

OPEN MARKET TRADING RULE for OZONE SMOG PRECURSORS
July 26, 1995

RULE COMPONENTS SUMMARY

The following is a summary of the key components of the model Open Market Trading Rule (OMTR). The rule was signed by the Administrator on July 26, 1995. The Agency will allow States that adopt this rule as written to receive automatic Agency approval of the SIP revision that contains this rule. The Agency recognizes that individual States may wish to modify the model OMTR based upon their unique circumstances, and intends to explain in the preamble to the model rule which specific modifications can be accommodated without undergoing lengthy EPA review.

DER Generation

Discrete emission reductions (DERs) are denominated in tons of emissions reduced. The amount of DERs are determined retrospectively and generally calculated as the change in emission rate times the activity level during the discrete period during which the reductions were made.

Generation baseline is the lower of a source's actual or allowable emissions rate, based on the most stringent of all applicable State or Federal requirements. Sources located in areas with approved attainment demonstrations based on sources' allowable emissions may be able to use their allowable emissions rate as the baseline.

In determining the amount of DERs generated, sources shall ensure that the DER estimates derived from monitoring and quantification methods appropriately reflect uncertainties in these methods. The EPA will provide general guidance on establishing such methods.

Generator must file a "Notice and Certification of DER Generation" no later than 90 days after the date a DER generation activity is completed, or no later than 1 year after the date the DER generation commenced, whichever is sooner. This notice contains basic information on the

reductions made, quantification methods, monitoring, baseline, etc., and must be supported by verifiable records. The notice must include a certification under penalty of law as to the accuracy of the information.

Generation can begin on or after the date that begins the 1995 ozone season for the area that adopts the rule.

To ensure consistency with various provisions of the Clean Air Act and existing EPA policies, creditable reductions cannot be generated by the following actions:

- shutdowns and production curtailments
- illegal activity or cessation of illegal activity
- reductions by sources who have been granted RACT variances to levels that still exceed otherwise applicable RACT
- reductions already relied on in the SIP for reasonable further progress requirements, attainment, or to meet any other requirement of Title II (mobile sources), Title IV (acid rain), or Federal air toxics standards.

DER Transfer/Purchase

The model OMTR does not place restrictions on who can own or hold DERs.

The model OMTR does not require government notification or tracking of DER ownership transactions.

DER Use

The user source must own DERs prior to use.

At least 30 days prior to use, the user source must submit a "Notice of Intent to Use DERs" to their State. If the intended use period is longer than 1 year, then this notice must be filed annually. This notice must specify specific DERs the source intends to use, and must contain a copy of the relevant "Notice(s) and Certification(s) of DER Generation". The notice must also contain documentation of the user sources' estimate of DERs needed for compliance, including information on quantification methods, monitoring, baseline, etc.

In conjunction with otherwise applicable compliance reporting requirements, but no less frequently than once every 12 months, the user source must submit a "Notice and Certification of DER Use" to the State. This notice must contain information on the actual amount of DERs used for compliance, including quantification methods, monitoring, baseline, etc., and must be supported by verifiable records. The notice must include a certification under penalty of law as to the accuracy of the information.

In determining the amount by which actual emissions will exceed compliance requirements, users shall ensure that the DER estimates derived from monitoring and quantification methods appropriately reflect uncertainties in these methods. The EPA will provide general guidance on establishing such methods.

At the time of use, DER users shall permanently retire 10 percent of all DERs dedicated to a specific compliance requirement. That is, the amount of DERs required to demonstrate compliance equals the source's calculated need divided by 0.9.

DERs may generally be used for any purpose not specifically excluded in the rule. Such uses may include, but are not limited to the following:

- RACT compliance
- Substitute for source-specific RACT variances
- Compliance insurance margin to cover uncertainties in the value of DERs or variations in process emissions or control device efficiency
- Cover emissions from occasional small-scale research and development activities
- NSR offset pool held by States as an incentive for economic development
- As part of a noncompliance settlement to help compensate the environment for past violations.

To ensure consistency with various provisions of the Clean Air Act or existing EPA policies, the model OMTR does not authorize the following uses:

- Use of VOC DERs generated outside the same nonattainment area unless an appropriate finding is made to justify an alternate approach
- Use of NOx DERs generated outside the same modeling

- domain unless an appropriate finding is made to justify an alternate approach
- Use of DERs to meet NSPS, MACT, BACT, LAER, various Title II mobile source requirements, and Title IV acid rain requirements
 - Use of DER's to meet national VOC regulations under §183 of the Act
 - Use of DERs for netting or other means to avoid NSR requirements
 - Use of DERs for NSR offsets unless the source accepts for the life of the source a Federally enforceable requirement in the preconstruction permit to own, prior to the start of any year, an amount of DERs sufficient to cover 1 year of anticipated future emissions
 - Use of DERs during an ozone season that were generated during a non-ozone season

State and EPA Responsibilities

State must file all notices/certifications submitted by generator and user sources with the source's operating permit (if applicable), and make them available for public review.

State must "track" DER generation and use activity and use the information in future program evaluations.

State can review DER generation and use activities at any time.

State must review and approve individual source compliance. The timing of such approval is not specified in the model OMTR, but could be before, during, or after DER use.

State must evaluate the open trading program at least once every 3 years and report to EPA on any effects of the program on reasonable further progress requirements and attainment demonstrations.

State must consider implementing special contingencies in the event the open market trading program is found to have detrimental effects.

EPA will compile information from States' triennial

program evaluations and use the information in considering revisions to the model OMTR.

State can work with the EPA and industry to develop DER quantification protocols.

Enforcement and Penalties

Generator certifications are subject to civil and criminal liability under Section 113 of the Clean Air Act.

DER users are strictly liable under Section 113 for compliance with applicable standards through use of DERs; it shall not be a defense for compliance, violations, and penalties that the user relied on the generator's DERs in good faith.

User violations include use of invalid DERs, DER shortfall, inadequate recordkeeping, and false certifications.

User violation days calculated as consecutive days with a DER shortfall after taking into account DERs used on a consecutive day basis.

Violations are subject to maximum penalty of \$25,000 per day per violation with civil liability and criminal penalties as provided for in the CAA and interpreted by policies written by the EPA. These policies will allow for leniency in cases involving good faith compliance efforts.

EPA will periodically audit compliance achieved by sources using DERs, and will use this information to provide guidance to States on effectively implementing the OMTR.

EPA retains authority to review any and all State compliance determinations and take appropriate action, based on its review.

DER Quantification Protocols

To provide a level of certainty to generators and users, EPA plans to work with States, industry and the public to approve DER quantification protocols for some industries, and

to develop protocols for certain types of mobile source DER generation activities. The EPA will also issue guidance on developing acceptable quantification protocols for use in open market trading programs. In general, protocols must contain methods that are credible, workable, enforceable, and replicable.

Because of concerns related to the Federal enforceability of the quantification of DERs, EPA is proposing and taking comment on two alternative ways of dealing with this issue. The two options are:

- Option 1. A generator or user source must either use an EPA-approved protocol or develop and use their own protocol as long as it is consistent with the EPA guidance on acceptable protocols.

- Option 2. A generator or user source must use an existing EPA-approved protocol for their type of source, must obtain preapproval from EPA to modify an existing EPA-approved protocol for their type of source, or develop and use their own protocol if no EPA-approved protocol exists for their type of source, as long as it is consistent with the EPA guidance on acceptable protocols.

Miscellaneous Provisions

Generator and user sources are required to actively provide all notices and supporting data required by this rule to the public in a manner consistent with the State's public availability laws and the requirements of section 114 of the CAA (i.e., emissions information cannot be confidential).

Sources subject to reporting toxic chemical releases under the Community Right-to-Know laws must include in their State notices the estimated amount of hazardous air pollutant emissions resulting from DER generation or use activity.

DERs are a limited authorization to emit and do not constitute a property right.

DERs have an infinite life.