

The EPA also believes the Act would not allow the use of DER's generated from other programs to meet the requirements of certain regional or local mobile source control programs. Many local or regional mobile source control programs, such as vehicle inspection and maintenance under sections 182(b)(4) or (c)(3) of the Act, employer trip reduction programs under section 182(d)(2)(B) of the Act, or clean fuel fleet requirements under section 246 of the Act, have provisions that appear to preclude compliance through DER's generated from other sources. However, unless prohibited by other provisions of the Act, DER's could be used to meet any regional or local mobile source requirements that are in addition to those specifically mandated by the Act. The EPA requests comment on whether the Act would allow the use of DER's to meet Federal mobile source requirements and whether EPA should adopt such an approach.

The EPA believes that emission reductions generated in the context of an existing averaging, banking, and trading (ABT) program specific to a particular mobile source program should not be used to generate DER's. The same rule applies to fuel producers. The reason for this restriction would be to avoid double use of DER's, especially since the State may not be aware of the use of the ABT DER in the context of the relevant program.

The EPA is concerned about quantifying DER's generated for upstream and downstream emissions reductions strategies. An example of an upstream activity is fuel distribution emissions—providers of natural gas may seek to generate a DER to reflect reductions in gasoline distribution emissions that result from sales of natural gas for alternative fuel vehicles. In this case, the use of an additional clean fuel vehicle does not necessarily take a known quantity of gasoline out of the conventional fuel distribution system. However, these kinds of emission reductions may be allowed to generate DER's if an adequate quantification method can be devised and approved by EPA. The EPA solicits comments on whether and under what conditions these emission reduction strategies should be allowed to generate DER's.

b. Compliance With Certain Technology Standards. Today's proposal is consistent with the EIP rule (59 FR 16696 (1994)) in that DER's could not be used to meet Act sections 111 and 129, new source performance standards (NSPS), best available control technology (BACT) standards, or lowest

achievable emissions reduction (LAER) standards.

The EPA believes it is important to begin investigating whether compliance flexibility and costs savings can be offered to new sources. In this regard, the Agency has proposed in the model rule that DER's be used for offsets that satisfy new source review requirements. However, EPA questions whether additional flexibility and cost savings can be achieved by allowing sources subject to NSPS, BACT or LAER to utilize the open market program to meet these control technology requirements. In certain cases, the compliance requirements for NSPS, BACT or LAER may inhibit new low-pollution facilities from replacing older, high-pollution facilities as quickly as would have occurred otherwise. If DER's were used to lower the economic hurdle in these cases, both the environment and the economy would be better off in the long run.

The EPA requests comment on how to allow the use of DER's under the open market program to meet NSPS, BACT and LAER requirements.

c. Compliance With Toxics Standards. Today's proposal would not relieve sources participating in the open market trading of the obligation to meet all requirements under section 112 of the Act. Standards promulgated under section 112 require sources to meet maximum achievable control technology (MACT) standards for air toxics. Often, section 112 standards apply to the same emissions point at a facility as RACT requirements. For example, a RACT requirement and a MACT requirement could both require control of an emissions point to a level achieved by a flare. In such a case, the source could not use a DER to meet the RACT control requirement because the MACT standard imposes an independent obligation to achieve the specified level of control. This ensures that trading would not result in higher levels of hazardous air pollutant emissions from a source than are permitted by Federal air toxics control requirements.

d. Avoiding New Source Review. While allowing the use of DER's to satisfy the requirement for offsets, EPA believes that it would be unlawful to allow DER's to be used to avoid new source review requirements altogether. Therefore, the model rule would specifically prohibit the use of DER's to "net out" of review.

In addition, sources that had previously agreed to operational limitations in order to avoid the new source review requirements, could not use DER's to subsequently increase their

emissions to major source levels, and thus circumvent the provisions requiring retroactive review as a major source or major modification.

e. Use To Avoid Penalties. The proposed model OMTR would require sources to purchase DER's before using them. A user could not defer purchase until after failing to comply. The EPA believes allowing such a retroactive acquisition of DER's would encourage sources to avoid their compliance obligations until such time as they were determined to be out of compliance. However, as described elsewhere in today's preamble, EPA does not wish to preclude the purchase of DER's as part of a settlement agreement for a violation or as a potential component of EPA's penalty policy.

f. Use To Increase Over 1990 Emissions Levels. The EPA recognizes the possibility that a source may want to use DER's to allow that source to relax current costly compliance obligations. Such use of DER's may, in some cases, allow a facility to emit levels of pollution greater than levels accounted for in the 1990 emissions inventory. The EPA requests comment on whether in order to prevent excessive degradation of air quality near a particular source the OMTR should prohibit sources from using DER's to revert to pre-1990 levels. The EPA acknowledges that it may be difficult to effectively enforce such a provision since the State may not know with certainty the lower of actual or allowable emissions from a particular source prior to 1990.

5. Use for Conformity Offsets

The EPA's General Conformity rule allows the conformity requirements to be met by a Federal agency obtaining emissions offsets (40 CFR 51.858, 93.158). The rule requires the offsets to come from within the same nonattainment or maintenance area.

The definition of emissions offsets in the conformity rule is intended to assure that offsets within the air programs are calculated and credited consistently and that the term is used the same in the conformity rules as in the EPA NSR program. All offsets must therefore be quantifiable, consistent with the applicable SIP attainment and ROP demonstrations, surplus to reductions required by—and credited to—other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the time-frame specified by the program. DER's used in accordance with the OMTR could meet these requirements. Thus, the current conformity rule allows DER's to be used as conformity offsets where they occur