

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §101.1, Definitions, §101.350, Definitions, §101.352, General Provisions, §101,353, Allocation of Allowances, §101.354, Allowance Deductions, §101.356, Allowance Banking and Trading, §101.360, Level of Activity Certification, §101.370, Definitions; §101.372, General Provisions; §101.373, Protocols; and new §101.363, Program Audits and Reports. The amended and new sections will be submitted to the United States Environmental Protection Agency (EPA) as proposed revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On December 6, 2000, the commission adopted amendments to Chapter 101, General Air Quality Rules, that established a program for the trading of nitrogen oxides (NO_x) emission allowances in the Houston/Galveston (HGA) ozone nonattainment area. The trading of these allowances takes place under an area-wide cap on NO_x emissions established under the SIP in order to meet the national ambient air quality standard (NAAQS) for ozone. Each allowance is equal to the emission of one ton of NO_x per year. The program requires incremental reductions in NO_x emissions every year beginning in calendar year 2003 and continuing through calendar year 2007, when the full reductions of the program are to be achieved.

HGA is a severe ozone nonattainment area. When fully implemented the program will place stringent area-wide limits on the emission of NO_x from stationary sources, and the trading program is intended to provide as much flexibility in meeting these limits as possible. Following adoption of the program, the agency has continued discussions to determine the most effective way to implement the reduction and

trading programs as smoothly and economically as possible while meeting emission reduction goals.

The agency also continues to evaluate its own procedures used to implement the program for efficiency and effectiveness. These proposed amendments are the result of these discussions and evaluations and also would correct outdated references and citations.

SECTION BY SECTION DISCUSSION

The proposed amendments to §101.1 would remove outdated references to §101.29, Emission Banking and Trading, which was repealed on December 6, 2000, and would replace them with references to Chapter 101, Subchapter H, Division 1.

The proposed amendments to §101.350(9) change the definition of Level of activity to apply to facilities instead of sources. The proposed amendments also remove the requirement that the units used to determine level of activity have a direct correlation with the economic output and emission rate of the source. The level of activity is only one factor used to determine allowance allocation and is not an emission rate. These changes are proposed to ensure the use of consistent terms and to clarify the current interpretation of the defined term.

The proposed amendments to §101.352 would specify that only an owner or operator of a facility may certify emission reductions from the facility as emission reduction credits (ERCs), if approved by the executive director and the owner or operator meets all the requirements of Chapter 101, Subchapter H, Division 1, Emission Credit Banking and Trading. This language would clarify who may apply for certification.

The proposed amendments to §101.353(a) correct typographical errors in the variables of the allocation equation and replace the term “source” with “facility.” The commission would also add a more complete reference to §117.10(13)(A)(iii), Definitions, in variable (3)(A) of the equation.

The proposed amendments to the figure in §101.353(a), variable (3)(A), adjust the factors for allocation of allowances to boilers, auxiliary steam boilers, and stationary gas turbines within an electric power generating system. The adjustment would result in the allocation of allowances consistent with the following: 44% reduction beginning April 1, 2003; 88% reduction beginning April 1, 2004; and 90% reduction of NO_x emissions from these facilities by April 1, 2007. The commission’s analysis of the air quality situation in the HGA area indicates that this reduction, along with reductions in NO_x from other sources and from grandfathered facilities in east Texas, will result in attainment of the NAAQS for ozone in the HGA area.

The commission also proposes a new set of factors in a new variable (3)(B) for boilers, auxiliary steam boilers, and stationary gas turbines within an electric power generating system. These factors would become effective if the executive director determines that the science confirms the benefit from the mid-course review process. This process will involve a thorough evaluation of all modeling, inventory data, and other tools and assumptions used to develop the attainment demonstration. It will also include the ongoing assessment of new technologies and innovative ideas to incorporate into the plan. If such benefit is confirmed, then it is the intent of the commission to implement such a program through a SIP revision which will first offset NO_x reductions from industrial sources down to the 80% (535 tons per day (tpd)) level. The commission, in its discretion, may allocate any additional benefit beyond 80% to

other SIP strategies and/or to the point source NO_x control strategy. Based upon current analysis, this 80% from utility and non-utility sources would result in a total reduction of not less than 535 tpd of NO_x emissions from industrial sources in the HGA area. This alternative schedule would provide for overall reductions of NO_x emitted from these facilities by 44% by April 1, 2003 and 88% by April 1, 2004.

The proposed amendments to §101.353(a)(3)(C) would adjust the allowance allocation schedule for non-utility facilities by requiring annual reductions in allowances to be spread over a five-year period, thus requiring smaller annual reductions. The commission proposes this adjustment to allow the affected industries more options for planning and implementing incremental reductions in emissions. The proposed amendments would not affect the April 1, 2007 date of final allocation levels, nor would it increase final allocations or change the final emission reductions as required by the SIP. The formulas in §101.353(a), variable (3)(C) would provide for overall reductions of NO_x emitted from non-utility facilities by 35% by April 1, 2004; 60% by April 1, 2005; 70% by April 1, 2006; and 90% by April 1, 2007.

The commission also proposes a new set of factors in a new variable (3)(D) for non-electric utility facilities. These factors would become effective if the executive director determines that the science confirms the benefit from the mid-course review process. This process will involve a thorough evaluation of all modeling, inventory data, and other tools and assumptions used to develop the attainment demonstration. It will also include the ongoing assessment of new technologies and innovative ideas to incorporate into the plan. If such benefit is confirmed, then it is the intent of the

commission to implement such a program through a SIP revision which will first offset NO_x reductions from industrial sources down to the 80% (535 tpd) level. The commission, in its discretion, may allocate any additional benefit beyond 80% to other SIP strategies and/or to the point source NO_x control strategy. Based upon current analysis this 80% from utility and non-utility sources would result in a total reduction of not less than 535 tpd of NO_x emissions from industrial sources in the HGA area. This alternative schedule would provide for overall reductions of NO_x emitted from non-utility facilities by 35% by April 1, 2004; 60% by April 1, 2005; 70% by April 1, 2006; and 75% by April 1, 2007.

The current §101.353(g) allows the executive director to deviate from stated allowance allocation methods at the request of the facility owner or operator. The existing rules require the request for the deviation to be submitted to the executive director by June 30, 2001. The proposed amendment extends this option for owners or operators of facilities that have not completed two calendar years of activity by June 30, 2001, so that new facilities may also have this option.

When requesting deviation from stated allowance allocation methods, owners or operators will be limited to an additional two calendar years to establish baseline activity of new or modified facilities if the first two calendar years of historical activity were not complete by June 30, 2001. Under the proposal, requests for this deviation must be submitted no later than 90 days from completion of the first two calendar years of actual activity. The commission is seeking comment on alternative methods of establishing a baseline for owners or operators of new boilers, auxiliary steam boilers, and stationary gas turbines within an electric power generating system as defined in §117.10(13)(A)(iii). Specifically, the commission is requesting comment on the following four alternative methods to determine a

sufficient amount of time for these new facilities to establish a baseline. This is consistent with the commission's intent to sustain energy reliability within the HGA nonattainment area while still achieving environmental goals. The methods are: 1) follow the two-year extension as proposed in this rule; 2) allow facilities to operate seven additional years to establish a two-year baseline; 3) allow these units to continuously receive allowances equal to actual emissions scaled up to full capacity with the limitation that any allowances not used during the year for which they were allocated, may not be banked for future use or sold to another site; or 4) develop a program where a percentage of total allowances allocated under the cap are retained by the commission and made available for these new facilities. These alternatives would only apply to facilities if the facility permit application was considered administratively complete or construction of the facility began under authorization of a permit by rule prior to January 2, 2001.

The proposed amendments to §101.354(a) would add language clarifying that established protocols in Chapter 117 should be used when quantifying actual emissions for facilities subject to the cap and trade program unless the executive director approves the use of the existing formula in §101.354(a) or another method. This would establish a protocol to demonstrate compliance that has been reviewed and approved by the EPA and thus satisfy the EPA concerns relating to using an EPA-approved protocol for a regulation which is a SIP requirement.

The commission proposes to add a new §101.354(b) to establish consistency between the protocols used to allocate and deduct allowances. This will ensure that allowances are not deducted from compliance accounts at a higher or lower rate than they were allocated. For example, if the allocation of the

allowances was based on assumed emission factors, and the facility subsequently installs a continuous emission monitoring system (CEMS) which shows a lower actual emission rate, the facility could state that it had achieved emission reductions simply by changing its method of measurement. Additionally, if a facility originally based its throughput on hours of operation, but changed the method of measurement to fuel consumption in order to use a more accurate measurement, the resulting difference in activity level may alter the number of allowances allocated because allowances are based on level of activity. The new subsection would provide the executive director the discretion to determine the consistency between allocation and deduction protocols. It is the intent of the commission that the reductions achieved under the cap and trade program are real and not based solely on differences of measurement. All subsequent subsections would be redesignated.

The proposed amendment to the newly designated §101.354(e) would require that a site hold a quantity of allowances in its compliance account on March 1 that is equal to or greater than the total NO_x emissions for the prior control period. This extends the date one month from February 1, which is currently required. This will allow site owners or operators the entire month of January to complete trades of allowances to reconcile their compliance accounts for the prior control period as was the original intent of the commission. Because trades are required under §101.356(f) to be submitted to the executive director at least 30 days prior to being approved and deposited into compliance or broker accounts, trades requested on or after February 1 will not be reflected in the compliance determination for the prior control period.

The proposed amendment to §101.356 would add a new subsection (c) that would allow the owner or operator of a site receiving allowances on an annual basis to permanently sell those rights to any person to eliminate the need to make an annual transaction. All subsequent subsections would be redesignated. The commission also proposes to delete subsection (g), which concerns program audits and place those requirements into the new §101.363.

The amendments to §101.356(f) would state that the executive director will review trades of allowances for approval. This language is added to clarify that trades of allowances are not complete until approval by the executive director.

The proposed amendments to §101.356(g) would add two steps to the devaluation, in respect to emission allowances, of banked discrete emission reduction credits (DERCs) and extend for two years the date at which DERCs are devalued to a ratio of ten DERCs to one allowance. Use of DERCs will continue to be limited to 10,000 per year beginning January 1, 2005 under §101.356(g)(7). The commission proposes to extend this flexibility to preserve as much credit as possible for those industries that have made emission reductions while still achieving the anticipated environmental benefits of the cap by 2007.

The proposed amendments to §101.360 would clarify that owners or operators certifying their levels of activity will also need to include emission factors in their report which will be used, along with level of activity, to establish the number of allowances the site will receive.

The commission also proposes to add new §101.360(c), which requires the owner or operator of a site which becomes subject to the cap and trade program after April 1, 2001 to certify the site's level of activity no later than 90 days from the date the site becomes subject to the division. The commission is proposing this subsection to include those sites that currently have facilities with a collective design capacity of less than ten tons per year of NO_x that at some future date add facilities or capacity that brings the collective design capacity to ten tons or more.

The proposed new §101.363 would incorporate the audit requirements of the existing §101.356(g) which is proposed for repeal, and add a requirement for an annual report from the executive director to be made available to the EPA and the public. The audit procedures would remain unchanged. The procedures require the executive director to evaluate the effectiveness of the cap and trade program as implemented by Chapter 101, Subchapter H, Division 3, Mass Emissions Cap and Trade Program, on the ozone attainment demonstration. The audit includes the availability and cost of allowances and compliance by participants. The executive director will recommend measures to remedy problems with the program including the cessation of allowance, emission reduction credit, and discrete emission reduction credit trading. The new requirement for an annual report would include information on allowance allocation and trading by account and total number of allocations and trades completed. This report would be made available by June 30 after the end of each control period. The provision for an annual report is included in response to a request by the EPA.

The proposed amendments to §101.370 state that the definitions of Activity and Level of activity apply to facilities instead of sources. The proposed amendments also remove the requirement that the units

used to determine level of activity have a direct correlation with the economic output and emission rate of the source. The level of activity is only one factor used to determine allowance allocation and is not an emission rate. The definition of Strategy emission rate would be amended to state that this term is the emission rate during a DERC generation period. These changes are proposed to ensure the use of consistent terms and to clarify the current interpretation of the defined terms.

The proposed amendment to §101.372(b)(2) removes the requirement that a mobile discrete emission reduction credit (MDERC) be surplus when it is used, because MDERCs are not certified until after the reduction has actually occurred. This certification results from an evaluation of the MDERC, which is not perpetual, at the time of certification and removes the need for another evaluation at the time of use. This revision represents a correction in existing rule language.

The proposed amendment to §101.373(c)(1)(A) adds temporary shutdown of a source to the list of activities that cannot generate a DERC. This clarifies the existing DERC regulations that do not allow generation of DERCs from temporary curtailments.

The proposed amendment to §101.373(f)(3) would delete the reference to the expiration of DERCs, because DERCs do not expire until used. This revision represents a correction in existing rule language.

The proposed amendments to §101.373(f)(6)(C) and (D) correct rule citations.

The proposed amendments to §101.373(g) require that an application to use DERCs be submitted to the executive director and that approval shall be received prior to use of the DERC. This allows the executive director to confirm that the DERC use complies with regulations for its use. Several changes would be made in the subsection to remove the term “notice of intent to use” and replace with “application of intent to use.”

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendments are in effect there will be no significant fiscal implications for units of state and local government due to the proposed changes to the mass emissions cap and trade program.

In December 2000, the commission adopted rules creating the mass emissions cap and trade program. This program is intended to implement and manage an annual NO_x emission cap, phased-in between January 1, 2002 and April 1, 2007 on all existing and new stationary sources located in the HGA ozone nonattainment area consisting of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The NO_x emission cap affects all facilities, that have emission requirements in Chapter 117, which are located at a site and have a collective capacity to emit ten tons of NO_x or more per year.

Examples of equipment and processes at sources that would be affected by the program include: electric utility boilers; industrial/commercial/institutional boilers and stationary gas turbines; duct

burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and carbon monoxide boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and boilers and industrial furnace units.

The commission would allocate to a facility the number of allowances (NO_x emissions in tons) which the facility would be allowed to emit during the calendar year. The facility would not be allowed to exceed this number of allowances granted unless they obtain additional allowances from another facility's surplus allowances.

The proposed amendments to the mass emissions cap and trade rules are intended to remove outdated references and increase flexibility for regulated industries that will be required to participate in the program. In order to promote flexibility, the proposed amendments would make a number of changes to the existing rules, including: adjusting the allowance allocation schedule for non-utility facilities by requiring smaller annual reductions between January 2002 and March 31, 2007; devaluing DERCs in relation to allowances by increments starting in 2005 and ending in 2007; and increasing the opportunity for facilities to request alternate allowance allocation methods.

The proposed amendments are not anticipated to impose requirements that would result in additional costs to units of state and local government beyond what was identified in previous rulemaking. During the mass emissions cap and trade rulemaking, the commission estimated that some of the approximately

6,000 pieces of equipment at sources in HGA that would be required to operate under the mass emissions cap and trade program would be owned and operated by units of state or local government. The cost of allowances was estimated to range from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. The total cost to units of state and local government will depend on the total number of allowances purchased.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of implementing the amendments will be increased flexibility for affected industries. The flexibility under these amendments does not affect the full implementation schedule of the NO_x emission cap in 2007.

The proposed amendments to the mass emissions cap and trade rules are intended to remove outdated references and increase flexibility for regulated industries that will be required to participate in the program. In order to promote flexibility, the proposed amendments would make a number of changes to the existing rules, including: adjusting the allowance allocation schedule for non-utility facilities by requiring smaller annual reductions between January 2002 and March 31, 2007; devaluing DERCs in relation to allowances by increments starting in 2005 and ending in 2007; and increasing the opportunity for facilities to request alternate allowance allocation methods.

The proposed amendments are not anticipated to impose requirements that would result in additional costs to individuals and businesses beyond what was identified in previous rulemaking. During the

mass emissions cap and trade rulemaking, the commission estimated that some of the approximately 6,000 pieces of equipment at sources in HGA that would be required to operate under the mass emissions cap and trade program would be owned and operated by individuals and businesses. The cost of allowances was estimated to range from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. The total cost to individuals and businesses will depend on the total number of allowances purchased.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications to small or micro-businesses as a result of administration or enforcement of the proposed amendments to the mass emissions cap and trade rules, which are intended to remove outdated references and increase flexibility for regulated industries that will be required to participate in the program.

In order to promote flexibility, the proposed amendments would make a number of changes to the existing rule, including: adjusting the allowance allocation schedule for non-utility facilities by requiring smaller annual reductions between January 2002 and March 31, 2007; devaluing DERCs in relation to allowances by increments starting in 2005 and ending in 2007; and increasing the opportunity for facilities to request alternate allowance allocation methods.

The proposed amendments are not anticipated to impose requirements that would result in additional costs to small or micro-businesses beyond what was identified in previous rulemaking. During the mass emissions cap and trade rulemaking, the commission estimated that some of the approximately 6,000

pieces of equipment at sources in HGA that would be required to operate under the mass emissions cap and trade program would be owned and operated by small or micro-businesses. The cost of allowances was estimated to range from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. The total cost to individuals and businesses will depend on the total number of allowances purchased.

The following is an analysis of the cost per employee for small or micro-businesses affected by the proposed amendments. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. A small business that purchases one allowance would incur costs ranging from \$5.00 to \$50 per employee. A micro-business that purchases one allowance would incur costs ranging from \$25 to \$250 per employee. The overall cost per employee will vary depending on the number of allowances purchased, and the number of persons employed by an affected business.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rules do not meet the definition of “major environmental rule.” “Major environmental rule” means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission intends these amendments to provide additional planning options to affected industries during the five-year period that allocations under the cap and trade program are reduced to their final

levels. The schedule for full implementation and the final level of allocations would be unaffected.

The proposed amendments would allow participants in the program additional options for the permanent sale of allowances, an extension of the period to request deviations from allocation methods, and additional time to make final trade reports after the end of a control period. The amendments would not increase the stringency of the program and will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §109, as codified in 42 United States Code (USC), §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for “implementation, maintenance, and enforcement” of the primary NAAQS in each air quality control region of the state.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. These amendments are proposed as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the rules will not burden private real property. The proposed amendments do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances that are the subject of these rules are not property rights. Consequently, these proposed amendments do not meet the definition of a takings under Texas Government Code, §2007.002(5). The purpose of the rule proposal is to provide flexibility in a NO_x control strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.) , and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As

required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and has determined that the proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. If adopted, the amendments will allow greater compliance flexibility for affected industries while reducing emissions of NO_x in the HGA nonattainment area to a level that would allow attainment of the NAAQS for ozone. No new contaminants will be authorized by these rules. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed amendments, if adopted, would become part of the state's ozone attainment strategy; therefore, these amendments would be submitted as part of the SIP. As a result, the proposed amendments and any allowances allocated under the affected sections would become applicable requirements under the federal operating permit program.

ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal on July 2, 2001 at 6:00 p.m., Houston City Hall Council Chambers, 2nd Floor, 901 Bagby, Houston. The hearing is structured for the receipt of

oral or written comments by interested persons. Registration will begin one hour prior to the hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during the hearing; however, agency staff members will be available to discuss the proposal one hour before the hearing, and will answer questions before and after the hearing. Earlier public hearings on this proposal were scheduled at the following times and locations: June 13, 2001, 6:00 p.m., Galveston City Council Chambers, Room 200, 823 Rosenberg, Galveston; June 14, 2001, 10:00 a.m., Rosenberg Civic and Convention Center, Room C, 3825 Highway 36 South, Rosenberg; June 14, 2001, 6:00 p.m., Houston City Hall Council Chambers, 2nd Floor, 901 Bagby, Houston; and June 15, 2001, 10:00 a.m., Texas Natural Resource Conservation Commission, Building E, Room 201S, 12100 North I-35, Austin. A public hearings notice was published in the June 8, 2001 issue of the *Texas Register*.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to siprules@tnrcc.state.tx.us. All comments should reference Rule Log Number 2001-017-101-AI. Comments must be received by 5:00 p.m., July 2, 2001, although written comments submitted

at the July 2, 2001 hearing will be accepted. On May 10, 2001, the commission proposed changes to Chapters 114, 117, and to the SIP which were made available on the commission's web site and which were the subject of newspaper notices as listed in the ANNOUNCEMENT OF HEARINGS portion of this preamble. Subsequently, on May 30, 2001 the commission proposed changes to Chapters 101, 117, and the SIP. The latest versions of all of the proposed rules in Chapters 101, 114, and 117 and the SIP revision were placed on the commission's web site on May 30, 2001 and are available at <http://www.tnrcc.state.tx.us/oprd/sips/houston.html>.

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amendment implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and 42 USC, §7410(A)(2)(a).

CHAPTER 101 : GENERAL AIR QUALITY RULES

SUBCHAPTER A: GENERAL RULES

§101.1

§101.1. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (24) (No change.)

(25) **Emissions reduction credit (ERC)** - Any stationary source emissions reduction which has been banked in accordance with Chapter 101, Subchapter H, Division 1 [§101.29] of this title (relating to Emission Credit Banking and Trading).

(26) - (56) (No change.)

(57) **Mobile emissions reduction credit (MERC)** - The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state regulations) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter E of this title (relating to Low Emission Vehicle Fleet Requirements) or Chapter 114, Subchapter F of this title (relating to

Vehicle Retirement and Mobile Emission Reduction Credits), and which has been banked in accordance with Chapter 101, Subchapter H, Division 1 [§101.29] of this title.

(58) - (109) (No change.)

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

§§101.350, 101.352 - 101.354, 101.356, 101.360, 101.363

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amendments and new section implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and 42 USC, §7410(a)(2)(A).

§101.350. Definitions.

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (8) (No change.)

(9) **Level of activity** - The amount of activity at a facility [source] measured in terms of production, fuel use, raw materials input, or other similar units [that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity)].

(10) - (11) (No change.)

§101.352. General Provisions.

(a) - (b) (No change.)

(c) An owner or operator of a facility subject to this division may certify reductions from the facility [Unused allowances can be certified] as emission reduction credits (ERCs), provided that:

(1) - (2) (No change.)

(d) - (i) (No change.)

§101.353. Allocation of Allowances.

(a) Allowances will be deposited into compliance accounts according to the following equation except as provided in subsection (g) of this section.

Figure: 30 TAC §101.353(a)

$$A = \left[B \right] - X \left[B - \left(\frac{LA_{HA} * EF_{final}}{2000} \right) \right]$$

Where: (1) A = number of allowances rounded to tenths of tons

(2) B = the facility's baseline emission rate and is calculated as follows:

(A) For facilities in operation prior to January 1, 1997,

$$B = \frac{(LA_{97} * EF_{97}) + (LA_{98} * EF_{98}) + (LA_{99} * EF_{99})}{3(2000)}$$

Where: LA_{97} = the facility's level of activity, as certified by the executive director for 1997

LA_{98} = the facility's level of activity, as certified by the executive director for 1998

LA_{99} = the facility's level of activity, as certified by the executive director for 1999

EF_{97} = the facility's [faculty's] emission factor, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for 1997.

EF_{98} = the facility's [faculty's] emission factor, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for 1997.

EF_{99} = the facility's [faculty's] emission factor, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for 1997.

(B) For new and modified facilities not in operation prior to January 1, 1997 and either have submitted, under Chapter 116 of this title (relating

to Control of Air Pollution by Permits for New Construction or Modification), an application which the executive director has determined to be administratively complete before January 2, 2001, or have qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have commenced construction before January 2, 2001 and that have been in operation less than two complete consecutive calendar years;

$$B = \frac{LA_{\text{Allowable}} * EF_{\text{Allowable}}}{2000}$$

Where $LA_{\text{Allowable}}$ = The level of activity authorized by the executive director until such time two consecutive calendar years of actual level of activity data is available

$EF_{\text{Allowable}}$ = The emission factor authorized by the executive director until such time two consecutive calendar years of actual emission data is available

- (C) For new and modified facilities not in operation prior to January 1, 1997 and either have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application which the executive director has determined to be administratively complete before January 2, 2001, or have qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have commenced construction before January 2, 2001; and that have been in operation for two complete consecutive calendar years;

$$B = \frac{(LA_{\text{Year} - 1} * EF_{\text{Year} - 1}) + (LA_{\text{Year} - 2} * EF_{\text{Year} - 2})}{2(2000)}$$

Where: $LA_{\text{Year} - 1}$ = the facility's level of activity, as certified by the executive director, for its first complete calendar year of operation

$LA_{\text{Year} - 2}$ = the facility's level of activity, as certified by the executive director, for its second complete calendar year of operation

$EF_{\text{Year} - 1}$ = the facility's [faculty's] emission factor, in pounds per unit of activity, (not to exceed any applicable federal or

state regulation, rule, or permit limit), as certified by the executive director, for its first complete calendar year of operation

EF_{Year-2} = the facility's [faculty's] emission factor, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for its first complete calendar year of operation

(3) X = reduction factor, where:

(A) For all boilers, auxiliary steam boilers, and stationary gas turbines within an electric power generating system, as defined in §117.10(13)(A)(iii) of this title (relating to Definitions), located in HGA

- (i) for January 1, 2002 through March 31, 2003, X = 0.00
- (ii) for April 1, 2003 through March 31, 2004, X = 0.489 [0.47]
- (iii) on or after [for] April 1, 2004 through March 31, 2007, X = 0.978 [0.95]
- (iv) on or after April 1, 2007, X = 1.00

(B) if the emissions specifications in §117.106(c)(5) of this title (relating to Emission Specifications for Attainment Demonstrations) apply, then:

- (i) for January 1, 2002 through March 31, 2003, X = 0.00
- (ii) for April 1, 2003 through March 31, 2004, X = 0.50
- (iii) on or after April 1, 2004, X = 1.00

(C) [(B)] For all other facilities [sources]

- (i) for January 1, 2002 through March 31, 2004, X = 0.00
- (ii) for April 1, 2004 through March 31, 2005, X = 0.389 [0.44]
- (iii) for April 1, 2005 through March 31, 2006 [2007], X = 0.667 [0.89]
- (iv) for April 1, 2006 through March 31, 2007, X = 0.778 [on or after April 1, 2007, X = 1.00]

- (v) on or after April 1, 2007, X = 1.00
- (D) if the emissions specifications in §117.206(c)(18) of this title (relating to Emission Specifications for Attainment Demonstrations) apply, then:
 - (i) for January 1, 2002 through March 31, 2004, X=0.00
 - (ii) for April 1, 2004 through March 31, 2005, X=0.47
 - (iii) for April 1, 2005 through March 31, 2006, X=0.80
 - (iv) for April 1, 2006 through March 1, 2007, X=0.93
 - (v) on or after April 1, 2007, X=1.00
- (E) [(C)] For calendar years which include two different reduction factors, the reduction factor shall be adjusted using the appropriate ratio to reflect the number of months covered by each reduction factor.
- (4) LA_{HA} = historical average level of activity, where:
 - (A) for facilities in operation prior to January 1, 1997, the average level of activity, as certified by the executive director, for 1997, 1998₂ and 1999, or
 - (B) for new and modified facilities not in operation prior to January 1, 1997 and either have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application which the executive director has determined to be administratively complete before January 2, 2001, or have qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have commenced construction before January 2, 2001; LA is
 - (i) The level of activity authorized by the executive director until such time two consecutive calendar years of actual level of activity data is available; or
 - (ii) When two complete consecutive calendar years of actual level of activity data is available, the level of activity becomes the average of the facility's actual level of activity over those two consecutive calendar years of actual level of activity data.
- (5) EF_{final} = emission factor, as listed in §§117.106, 117.206, or 117.475 of this title.

- (6) For facilities using alternative emission specifications as allowed in §117.106(c)(2), §117.206(c)(17), or §117.475(c)(3) of this title (relating to Control of Air Pollution from Nitrogen Compounds), the level of activity for any formula will be the lowest of the level of activity as calculated in variables (2)(A), (2)(B), or the level of activity limited by an enforceable limit or commitment necessary to qualify alternative emission specification in §117.106(c)(2) or §117.206(c)(17).

(b) - (f) (No change.)

(g) In extenuating circumstances, the executive director may deviate from the requirements of this section to determine the amount of allowances to be allocated to a facility. Applications to seek deviation must be submitted by the owner or operator of the facility in discussion to the executive director; [no later than June 30, 2001.]

(1) no later than June 30, 2001; or

(2) for facilities whose baseline as described in subsection (a), variable (2)(C) of this section is not complete by June 30, 2001, no later than 90 days after completion of the baseline period. The owner or operator of a facility who requests extenuating circumstances under this paragraph may request, subject to approval of the executive director, up to two additional calendar years to establish the baseline period.

(h) (No change.)

§101.354. Allowance Deductions.

(a) Allowances will be deducted in tenths of a ton from a site's compliance account for a control period based upon the protocols established in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds). With the approval of the executive director, the following equation or other method may be used instead of the protocols in Chapter 117 [as determined by the executive director].

Figure: 30 TAC §101.354 (No change.)

(b) If the protocol used to show compliance with this section differs from the protocol used by the commission to establish the allocation of allowances under §101.353 of this title (relating to Allocation of Allowances), the executive director may recalculate the number of allowances allocated per year for consistency between the methods.

(c) [(b)] When deducting allowances from a site's compliance account for a control period, the executive director will deduct the allowances beginning with the most recently allocated allowances before deducting banked allowances.

(d) [(c)] Allowances allocated in accordance with the variables in (a)(2)(B) listed in Figure 30 TAC §101.353(a) may only be used by the facility for which they were allocated and may not be used by other facilities at the same site during the same control period.

(e) [(d)] On March [February] 1 after every control period, a site shall hold a quantity of allowances in its compliance account that is equal to or greater than the total nitrogen oxides [NO_x] emissions emitted during the prior control period.

§101.356. Allowance Banking and Trading.

(a) - (b) (No change.)

(c) The owner or operator of a site receiving allowances on an annual basis may permanently sell those rights to any person. This request for transfer of ownership shall be completed by the executive director following the submission of a completed ECT-4 Form, Application for Permanent Transfer of Allowance Ownership. The executive director will issue a letter to the purchaser and seller reflecting this transaction. The transaction will be considered finalized upon issuance of this letter.

(d) [(c)] Allowances not used for compliance during a control period which were allocated in accordance with the variables in (a)(2)(B) and (3)(B) listed in the figure contained in [Figure 30 TAC] §101.353(a) of this title (relating to Allocation of Allowances) may not be banked for future use or traded.

(e) [(d)] Only authorized account representatives may trade allowances.

(f) [(e)] Trades will be reviewed for approval by the executive director [shall be completed by the executive director] following the submittal of a completed ECT-2 Form, Application for Transfer of Allowances. The completed ECT-2 shall include the price paid per allowance and shall be submitted to executive director at least 30 days prior to the allowances being deposited into the transferee's broker or compliance account. The executive director will issue a letter to the purchaser and seller reflecting this trade. The trade will be considered finalized upon issuance of this letter.

(g) [(f)] Sites may use nitrogen oxides (NO_x) discrete emission reduction credits (DERCs) or mobile discrete emission reduction credits (MDERCs) which have been generated and [,] acquired [,] in accordance with Division 4 of this subchapter (relating to Discrete Emission Credit Banking and Trading) in place of allowances for compliance with this division in accordance with paragraphs (1) - (9) [(7)] of this subsection. Sites may use volatile organic compound (VOC) DERCs or MDERCs which have been generated and acquired in accordance with Division 4 of this subchapter, in place of allowances for compliance with this division in accordance with paragraphs (1) - (9) [(7)] of this subsection provided that demonstration has been made and approved by the executive director and the EPA [United States Environmental Protection Agency] to show that the use of VOC DERCs or MDERCs is equivalent, on a one to one basis or other ratio, to the use of NO_x allowances in reducing ozone.

(1) MDERCS may be used in lieu of allowances at a ratio of one MDERC for one allowance.

(2) Prior to January 1, 2005, DERCs generated prior to January 1, 2005 may be used at a ratio of one DERC for one allowance.

(3) DERCs generated prior to January 1, 2005 may be used in lieu of allowances for compliance with this division for the control period beginning January 1, 2005 through December 31, 2005 at a ratio of four DERCs for one allowance.

(4) DERCs generated prior to January 1, 2005 may be used in lieu of allowances for compliance with this division for the control period beginning January 1, 2006 through December 31, 2006 at a ratio of seven DERCs for one allowance.

(5) [(3)] DERCs generated prior to January 1, 2005 may be used in lieu of allowances for compliance with this division for the control period beginning January 1, 2007 and all subsequent control periods at a ratio of ten DERCs for one allowance [Beginning January 1, 2005, DERCs generated prior to January 1, 2005 may be used in lieu of allowances at a ratio of ten DERCs for one allowance].

(6) [(4)] DERCs generated on or after January 1, 2005 may be used in lieu of allowances at a ratio of one DERC for one allowance.

(7) [(5)] Beginning January 1, 2005, no more than 10,000 DERCs may be used in any combination totaled over all sites in the Houston/Galveston [HGA] ozone nonattainment area during a single calendar year. This restriction does not apply to MDERCs.

(8) [(6)] The 10% environmental contribution and the 5% compliance margin of Division 4 of this subchapter shall not apply.

(9) [(7)] DERCs or MDERCs submitted with a notice of intent to use, DEC-2 Form, for the purpose of compliance with this section, must be submitted to executive director at least 30 days prior to intended use.

[(g) Program Audits. No later than three years after the effective date of this division, and every three years thereafter, the executive director will audit this program.]

[(1) The audit will evaluate the impact of the program on the state's attainment demonstration, the availability and cost of allowances, compliance by the participants, and any other elements the executive director may choose to include.]

[(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of allowances, discrete emission reduction credits, and/or mobile discrete emission reduction credits may be discontinued by the executive director in part or in whole

and in any manner, with commission approval, as a remedy for problems identified in the program audit.]

[(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.]

§101.360. Level of Activity Certification.

(a) The owner or operator of any facility subject to this division shall certify, no later than June 30, 2001, its historical level of activity by submitting to the executive director a completed ECT-3 Form, Level of Activity Certification, along with any supporting information such as usage records, testing or monitoring data, emission factors, and production records as follows:

(1) - (2) (No change.)

(b) The owner or operator of any facility subject to this division who has certified a facility's level of activity under subsection (a)(2) of this section shall certify, no later than 90 days from the end of its second complete calendar year of operation, its first two complete consecutive calendar years of actual level of activity and actual emission factors by submitting to the executive director a completed ECT-3 Form, Level of Activity Certification, along with any supporting information such as usage records, testing or monitoring data, and production records.

(c) Owners or operators of a site that becomes subject to this division on or after April 1, 2001 by virtue of adding facilities subject to the emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) shall certify the level of activity by submitting to the executive director a completed ECT-3 Form, Level of Activity Certification, along with any supporting information such as usage records, testing or monitoring data, and production records as follows:

(1) in accordance with subsections (a) and (b) of this section; and

(2) no later than 90 days from the date the site becomes subject to this division, as determined by the executive director, for each facility that:

(A) had an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) which the executive director has determined to be administratively complete before January 2, 2001; or

(B) has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and has commenced construction before January 2, 2001.

§101.363. Program Audits and Reports

(a) No later than three years after the effective date of this division, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the impact of the program on the state's ozone attainment demonstration, the availability and cost of allowances, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of allowances, discrete emission reduction credits (DERCs), and/or mobile discrete emission reduction credits (MDERCs) may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the EPA and made available for public inspection within six months after the audit begins.

(b) No later than June 30 following the end of each control period, the executive director shall develop and make available to the general public and EPA, a report that includes:

(1) number of allowances allocated to each compliance account;

(2) total number of allowances allocated under this division;

(3) number of actual nitrogen oxides (NO_x) allowances subtracted from each compliance account based on the actual NO_x emissions from the site; and

(4) a summary of all trades completed under this division.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING

§§101.370, 101.372, 101.373

STATUTORY AUTHORITY

The amendments are proposed under Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amendments implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and 42 USC, §7410(A)(2)(a).

§101.370. Definitions.

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Activity** - The amount of operation [activity] at a facility [source] measured in terms of production, use, raw materials input, vehicle miles traveled, or other similar units [that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity)].

(2) - (16) (No change.)

(17) **Level of activity** - The amount of activity at a facility [source] measured in terms of production, fuel use, raw materials input, or other similar units [that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity)].

(18) - (31) (No change.)

(32) **Strategy emission rate** - The source's emission rate [level of activity] during the DERC generation period.

(33) - (36) (No change.)

§101.372. General Provisions.

(a) (No change.)

(b) Discrete emission credit requirements.

(1) (No change.)

(2) Mobile discrete emission reduction credit (MDERC) - To be creditable as an MDERC, an emission reduction must be quantifiable, real, and surplus. The discrete emission credit must be surplus at the time it is created [, as well as when it is used]. The creditable reduction must have occurred after the most recent year of emissions inventory used for SIP determinations for all applicable pollutants, the mobile source's emissions must have been represented in the emissions inventory used for SIP determinations, and the mobile sources are in the attainment demonstration baseline. If a mobile reduction is implemented that is not in the baseline for emissions, this would not constitute an emission reduction.

(3) (No change.)

(c) - (l) (No change.)

§101.373. Protocols.

(a) - (b) (No change.)

(c) Discrete emission credit generation.

(1) Discrete emission reduction credits (DERCs) may be generated by any strategy that reduces a source's emission rate below its baseline and is approved by the executive director, except for the following:

(A) temporary shutdown or curtailment of an activity at a source;

(B) - (H) (No change .)

(2) (No change.)

(d) - (e) (No change.)

(f) Discrete emission credit practices.

(1) - (2) (No change.)

(3) All discrete emission credits are deposited in the registry and reported as available credits until they are used[, or withdrawn [, or expire].

(4) - (5) (No change.)

(6) With the exception of uses prohibited in paragraph (7) of this subsection or strictly prohibited in other rules or regulations, discrete emission credits may be used to meet or demonstrate compliance with any mobile or stationary regulatory requirement including the following:

(A) - (B) (No change.)

(C) compliance with NO_x cap and trade requirements as provided in §101.356 (g) [(d)] of this title (relating to Allowance Banking and Trading).

(D) compliance with §115.950 [of this title (relating to Emissions Trading)] and §117.570 of this title (relating to Use of Emissions [Emission] Credits for Compliance), as allowed.

(7) - (8) (No change.)

(g) Application [Notice] of intent to use. An application [A notice] of intent to use, DEC-2 Form, must be submitted to the executive director in accordance with the following requirements:

(1) discrete emission credits may be used only after the applicant [user] has submitted the notice and received executive director approval [to the registry];

(2) the application [notice] must be submitted at least 45 days prior to the first day of the use period if the generator is a stationary source, and 90 days if the generator is a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months;

(3) a copy of the application [notice] must also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area;

(4) the application [notice] for a stationary or area source user must include the following information for each use:

(A) - (M) (No change.)

(5) the application [notice] for a mobile source user must include the following information:

(A) - (N) (No change.)

(6) - (7) (No change.)