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(b) *Serious CO nonattainment areas.* (1) A State or authorized governing body for any serious CO nonattainment area shall submit a plan revision to implement an EIP, in accordance with the requirements of this part, if:

(i) A milestone demonstration is not submitted within the required period, pursuant to section 187(d) of the Act.

(ii) The Administrator notifies the State, pursuant to section 187(d) of the Act, that a milestone has not been met.

(iii) The Administrator determines, pursuant to section 186(b)(2) of the Act that the NAAQS for CO has not been attained by the applicable date for that area. Such revision shall be submitted within 9 months after such failure or determination.

(2) Submittals made pursuant to paragraphs (b)(1) (i) and (ii) of this section shall be sufficient, together with a transportation control program, to achieve the specific annual reductions in CO emissions set forth in the implementation plan by the attainment date. Submittals made pursuant to paragraph (b)(1)(iii) of this section shall be adequate, in combination with other elements of the revised plan, to reduce the total tonnage of emissions of CO in the area by at least 5 percent per year in each year after approval of the plan revision and before attainment of the NAAQS for CO.

(c) *Serious and severe O<sub>3</sub> nonattainment areas.* If a State, for any serious or severe O<sub>3</sub> nonattainment area, elects to implement an EIP in the circumstances set out in section 182(g)(3) of the Act, the State shall submit a plan revision to implement the program in accordance with the requirements of this part. If the option to implement an EIP is elected, a plan revision shall be submitted within 12 months after the date required for election, and shall be sufficient, in combination with other elements of the SIP, to achieve the next milestone.

(d) *Any nonattainment or attainment area.* Any State may at any time submit a plan or plan revision to implement a discretionary EIP, in accordance with the requirements of this part, pursuant to sections 110(a)(2)(A) and 172(c)(6) and other applicable provisions of the Act concerning SIP sub-

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mittals. The plan revision shall not interfere with any applicable requirement concerning attainment and RFP, or any other applicable requirements of the Act.

**§ 51.493 State program requirements.**

Economic incentive programs shall be State and federally enforceable, nondiscriminatory, and consistent with the timely attainment of NAAQS, all applicable RFP and visibility requirements, applicable PSD increments, and all other applicable requirements of the Act. Programs in nonattainment areas for which credit is taken in attainment and RFP demonstrations shall be designed to ensure that the effects of the program are quantifiable and permanent over the entire duration of the program, and that the credit taken is limited to that which is surplus. Statutory programs shall be designed to result in quantifiable, significant reductions in actual emissions. The EIP's shall include the following elements, as applicable:

(a) *Statement of goals and rationale.* This element shall include a clear statement as to the environmental problem being addressed, the intended environmental and economic goals of the program, and the rationale relating the incentive-based strategy to the program goals.

(1) The statement of goals must include the goal that the program will benefit both the environment and the regulated entities. The program shall be designed so as to meaningfully meet this goal either directly, through increased or more rapid emissions reductions beyond those that would be achieved through a traditional regulatory program, or, alternatively, through other approaches that will result in real environmental benefits. Such alternative approaches include, but are not limited to, improved administrative mechanisms, reduced administrative burdens on regulatory agencies, improved emissions inventories, and the adoption of emission caps which over time constrain or reduce growth-related emissions beyond traditional regulatory approaches.

(2) The incentive-based strategy shall be described in terms of one of the following three strategies:

(i) Emission-limiting strategies, which directly specify limits on total mass emissions, emission-related parameters (e.g., emission rates per unit of production, product content limits), or levels of emissions reductions relative to a program baseline that affected sources are required to meet, while providing flexibility to sources to reduce the cost of meeting program requirements.

(ii) Market-response strategies, which create one or more incentives for affected sources to reduce emissions, without directly specifying limits on emissions or emission-related parameters that individual sources or even all sources in the aggregate are required to meet.

(iii) Directionally-sound strategies, for which adequate procedures to quantify emissions reductions are not defined.

(b) *Program scope.* (1) This element shall contain a clear definition of the sources affected by the program. This definition shall address:

(i) The extent to which the program is mandatory or voluntary for the affected sources.

(ii) Provisions, if any, by which sources that are not required to be in the program may voluntarily enter the program.

(iii) Provisions, if any, by which sources covered by the program may voluntarily leave the program.

(2) Any opt-in or opt-out provisions in paragraph (b)(1) of this section shall be designed to provide mechanisms by which such program changes are reflected in an area's attainment and RFP demonstrations, thus ensuring that there will not be an increase in the emissions inventory for the area caused by voluntary entry or exit from the program.

(3) The program scope shall be defined so as not to interfere with any other Federal requirements which apply to the affected sources.

(c) *Program baseline.* A program baseline shall be defined as a basis for projecting program results and, if applicable, for initializing the incentive mechanism (e.g., for marketable permits programs). The program baseline shall be consistent with, and adequately reflected in, the assumptions and inputs

used to develop an area's RFP plans and attainment and maintenance demonstrations, as applicable. The State shall provide sufficient supporting information from the areawide emissions inventory and other sources to justify the baseline used in the EIP.

(1) For EIP's submitted in conjunction with, or subsequent to, the submission of any areawide progress plan due at the time of EIP submission (e.g., the 15 percent RFP plan and/or subsequent 3 percent plans) or an attainment demonstration, a State may exercise flexibility in setting a program baseline provided the program baseline is consistent with and reflected in all relevant progress plans or attainment demonstration. A flexible program baseline may be based on the lower of actual, allowable, or some other intermediate or lower level of emissions. For any EIP submitted prior to the submittal of an attainment demonstration, the State shall include the following with its EIP submittal:

(i) A commitment that its subsequent attainment demonstration and all future progress plans, if applicable, will be consistent with the EIP baseline.

(ii) A discussion of how the baseline will be integrated into the subsequent attainment demonstration, taking into account the potential that credit issued prior to the attainment demonstration may no longer be surplus relative to the attainment demonstration.

(2) Except as provided for in paragraph (c)(4) of this section, for EIP's submitted during a time period when any progress plans are required but not yet submitted (e.g., the 15 percent RFP plan and/or the subsequent 3 percent plans), the program baseline shall be based on the lower-of-actual-or-allowable emissions. In such cases, actual emissions shall be taken from the most appropriate inventory, such as the 1990 actual emission inventory (due for submission in November 1992), and allowable emissions are the lower of SIP-allowable emissions or the level of emissions consistent with source compliance with all Federal requirements related to attainment and maintenance of the NAAQS.

(3) For EIP's that are designed to implement new and/or previously existing RACT requirements through emissions trading and are submitted in conjunction with, or subsequent to, the submission of an associated RACT rule, a State may exercise flexibility in setting a program baseline provided the program baseline is consistent with and reflected in the associated RACT rule, and any applicable progress plans and attainment demonstrations.

(4) For EIP's that are designed to implement new and/or previously existing RACT requirements through emissions trading and are submitted prior to the submission of a required RFP plan or attainment demonstration, States also have flexibility in determining the program baseline, provided the following conditions are met.

(i) For EIP's that implement new RACT requirements for previously unregulated source categories through emissions trading, the new RACT requirements must reflect, to the extent practicable, increased emissions reductions beyond those that would be achieved through a traditional RACT program.

(ii) For EIP's that impose new RACT requirements on previously unregulated sources in a previously regulated source category (e.g., RACT "catch-up" programs), the new incentive-based RACT rule shall, in the aggregate, yield reductions in actual emissions at least equivalent to that which would result from source-by-source compliance with the existing RACT limit for that source category.

(5) A program baseline for individual sources shall, as appropriate, be contained or incorporated by reference in federally-enforceable operating permits or a federally-enforceable SIP.

(6) An initial baseline for TCM's shall be calculated by establishing the pre-existing conditions in the areas of interest. This may include establishing to what extent TCM's have already been implemented, what average vehicle occupancy (AVO) levels have been achieved during peak and off-peak periods, what types of trips occur in the region, and what mode choices have been made in making these trips. In addition, the extent to which travel options are currently available within the re-

gion of interest shall be determined. These travel options may include, but are not limited to, the degree of dispersion of transit services, the current ridership rates, and the availability and usage of parking facilities.

(7) Information used in setting a program baseline shall be of sufficient quality to provide for at least as high a degree of accountability as currently exists for traditional control requirements for the categories of sources affected by the program.

(d) *Replicable emission quantification methods.* This program element, for programs other than those which are categorized as directionally-sound, shall include credible, workable, and replicable methods for projecting program results from affected sources and, where necessary, for quantifying emissions from individual sources subject to the EIP. Such methods, if used to determine credit taken in attainment, RFP, and maintenance demonstrations, as applicable, shall yield results which can be shown to have a level of certainty comparable to that for source-specific standards and traditional methods of control strategy development. Such methods include, as applicable, the following elements:

(1) Specification of quantification methods. This element shall specify the approach or the combination or range of approaches that are acceptable for each source category affected by the program. Acceptable approaches may include, but are not limited to:

(i) Test methods for the direct measurement of emissions, either continuously or periodically.

(ii) Calculation equations which are a function of process or control system parameters, ambient conditions, activity levels, and/or throughput or production rates.

(iii) Mass balance calculations which are a function of inventory, usage, and/or disposal records.

(iv) EPA-approved emission factors, where appropriate and adequate.

(v) Any combination of these approaches.

(2) Specification of averaging times.

(i) The averaging time for any specified mass emissions caps or emission rate limits shall be consistent with: attaining and maintaining all applicable

NAAQS, meeting RFP requirements, and ensuring equivalency with all applicable RACT requirements.

(ii) If the averaging time for any specified VOC or NO<sub>x</sub> mass emissions caps or emission rate limits for stationary sources (and for other sources, as appropriate) is longer than 24 hours, the State shall provide, in support of the SIP submittal, a statistical showing that the specified averaging time is consistent with attaining the O<sub>3</sub> NAAQS and satisfying RFP requirements, as applicable, on the basis of typical summer day emissions; and, if applicable, a statistical showing that the longer averaging time will produce emissions reductions that are equivalent on a daily basis to source-specific RACT requirements.

(3) Accounting for shutdowns and production curtailments. This accounting shall include provisions which ensure that:

(i) Emissions reductions associated with shutdowns and production curtailments are not double-counted in attainment or RFP demonstrations.

(ii) Any resultant "shifting demand" which increases emissions from other sources is accounted for in such demonstrations.

(4) Accounting for batch, seasonal, and cyclical operations. This accounting shall include provisions which ensure that the approaches used to account for such variable operations are consistent with attainment and RFP plans.

(5) Accounting for travel mode choice options, as appropriate, for TCM's. This accounting shall consider the factors or attributes of the different forms of travel modes (e.g., bus, ridesharing) which determine which type of travel an individual will choose. Such factors include, but are not limited to, time, cost, reliability, and convenience of the mode.

(e) *Source requirements.* This program element shall include all source-specific requirements that constitute compliance with the program. Such requirements shall be appropriate, readily ascertainable, and State and federally enforceable, including, as applicable:

(1) Emission limits.

(i) For programs that impose limits on total mass emissions, emission rates, or other emission-related parameter(s), there must be an appropriate tracking system so that a facility's limits are readily ascertainable at all times.

(ii) For emission-limiting EIP's that authorize RACT sources to meet their RACT requirements through RACT/non-RACT trading, such trading shall result in an exceptional environmental benefit. Demonstration of an exceptional environmental benefit shall require either the use of the statutory offset ratios for nonattainment areas as the determinant of the amount of emissions reductions that would be required from non-RACT sources generating credits for RACT sources or, alternatively, a trading ratio of 1.1 to 1, at a minimum, may be authorized, provided exceptional environmental benefits are otherwise demonstrated.

(2) Monitoring, recordkeeping, and reporting requirements.

(i) An EIP (or the SIP as a whole) must contain test methods and, where necessary, emission quantification methodologies, appropriate to the emission limits established in the SIP. EIP sources must be subject to clearly specified MRR requirements appropriate to the test methods and any applicable quantification methodologies, and consistent with the EPA's title V rules, where applicable. Such MRR requirements shall provide sufficiently reliable and timely information to determine compliance with emission limits and other applicable strategy-specific requirements, and to provide for State and Federal enforceability of such limits and requirements. Methods for MRR may include, but are not limited to:

(A) The continuous monitoring of mass emissions, emission rates, or process or control parameters.

(B) In situ or portable measurement devices to verify control system operating conditions.

(C) Periodic measurement of mass emissions or emission rates using reference test methods.

(D) Operation and maintenance procedures and/or other work practices designed to prevent, identify, or remedy noncomplying conditions.

(E) Manual or automated record-keeping of material usage, inventories, throughput, production, or levels of required activities.

(F) Any combination of these methods. EIP's shall require that responsible parties at each facility in the EIP program certify reported information.

(ii) Procedures for determining required data, including the emissions contribution from affected sources, for periods for which required data monitoring is not performed, data are otherwise missing, or data have been demonstrated to have been inaccurately determined.

(3) Any other applicable strategy-specific requirements.

(f) *Projected results and audit/reconciliation procedures.* (1) The SIP submittal shall include projections of the emissions reductions associated with the implementation of the program. These projected results shall be related to and consistent with the assumptions used to develop the area's attainment demonstration and maintenance plan, as applicable. For programs designed to produce emissions reductions creditable towards RFP milestones, projected emissions reductions shall be related to the RFP baseline and consistent with the area's RFP compliance demonstration. The State shall provide sufficient supporting information that shows how affected sources are or will be addressed in the emissions inventory, RFP plan, and attainment demonstration or maintenance plan, as applicable.

(i) For emission-limiting programs, the projected results shall be consistent with the reductions in mass emissions or emissions-related parameters specified in the program design.

(ii) For market-response programs, the projected results shall be based on market analyses relating levels of targeted emissions and/or emission-related activities to program design parameters.

(iii) For directionally-sound programs, the projected results may be descriptive and shall be consistent with the area's attainment demonstration or maintenance plan.

(2) Quantitative projected results shall be adjusted through the use of two uncertainty factors, as appro-

priate, to reflect uncertainties inherent in both the extent to which sources will comply with program requirements and the overall program design.

(i) Uncertainty resulting from incomplete compliance shall be addressed through the use of a rule compliance factor.

(ii) Programmatic uncertainty shall be addressed through the use of a program uncertainty factor. Any presumptive norms set by the EPA shall be used unless an adequate justification for an alternative factor is included in supporting information to be supplied with the SIP submittal. In the absence of any EPA-specified presumptive norms, the State shall provide an adequate justification for the selected factors as part of the supporting information to be supplied with the SIP submittal.

(3) Unless otherwise provided in program-specific guidance issued by the EPA, EIP's for which SIP credit is taken shall include audit procedures to evaluate program implementation and track program results in terms of both actual emissions reductions, and, to the extent practicable, cost savings relative to traditional regulatory program requirements realized during program implementation. Such audits shall be conducted at specified time intervals, not to exceed three years. The State shall provide timely post-audit reports to the EPA.

(i) For emission-limiting EIP's, the State shall commit to ensure the timely implementation of programmatic revisions or other measures which the State, in response to the audit, deems necessary for the successful operation of the program in the context of overall RFP and attainment requirements.

(ii) For market-response EIP's, reconciliation procedures that identify a range of appropriate actions or revisions to program requirements that will make up for any shortfall between credited results (i.e., projected results, as adjusted by the two uncertainty factors described above) and actual results obtained during program implementation shall be submitted together with the program audit provisions. Such measures must be federally enforceable, as appropriate, and automatically executing to the extent necessary to

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make up the shortfall within a specified period of time, consistent with relevant RFP and attainment requirements.

(g) *Implementation schedule.* The program shall contain a schedule for the adoption and implementation of all State commitments and source requirements included in the program design.

(h) *Administrative procedures.* The program shall contain a description of State commitments which are integral to the implementation of the program, and the administrative system to be used to implement the program, addressing the adequacy of the personnel, funding, and legislative authority.

(1) States shall furnish adequate documentation of existing legal authority and demonstrated administrative capacity to implement and enforce the provisions of the EIP.

(2) For programs which require private and/or public entities to establish emission-related economic incentives (e.g., programs requiring employers to exempt carpoolers/multiple occupancy vehicles from paying for parking), States shall furnish adequate documentation of State authority and administrative capacity to implement and enforce the underlying program.

(i) *Enforcement mechanisms.* The program shall contain a compliance instrument(s) for all program requirements, which is legally binding and State and federally enforceable. This program element shall also include a State enforcement program which defines violations, and specifies auditing and inspections plans and provisions for enforcement actions. The program shall contain effective penalties for noncompliance which preserve the level of deterrence in traditional programs. For all such programs, the manner of collection of penalties must be specified.

(1) Emission limit violations. (i) Programs imposing limits on mass emissions or emission rates that provide for extended averaging times and/or compliance on a multisource basis shall include procedures for determining the number of violations, the number of days of violation, and sources in violation, for statutory maximum penalty purposes, when the limits are exceeded.

The State shall demonstrate that such procedures shall not lessen the incentive for source compliance as compared to a program applied on a source-by-source, daily basis.

(ii) Programs shall require plans for remedying noncompliance at any facility that exceeds a multisource emissions limit for a given averaging period. These plans shall be enforceable both federally and by the State.

(2) Violations of MRR requirements. The MRR requirements shall apply on a daily basis, as appropriate, and violations thereof shall be subject to State enforcement sanctions and to the Federal penalty of up to \$25,000 for each day a violation occurs or continues. In addition, where the requisite scienter conditions are met, violations of such requirements shall be subject to the Act's criminal penalty sanctions of section 113(c)(2), which provides for fines and imprisonment of up to 2 years.

### § 51.494 Use of program revenues.

Any revenues generated from statutory EIP's shall be used by the State for any of the following:

(a) Providing incentives for achieving emissions reductions.

(b) Providing assistance for the development of innovative technologies for the control of O<sub>3</sub> air pollution and for the development of lower-polluting solvents and surface coatings. Such assistance shall not provide for the payment of more than 75 percent of either the costs of any project to develop such a technology or the costs of development of a lower-polluting solvent or surface coating.

(c) Funding the administrative costs of State programs under this Act. Not more than 50 percent of such revenues may be used for this purpose. The use of any revenues generated from discretionary EIP's shall not be constrained by the provisions of this part.

### Subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

SOURCE: 58 FR 63247, Nov. 30, 1993, unless otherwise noted.