

## MODEL OPEN MARKET TRADING RULE FOR OZONE SMOG PRECURSORS

### I. Purpose

To establish a process whereby sources may generate and use discrete emission reductions for compliance with VOC and NOx requirements in the Act while complying with all other applicable requirements of the Act.

### II. Definitions

Terms not defined in this part shall have the meaning given in the Act and EPA regulations (40 CFR) **[or State citations]** .

**Act** means the Clean Air Act as amended in 1990.

**Activity level** means the amount of activity at a source measured in terms of production, use, raw materials input, vehicle miles traveled, or other similar units that have a direct correlation with the economic output of the source and is not affected by changes in the emissions rate (i.e., mass per unit of activity).

**Actual emissions rate** means the actual rate of emissions of a pollutant from a source. Actual emissions as of a particular date shall equal the average rate, in mass per unit of time or mass per unit of activity, at which the unit actually emitted the pollutant during a two-year

period which precedes the particular date and which is representative of normal source operation at a particular time. A different time period may be used if that is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, types of materials processed, stored, or combusted during the selected time period.

**Allowable emission rate** means any emission limit applicable to a particular source including all Federal and State requirements for the control of tropospheric ozone and the requirements of Title IV of the Act, including but not limited to, all requirements in a SIP, the inventories contained in any attainment strategy, maintenance demonstration or ROP plan for any NAAQS as well as source-specific or source-category-specific permits.

**Alternative emission limitation** means any emission limit that applies to a specific source that is less stringent than the limit contained in the SIP approved by the [State authority] generally for similar sources.

**Applicable emissions inventory** means the emission inventory that forms the basis for an attainment

demonstration or strategy, a ROP plan, or maintenance plan submitted to or acted on by USEPA.

**Applicable implementation plan or applicable SIP** means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110 of the Act, or promulgated under section 110(c) of the Act (Federal implementation plan), or promulgated or approved pursuant to regulations promulgated under section 301(d) of the Act and which implements the relevant requirements of the Act.

**Area source** means those small or diverse stationary source that are not required to be, and are not individually included in a stationary source emissions inventory. The term area sources include emissions related to consumer and commercial products.

**Attainment area** means any area of the country designated or redesignated by EPA at 40 CFR part 81 in accordance with section 107(d) of the Act as unclassifiable or better than the national ambient air quality standards for ozone [**or State may cite its regulations, or list its areas**].

**Attainment demonstration** means the State rules that comply with the requirement in section 172(c)(1),

182(b)(1), or 182(c)(2) of the Act to demonstrate that the specific emission reductions included in the SIP are sufficient to attain the ozone NAAQS by the date applicable to the area **[or State citation of their plan]** .

**Baseline emission rate** means a generating source's actual emissions rate or allowable emissions rate considering all applicable State and Federal regulations.

**Best available control technology** (BACT) is as defined in 40 CFR part 51.166(b)(12) **[State may add the cite to its rules if they are USEPA-approved]** .

**Conformity purposes** means any reductions required to comply with the conformity requirements contained in 40 CFR part 51, subparts T and W, and part 93, subparts A and B.

**Contingency measure** means any emission control measure that is adopted into the SIP which shall be implemented whenever there is a failure to meet the ROP requirement in section 185 of the Act or a failure to attain a NAAQS as projected in an approved attainment demonstration.

**Curtailment** means a temporary or partial reduction in activity level (e.g., hours of operation and process rate). For purposes of this rule, curtailment shall not include a reduction in activity levels for a mobile

source that occurs as a result of an activity reduction plan that is the subject of a USEPA emissions quantification protocol.

**Discrete emission reduction (DER)** means an emission reduction generated over a discrete period of time, and measured in weight (e.g., tons).

**Emissions cap** means an emissions limit that is measured as mass emissions per unit of time.

**Emissions unit** means any part of a source that emits or would have the potential to emit VOC or NOx.

**Fuels and fuel delivery system**, for mobile sources, means fuels intended for use in mobile sources and the distribution systems associated with those fuels including, but not limited to, pipelines, tanker trucks, storage tanks, and dispenser pumps.

**Generator source** means any source that generates a DER.

**Generation period** means the period of time over which a DER is generated.

**Lowest achievable emissions rate (LAER)** means the control technology defined at 40 CFR 51.165(a)(1)(xiii) [or State may insert citation to its rules] .

**Maintenance area** means any area with a maintenance plan

approved under section 175 of the Act [or State may insert the list of its areas] .

**Maintenance plan** means a revision to the applicable SIP, meeting the requirements of section 175A of the Act.

**Mobile source** means any vehicle or engine used for on-highway or nonroad purposes, the mobile-source related fuels and/or fuel delivery systems used by those vehicles or engines. For the purpose of this definition, nonroad vehicles and engines include those used in marine vessels, locomotives, and airplanes, as well as those described in the definition of nonroad contained in the Act.

**Modeling domain** means a geographic area covered by an air quality model used to support an attainment or maintenance demonstration. Specifications for existing modeling domains are available through the USEPA's Technology Transfer Network (TTN).

**National ambient air quality standards (NAAQS)** means the standards set by EPA at 40 CFR part 50 under section 109 of the Act.

**New Source Review (NSR)** means the permitting requirements for major new and modified sources contained in Parts C and D of Title I of the Act and in 40 CFR parts 51.165,

51.166 and part 52.21. **[State may add citations to SIP rules if they are USEPA-approved]**

**Nonattainment area** means any area designated at 40 CFR part 81 in accordance with section 107(d) of the Act as nonattainment for ozone.

**Normal source operation** means the average actual activity rate of a source necessary for determining the actual emissions rate for the two years prior to the date necessary for determining actual emissions, unless some other time period is more representative of the operation of the source. A source may use either the simple arithmetic mean (sum of emissions for 12 months divided by 12) or the mean plus one standard deviation if sufficient data are available to determine the normal source operation for the shorter time period.

**NO<sub>x</sub>** means oxides of nitrogen, including nitric oxide (NO) and nitrogen dioxide (NO<sub>2</sub>) and not including, for purposes of this rule, nitrous oxide (N<sub>2</sub>O).

**Operator** means the individual who is in control of or in charge of a source while it is in operation. For all requirements of this section, the operator is considered to be an agent of the owner.

**Owner** means a person who claims lawful possession of a

source by virtue of legal title or equitable interest therein which entitles him to such possession.

**Ozone season** means the portion of year when ozone monitoring is required to occur in a specific geographic area as defined in 40 CFR part 58 appendix D.

**Person** means an individual, corporation, partnership, association, State, municipality, firm, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

**Protocol** means a replicable and workable method to estimate the mass of emissions reductions, or the amount of DER's needed for compliance, that meets USEPA's approval criteria.

**Quantifiable** means that the quantity of emission reductions can be measured or estimated by accurate and replicable techniques. These techniques shall be at least as accurate and replicable as the techniques accepted by the USEPA for SIP purposes, where accepted techniques exist.

**Rate of progress (ROP) plan** means a SIP providing for the incremental emission reductions required by section 182(b)(1) and 182(c)(2)(B) of the Act [or State may



**insert the cite for its plans] .**

**Shutdown** means the permanent cessation of the activity that results in emissions at all or part of a source. For purposes of this rule, scrappage of mobile sources is not considered a shutdown.

**Source** means any mobile, area, or stationary source.

**State** means State, local government, or Indian-governing body.

**State implementation plan (SIP)** means a plan developed by an authorized governing body, including a State, local government, and Indian-governing body, as required under Titles I and II of the Act, and approved by the USEPA.

**Stationary source** means any building, structure, facility or installation which emits or may emit any air pollutant subject to regulation under the Act. Building, structure, facility or installation includes all pollutant emitting activities that are located on one or more contiguous or adjacent properties, and are under the common control of the same person (or persons under common control).

**Surplus emission reduction** means, in general, any emission reduction that is not otherwise required of a source. Any emission reduction that complies with

sections IV(A) and IV(B) is considered surplus for purposes of this rule.

**Use period** means the period of time over which the user source applies the DER's to an applicable emission reduction requirement.

**USEPA** means the United States Environmental Protection Agency.

**User source** means any source that seeks to use DER's to comply with an applicable emission reduction requirement.

**Volatile organic compounds (VOC)** means all emissions included at 40 CFR part 51.100(s) as measured by a USEPA test method [**or State may insert citation to its definition**] .

### **III. General Rules for Generation and Use**

(A) General Rule. Except as provided under section IV(B), any source may generate a DER by reducing emissions, in the amount determined under section IV(A). DER generators must ensure that DER's, are real, properly quantified, and surplus.

(B) Governmental Approvals. No prior Federal, State, or local governmental approval is necessary for the use of DER's, except for DER's that are used for NSR offsets, in which case State approval pursuant to an approved NSR

rule is required.

(C) Market participation. Any person may, at any time, transfer, buy, sell, trade, or otherwise convey DER's to another person in any manner in accordance with the laws of **[State]**.

(D) Time of Use. DER's may be used any time after the State has received the Notice and Certification of Generation pursuant to section IV(C).

(E) Limited Authorization to Emit. A DER created under this rule is a limited authorization to emit NOx and/or VOC in accordance with the provisions of this rule and the Act as well as regulations promulgated thereunder. A DER does not constitute a property right. Nothing in this rule shall be construed to limit the authority of the **[State authority]** or the United States to terminate or limit such authorization.

#### **IV. DER Generation**

(A) Computation of DER's

(1) General Rule. The amount of DER's shall be the difference between--

(a) The amount of VOC or NOx emissions that would have been emitted during the generation period based on actual activity levels during that period and the lower

of (i) the lowest applicable allowable emissions rate, or  
(ii) the actual emissions rate based on normal source  
operation, and

(b) The amount of actual emissions during the  
generation period based on actual activity levels during  
that period.

(2) **[States may delete this paragraph at their  
discretion]** Areas with Approved Attainment Demonstrations  
or Maintenance Plans. In an area with a USEPA-approved  
attainment demonstration or maintenance plan, the amount  
of DER's shall be the difference between--

(a) The amount of VOC or NOx emissions that would  
have been emitted during the generation period based on  
actual activity levels during that period and the lowest  
applicable allowable emissions rate, and

(b) The amount of emissions during the generation  
period based on actual activity levels during that  
period.

(3) Sources Subject to Emissions Caps.

(a) For purposes of subsection **[s]** (1) **[and (2)]** of  
this section, the term "allowable emissions rate"  
includes a source's allowable amount of total emissions  
for the generation period, as may be specified in that

source's Federally enforceable operating permit, in the SIP, or included with respect to that source in the attainment demonstration or maintenance plan (or the emissions inventory that forms the basis for such demonstration or plan).

(b) For sources subject to this subsection, if the generation period differs from the period of the emissions cap, the allowable emissions rate for the generation period shall be adjusted to reflect the proportion of the generation period to the period of the emissions cap.

(c) Amounts determined under subsection **[s] (1) [and (2)]** of this section, must be adjusted to the extent necessary to exclude emission reductions resulting from shutdowns or curtailments.

(5) Sources Subject to Multiple Emissions Limitations. If a source is subject to multiple emissions limitations, the amount of DER's shall be determined by reference to the emissions limitation that results in the least amount of DER's.

(6) Protocols. The amount of DER's must be calculated using quantification protocols that meet the requirements of section VIII.

(B) Limitations on Generation. A DER shall not be formed by emissions reductions of activities or source categories identified in this subsection:

(1) Shutdowns;

(2) Curtailments;

(3) Modification or discontinuation of any activity that is otherwise in violation of any Federal, State or local law;

(4) Emissions reductions required to comply with any provision under the Act for control of tropospheric ozone and Title IV of the Act, including but not limited to--

(a) Administrative orders issued pursuant to enforcement actions.

(b) Any provision of a Federal implementation plan.

(c) Requirements for ROP or attainment of the ozone NAAQS.

(5) Emission reductions of hazardous air pollutants, as defined in section 112 of the Act, from application of a standard promulgated under section 112 of the Act.

(6) Reductions credited or used under any other emissions trading program, including any mobile source averaging, banking, and trading program.

(7) Emission reductions occurring at a source which

received an alternative emission limitation to meet a State RACT requirement, except to the extent that the emissions are reduced below the level that would have been required had the alternative emission limitation not been issued.

(8) Emission reductions generated prior to the start of the ozone season in 1995.

(9) Any source subject to a RACT limit pursuant to the Act, but with respect to which the State has not determined the RACT limit, until the State determines RACT through a permit or SIP approval action.

(C) Notice and Certification of Generation.

(1) General Rule. The owner or operator of a generator source shall provide a Notice and Certification of Generation to **[State authority]**:

(a) no later than 90 days after the DER generation activity was completed,

(b) one year after the first day of the generation period (and at least annually thereafter), or

(c) prior to the first day of the use period, whichever is sooner.

The Notice and Certification of Generation shall be publicly available pursuant to section VII(B).

(2) Required Information. The Notice and Certification of Generation shall include the following information, submitted on **[State form \_\_\_\_]** :

(a) For stationary source reductions, identifying information, including--

(i) The name and address of the generator, and

(ii) The name of the owner and/or operator of the generator source.

(b) For mobile sources related reductions, identifying information as required in the applicable USEPA approved protocol or described in USEPA guidance on protocols.

(c) The generation period and the unique serial numbers assigned by the **[State authority]** to each ton of DER's.

(d) A brief description of the generation activity.

(e) The amount of DER's generated during the ozone season and the amount of DER's generated during other parts of the year.

(f) The protocols that were used to calculate and document the DER's.

(g) Information on all the generator source's applicable allowable emission rates.



(h) A statement that the reductions were calculated in accordance with section IV(A).

(i) A statement that the DER's were not generated in whole or in part from actions prohibited pursuant to section IV(B).

(j) For each source subject to reporting toxic chemical releases for the Community Right-to-Know provisions under 40 CFR part 372, the estimated amount of hazardous air pollutants, as defined below, emitted to the air as the result of the generation of the DER.

(i) A pollutant shall be reported under this paragraph, only if it is listed both in 40 CFR 372.65 and section 112(b) of the Act, and a chemical which the source is reporting or expects to report under 40 CFR part 372 for the calendar year in which the DER was generated.

(ii) The requirements in 40 CFR 373.30(b) shall be followed for the notice.

(iii) The exemptions listed in 40 CFR 372.38 for determining the amount of release to be reported under 40 CFR 372.30 shall also be exemptions for determining the amount emitted under this section.

(iv) The notice shall include:

((A)) The name and CAS number (if applicable) of the chemical reported;

((B)) If the chemical identity is claimed trade secret under 40 CFR 372, a generic name for the chemical as reported under 40 CFR 372.85(b)(11);

((C)) A mixture component identity if the chemical identity is not known; and

((D)) An estimate of total air emissions, in pounds, for the relevant time period of DER generation. Releases of less than 1,000 pounds may be indicated in ranges.

(3) Certification Under Penalty of Law. Any Notice and Certification of Generation submitted pursuant to this subsection shall contain certification under penalty of law by a responsible official of the generator source of truth, accuracy and completeness. This certification shall state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete.

#### **V. DER Use**

(A) Time of Acquisition. DER's may not be used unless they are acquired by the user source before the

compliance period for which the specific DER's are to be used.

(B) Sufficiency. The user source must hold sufficient DER's to cover its compliance obligation at all times.

(C) Operating Permits.

(1) For sources subject to the requirement to obtain a permit under a Federally approved operating permit program, the permit, when issued or revised, shall authorize the use of DER's for compliance purposes.

(2) The Notices of Intent to Use DER's and Notice and Certification of Use shall be stored with the user source's operating permit, if applicable.

(D) Environmental Contribution. At the time of use, DER users shall permanently retire ten percent of all DER's dedicated to that particular use. That is, the amount of DER's required to demonstrate compliance equals the source's calculated need divided by 0.9.

(E) Compliance Calculation. The amount of DER's needed to demonstrate compliance shall be the difference between--

(1) The actual emissions expressed in units of mass or the alternative limit under which the source will operate, and

(2) The allowable emissions based on actual activity levels expressed in units of mass.

(F) Notice of Intent to Use DER's.

(1) General Rule. DER's may be used only if the owner or operator of the user source submits to **[State authority]** a Notice of Intent to Use DER's. The Notice of Intent to Use DER's shall be submitted at least 30 days before the intended use period begins, and at least annually if the use period is greater than one year. The Notice of Intent to Use DER's shall be made publicly available pursuant to section VII(B).

(2) Required Information. The Notice of Intent to Use DER's shall include the following information submitted on **[State form \_\_\_\_\_]** :

(a) The name and location of the user.

(b) The emissions unit or application name, the permit or identification number (if applicable), and the applicable pollutant.

(c) The applicable State and Federal requirements that the DER's will be used to comply with and the intended use period.

(d) A copy of the Notice and Certification of Generation submitted by the generator source to the

State.

(e) The emission quantification protocols that will be used to document the amount of DER's needed to demonstrate compliance.

(f) For each source subject to reporting toxic chemical releases for the Community Right-to-Know provisions under 40 CFR part 372, the estimated amount of hazardous air pollutants expected to be emitted to the air as the result of the use of the DER's to meet the otherwise applicable requirements. The estimated amount shall include expected emissions increases and any expected forgone emission reductions due to use of the DER's instead of non-DER compliance with otherwise applicable requirements. The same procedures shall be followed as for the similar requirements under the Notice and Certification of Generation (see section IV(C)(2)(j)).

(G) Notice and Certification of Use.

(1) General Rule. The owner or operator of a user source shall submit to **[State authority]** a Notice and Certification of Use that contains the information described in paragraph (2) of this subsection within 90 days after the end of the use period or one year after

the beginning of the use period, whichever is sooner. The owner or operator of a user source shall provide the required information for each increment of DER's used over a time period not to exceed one year. The Notice and Certification of Use shall be made publicly available pursuant to section VII(B).

(2) Required Certification Information. The Notice and Certification of Use shall include the following information submitted on **[State form \_\_\_\_]** :

(a) The name and location of the owner or operator of the user source.

(b) The date(s) on which the DER's were acquired.

(c) The amount of DER's used and the associated serial numbers assigned by the **[State authority]** .

(d) The use period.

(e) The applicable State and Federal requirements that the DER's were used to comply with.

(f) The emissions quantification protocols that were used to calculate the amount of DER's required to demonstrate compliance and documentation for the compliance calculation under subsection (E) of this section.

(g) A statement that due diligence was made to

verify that the DER's were not previously used, not generated as a result of actions prohibited under this regulation or other provisions of law.

(h) A statement that the DER's were not used in a manner prohibited under this regulation or other provisions of law.

(i) A copy of the relevant Notice and Certification of Generation.

(j) For each source subject to reporting toxic chemical releases for the Community Right-to-Know provisions under 40 CFR part 372, the estimated amount of hazardous air pollutants emitted to the air as the result of the use of the DER to meet otherwise applicable requirements. The estimated amount shall include emissions increases and any forgone emission reductions due to use of DER's instead of non-DER compliance with otherwise applicable requirements. The same procedures shall be followed as the similar requirement under the Notice and Certification of Generation (see section IV(C)(2)(j)).

(3) Any Notice and Certification of Use submitted pursuant to this regulation shall contain certification under penalty of law by a responsible official of truth,

accuracy and completeness. This certification shall state that based on information and belief formed after reasonable inquiry, the statements and information in the document and in referenced documents attached are true, accurate and complete.

(H) Use Limitations. DER's may not be used--

(1) Before acquisition by the user of the DER's;

(2) For netting or other means to avoid the applicability of NSR requirements;

(3) For NSR offsets or conformity purposes unless the requirements of section IX are met;

(4) To meet Act requirements for new source performance standards (NSPS) under section 111; lowest achievable emission rate (LAER) standards under section 173(a)(2); best available control technology (BACT) standards under section 165(a)(4); hazardous air pollutant (HAP) standards under section 112; standards for solid waste combustion under section 129; requirements for a vehicle inspection and maintenance program under sections 182(b)(4) or (c)(3); requirements for an employer trip reduction program under section 182(d)(1)(B); ozone control standards set under section 183; clean fueled fleet requirements under section 246;



motor vehicle emissions standards under section 202;  
standards for nonroad vehicles under section 213;  
requirements for reformulated gasoline under section  
211(k); or requirements for Reid vapor pressure standards  
under section 211(h) and (i);

(5) State motor vehicle emission standards;

(6) To meet requirements for one class of  
tropospheric ozone precursor by using DER's generated in  
a different class of tropospheric ozone precursors (e.g.,  
NOx reductions may not be exchanged for VOC increases, or  
vice-versa);

(7) To meet requirements during an ozone season  
unless the DER was generated during an ozone season; or

(8) To meet requirements contained in Title IV of  
the Act.

## **VI. Geographic Scope of Trading**

### **(A) General Rule.**

(1) In using DER's, user sources must comply with  
the requirements of this subsection (A) and the  
geographic limitations described in subsection (B).

(2) DER use must be consistent with modeling  
analyses contained in an approved SIP; however, each DER  
use is not required to be supported by a modeling

analysis specific to such use.

(3) No provision of this section shall be construed to authorize use of DER's in a manner that interferes with any applicable requirement of the Act.

(B) Geographic Scope.

(1) NOx DER's.

(a) NOx DER's may be used in the same SIP modeling domain in which they were generated.

(b) NOx DER's generated inside a nonattainment or maintenance area may be used outside a nonattainment area, maintenance area, or modeling domain.

(2) VOC DER's.

(a) VOC DER's may be used in a nonattainment or maintenance area only if they were generated in the same nonattainment or maintenance area.

(b) VOC DER's may be used in an attainment area that is not a maintenance area.

(c) VOC DER's generated inside a nonattainment or maintenance area may be used outside a nonattainment area, maintenance area, or modeling domain.

(C) Interstate Trading. DER's may be used in a State other than the State in which they were generated if authorized representatives of the two States approve a

binding interstate agreement that is approved by USEPA as a SIP revision for each State, and that contains at least the following provisions that apply to each DER use:

(1) The authority of the State where the generator source is located agrees to provide the authority of the State where the user source is located with all relevant information concerning the generator source and the DER generation including, but not limited to, emission limitations and permits issued to the generator source, if any, as well as the Notice and Certification of Generation and supporting documentation, in a timely manner;

(2) The authority of the State where the user source is located agrees to provide the state where the generator source is located with all relevant information, including the Notice of Intent to Use DER's and the Notice and Certification of Use and supporting documentation, in a timely manner;

(3) The authority of the State where the generator source is located agrees to notify the authority of the State where the user source is located as to whether the DER has been used previously; and

(4) The authorities of the States where the user and

generator sources are located agree to enforce their individual State emission requirements as modified by any valid emissions trades.

## **VII. Recordkeeping and Public Availability**

(A) Recordkeeping. The generator source shall adequately document the protocol and specific data by which a DER is quantified. Generator sources shall transfer all such documentation to any transferee at the time that ownership of a DER is transferred. The user source shall document the protocol and specific data by which the amount of DER's needed for compliance was determined. The user source shall maintain all relevant documentation for a minimum of five years after a DER is used for compliance. Records shall be kept with at least the same frequency as required for the underlying requirement.

(B) Public availability. All information submitted to the State for compliance with this rule shall be available to the public under **[insert relevant State law pertaining to public availability of data]** . This information shall not be considered confidential business information.

(1) The **[State official]** will make all notices submitted by sources pursuant to this rule available for

public review. For sources with operating permits, the **[State official]** will attach copies of these notices to the copy of the operating permit retained in the State offices. For sources that do not have operating permits, the **[State official]** will make these notices available in a similar manner **[Cite of State rule.]**

(2) The sources shall make all documentation that supports the notices submitted to the State as part of this rule available to the public ("pursuant to **[applicable State regulation", if applicable]** ).

#### **VIII. Protocol Development and Approval.**

(A) General Rule. To quantify the amount of DER's generated and the amount needed for compliance, sources shall use quantification protocols in accordance with the requirements of this section.

(B) Option 1: **[Option 1 or Option 2 will be selected for the final model rule.]**

(1) If a USEPA-approved protocol exists for a given application, it may be used.

(2) If a credit generator wishes to deviate to some extent from an approved protocol, or develop a new protocol, the generator must do so in accordance with guidance set forth by USEPA. The USEPA approval need not

be obtained in advance, however, USEPA reserves the right to reject the protocol and any resulting credits whether or not the protocol was followed.

(B) **Option 2:** [Option 1 or Option 2 will be selected for the final model rule.]

(1) If an EPA-approved quantification protocol exists for a given application, it must be used.

(2) If a credit generator wishes to deviate to some extent from an approved protocol, the credit generator must obtain advance approval from USEPA.

(3) If an approved protocol does not exist, a new protocol shall be designed with the participation of affected parties according to a guidance set forth by USEPA. The USEPA approval need not be obtained in advance, however, USEPA reserves the right to reject the protocol and any resulting credits whether or not the protocol was followed.

(C) Protocols must contain methods that are credible, workable, enforceable, and replicable and must include each of the following elements:

(1) A description of the calculation methods used for determining the reductions achieved by the emissions controls as implemented;

(2) Estimates of the accuracy of the appropriate USEPA test method, if available, not to exceed some given value;

(3) A description of the recordkeeping program that permits verification of production, materials used, and use of control equipment;

(4) The USEPA test methods where available; and

(5) A requirement for complete, verifiable records on production, materials used and use of control equipment.

(D) A protocol may contain the following:

(1) Emission quantification methods contained in an applicable Federally approved operating permit; or

(2) Emission quantification methods approved in the applicable SIP.

#### **IX. DER Use for NSR and Conformity Purposes.**

(A) General Rule. All DER's used to

(1) Meet NSR offset requirements shall comply with the requirements of section 173 of the Act and 40 CFR 51.165(a) including the requirements of subsection (B) of this section.

(2) Meet conformity requirements shall comply with 40 CFR part 51, subparts T and W and part 93 subparts A

and B.

(B) Specific Requirements for NSR .

(1) The State must approve the use of specific DER's that cover at a minimum 1 year of operation of the new or modified source in the NSR permit.

(2) The NSR permit must contain an enforceable requirement that the source obtain at least one additional year of offsets before continuing operation in each subsequent year.

(3) The NSR permit must contain an enforceable commitment that before receiving any operating permit or permit renewal, the operating permit must contain an enforceable condition that the source must obtain offsets for each subsequent year before continuing to operate in each subsequent year.

**X. Program Audits.**

(A) Beginning no later than **[insert the next ROP milestone year or date 3 years after State adoption of this rule]** and at least every 3 years thereafter (coinciding with the periodic inventory submittals required under section 182 of the Act), the **[State authority]** shall audit this program to evaluate at a minimum, the following program elements:



(1) Amount and timing of emission reductions (e.g., DER's used compared to DER's generated in a given year or ozone season);

(2) Compliance by generators and users;

(3) The effect of the program on temporal and spatial assumptions in the attainment demonstration, and ROP plans;

(4) The effects of remedial measures, if applicable, implemented as a result of previous audit findings.

(5) The effects on toxic emissions from operation of this rule.

(B) As determined by the **[State authority]**, the **[State authority]** shall institute remedial measures to the extent necessary.

(C) The audit data and results shall be completed, submitted to USEPA, and available for public inspection within one year after the audit begins.

## **XI. Enforcement.**

(A) Compliance Burden.

(1) The DER user source is responsible for assuring that the generation and use of DER's comply with this rule.

(2) The DER user source (not the enforcing

authority) bears the burden of proving that DER's used are valid and sufficient and that the DER use meets all applicable requirements of this rule. The DER user source is responsible for compliance with its underlying obligations. In the event of enforcement against the user source for non-compliance, it shall not be a defense for the purpose of determining civil liability that the user source relied in good faith upon the generator source's representations.

(B) Violation Day Definition for User Source Excess Emissions. Section 113(b) of the Act authorizes a maximum civil penalty of \$25,000 per day for each violation. For purposes of this regulation, the number of days of violation associated with improper DER use or insufficient DER quantity shall be the number of consecutive days with insufficient DER quantity after taking into account DER's used to offset excess emissions (converted to units of mass) on a consecutive day basis. If a user is unable to document actual emissions rate on a daily basis, the number of days of violation shall include every day since the beginning of the use period during which there was insufficient DER's. Failure to keep adequate records is equivalent to a lack of

creditable DER's.