Pub. L. 104-4).

**C. Executive Order 13132: Federalism**

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism

implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's rule imposes no additional burdens beyond those imposed by the January 2000 Rule. Thus, the requirements of section 6 of the Executive Order do not apply to this rulemaking action.

**D. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have

“substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Today's action does not significantly or uniquely affect the communities of Indian tribal governments. As discussed above, today's action imposes no new requirements that would impose compliance burdens beyond those that would already apply under the January 2000 rule. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

**E. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative

Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Today's rule does not create new requirements for small entities or other sources. Instead, this action extends the compliance dates for sources subject to the January 2000 rule as a result of court actions. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Because the Agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute (see section IV of this preamble), it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

**F. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks**

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that (1) is

determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because this action is not “economically significant” as defined under Executive Order 12866 and the Agency does not have reason to believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children.

**G. National Technology Transfer and Advancement Act**

Section 12(d) of the National Transfer and Advancement Act of 1995 (“NTTAA,” Public Law 104-113

section 12(d) 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The National Technology Transfer and Advancement Act of 1997 does not apply because today's action does not impose any new technical standards. This action extends deadlines for sources subject to the January 2000 Rule, as the result of court actions.

**H. Paperwork Reduction Act**

Today's action does not impose any new information collection request requirements. Therefore, an information collection request document is not required.

**I. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use**

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355; May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. Today's action does not impose any new regulatory requirements.

**J. Judicial Review**

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

For the reasons discussed in the May 25, 1999 final rule (64 FR 28250), the Administrator determined that final action regarding the section 126 petitions is of nationwide scope and effect for purposes of section

307(b)(1). Thus, any petitions for review of final actions regarding the section 126 rulemaking must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the Federal Register.

**K. Congressional Review Act**

The Congressional Review Act (CRA), 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 of the CRA provides an exception to this requirement. For any rule for which an agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest, the rule may take effect on the date set by the Agency. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as

defined by 5 U.S.C. 804(2). As EPA is finding good cause to promulgate this rule without prior notice and comment, this rule will be effective **[INSERT DATE OF PUBLICATION]**.

List of Subjects in 40 CFR Part 97

Administrative practice and procedure, Air pollution control, Intergovernmental Relations, Nitrogen oxides, Ozone, Reporting and record keeping requirements.

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Dated: April 23, 2002.

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Christine Todd Whitman,
Administrator

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

**PART 97 -- FEDERAL NOx BUDGET TRADING PROGRAM**

1. The authority citation for part 97 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7426, and 7601.

§97.4 [Amended]

2. In §97.4 paragraphs (b)(4)(vi)(A) and (b)(4)(vi)(B) are amended by revising the date “2003" to read “2004", wherever it appears.

§97.5 [Amended]

3. In §97.5 paragraphs (c)(5)(i) and (c)(5)(ii) are amended by revising the date “May 1, 2003" to read “May 31, 2004," wherever it appears.

§97.6 [Amended]

4. In §97.6 paragraph (c)(3) is amended by revising the date “May 1, 2003" to read “May 31, 2004".

§97.21 [Amended]

5. In §97.21 paragraphs (b)(1)(i), (b)(1)(ii), (b)(2)(i), and (b)(2)(ii) are amended by revising the date “January 1, 2000" to read “January 1, 2001" and the

date “May 1, 2003" to read “May 31, 2004," wherever they appear.

§97.41 [Amended]

6. In §97.41 by amending:

a. Paragraph (a) by revising the date “2003 through 2007" to read “2004 through 2007"; and

b. Paragraph (d) by revising the date “April 1, 2003" to read “April 1, 2004".

§97.42 [Amended]

7. In §97.42 by amending:

a. Paragraph (b) by removing the word “five”; and

b. Paragraph (c) by removing the word “five”.

§97.43 [Amended]

8. In §97.43 by amending:

a. Paragraph (a) introductory text by revising the date “2001 or 2002" to read “2001 through 2003";

b. Paragraph (a)(4) introductory text by revising the date “2001 or 2002" to read “2001 through 2003";

c. Paragraph (a)(4)(ii) by revising the date “February 1, 2003" to read “February 1, 2004";

d. Paragraph (b)(1) by revising the date “2001 or 2002" to read “2001 through 2003," wherever it appears;

e. Paragraph (b)(2) by revising the date “February 1,

2003" to read “February 1, 2004";

f. Paragraphs (c)(2), (c)(3), and (c)(4) by revising the date “February 1, 2003" to read “February 1, 2004," wherever it appears;

g. Paragraphs (c)(3) and (c)(4) by revising “2001 and 2002" to read “2001 through 2003," wherever it appears;

h. Paragraph (c)(5) by revising the date “April 1, 2003" to read “April 1, 2004";

i. Paragraph (c)(6) by revising the date “May 1, 2003" to read “May 1, 2004";

j. Paragraph (c)(7) by revising the date “2003 or 2004" to read “2004 or 2005”; and

k. Paragraph (c)(8) by revising the date “2004" to read “2005".

§97.53 [Amended]

9. In §97.53 by amending:

a. Paragraph (a) by revising the date “2003" to read “2004", wherever it appears;

b. Paragraph (b) by revising the date “May 1, 2001" to read “May 1, 2003" and revising the date “2004" to read “2005", wherever they appear;

c. Paragraph (c) by revising the date “May 1, 2002" to read “May 1, 2003" and revising the date “2005" to read

“2006", wherever they appear;

d. Paragraph (d) by revising the date “May 1, 2003" to read “May 1, 2004" and revising the date “2006" to read “2007", wherever they appear; and

e. Paragraph (e) introductory text by revising the date “2004" to read “2005".

§97.54 [Amended]

10. In §97.54 paragraph (f) is amended by revising the date “2005" to read “2006".

§97.70 [Amended]

11. In §97.70 by amending:

a. Paragraph (b)(1) by revising the date “May 1, 2000" to read “May 1, 2001"; and

b. Paragraphs (b)(2), (b)(3), (b)(3)(i), (b)(4), (b)(5), (b)(5)(i), and (b)(6) by revising the date “January 1, 2002" to read “January 1, 2003" and revising the date the “May 1, 2002" to read “May 1, 2003," wherever they appear.

§97.74 [Amended]

12. In §97.74 paragraphs (d)(1)(ii), (d)(1)(iii), (d)(2)(ii)(B), (d)(2)(ii)(C), and (d)(2)(ii)(D) are amended by revising the date “May 1, 2002" to read “May 1, 2003" and revising the date “May 1, 2002 through June

30, 2002" to read “May 1, 2003 through June 30, 2003," wherever they appear.

Appendix A to part 97 [Amended]

13. In Appendix A the table heading is amended by revising the date “2003-2007" to read “2004-2007".

Appendix B to part 97 [Amended]

14. In Appendix B the table heading is amended by revising the date “2003-2007" to read “2004-2007".

Appendix C to part 97 [Amended]

15. In Appendix C the table heading is amended by removing the date “, 2003-2007".