

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §101.379 *with change* to the proposed text as published in the November 2, 2012 issue of the *Texas Register* (37 TexReg 8718).

If adopted, the amended §101.379 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rule

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas, with oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed 16 TAC §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program (new 16 TAC §25.507). Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Subsequent changes to ERCOT's Nodal Protocols reflecting the new ERS program became effective on June 1, 2012.

On December 10, 2008, the commission adopted the amendment to §101.379 to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area) to a level consistent with the

attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS). The rule requires an annual review of the DFW area DERC program to determine the flow control limit and apportion available DERCS for potential use. The rule also provides an exemption from the DFW flow control limit for DERCS used in response to an ERCOT-declared emergency situation and references the specific ERCOT protocols that detail the emergency notice. The existing rule references a previous version of the ERCOT protocols, which could potentially cause confusion for regulated entities and delay the processing of DERC usage requests. The adopted rulemaking updates §101.379 to reference the version of the ERCOT protocols effective on June 1, 2012.

The amendment to §101.379 is adopted concurrently with the amendment to 30 TAC §117.10 that will be published in a separate rulemaking in this issue of the *Texas Register*.

Section Discussion

The commission revises §101.379(c)(2)(D) to reference the version of the ERCOT Protocols effective on June 1, 2012. Additionally, in response to ERCOT's comments on this rulemaking, the commission is revising §101.379(c)(2)(D) to also include operations in response to an ERCOT energy emergency alert. The commission is making this change to address situations when system conditions deteriorate so rapidly that it is not

possible for ERCOT to issue an emergency notice prior to declaring an energy emergency alert.

Final Regulatory Impact Analysis

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent 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. Furthermore, while the adopted rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule

solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the adopted rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the adopted rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this adopted rulemaking; and 4) the adopted rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

The adopted rule implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to

determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the adopted rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10.

While the adopted rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government

Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application. The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP were considered to be a major environmental rule that exceeds

federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation. (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ) *superseded by statute on another point of law*, Tax Code

§112.108, Other Actions Prohibited, *as recognized in, First State Bank of Dumas v. Sharp*, 863 S.W.2d 81, 83 (Tex. App. Austin 1993, no writ); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedures Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of substantial compliance as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Even if the adopted rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law,

since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the adopted rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10. This adoption, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law, but does not exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this adopted rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply and a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

Promulgation and enforcement of the rulemaking would be neither a statutory nor a

constitutional taking of private real property. The primary purpose of the rulemaking is an update to Chapter 101, Subchapter H to ensure consistency with ERCOT's new ERS program. This rule is not burdensome, restrictive, or limiting of rights to private real property because the rulemaking regulates the use of electric generators in certain limited emergency situations. Furthermore, the rulemaking benefits the public by potentially decreasing the likelihood of requiring firm load shedding (i.e., rolling black-outs) when additional control measures are needed to achieve or maintain attainment of the federal air quality standards through the use of electric generators. The rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the rule is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the adopted rulemaking is

consistent with the applicable CMP goals and policies.

The CMP goal applicable to the adopted rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (§501.12(l)). The CMP policy applicable to the adopted rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (§501.32). The adopted rulemaking does not increase emissions of air pollutants and is therefore, consistent with the CMP goal in §501.12(l) and the CMP policy in §501.32.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rule is consistent with these CMP goals and policies and because this rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

Therefore, in accordance with §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited comment on the consistency of this rulemaking during the public comment period. The commission received no comments on the consistency of this rulemaking.

Effect on Sites Subject to the Federal Operating Permits Program

The adopted amendment will not require any changes to federal operating permits.

Public Comment

The commission scheduled a public hearing in Austin on November 28, 2012. However, the hearing was not officially opened because no one registered to provide comments. The public comment period closed on December 5, 2012. The commission received comments from Blue Sky Environmental LLC (Blue Sky), EnerNOC, Inc. (EnerNOC), EPA, and ERCOT.

Response to Comments

Comment

Blue Sky, EnerNOC, EPA, and ERCOT expressed support for the proposed revisions to §101.379(c)(2)(D).

Response

The commission appreciates the support.

Comment

ERCOT commented that if system conditions deteriorate too rapidly it might not be possible to issue an emergency notice prior to declaring an energy emergency alert and

subsequently deploying ERS. ERCOT recommended the commission amend §101.379(c)(2)(D) to refer to ERCOT's dispatch of ERS rather than the issuance of an emergency notice. ERCOT recommended that the commission reference the PUCT's ERS rule in 16 TAC §25.507 rather than the ERCOT Nodal Protocols referenced in the proposed rules. ERCOT expressed concern that the frequent revisions to the ERCOT Nodal Protocols could create confusion as to the applicability of §117.10(15)(A)(ii) and §101.379(c)(2)(D). ERCOT suggested the commission could more easily monitor the infrequent changes to the PUCT rules than the numerous ongoing proposals to revise the ERCOT Nodal Protocols referenced in the proposed rules.

Response

The intent of §101.379(c)(2)(D) is to provide electric generating facilities that are subject to the DERC flow control limit specified in §101.379(c)(2)(A), a temporary exemption from the DERC flow control limit. Limiting the definition of an ERCOT-declared emergency solely to deployment of the ERS will exclude electric generating facilities from being temporarily exempt from the DERC flow control limit when required to operate in an emergency situation in which the safety or reliability of the ERCOT system is compromised or threatened, as determined by ERCOT. Since the provision in §101.379(c)(2)(D) affects sources that are likely not participating in ERCOT's ERS program but are operating as a result of an

ERCOT-declared emergency, it is necessary for the commission to retain the reference to emergency notice. Additionally, in response to ERCOT's comments the commission is revising §101.379(c)(2)(D) to also include operations in response to an ERCOT energy emergency alert. The commission is making this change to ensure the definition of an ERCOT-declared emergency includes situations when system conditions deteriorate so rapidly that it is not possible for ERCOT to issue an emergency notice prior to declaring an energy emergency alert.

The commission is aware that the ERCOT Nodal Protocols references in §101.379(c)(2)(D) are frequently revised and have even been revised since the commission proposed this rulemaking in October 2012. Since the provision in §101.379(c)(2)(D) affects sources that are likely not participating in ERCOT's ERS program but are operating as a result of an ERCOT-declared emergency, it is not appropriate for the commission to reference the PUCT's ERS rule in 16 TAC §25.507. The commission respectfully declines to make the suggested change.

Comment

To account for emergency demand response programs initiated by Texas utilities that are experiencing voltage reductions, Blue Sky and EnerNOC recommended expanding

the term ERCOT-declared emergency in §101.379(c)(2)(D) to also include utility-declared emergencies.

Response

The purpose of this rulemaking is not to redefine emergency situation but merely to update §101.379 to reference the version of the ERCOT protocols effective on June 1, 2012. The commission does not agree that an emergency situation should include operations that occur in response to a utility-declared emergency. The suggested change would effectively decrease the stringency of the existing rules by expanding the scope of the current definition to include additional situations that would not currently be considered emergency situations. Because the EPA has approved the existing rules as part of the SIP, the suggested expansion of the definition could be considered backsliding and result in the EPA's disapproval of the rulemaking. As discussed elsewhere in the Response to Comments section of the preamble, the commission is also revising the proposed rule language to include operations that are in direct response to an instruction by ERCOT during the period of an ERCOT energy emergency alert. The commission makes no change in response to these comments.

Comment

EPA stated that the current DERC rules in §101.379 establish the DERC flow-control mechanism to support attainment of the 1997 eight-hour ozone standard. The EPA commented it has since promulgated a more stringent ozone standard. On March 27, 2008 and on April 30, 2012, the EPA designated a new ten-county area as the 2008 Dallas-Fort Worth ozone nonattainment area. EPA also commented that the commission will need to review the technical basis for the DERC flow control in §101.379 and update as necessary to reflect the most current ozone standard as part of its attainment planning.

Response

The scope of this rulemaking is limited to updating the reference to the ERCOT protocols and therefore evaluating the technical basis of the DERC flow control for the 2008 ozone standard is beyond the scope of this rulemaking. However, the commission may consider the DERC flow control requirement as part of its planning efforts for the 2008 ozone standard.

The commission makes no change in response to this comment.

Comment

Blue Sky and EnerNOC recommended the commission provide guidance regarding the SIP process. The commenters also requested the commission confirm that the following assumptions are correct: 1) the revisions in §117.379 will not be fully implemented until

the EPA approves the SIP revision; 2) engines participating in the ERS and other utility-sponsored emergency demand response programs without sending power to the electric grid can continue to operate under the definition of emergency situation until the references to the appropriate protocols are changed; and 3) emergency engines could not send power to the electric grid under an emergency situation until the SIP revision is approved.

Response

The Texas Water Code authorizes the commission to propose and adopt rules necessary to carry out its powers and duties. Once adopted, the commission files the rule with the Secretary of State for publication in the *Texas Register*. This action usually occurs the first Friday after adoption. The rule becomes effective 20 calendar days after filing and is fully enforceable by the commission from that time on irrespective of EPA approval of the rule revision as part of the SIP. Therefore, beginning on the effective date of the rule, the definition of emergency situation will include operations in direct response to an instruction by ERCOT during the period of an ERCOT-declared emergency that supply power to the electric grid. As discussed elsewhere in the Response to Comments section of the preamble, the definition of emergency situation in §101.379 includes operations during an ERCOT-declared emergency but does not include other utility-

sponsored emergency demand response programs. The commission makes no change in response to these comments.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT

BANKING AND TRADING

§101.379

Statutory Authority

The amendment is adopted under the authority of the following: Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC); Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. Finally, the amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to

submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401, *et seq.*

§101.379. Program Audits and Reports.

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

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, 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 discrete emission 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.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency a report that includes the following information for the previous calendar year:

(1) the amount of each pollutant emission credits generated under this division;

(2) the amount of each pollutant emission credits used under this division;

(3) a summary of all trades completed under this division; and

(4) the amount of discrete emission reduction credits (DERC) approved for use under subsection (c) of this section.

(c) No later than October 1 of each year, the executive director will complete, and make available to the general public and the United States Environmental Protection Agency, an annual review to determine the number of DERCS available for potential use in the upcoming calendar year for the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area. The annual review will include the calculation of the flow control limit as specified in subsection (c)(2)(A) of this section to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and the apportionment of approved DERCS.

(1) For the 2009 control period, the flow control limit for DERCS available for use is the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(A) The flow control limit for a particular year will be determined using the following equation:

Figure: 30 TAC §117.379(c)(2)(A) (No change to the figure as it currently exists in TAC.)

(B) If use of the entire DERC bank would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank.

(C) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the total number of DERCs requested for use in accordance with §101.376(d) of this title (relating to Discrete Emission Credit Use) the executive director:

(i) may approve all requested Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) submittals; and

(ii) will consider any late DEC-2 Forms submitted as provided under §101.376(d)(3) of this title that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in subparagraph (D) of this paragraph, but will not otherwise approve a late submittal that would exceed the flow control limit established by the equation under subsection (c)(2)(A) of this section.

(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an ERCOT-issued emergency notice or energy emergency alert (EEA) (as defined in *ERCOT Nodal Protocols, Section 2: Definitions and Acronyms* (June 1, 2012) and issued as specified in *ERCOT Nodal Protocols, Section 6: Adjustment Period and Real-Time Operations* (June 1, 2012)) is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice or EEA issued by ERCOT.