# 1. Subchapter E. NEW SOURCE REVIEW

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**Source**

The provisions of this Subchapter E adopted January 14, 1994, effective January 15, 1994, 24 Pa.B. 443, unless otherwise noted.

**Cross References**

This subchapter cited in 25 Pa. Code § 127.13 (relating to extensions); 25 Pa. Code § 127.44 (relating to public notice); 25 Pa. Code § 127.449 (relating to de minimis

emission increases); 25 Pa. Code § 127.450 (relating to administrative operating permit amendments); and 25 Pa. Code § 127.702 (relating to plan approval fee).

## § 127.201. General requirements.

(a) A person may not cause or permit the construction or modification of an air contamination facility in a nonattainment area or having an impact on a nonattainment area unless the Department or an approved local air pollution control agency has determined that the requirements of this subchapter have been met.

(b) The nonattainment area classification that applies for offset trading and offset ratio selection shall be the highest classification designated by the EPA Administrator in 40 CFR Part 81.339 (relating to designation of areas for air quality planning purposes) or by operation of law.

(c) The new source review requirements of this subchapter also apply to a facility located in an attainment area for ozone and within an ozone transport region that emits or has the potential to emit at least 50 tons per year of VOC or 100 tons per year of $NO_x$. A facility within either an unclassifiable/attainment area for ozone or within a marginal or incomplete data nonattainment area for ozone and located within an ozone transport region will be considered a major stationary facility and shall be subject to the requirements applicable to a major stationary facility located in a moderate nonattainment area.

## § 127.202. Effective date.

(a) The special permit requirements in this subchapter apply to a facility submitting a complete plan approval application to the Department after January 15, 1994.

(b) For $SO_x$, particulate matter, PM-10 precursors, PM-10, lead and CO, this subchapter applies until a given nonattainment area is redesignated as an unclassifiable or attainment area. After a redesignation, special permit conditions remain effective until the Department approves a permit modification request and modifies the permit.

## § 127.203. Facilities subject to special permit requirements.

(a) This subchapter applies to a facility with the potential to emit 100 tons per year or more of one of the following pollutants and meeting the requirements for that pollutant:

(1) For PM-10, PM-10 precursors and particulate matter, either a new facility, or a modification to an existing facility including the addition of a new source at an existing facility, which when aggregated with the other emissions increases determined in accordance with § 127.211 (relating to applicability determination) results in an increase in the potential to emit PM-10, PM-10 precursors or particulate matter that would yield 15 tons per year of PM-10 or 25 tons per year of particulate matter, or 1,000 pounds per day, or 100 pounds per hour of PM-10 or particulate matter, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

(i) A nonattainment area.

(ii) An attainment or unclassifiable area which impacts a part of a nonattainment area in excess of the following significance levels:

| *Averaging Period* | *Significance Levels* |
|---|---|
| Annual | 1.00 $\mu$g/m$^3$ |
| 24-hour | 5.00 $\mu$g/m$^3$ |

(2) For sulfur oxides, either a new facility, or a modification to an existing facility including the addition of a new source at an existing facility, which when aggregated with the other emissions increases determined in accordance with § 127.211 results in an increase in the potential to emit of 40 tons per year, or 1,000 pounds per day, or 100 pounds per hour of $SO_x$, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

(i) A nonattainment area.

(ii) An attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance levels:

| *Averaging Period* | *Significance Levels* |
|---|---|
| Annual | 1.00 $\mu$g/m$^3$ |
| 24-hour | 5.00 $\mu$g/m$^3$ |
| 3-hour | 25.00 $\mu$g/m$^3$ |

(3) For carbon monoxide, either a new facility, or a modification to an existing facility, including the addition of a new source at an existing facility which, when aggregated with the other emissions increases determined in accordance with § 127.211, results in an increase in the potential to emit of 50 tons per year, 1,000 pounds per day or 100 pounds per hour of CO, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

(i) A nonattainment area.

(ii) An attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance levels:

| *Averaging Period* | *Significance Levels* |
|---|---|

| | |
|---|---|
| 8-hour | 0.5 $mg/m^3$ |
| 1-hour | 2.0 $mg/m^3$ |

(4) For lead, either a new facility, or a modification to an existing facility including the addition of a new source at an existing facility, which when aggregated with the other emissions increases determined in accordance with § 127.211, results in an increase in the potential to emit of 0.6 tons per year, 10 pounds per day or 1 pound per hour of lead, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

(i) A nonattainment area.

(ii) An attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance level:

| *Averaging Period* | *Significance Level* |
|---|---|
| 24-hour | 0.1 $\mu g/m^3$ |

(b) This subchapter applies to a VOC or $NO_x$ facility located in or having an impact on one of the following areas and meeting the applicable requirements:

(1) For an area either classified at 40 CFR 81.339 (relating to Pennsylvania) as a moderate nonattainment area for ozone, or an area included in an ozone transport region established under section 184 of the Clean Air Act (42 U.S.C.A. § 7511c), which is either classified as a marginal or incomplete data nonattainment area for ozone or designated as an unclassifiable/attainment area for ozone, this subchapter applies to the following:

(i) A new facility with the potential to emit 100 tons or more per year of $NO_x$ or 50 tons or more per year of VOCs.

(ii) A modification to an existing facility with the potential to emit 100 tons or more per year of $NO_x$ or 50 tons or more per year of VOCs, or a new source at an existing facility resulting in an increase in the potential to emit either VOC or $NO_x$ which, when aggregated with the other emissions increases determined in accordance with § 127.211, results in an increase of 40 tons per year, 1,000 pounds per day or 100 pounds per hour of VOC or $NO_x$, or more, whichever is more restrictive.

(2) For an area classified at 40 CFR 81.339 as a serious nonattainment area for ozone, this subchapter applies to the following:

(i) A new facility with the potential to emit 50 tons or more per year of $NO_x$ or VOCs.

(ii) A modification to an existing facility with the potential to emit 50 tons or more per year of VOC or $NO_x$, or a new source at an existing facility resulting in an increase in the potential to emit either VOC or $NO_x$ which, when aggregated with the other emissions

increases determined in accordance with subsection (c)(1), results in an increase of 25 tons per year, 1,000 pounds per day or 100 pounds per hour of VOC or $NO_x$, or more, whichever is more restrictive.

(3) For an area classified at 40 CFR 81.339 as a severe nonattainment area for ozone, this subchapter applies to the following:

(i) A new facility with the potential to emit 25 tons or more per year of $NO_x$ or VOCs.

(ii) A modification to an existing facility with the potential to emit 25 tons or more per year of $NO_x$ or VOC, or a new source at an existing facility resulting in an increase in the potential to emit either VOC or $NO_x$ which, when aggregated with the other emissions increases determined in accordance with subsection (c)(1), results in an increase of 25 tons per year or 1,000 pounds per day or 100 pounds per hour of VOC or $NO_x$, or more, whichever is more restrictive.

(c) Special rules for modifications to VOC or $NO_x$ facilities located in serious and severe nonattainment areas for ozone are as follows:

(1) The applicability requirements in § 127.211 apply except as provided by this subsection. A modification to an existing facility with the potential to emit 25 tons per year or more which results in an increase in the potential to emit VOC or $NO_x$ may not be considered a de minimis increase. The requirements of this subchapter apply, if the increase in potential to emit, when aggregated with the other net emission increases in potential to emit occurring over a consecutive 5-calendar-year period exceeds 25 tons per year or 1,000 pounds per day or 100 pounds per hour, whichever is more restrictive. The consecutive 5-calendar-year period for an increase that is not considered de minimis shall include the calendar year of the modification or addition which results in the emissions increase, and may not extend beyond either January 1, 1991, or the design year of the most recent attainment demonstration, whichever is later.

(2) For a facility with the potential to emit less than 100 tons per year of VOC or $NO_x$, when a modification results in an increase—other than a de minimis increase—in emissions of VOC or $NO_x$ from a discrete operation, unit or other pollutant emitting activity at the facility, the increase shall be considered a modification unless the owner or operator elects to offset the increase by a greater reduction in emissions of VOC or $NO_x$ from other operations, units or activities within the facility at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not elect to offset at the required ratio, the change shall be considered a modification, but in the case of the modification, the BACT requirement shall be substituted for LAER. The facility shall comply with the applicable EPA requirements and shall also satisfy the Best Available Technology (BAT) requirement.

(3) For a facility with the potential to emit 100 tons per year or more of VOC or $NO_x$, when a modification at the facility results in an increase—other than a de minimis increase—in emissions of VOC or $NO_x$ from a discrete operation, unit or other pollutant emitting activity at the facility, the increase shall be considered a modification unless the owner or operator elects to offset the increase by a greater reduction in emissions of VOC

or $NO_x$ from other operations, units or activities within the facility at an internal offset ratio of at least 1.3 to 1. If the owner or operator elects to offset at the required ratio, the LAER requirement does not apply. The facility shall comply with the applicable EPA requirements and shall also satisfy the BAT requirement.

**Notes of Decisions**

*Modification to an Existing Facility*

The original potential to emit of an existing landfill is not relevant under subsection (c)(1), since the regulation only requires that net increases in the potential to emit must be aggregated with the potential to emit of the modification for the purposes of new source review; therefore, the Department of Environmental Protection was only required to consider increases in the potential to emit of the original landfill, not its total potential to emit. *Florence Township v. Department of Environmental Protection*, 1997 EHB 763.

**Cross References**

This section cited in 25 Pa. Code § 121.1 (relating to definitions); 25 Pa. Code § 127.204 (relating to emissions subject to this subchapter); 25 Pa. Code § 127.205 (relating to special permit requirements); 25 Pa. Code § 127.211 (relating to applicability determination); 25 Pa. Code § 127.212 (relating to portable facilities); and 25 Pa. Code § 127.213 (relating to construction and demolition).

## § 127.204. Emissions subject to this subchapter.

(a) In determining whether a facility exceeds the emissions rates or significance levels specified in § 127.203 (relating to facilities subject to special permit requirements), the potential emissions, actual emissions and actual emissions increase shall be determined by aggregating the emissions or emissions increases from the facilities on contiguous or adjacent properties under the common control of a person or entity. This includes emissions resulting from the following: flue emissions, stack and additional fugitive emissions, material transfer, use of parking lots and paved and unpaved roads on the facility property, storage piles and other emission generating activities resulting from operation of the new or modified facility.

(b) Secondary emissions need not be considered in determining whether a facility meets the requirements of § 127.203. If a facility is subject to § 127.203 on the basis of the direct emissions from the facility, the conditions of § 127.205 (relating to special permit requirements) shall also be met for secondary emissions.

**Notes of Decisions**

*Fugitive Emissions*

This regulation explicitly provides that potential and actual emissions include, among others, ‘‘stack and additional fugitive emissions.’’ Therefore, even though Federal rules do not provide for the inclusion of fugitive emissions, states are not precluded by the Clean Air Act (42 U.S.C.A.) or its regulations from providing more stringent

requirements for air pollution control. In determining volatile organic compound emissions from the landfill and expansion for the purpose of determining whether Pennsylvania's new source review requirements apply, it is appropriate to include fugitive emissions. *Florence Township v. Department of Environmental Protection*, 1996 EHB 1399.

## § 127.205. Special permit requirements.

The Department will not issue a plan approval, or an operating permit, or allow continued operations under an existing permit or plan approval unless the applicant demonstrates that the following special requirements are met:

(1) A new or modified facility subject to this subchapter shall comply with LAER. In cases where a facility is composed of several sources, only sources which are new or which are modified shall be required to implement LAER.

(i) A project that does not commence construction within 18 months of the date specified in the plan approval shall be reevaluated for its compliance with LAER before the start of construction.

(ii) A project that discontinues construction for 18 months or more after construction is commenced shall be reevaluated for its compliance with LAER before resuming construction.

(iii) A project that does not complete construction within the time period specified in the plan approval shall be reevaluated for its compliance with LAER.

(iv) A project that is constructed in phases shall be reevaluated for its compliance with LAER if there is a delay of greater than 18 months beyond the projected and approved commencement date for each independent phase.

(2) Each facility located within this Commonwealth which meets or exceeds the threshold limits contained in § 127.203 (relating to facilities subject to special permit requirements), which is owned or operated by the applicant, or by an entity controlling, controlled by or under common control with the applicant, and which is subject to emissions limitation shall be in compliance, or on a schedule for compliance approved by the Department in a plan approval or permit, with the applicable emissions limitation and standards contained in this article. A responsible official of the applicant shall certify as to the facilities' compliance in writing on a form provided by the Department.

(3) Each modification to a facility which meets the requirements of and is subject to § 127.203 shall offset, in accordance with § § 127.210 and 127.211 (relating to offset ratios; and applicability determination), the total of the net increase in potential to emit.

(4) Each new facility which meets the requirements of and is subject to § 127.203 shall offset the potential to emit of that facility with ERCs in accordance with § 127.210.

(5) For a new or modified facility with potential emissions exceeding significance levels or otherwise meeting the requirements of § 127.203, an analysis shall be conducted of

alternative sites, sizes, production processes and environmental control techniques for the proposed facility, which demonstrates that the benefits of the proposed facility significantly outweigh the environmental and social costs imposed within this Commonwealth as a result of its location, construction or modification.

(6) In the case of a new or modified facility which is located in a nonattainment area, and within a zone, identified by the EPA Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, emissions of a pollutant resulting from the proposed new or modified facility may not cause or contribute to emission levels which exceed the allowance permitted for the pollutant for the area from new or modified facilities in the SIP.

**Cross References**

This section cited in 25 Pa. Code § 127.204 (relating to emissions subject to this subchapter); 25 Pa. Code § 127.206 (relating to ERC general requirements); 25 Pa. Code § 127.211 (relating to applicability determination); and 25 Pa. Code § 127.213 (relating to construction and demolition).

## § 127.206. ERC general requirements.

(a) Emissions reductions banked prior to January 1, 1991, may not be used as ERCs for emission offsets. ERCs generated prior to January 1, 1991, which meet the requirements of this subchapter for ERCs and are approved by the Department may be used in applicability determinations conducted in accordance with § 127.211 (relating to applicability determination) for netting purposes, if the ERCs are treated as new source growth and offset at the applicable ratio specified in § 127.210 (relating to offset ratios).

(b) The EQB may, by regulation and upon notice in the *Pennsylvania Bulletin* and opportunity for public comment, proportionally reduce the quantity of registered ERCs not previously included in a plan approval, or may halt transfer activity, in a nonattainment area or throughout this Commonwealth only as necessary when the other measures required by the Clean Air Act and the act may fail to achieve NAAQS or SIP requirements.

(c) ERCs shall be proportionally reduced prior to use in a plan approval in an amount equal to the reductions that the generating facility is or would have been required to make in order to comply with new requirements promulgated by the Department or the EPA, which apply to the generating facility after the ERCs were created.

(d) The Department may issue a plan approval for the construction of a new or modified facility which satisfies the offset requirements specified in § 127.205(3) and (4) (relating to special permit requirements) under the following conditions:

(1) The application for a plan approval demonstrates that the proposed facility either has or will secure the appropriate ERCs which are suitable for use at the specific facility. The ERCs shall be identified in a Department approved and Federally enforceable permit condition for the ERC generating source. The permit condition will provide that the

ERCs are properly generated, certified by the Department and processed through the registry no later than the date approved by the Department for commencement of operation of the proposed new or modified facility.

(2) The proposed new or modified facility may not commence operation or increase emissions until the required emissions reductions are certified by the Department.

(e) ERCs generated by the overcontrol of emissions by an existing facility will not expire for use as offsets. The use of these ERCs in applicability determinations for netting purposes is limited to the period specified in § 127.211.

(f) ERCs generated by the curtailment or shutdown of a facility which are not included in a plan approval and used as offsets will expire for use as offsets 10 years after the date the facility ceased emitting the ERC generating emissions. The use of these ERCs in applicability determinations for netting purposes is limited to the period specified in § 127.211.

(g) The expiration date of ERCs may not extend beyond the 10-year period allowed by subsection (f), if the ERCs are included in a plan approval but are not used and are subsequently reentered in the registry.

(h) ERCs which are included in a plan approval issued by the Department for a new or modified facility which is never operated may be reentered in the registry if the ERCs are no longer required by the plan approval. Applicable discounts in subsections (b) and (c) shall be applied when the ERCs are reentered in the registry.

(i) ERCs may not be used to achieve compliance with RACT, BAT, NSPS, BACT, LAER or other emissions limitations required by the Clean Air Act or the act.

(j) ERCs may not be entered into the ERC registry until the emissions reduction generating the ERCs has been certified by the Department in accordance with the criteria for ERC generation and creation contained in § 127.207 (relating to ERC generation and creation), with the following qualifications:

(i) ERCs may not be generated for emissions in excess of those previously identified in required emission statements and for which applicable emission fees have been paid.

(ii) Emissions reduction at a facility occurring after January 1, 1991, but prior to January 15, 1994 may be used to generate ERCs, if a complete ERC registry application is submitted to the Department by May 16, 1994.

(k) A major facility which, due to reductions in the maximum allowable emissions rates, including reductions made to generate ERCs, no longer meets the criteria in § 127.203 will continue to be treated as a major facility.

(l) ERCs may not be traded to facilities under different ownership until the emissions reduction generating the ERCs is made Federally enforceable. A facility which is not subject to Title V permit requirements under the Clean Air Act will require EPA approval in the form of a SIP revision which incorporates the required permit modification

reflecting the reduced emissions limitation of the generating facility.

(m) ERCs may not be created for an emissions reduction previously used in an applicability determination for netting purposes nor for an emissions decrease used to create an alternative emissions limitation.

(n) ERCs transferred from one facility to another may not be transferred to a third party, except as provided in subsection (h).

(o) An ERC created for a regulated criteria pollutant shall only be used for offsetting or netting an emissions increase involving the same criteria pollutant.

(p) A source or facility which has registered ERCs with the Department may not exceed the emissions limitation or violate other permit conditions established in generating the ERCs.

**Cross References**

This section cited in 25 Pa. Code § 127.208 (relating to ERC use and transfer requirements); and 25 Pa. Code § 127.209 (relating to ERC registry system).

## § 127.207. ERC generation and creation.

ERC generation and creation may occur under the following conditions:

(1) ERCs shall be surplus, permanent, quantified and Federally enforceable as follows:

(i) *Surplus*. ERCs shall be included in the current emission inventory, and may not be required by or be used to meet past or current SIP, attainment demonstration, RFP, emissions limitation or compliance plans. Emission reductions necessary to meet NSPS, LAER, RACT, Best Available Technology (BAT), BACT and permit or plan approval emissions limitations or another emissions limitations required by the Clean Air Act or the act may not be used to generate ERCs.

(ii) *Permanent*. ERCs generated from emissions reductions which are Federally enforceable through an operating permit or a revision to the SIP and assured for the life of the corresponding increase, whether unlimited or limited in duration, are considered permanent. Emissions limitations and other restrictions imposed on a permit as a result of ERC generation shall be carried over into each successive permit issued to that facility. MERCs and other ERCs generated pursuant to an approved economic incentive program shall be permanent within the time frame specified by the program.

(iii) *Quantified*. ERCs shall be quantified in a credible, workable and replicable method consistent with procedures promulgated by the Department and the EPA.

(iv) *Enforceable*. ERCs shall be Federally enforceable, regulated by Federal or SIP emissions limitation, such as a limit on potential to emit in the permit, and be generated from a plan approval, economic incentive program or permit limitation.

(2) For facilities subject to this subchapter, an ERC registry application shall be

submitted to the Department within 1 year of the initiation of an emissions reduction used to generate ERCs. Facilities or sources not subject to this subchapter shall submit a registry application and receive Department approval prior to the occurrence of an emissions reduction.

(3) An ERC registry application shall include the following information:

(i) The name of the owner and operator of the source or facility.

(ii) The intended use of the ERCs, including information as to whether the ERCs are to be used for netting, internal offsetting or trading purposes.

(iii) The intended or actual date of initiation of emission reductions.

(iv) A description of the emission reduction techniques used to generate the ERCs.

(v) Full characterization of the emissions reductions using a protocol approved by the Department, including the following:

(A) Requirements and methods specified by EPA emission regulations and trading policies.

(B) Information concerning tests and related emission quantification methods specified in Chapter 139 (relating to sampling and testing) and other Department and EPA approved test methods and sampling procedures.

(C) The amounts, rates, hours, seasonal variations, annual emission profile and other data necessary to determine the ambient impact of the emissions.

(D) Compliance and verification methods.

(vi) Other information required by the Department to properly certify the ERCs.

(vii) For an ERC generating source or facility located outside of this Commonwealth, the name of the Pennsylvania agent authorized to accept service of process, and a statement that the applicant accepts the jurisdiction of this Commonwealth for purposes of regulating the ERCs registered with the Department.

(4) In establishing the baseline used to calculate ERCs, the Department will consider emission characteristics and operating conditions which include, at a minimum, the emission rate, capacity utilization, hours of operations and seasonal emission rate variations, in accordance with the following:

(i) The baseline emissions rate will be determined as follows:

(A) The average actual emissions or allowable emissions, whichever is lower, shall be calculated over the 2 calendar years immediately preceding the emissions reduction which generates the ERCs.

(B) When the Department determines that the 2-year period immediately preceding the

emissions reduction is not representative of the normal emission rates or characteristics of the existing facility, the Department may specify a different 2-year period if that period of time or other conditions are representative of normal operations occurring within the preceding 5 calendar years. If the existing facility has been in operation for fewer than 2 years, the Department will determine the baseline emissions rate based on a shorter representative period when the facility was in operation.

(ii) The baseline emissions rate may not exceed the emissions in the emission statements required by Chapter 135 (relating to reporting of sources), for which fees have been paid.

(iii) The baseline emissions rate will not exceed the allowable emissions rate including RACT requirements in force at the time the ERC registry application is submitted. The allowable emissions rate will be based on the emissions limitation in this article or a permit limitation or another more stringent emissions limitation required by the Clean Air Act or the act, whichever is more restrictive. The Department will consider only complete applications and will apply the requirements in effect at that time in determining the emission reduction achieved.

(5) Acceptable emissions reduction techniques which an applicant may use to generate ERCs are limited to the following:

(i) Shutdown of an existing facility occurring after January 1, 1991, pursuant to the issuance of a new permit or permit modification which is not otherwise required to comply with the Clean Air Act or the act.

(ii) Permanent curtailment in production or operating hours of an existing facility operating in accordance with a new permit or a permit modification if the curtailment results in an actual emissions reduction and is not otherwise required to comply with the Clean Air Act or the act.

(iii) Improved control measures, including improved control of fugitive emissions, which decrease the actual emissions from an existing facility to less than that required by the most stringent emissions limitation required by the Clean Air Act or the act and which is reflected in a new permit or a permit modification.

(iv) New technology and materials or new process equipment modifications which are not otherwise required by the Clean Air Act or the act.

(v) The incidental emissions reduction of nonhazardous air pollutants resulting from statutorily required reductions of hazardous air pollutants, or the emissions reduction of nonhazardous air pollutants which are incidental to the excess early emissions reduction of hazardous air pollutants listed in section 112(b)(1) of the Clean Air Act (42 U.S.C.A. § 7412(b)(1)), if the reduction meets the other requirements of this section.

(vi) For facilities or sources not subject to this subchapter, a MERC program or another Economic Incentive Program which meets the requirements of this subchapter and which is approved by the EPA as a SIP revision.

(A) The program shall comply with the following requirements:

(I) The program shall be consistent with the Clean Air Act and the act.

(II) ERCs shall be quantifiable and enforceable at both the Federal and State levels.

(III) ERCs shall be consistent with SIP attainment and RFP demonstrations.

(IV) ERCs shall be surplus to other Federal and State regulations relied upon in an applicable attainment plan or demonstration or credited in an RFP or milestone demonstration.

(V) ERCs shall be permanent within the time frame specified by the program.

(B) The program shall contain the following elements:

(I) A clearly defined purpose and goals and an incentive mechanism that can rationally be related to accomplishing the goals.

(II) A clearly defined scope, which identifies affected sources and assures that the program will not interfere with other applicable regulatory requirements.

(III) A program baseline from which projected program results, including quantifiable emission reductions, can be determined.

(IV) Credible, workable and replicable procedures for quantifying emissions or emission-related parameters.

(V) Source requirements, including those for monitoring, recordkeeping and reporting, that are consistent with specified quantification procedures and allow for compliance certification and enforcement.

(VI) Projected program results and methods for accounting for compliance and program uncertainty.

(VII) An implementation schedule, administrative system and enforcement provisions adequate for ensuring Federal and state enforceability of the program.

(VIII) Audit procedures to evaluate program implementation and track results.

(IX) Reconciliation procedures to trigger corrective or contingency measures to make up a shortfall between the projected emissions reduction and the emissions reduction actually achieved.

(6) Methods for initial quantification of ERCs and verification of the required emissions reduction include the following:

(i) The use of existing continuous emission monitoring data, operational records and other documentation which provide sufficient information to quantify and verify the required emissions reduction.

(ii) For a facility which does not have Department approved data collection or quantification procedures to characterize the emissions, the use of prereduction and postreduction emission tests. Emission tests used to establish emission data shall be conducted in accordance with the requirements and procedures specified in 40 CFR Part 51, Appendix S (relating to emission offset interpretive ruling) and Chapter 139, and other applicable Federal and state requirements.

(iii) For facilities for which emissions rates vary over time, a Department approved alternative method for quantifying the reduction and ensuring the continued emissions reduction, if the method is approved by the EPA.

(7) The reduced emissions limitation of the new or modified permit of the source or facility generating the ERC shall be continuously verified by Department, local air pollution control agency or other State approved compliance monitoring and reporting programs. Onsite inspections will be made to verify shutdowns. If equipment has not been dismantled or removed, the owner or operator shall on an annual basis certify to the Department the continuance of the shutdown.

**Cross References**

This section cited in 25 Pa. Code § 127.206 (relating to ERC general requirements); 25 Pa. Code § 127.209 (relating to ERC registry system); 25 Pa. Code § 127.211 (relating to applicability determination).

## § 127.208. ERC use and transfer requirements.

The use and transfer of ERCs shall meet the following conditions:

(1) The registry system established by § 127.209 (relating to ERC registry system) shall be used to transfer ERCs, with the Department's approval, directly from an existing source or facility where the ERCs were generated to the proposed facility.

(2) The transferee shall secure approval to use the offsetting ERCs through a plan approval which indicates the Department approval of the ERC transfer and use. Upon the issuance of a plan approval, the ERCs are no longer subject to expiration under § 127.206(f) (relating to ERC general requirements) except as specified in § 127.206(g).

(3) For the pollutants regulated under this subchapter, the facility shall demonstrate to the satisfaction of the Department that the ERCs proposed for use as offsets will provide, at a minimum, ambient impact equivalence to the extent equivalence can be determined and that the use of the ERCs will not interfere with the overall control strategy of the SIP.

(4) ERCs shall include the same conditions, limitations and characteristics, including seasonal and other temporal variations in emission rate and quality, as well as the maximum allowable emission rates the emissions would have had if emitted by the generator, unless equivalent ambient impact is assured through other means.

(5) ERCs may be obtained from or traded in another state, which has reciprocity with the

Commonwealth for the trading and use of ERCs, only upon the approval of both the Commonwealth and the other state through SIP approved rules and procedures, including an EPA approved SIP revision. ERCs generated in another state may not be traded into or used at a facility within this Commonwealth unless the ERC generating facility's ERCs are enforceable by the Department.

(6) ERCs may not be transferred to and used in an area with a higher nonattainment classification than the one in which they were generated.

(7) A facility proposing new or increased emissions shall demonstrate that sufficient offsetting ERCs at the ratio specified in § 127.210 (relating to offset ratios) have been acquired from within the nonattainment area of the proposed facility.

(8) If the facility proposing new or increased emissions demonstrates that ERCs are not available in the nonattainment area where the facility is located, ERCs may be obtained from another nonattainment area if the other nonattainment area has an equal or higher classification and if the emissions from the other nonattainment area contribute to an NAAQS violation in the nonattainment area of the proposed facility. In addition, the requirements of paragraph (3) shall be satisfied.

(9) For a VOC or $NO_x$ facility, the use and transfer of ERCs shall comply with the following:

(i) For the purpose of emissions offset transfers, the areas included within an ozone transport region established under section 184 of the Clean Air Act (42 U.S.C.A. § 7511c), which are designated in 40 CFR 81.339 as attainment areas or unclassifiable areas for ozone shall be treated as a single nonattainment area.

(ii) A facility shall acquire ERCs for use as offsets from an ERC generating facility located within the same nonattainment area.

(iii) An exception to the requirement of subparagraph (ii) may be granted to allow the acquisition of ERCs from a facility located outside the nonattainment area, but within either 2 days transport upwind or within 200 kilometers of the using facility, if the ERCs are obtained from another nonattainment area with an equal or higher classification and if the emissions from the other nonattainment area contribute to an NAAQS violation in the nonattainment area of the proposed facility. The facility shall demonstrate to the Department's satisfaction that the ERC generating facilities located in the nonattainment area were investigated and no suitable ERCs were available, and that the ERCs meet the 2-day transport upwind requirement.

**Notes of Decisions**

*Agency Interpretation*

Because the Department of Environmental Protection is more likely to develop expertise in assessing the effect of regulatory interpretations than the Environmental Hearing Board, it is presumed that the General Assembly intended to invest the Department, and not the EHB, with authoritative interpretive powers. *Department of Environmental*

*Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002).

*Commencement of Time*

Although the interpretation of § 127.207(2) (relating to ERC generation and creation) that the commencement of the 1-year period for emissions begins to run at the initiation of emissions reduction rather that at the time the operator makes the decision to reduce emissions is reasonable, it was error not to consider whether that section is invalid because it is more stringent than Federal law. *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002).

**Cross References**

This section cited in 25 Pa. Code § 127.209 (relating to ERC registry system).

## § 127.209. ERC registry system.

(a) The Department will establish an ERC registry system to track ERCs which have been created, transferred and used in accordance with the requirements of this subchapter. Prior to registration of the ERCs, the Department will review and approve the ERC registry application to verify compliance with this subchapter. Registration of the ERCs in the registry system will constitute certification that the ERCs satisfy the requirements of this subchapter and are available for use.

(b) The Department will maintain supporting documentation, including plan approval or permit decisions, registry applications and other items required to sufficiently characterize the emissions, which will allow the Department and potential users to determine if the ERCs are suitable for use at a specific facility.

(c) As part of the new source review process, the Department will provide the EPA and the public with notice of plan approval applications proposing to use ERCs.

(d) The Department will process each ERC registry application, permit modification and plan approval application, including those involving netting transactions, which contain a change in allowable emission rates, through the registry system to verify the information and to ensure that the requirements of § § 127.206—127.208 (relating to ERC general requirements; ERC generation and creation; and ERC use and transfer requirements) have been met, including the requirement that the required reductions have been made and certified before registry entries or changes are made.

(e) Registry operations and procedures are as follows:

(1) The registry will list the ERCs, and the Department will publish the list of registered ERCs available for trading purposes in the *Pennsylvania Bulletin* on a quarterly basis.

(2) The registry will list ERCs by criteria pollutants and identify the nonattainment areas in which the ERCs were generated. The registry will identify ERCs that are available for use and that are in use.

(3) The ERC creation date entered in the registry will reflect the anticipated date of emissions reduction and will be amended as necessary to reflect the actual emissions reduction date.

(4) Upon issuance of a plan approval allowing the use of ERCs entered in the registry, the following registry transactions will occur:

(i) The registry will identify the remaining ERCs available for use, if any, after the transaction. The ERC expiration date will be included for ERCs generated under § 127.207(5)(i) and (ii).

(ii) The registry will indicate the effective date, the quantity of used ERCs, the originating generator and the ERC creation date, which is the date of actual or anticipated emissions reduction by the ERC generating facility.

**Cross References**

This section cited in 25 Pa. Code § 127.208 (relating to ERC use and transfer requirements).

## § 127.210. Offset ratios.

The emission offset ratios for ERC transactions subject to the requirements of this subchapter shall be in an amount equal to or greater than the ratios specified in the following table:

***Required Emission Reductions From Existing Sources***

| | ***Flue Emissions*** | ***Fugitive Emissions*** |
|---|---|---|
| **Particulate Matter, PM-10 and $SO_x$** | | |
| **Primary Nonattainment Areas** | **1.3:1** | **5:1** |
| **Secondary Nonattainment Areas** | **1.1:1** | **3:1** |
| **Volatile Organic Compounds** | | |
| **Ozone Classification Areas** | | |
| **Severe Areas** | **1.3:1** | **1.3:1** |
| **Serious Areas** | **1.2:1** | **1.3:1** |

| | | |
|---|---|---|
| **Moderate Areas** | **1.15:1** | **1.3:1** |
| **Marginal/Incomplete Data Areas** | **1.15:1** | **1.3:1** |
| **Transport Region** | **1.15:1** | **1.3:1** |
| **$NO_x$** | | |
| **Ozone Classification Areas** | | |
| **Severe Areas** | **1.3:1** | **1.3:1** |
| **Serious Areas** | **1.2:1** | **1.2:1** |
| **Moderate Areas** | **1.15:1** | **1.15:1** |
| **Marginal/Incomplete Data Areas** | **1.15:1** | **1.15:1** |
| **Transport Region** | **1.15:1** | **1.15:1** |
| **Carbon Monoxide** | | |
| **Primary Nonattainment Areas** | **1.1:1** | **1.1:1** |
| **Lead** | **1.1:1** | **1.1:1** |

**Cross References**

This section cited in 25 Pa. Code § 127.205 (relating to special permit requirements); 25 Pa. Code § 127.206 (relating to ERC general requirements); 25 Pa. Code § 127.208 (relating to ERC use and transfer requirements); 25 Pa. Code § 127.211 (relating to applicability determination).

## § 127.211. Applicability determination.

(a) An applicability determination will establish whether:

(1) A modification which results in an emissions rate increase or the emission of pollutants not previously emitted at an existing major facility for particulate matter, PM-10 precursors, PM-10, $SO_x$, CO or lead emissions, located in or impacting a nonattainment area for these criteria pollutants, is a major modification under § 127.203 (relating to facilities subject to special permit requirements) and is subject to the new source review requirements of this subchapter.

(2) A modification which results in an emissions rate increase or the emission of pollutants not previously emitted at an existing major facility of VOC or $NO_x$ emissions,

located in or impacting a moderate nonattainment area for ozone, or an area included within an ozone transport region and designated as either a marginal or incomplete data nonattainment area or as an unclassifiable/attainment area for ozone, is a major modification under § 127.203 and is subject to the new source review requirements of this subchapter.

(3) A modification which results in an emissions rate increase or the emission of pollutants not previously emitted at an existing major facility of VOC or $NO_x$ emissions, located in or impacting a serious or severe nonattainment area for ozone is a major modification under § 127.203 and is subject to the new source review requirements of this subchapter, except as modified by the requirements in § 127.203(c).

(b) The Department will conduct an applicability determination during its review of a plan approval application for a proposed modification which results in an increase in allowable emissions to determine the amount of the net increase in accordance with the following:

(1) For a proposed de minimis increase the proposed increase will be summed with those emission increases and decreases occurring after January 1, 1991.

(2) For a proposed increase which equals or exceeds an emissions rate threshold or significance level specified in § 127.203, the proposed increase will be summed with those emissions increases and decreases that occurred within the contemporaneous period which begins 5 years before commencement of construction of the proposed modification and ends with the date that the emission increase from the modification occurs. Notwithstanding the requirement to begin the contemporaneous period 5 years before construction, the period may not begin prior to January 1, 1991, or the design year of the most recent attainment demonstration, whichever is later.

(3) The following procedures will apply in determining the amount of emissions increases and decreases to be summed:

(i) If a facility's maximum allowable emissions rate has not been established, the rate will be calculated for purposes of the applicability determination.

(ii) The increase in potential to emit for each proposed modification or new source will be used to set an allowable emissions rate for the modified or new facility. The allowable rate increase will be treated as an increase in the maximum allowable emissions rate for the facility.

(iii) Other increases and decreases in allowable emission rates at a facility which occur within the applicable time period are creditable in accordance with the following:

(A) Increases in the allowable rates shall be factored into the facility maximum allowable emissions rate.

(B) A decrease in an allowable emissions rate is not creditable unless the following conditions are met:

(I) The emissions reduction credit provisions in § 127.207(1) and (3)—(7) (relating to ERC generation and creation) have been complied with, and the decrease is Federally enforceable by the time that actual construction begins on the modification. The plan approval for the modification will contain a provision specifying that the emissions decrease is Federally enforceable on or before the date of commencement of construction. The facility owner or operator shall certify in writing that the reductions were not relied on for a previous applicability determination or to generate ERCs.

(II) The emissions decrease is such that when compared with the proposed increase there is no significant change in the character of emissions, including seasonal emission patterns, stack heights or hourly emission rates. A significant change in the character of emissions means a change resulting in an increase in emissions equal to or greater than an emissions rate threshold or an impact in excess of a significance level as specified in § 127.203. For VOC and $NO_x$ during the ozone season, the portion of the annual emissions rate threshold specified in § 127.203 which as a percentage occurs during the ozone season may not be exceeded.

(III) The emission decrease represents approximately the same qualitative significance for public health and welfare as attributed to the proposed increase. This requirement is satisfied if the emission rate thresholds and significance levels contained in § 127.203 are not exceeded.

(C) An emissions reduction or an ERC generated at the facility may be used as a creditable decrease in an applicability determination. A portion of an ERC generated at another facility, acquired by trade and incorporated in a plan approval for use at the facility will not be credited as an emissions decrease in an applicability determination.

(D) ERCs which the facility has generated and registered are not creditable as reductions in an applicability determination unless the ERCs are withdrawn from the registry.

(E) A creditable emissions decrease which occurred prior to January 1, 1991, or the design year of the most recent attainment demonstration, whichever is later, and within the contemporaneous period of the proposed increase will be treated as new source growth and discounted in accordance with the applicable nonattainment area ratio in § 127.210 (relating to offset ratios).

(iv) An emissions increase that results from a physical change at a facility occurs when the unit on which construction occurred becomes operational and begins to emit a criteria pollutant. A replacement unit that is allowed a shakedown period becomes operational at the end of the approved shakedown period, which may not exceed 180 days.

(c) The new source review requirements of this subchapter apply to:

(1) A facility at which the proposed emissions increase and the net increase in the facility maximum allowable emissions rate as determined under subsection (b) meet or exceed the applicable threshold limits in § 127.203. A decrease in a facility maximum allowable emissions rate will not qualify as a decrease for purposes of this section when a facility petitions for a decrease in its maximum allowable emissions rate through a permit

restriction unless the conditions of subsection (b)(3)(iii) are met.

(2) A facility which was deactivated for a period in excess of 1 year and is not in compliance with the reactivation requirements of § 127.215 (relating to reactivation).

(3) A source which has netted out of new source review by applying emissions reduction or ERCs generated by another source at the facility, if the emissions reduction or ERC generating source subsequently increases its allowable emissions unless the facility generates sufficient additional emissions reductions or ERCs equal to the proposed increase at the ERC generating source.

(d) For a proposed emissions increase that is subject to the new source requirements under subsection (c), the requirements of § 127.205 (relating to special permit requirements) are applicable in the following manner:

(1) Emissions offsets shall be required for the entire net emissions increase which occurred over the contemporaneous period except to the extent that offsets or other reductions were previously applied against increases in an earlier applicability determination.

(2) LAER applies to the proposed modification which results in an increase in emissions, and to subsequent or previous modifications which result in emissions increases that are directly related to and normally included in the project associated with the proposed modification and which occurred within the contemporaneous period of the proposed emissions increase.

(e) For a proposed de minimis increase in which the net emissions increase since January 1, 1991, meets or exceeds the threshold limits in § 127.203, only the emissions offset requirements in § 127.205(3) apply to the net emissions increase.

(f) The new source review requirements of this subchapter do not apply to:

(1) A facility at which a proposed major modification results in a net increase in the maximum allowable emission rate as determined under subsection (b) which does not meet or exceed the applicable threshold limits in § 127.203.

(2) A facility at which a proposed de minimis increase results in a net emissions increase since January 1, 1991, which as determined under subsection (b) does not meet or exceed the applicable threshold limits in § 127.203.

**Cross References**

This section cited in 25 Pa. Code § 127.203 (relating to facilities subject to special permit requirements); 25 Pa. Code § 127.205 (relating to special permit requirements); and 25 Pa. Code § 127.206 (relating to ERC general requirements).

## § 127.212. Portable facilities.

(a) A portable $SO_x$, particulate matter, PM-10 precursor, PM-10, lead or CO facility subject to this subchapter which will be relocated within 6 months of the commencement of operation to a location within an attainment area which does not have an impact on a nonattainment area at or above the significance levels contained in § 127.203 (relating to facilities subject to special permit requirements) shall be exempt from this subchapter. A facility which subsequently returns to a location where it is subject to this subchapter shall comply with this subchapter.

(b) A portable VOC or $NO_x$ facility subject to this subchapter which will be relocated outside of this Commonwealth within 6 months of the commencement of operation shall be exempt from this subchapter. A facility which subsequently returns to a location in this Commonwealth where it is subject to this subchapter shall comply with this subchapter.

## § 127.213. Construction and demolition.

(a) Emissions from construction or demolition activities will be exempt from § 127.205 (relating to special permit requirements) if BACT is used during the construction or demolition period.

(b) Emissions from construction and demolition activities may not be considered under § 127.203 (relating to facilities subject to special permit requirements).

## § 127.214. Exemption.

The special permit requirements of this subchapter may be waived for modifications to an existing facility through a plan approval application which demonstrates to the satisfaction of the Department that:

(1) The capital expenditure is being made with the primary purpose of achieving compliance with a new, more stringent regulation than was previously applicable, and will bring the facility into compliance with the new regulation.

(2) The maximum allowable emissions from the facility itself or a discrete operation, unit or other pollutant emitting activity at the facility will not increase.

## § 127.215. Reactivation.

(a) A facility which has been out of operation or production for 1 year or more during the term of its operating permit may be reactivated within the term of its operating permit and will not be considered a new facility subject to this subchapter if the following conditions are satisfied:

(1) The permittee shall within 1 year of the deactivation submit to the Department and implement a maintenance plan which includes the measures to be taken, including maintenance, upkeep, repair or rehabilitation procedures, which will enable the facility to

be reactivated in accordance with the terms of the permit.

(2) The permittee shall submit a reactivation plan at least 30 days prior to the proposed date of reactivation. The reactivation plan shall include sufficient measures to ensure that the facility will be reactivated in compliance with the permit requirements. The permittee may submit a reactivation plan to the Department at any time during the term of its operating permit. The reactivation plan may also be submitted to and approved by the Department as part of the plan approval or permit application process.

(3) The permittee shall submit a notice to the Department within 1 year of deactivation requesting preservation of the emissions in the inventory and indicating the intent to reactivate the facility.

(4) The permittee shall comply with the terms and conditions of the maintenance plan while the facility is deactivated, and shall comply with the terms and conditions of the reactivation plan and the operating permit upon reactivation.

(5) The permittee with an approved reactivation plan shall notify the Department in writing at least 30 days prior to reactivation of the facility.

(b) The Department will approve or disapprove the complete reactivation plan within 30 days of plan submission, unless additional time is required based on the size or complexity of the facility.

(c) For a facility which is deactivated in accordance with subsection (a), ERCs may be created only if an ERC registry application is filed within 1 year of deactivation.

**Cross References**

This section cited in 25 Pa. Code § 127.11 (relating to plan approval requirements); 25 Pa. Code § 127.11a (relating to reactivation of sources); 25 Pa. Code § 127.13 (relating to extensions); and 25 Pa. Code § 127.211 (relating to applicability determination).

## § 127.216. Circumvention.

Regardless of the exemptions provided in this subchapter, an owner or other person may not circumvent this subchapter by causing or allowing a pattern of ownership or development, including the phasing, staging, delaying or engaging in incremental construction, over a geographic area of a facility which, except for the pattern of ownership or development, would otherwise require a permit or submission of a plan approval application.

## § 127.217. Clean Air Act Titles III—V applicability.

Compliance with this subchapter does not relieve a source or facility from complying with Titles III—V of the Clean Air Act (42 U.S.C.A. § § 7601—7627; 7641, 7642 and 7651—7651o; and 7661—7661f).