liability approach, States would address jurisdictional issues over out-of-State generators, or issues of responsibility for DER's generated in the past by sources no longer in business.

The EPA requests comments on all aspects of its proposed approach to liability.

B. DER Generation

1. DER Formation and Baseline

Under the proposed OMTR, participating sources may create reductions by reducing their emissions for a specific period of time below levels allowed by the approved SIP, State adopted rules (if more stringent and not yet in the approved SIP), applicable Federal requirements (e.g., NSPS), or historical actual emissions, whichever is more stringent. The source would not be required to remain at that new lower level permanently, but instead could reduce for a discrete time period. During that period, reductions may be calculated by determining the difference between what the source's emissions would have been under the baseline emissions rate (actual or allowable emissions without the DER generation strategy) and the actual emissions for the discrete period of operation at the new lower emissions level, times a measure of the source's operational level. The source would calculate its DER's in one ton units.

The generation baseline establishes a benchmark for what is surplus to all the source's applicable Federal and State requirements, including those contained in the area's SIP. Therefore, for sources located in areas where the attainment or maintenance plan is based on a source's actual emissions, the generation baseline would be the lower of the source's expected actual or allowable emissions. In areas that have fully approved attainment or maintenance plans which are based on sources allowable emissions, the State has the option to let sources use their allowable emissions as the generation baseline. For sources not subject to any applicable VOC or NO_X requirements, and located in areas that are not required to have attainment or maintenance plans, the baseline would also be based on the source's actual pregeneration strategy emissions.

In some cases, the sources "actual" baseline emissions could be measured directly, for example, as the pre-control device emissions. In other cases, the baseline could be determined by reference to emissions rates for the two years immediately prior to the generation period in question, unless some other time period was deemed to be more representative of the operation of the source. In such cases, the expected actual emissions would be the product of the historical baseline emissions rate per unit production and the actual production during the generation period. The expected allowable emissions would be the product of the allowable emissions rate per unit production and the actual production during the generation period.

Some comments have expressed concern about the establishment of the emissions baseline for sources generating DER's in areas which have failed on a prolonged basis to submit and gain EPA approval of: (a) Measures needed to meet rate of progress (ROP) requirements, (b) attainment demonstrations, or (c) maintenance plans. These commenters have argued that if a State has not yet adopted the additional emissions control measures that would be necessary to rectify such a SIP deficiency, DER generating sources would be operating from an inappropriately high baseline. The commenters have suggested that steps would need to be taken to address such situations, for example, (a) barring further DER accrual by generators until the ROP, attainment demonstration, or maintenance plan deficiency is remedied, or (b) discounting DER generation by an amount proportional to the area's overall reduction deficiency.

Other commenters have argued that while a DER generator's baseline would be inappropriately high in such cases, all sources' baselines would be inappropriately high, whether the sources are participating in the open market program or not. These commenters believe that including in the OMTR a requirement to address such SIP problems by selectively targeting DER generators and users is unwarranted, since all sources reap an economic benefit from not having a lower baseline and tighter control requirements. They also believe that singling out open market participants would act to discourage participation in the open market system by creating undue regulatory uncertainty about the ability to create and use DER's, thereby sacrificing the efficiency gains provided by this regulatory approach. They have argued that States should rectify such attainment problems without singling out open market participants.

The EPA believes that both arguments raise valid concerns, and requests comments on whether the OMTR should require action to address DER generation in cases where States have such attainment problems, and, if so, what those actions should be.

2. Start Date for DER Generation

DER's that may be used for compliance under this model rule must have been generated after the start of the 1995 ozone season (May 1, 1995 in most cases) and must meet all other requirements of the model rule. One of the objectives of this model rule development process has been to make trading possible during the 1995 ozone season. Earlier dates were considered but rejected because of the potential to overwhelm the market with pre-existing reductions that by definition were not motivated by the prospect of creating a tradable product of value. Another objective of the rule is to create an incentive for sources to make additional reductions beyond those they would otherwise have made. It would not be consistent with this objective to give retroactive credit for actions taken before this rule was developed and which were made for other reasons. The EPA is also concerned that crediting earlier reductions could lead to an imbalance in the first years after a State program is in place. Thus, if a largescale use of pre-1995 reduction stockpiles occurred in that period, before large-scale generation of new DER's had developed, it could lead to elevated ozone levels during the use years, creating human health consequences and jeopardizing an area's compliance with underlying Act requirements.

The EPA acknowledges that some stationary sources in the Northeast have participated in the NESCAUM– MARAMA Demonstration Project, and have made discrete reductions before the 1995 ozone season which they intend to sell as DER's. While EPA has acknowledged and encouraged these potential trades, they cannot fall within this model rule. These facilities may need to proceed through source-specific SIP revisions. The EPA will continue to work with the NESCAUM–MARAMA participants to process revisions expeditiously.

3. Converting ERC Activity Into DER Activity

The EPA recognizes that there are beneficial emissions reductions that will occur in the future under the current ERC program. Emissions reduction activity intended for ERC use would be creditable as DER's, provided that the activity met all applicable requirements of the OMTR. However, the same emissions reduction activity may not be used in both programs; the source would have to choose one program to the exclusion of credit in the other. Reductions made before the 1995 ozone