

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §101.302 and §101.372; new §101.338 and §101.357; and corresponding revisions to the state implementation plan (SIP). Sections 101.302, 101.338, 101.357, and 101.372 are adopted *with changes* to the proposed text as published in the November 23, 2001 issue of the *Texas Register* (26 TexReg 9513).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these amendments and new sections in order to control ground-level ozone and other criteria pollutants in nonattainment areas in the state, and to implement Senate Bill (SB) 5 (an act relating to the Texas emissions reduction plan) and SB 1561 (an act relating to the acceptance by the Texas Natural Resource Conservation Commission of certain emissions reductions in exchange for other emissions reductions), 77th Legislature, 2001.

The 77th Legislature adopted SB 5 to establish and provide for the administration of the Texas Emissions Reduction Plan (TERP). The TERP is a comprehensive plan to reduce emissions of air contaminants from mobile sources. The program offers subsidies for the replacement of older diesel engines with more efficient diesels with lower emissions and for the purchase of automobiles with low emissions. The program is funded in part through surcharges and fees on the lease, sale, and registration of certain diesel-powered vehicles. The plan is also partially funded by contributions from owners or operators of stationary sources of nitrogen oxides (NO<sub>x</sub>) in the Houston/Galveston (HGA) or Dallas/Fort Worth (DFW) ozone nonattainment areas. These owners or operators may substitute emissions reductions made under the plan for those reductions otherwise required under the commission's rules; such substitutions require a contribution to the fund based on the amount of

emissions reductions substituted. This adopted rulemaking implements the relevant portions of SB 5 concerning these contributions to the TERP fund in the HGA area, as described in greater detail in the SECTION BY SECTION DISCUSSION portion of this preamble.

This rulemaking also implements the provisions of SB 1561. This legislation allows surplus emission reductions achieved outside the United States (U.S.) to satisfy emission reduction requirements in Texas by allowing reductions in one nonattainment air contaminant to substitute for reductions in another nonattainment air contaminant under the specific conditions described in the SECTION BY SECTION DISCUSSION portion of this preamble.

#### SECTION BY SECTION DISCUSSION

The adopted amendments to §101.302, General Provisions, address the relationship of the requirements of SB 1561 and the generation of emission reduction credits (ERCs). The amendments allow emission reductions from facilities located outside the U.S. to be used to meet the requirements for reductions in another pollutant in Texas, provided the executive director determines that the substitution results in a greater health benefit or is of equal or greater benefit to the overall air quality of the area. The executive director will make this determination. The amendments involve the substitution of a reduction of a criteria pollutant for which the area has been designated as nonattainment for a required reduction for any criteria pollutant for which the area is also designated as a nonattainment area. The substitution must clearly result in greater health benefits for the community as a whole than would reductions at the original facility. In response to public comment, the commission has amended the rule language to state that the substitution must not cause harm to public health in the area around the

facility using the emission substitution. When determining whether an emissions reduction outside the U.S. will be of greater health benefit, the executive director may consider the amount of air contaminant removed, the frequency that concentrations of an air contaminant have exceeded the national ambient air quality standard (NAAQS), existing air quality demonstrations performed under SIP requirements, the air quality index, and any other information which would indicate a clear benefit of a proposed emission reduction. For example, consider a proposed reduction of particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns ( $PM_{10}$ ) instead of a required  $NO_x$  reduction. The *de minimis* netting threshold for  $NO_x$  is 40 tons per year (tpy) while the threshold for  $PM_{10}$  is ten tpy. The lower netting threshold for  $PM_{10}$  indicates that a reduction in that pollutant would be of greater significance than a numerically equivalent reduction of  $NO_x$ . The commission believes that this greater significance could be part of a demonstration that such a substitution would be of greater health benefit and overall air quality improvement depending on the documentation and the ability to enforce the reduction in Mexico. While the commission will closely examine any proposed emission reduction under this rule, it does not at this time plan to specify or endorse any particular method of demonstration. The commission recognizes the influence of air contaminant sources outside the U.S. on the El Paso airshed and will encourage emission reductions under this rule. This rule would not affect federally required reductions.

In order for the reductions to be eligible for substitution, they must be real, permanent, quantifiable, enforceable, and surplus to any applicable international, federal, state, or local law. Reductions of contaminants other than volatile organic compounds (VOC) and  $NO_x$  will not qualify as ERCs.

The adopted new §101.338, Emission Reductions Achieved Outside the United States, applies the provisions of SB 1561 to the existing emission credit system for electric generating facilities. This system was created under the implementation of SB 7 from the 76th Legislature, 1999. This new section allows the substitution of reductions of one criteria pollutant for another criteria pollutant provided the substitution meets the same requirements as stated in the description of §101.302. In response to public comment, the commission added additional language in subsection (a) that describes under what conditions emissions substitutions may be used and replaced the phrase “may be” with “are” in subsection (b).

The adopted new §101.357, Use of Emission Reductions Generated from the Texas Emission Reduction Plan (TERP), allows site owners or operators in the HGA nonattainment area to defer a portion of their required NO<sub>x</sub> emissions under applicable commission rules by using emissions reductions generated under the TERP. The TERP reductions may be used if the owner or operator does the following: contributes to the TERP fund \$75,000 per ton of NO<sub>x</sub> reductions used, not to exceed 25 tpy or 0.5 tons per day (tpd) on a site-wide basis; demonstrates to the executive director that the site will be in full compliance with applicable rules no later than five years after the anniversary of the date the emissions reductions would have normally been required; reduces emissions from the site at least 80% of the required reductions; and receives approval from the executive director of a petition from the owner or operator that demonstrates that it is technically infeasible to comply with the applicable emission reductions of 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds. In order to ensure that TERP reductions are not used twice to meet SIP reductions, the commission added a restriction that TERP emissions used to meet stationary source reduction requirements must not have

been previously used to meet reduction requirements under a SIP attainment demonstration. For consistency with SB 5, the commission also added a restriction that TERP credits must be used in the same nonattainment area in which they are generated and a requirement that emission reduction projects funded under TERP must be used to benefit the community in which the site using the TERP emission reduction credits is located.

The adopted amendments to §101.372, General Provisions, address the relationship of SB 1561 requirements to the generation of discrete emission reduction credits (DERCs). The adopted amendments allow the substitution of emission reductions in one nonattainment air contaminant for reductions of another nonattainment air contaminant under the same restrictions as described for §101.302. Reductions of contaminants other than VOC and NO<sub>x</sub> will not qualify as DERCs. In response to public comment, the commission also corrected typographical errors and deleted the phrase “and using” from §101.372(a)(2).

New §117.571, which is being adopted concurrently in this issue of the *Texas Register* (Rule Log Number 2001-025d-117-AI), allows site owners or operators to defer NO<sub>x</sub> emissions reductions in the DFW ozone nonattainment area by using reductions under the TERP. The conditions on the use of these reductions are identical to those described for §101.357.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the draft regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the adopted rulemaking does not meet

the definition of “major environmental rule.” Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). A “major environmental rule” means a rule which has as its specific intent 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 adopted rules implement SB 1561 and allow the substitution of emissions reductions of one criteria pollutant, accomplished outside the U.S., for emissions reductions of another criteria pollutant in Texas. This substitution will occur only under specific conditions as described in the SECTION BY SECTION DISCUSSION. The adopted rules also implement certain requirements of SB 5 and allow the deferral of NO<sub>x</sub> emissions reductions in the HGA nonattainment area under specific conditions described in the SECTION BY SECTION DISCUSSION portion of this preamble. The adopted rulemaking increases the compliance options for industries currently regulated by the commission. The adopted amendments and new sections do not increase the stringency of existing rules 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 adopted rules do not meet any of the four applicability requirements. Specifically, the amendments and new sections implement the requirements of Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §386.056 and §382.0172.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rules. Promulgation and enforcement of the rules will not burden private real property. The adopted rules 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. Consequently, these rules do not meet the definition of a takings under Texas Government Code, §2007.002(5). These rules are specifically adopted to implement the requirements of THSC, TCAA, §386.052 and §382.0172, and address alternative methods of meeting emission reduction requirements and emissions reduction substitutions respectively. Therefore, these revisions do not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the 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 adopted 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 §501.14(q), which requires that the commission protect air quality in coastal areas. The adopted rulemaking addresses alternative methods of meeting emission reduction requirements and emissions reduction substitutions. No new emissions of criteria pollutants are authorized by these rules.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The adopted rulemaking is part of the state's ozone attainment strategy; therefore, these rules will be submitted as part of the SIP. As a result, the rules will become applicable requirements under the federal operating permit program.

#### HEARINGS AND COMMENTERS

The commission held public hearings on this proposal in El Paso on December 17, 2001, and in Houston on December 18, 2001. The comment period closed on January 7, 2002. The El Paso Electric Company (EPE); Environmental Defense (ED); Galveston-Houston Association for Smog Prevention (GHASP); Harris County Public Health and Environmental Services, Pollution Control Division (HCPC); Sierra Club, Houston Regional Group (Sierra-Houston); and U.S. Environmental Protection Agency (EPA) submitted comments. ED submitted comments separately and also on GHASP letterhead. The EPE, ED, GHASP, HCPC, and EPA generally supported the proposal with suggested changes. Sierra-Houston generally opposed the proposal.

## RESPONSE TO COMMENTS

Sierra-Houston, ED, and EPA stated that there is no criteria for deciding whether an emissions substitution will result in a greater health benefit to the overall air quality of the area, and that the lack of criteria will allow the executive director to operate in an arbitrary and capricious manner. They also stated that the criteria and procedures used to determine “greater health benefit” should be defined in the rule. Sierra-Houston opposed the substitution of reductions of one pollutant from a source outside the U.S. for reductions of another pollutant otherwise required in Texas. Sierra-Houston stated that the proposal ignored the effects of the mix of air pollutants.

**The commission has not changed the rules in response to this comment. When determining whether an emissions reduction outside the U.S. will be of greater health benefit, the commission will consider the amount of air contaminant removed, the frequency that concentrations of an air contaminant have exceeded the NAAQS, existing air quality demonstrations performed under SIP requirements, the air quality index, and any other information which would indicate a clear benefit of a proposed emission reduction. While the commission will closely examine any proposed emission reduction under these rules, it does not want to specify or endorse any particular method of demonstration. The commission recognizes the influence of air contaminant sources outside the U.S. on the El Paso airshed and wishes to encourage emission reductions under these rules. These rules would not affect federally required reductions. Subsequent and identical trades involving the same participants may not require any further demonstration.**

Sierra-Houston stated that nothing ensures the permanent removal of air contaminants from sources outside the U.S. and questioned how the commission can enforce against a source in Mexico. ED questioned whether a U.S. or Texas regulatory agency would have the authority to inspect monitoring systems and documentation to ensure comparability of emission reductions. ED suggested enforcement strategies that included permit conditions, memoranda of understanding between government agencies, and contracts between private parties with incentives to promote compliance.

**The commission believes reductions outside the U.S. can be enforceable and has not changed the rule in response to these comments. Prior to approving any emission substitution, the commission intends to put enforceable requirements on the user of the reduction. For example, an enforceable requirement could be a permit condition requiring a contract with a third party to inspect facilities outside the U.S. If the inspection reveals violations, the user of the reductions would then be held accountable by the commission. This type of plan could also require that the user of reductions maintain records within Texas that demonstrate the Mexican source has accomplished and is maintaining the emissions reduction. Any individual plan used to ensure that reductions outside the U.S. are actually occurring and are maintained would be evaluated on a case-by-case basis.**

Sierra-Houston stated that a severe ozone nonattainment area such as HGA should be required to make all available reductions. Sierra-Houston commented that this is particularly important because the current Houston SIP has a 56 tpd reduction deficit. Sierra-Houston also stated that TERP emission

reductions should not be allowed as a substitution for reduction currently required of stationary sources, but rather both sets of reductions should be made.

**The commission has not changed the rules in response to this comment. The rules require that emission substitution from the TERP occur on a ton-for-ton basis so that all reductions required under the HGA attainment demonstration will be accomplished. The TERP allows the user of TERP emission reductions to delay up to 20% of its required emissions for five years. At the end of this period, any delayed reductions will be surplus to those required under the SIP. Regarding the 56-ton emission reduction deficit, the commission will address the deficit in the 2004 review of the HGA SIP.**

EPE expressed concern that the rule as proposed did not specifically mention any provisions for the creation of emission offset credits. This possibility of creating offsets is the principal motivation for EPE to continue work to reduce brick kiln emissions in Ciudad Juárez. ED expressed concern that emission reductions achieved in Mexico may not meet federal nonattainment requirements for compliance with the Federal Clean Air Act (FCAA) because cross-border transactions seem to be limited to the U.S. under the FCAA definitions.

**The commission has not changed the rules in response to these comments. The rules do not restrict the use of offsets; however, the offset user must meet the requirements and intent of all federal, state, and local rules and regulations.**

ED anticipated that emission reduction substitution will be a complex business when conducted across an international border and recommended the commission first establish regulations that deal with the single pollutant trading.

**The commission has not changed the rule in response to this comment. The commission acknowledges that the international trading of emission credits makes issues, such as enforcement and verification, more complex as compared to trading within the U.S. However, the commission believes that such a program can be successfully implemented and will be an effective program to reduce air pollutants in the border area. The commission also believes that tools such as third-party inspections, contracts, and credit user liability can be effective. Finally, the adopted rules reflect the intent of SB 1561 which does not limit trades to one pollutant.**

ED recommended the inter-pollutant trades be restricted to those involving precursors for the same resulting pollutant, and stated that this recommendation is consistent with EPA guidance concerning inter-pollutant trading.

**The commission has not changed the rule in response to this comment. The commission believes that the intent of SB 1561 is to allow the substitution of emission reductions in one nonattainment pollutant for reductions otherwise required in another, as long as there is an improvement to the overall health benefit and general air quality in the affected area. The commission acknowledges that some trades may not meet federal regulations and may not be approved.**

ED stated that a source that elects to use emissions trading be required to demonstrate that the benefit derived from the trade does not come at public health detriment or lower environmental performance.

**The commission agrees and amended the rules in response to this comment. In order for a trade to be considered a greater benefit, the emission reduction outside the U.S. must result in no harmful local health effects through the avoidance of reductions otherwise required in Texas. The trade must also result in a greater health benefit as determined by the executive director. Both of these demonstrations would be accomplished using methods approved by the executive director, including, but not limited to, air dispersion modeling. The commission may require this demonstration only for the initial trade. Subsequent and identical trades involving the same participants may not require further demonstration.**

ED commented that emissions trading could increase local effects from hazardous air pollutants or diminish the benefits a local community might have realized under a reduction program. ED used the example of a source acquiring credits and using the credits to avoid a reduction in a hazardous air pollutant such as benzene. ED stated that the commission rules should contain safeguards to protect low-income and minority populations adjacent to sources of toxic emissions. In addition, ED stated that the commission should prohibit trading in situations where VOC reductions are otherwise required.

**The commission changed the rule to include the requirement to evaluate localized health effects. These rules shall not be used to allow emissions increases that are determined by the commission to be a threat to public health. Prior to authorization to use emissions reductions from outside the**

**U.S., the user's emissions are subject to a health effects review to ensure that harmful concentrations of a pollutant do not occur off the property where the source is located. However, the commission believes that prohibiting VOC trades would not be consistent with SB 1561, which allows the trading of one nonattainment pollutant for another.**

ED and HCPC commented that rules should be applied only in nonattainment areas on an international border as SB 1561 amended the TCAA, §382.0172, International Border Areas. ED commented that, if the bill were intended to apply to any nonattainment area of the state, it would have amended a more generic statute. In its interpretation of SB 1561, ED does not believe that Texas Government Code, §311.024, which states that the heading of a section does not limit or expand the meaning of a statute, should be read in isolation, but that the commission should also consider legislative history and intent. ED made a reference to the state senator who sponsored the bill, and who stated that SB 1561 would give the commission the necessary authority to allow for greater flexibility in improving air quality along the border region. HCPC commented that §§101.302(c)(4), 101.372(e)(6), and 101.338 are too broad in scope and need additional language consistent with SB 1561 to clarify that the facilities outside the U.S. are in the international border area with Mexico, and the reductions can only be used in the corresponding border areas in Texas. EPA stated that only sources in the El Paso nonattainment area could participate in the emissions substitution program.

**The commission changed the rule in response to these comments. The commission believes the legislature intended that SB 1561 apply to the border area because the statute amended TCAA, §382.0172. The commission will restrict the use of this rule to facilities within 100 kilometers of**

**the Texas - Mexico border. This is consistent with the definition of the border area contained in the 1983 La Paz agreement. El Paso is currently the only nonattainment area on the international border with Mexico and is designated nonattainment for three criteria pollutants: ozone, carbon monoxide, and PM<sub>10</sub>. Additionally, the commission has demonstrated under the FCAA Amendments of 1990, §818, that El Paso would be in attainment for these pollutants were it not for emissions from outside the U.S. Therefore, the commission believes that trading across the international border will result in air quality improvement for this area.**

ED commented that §101.338(a) does not contain the same level of detail as §101.302 regarding the nature of acceptable emissions substitutions. ED stated that the word “are” should be substituted for “may be” in §101.338(b). ED also commented that the commission should insert the word “monoxide” after “carbon” in §101.372(a). ED also stated that the words “and using” in §101.372(a)(2) appear to be unnecessary and inconsistent with the statute and that the word “an” appears twice in §101.372(a)(2)(B).

**The commission modified the rule to make the requested changes and corrections.**

EPA stated that it will be very difficult to determine if emissions reductions outside the U.S. have actually occurred and stated that some mechanism to ensure the permanence of the reductions is necessary. The inability to inspect sources outside the U.S. will be a major difficulty in approval of the emissions substitution program. Section 101.302(e)(4) names enforceability as a criterion, but there is no mechanism for enforcement against facilities located outside the U.S. EPA stated that emission

reductions must be subject to monitoring, recordkeeping, and reporting requirements of the EPA economic incentive programs (EIP) document. EPA added that the commission should clarify that emission reductions used as credits must be enforceable in accordance with the EPA EIP guidance. In the absence of an agreement that specifically addresses compliance, EPA suggested that the source receiving the reduction credit will be subject to enforcement action and the immediate installation of controls should the source that generates the credit outside the U.S. not monitor, keep records, or report in English. EPA further stated that records from the source generating the credit must be kept at the U.S. facility receiving the credits. The commission must address how the records from a foreign source generating credits for use in the U.S. will be checked for accuracy. Sierra-Houston stated that there are no criteria for determining when emission reductions are enforceable, quantifiable, and surplus to any applicable federal, state, or local law.

**The commission has not changed the rule in response to these comments. Prior to approving any emissions reduction substitution, the commission intends to put enforceable requirements on the user. For example, an enforceable requirement might be a permit condition requiring a contract with a third party to inspect facilities outside the U.S. If the inspection reveals violations, the user of the reductions could then be held accountable by the commission. This type of plan could also require that the user of reductions maintain records within Texas that demonstrate that the Mexican source has accomplished and is maintaining the emissions reduction. Any individual plan used to ensure that reductions outside the U.S. are actually occurring and are maintained would be evaluated on a case-by-case basis. Any emission reductions from outside the U.S. must meet the same criteria as ERC and DERC generation.**

EPA stated that, in order to be surplus, reductions must not have been relied upon in the most recent attainment demonstration approved by EPA or have the same qualitative effect on the environment.

**The commission has not changed the rule in response to this comment. The commission agrees with the EPA comment and will use these standards to help evaluate potential emission trades.**

EPA stated the emission reductions must have been established by use of an emissions quantification protocol that was pre-approved by EPA.

**The commission has not changed the rule in response to this comment and intends to use EPA-approved protocols established by the new source review (NSR) section of the commission's Air Permits Division.**

EPA stated that emission reductions under TERP must be real, permanent, quantifiable, and enforceable, and that these issues should be addressed in proposed TERP rules. Until a TERP rule is proposed, §101.357 must require that any emissions deferral be subject to EPA review and comment. Section 101.357 must also clarify from which baseline an 80% emission reduction is accomplished.

**The commission has not changed the rule in response to this comment, but agrees with EPA that the reductions must be real, permanent, quantifiable, and enforceable. Any emission reduction deferrals will be made available to the EPA until such time as a TERP rule is approved as a SIP revision. Reductions will be determined from the 1997 emission inventory (EI) for DFW and from**

**the baseline as established under the Mass Emissions Cap and Trade (MECT) program for HGA.**

**If a site is not subject to the MECT, the baseline will be the 1997 EI. The commission has not included the baseline within the rule to allow flexibility should the baseline require a change.**

Sierra-Houston stated that the proposal lacks the technical criteria that would determine whether it is technically infeasible for a source to make a required reduction. EPA stated that §101.357(4) allows impermissible executive director discretion in the determination of technical infeasibility.

**The commission changed the rule in response to this comment. The commission will determine on a case-by case basis whether a required reduction is technically infeasible. Technical specifications and control technology are constantly changing and involve a wide range of technologies and techniques. The commission does not believe it is possible to place a meaningful summary of these technologies within the rule, but has added rule language stating that a technical review will consider current technology, adaptability of technology to a particular source, age and projected useful life of the source, and cost benefits at the time of application.**

GHASP and ED commented that the \$75,000 paid to the TERP fund for each ton of emissions reduction deferrals should be used to finance reduction under TERP greater than one ton; and that to prevent double counting of SIP reductions, the money should be used to finance reductions distinct from those already in the SIP. GHASP and ED also stated that the rule should contain a provision that any reductions accomplished under TERP remain in effect over the period for which the substitution is

granted. Finally, GHASP and ED stated that the definition of “site” must encompass an entire facility and not just single emission units.

**The commission has not changed the rule in response to this comment. Money collected from the sale of TERP reductions will go back into the TERP fund and be distributed under TERP rules. Reductions from the TERP will be based on mass tons; therefore, the reducing site does not necessarily need to continue the reductions during the time span in which the reductions are used. For example, if a TERP reduction generates 100 tons of reductions over one year, a facility could use those reductions at a rate of 50 tons over a two-year period. In addition, the commission has not changed the definition of “site” to encompass an entire facility in this rulemaking. However, the definition is being considered for proposal in Chapter 101 as part of the upset/maintenance rule package (Rule Log Number 2001-075-101-AI) in the near future. The definition, as currently planned for that proposal, is: “(88) Site - The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control)....”**

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 1: EMISSION CREDIT BANKING AND TRADING**

**§101.302**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air. The amendment is also adopted under TCAA, §382.0172(b), concerning International Border Area, as amended by SB 1561, which authorizes the commission to make certain emission reduction substitutions for emission reductions outside the U.S. The amendment is also adopted under SB 5 and SB 1561, as passed by the 77th Legislature, 2001.

**§101.302. General Provisions.**

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs) and nitrogen oxides (NO<sub>x</sub>) may qualify as emission credits. Reductions of other pollutants do not qualify as emission

credits under this division. Reductions of one pollutant may not be used to meet the requirements of another pollutant, unless:

(1) urban airshed modeling demonstrates that one ozone precursor may be substituted for another, subject to executive director and EPA approval;

(2) the facility(s) generating the emission reductions is located outside the United States; and the substitution:

(A) results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area, as determined by the executive director;

(B) is from the reduction of an air contaminant for which the area has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment; and

(C) is for any air contaminant for which the area has been designated as nonattainment or leads to the formation of a criteria pollutant for which the area has been designated as nonattainment; or

(3) the user of emission reductions substitutions under paragraph (2) of this subsection:

(A) demonstrates that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(B) submits all supporting information for calculations, modeling, and any additional information requested by the executive director; and

(C) is located within 100 kilometers of the Texas - Mexico border.

(b) Emission reduction requirements.

(1) Emission reduction credits (ERCs) are generated from reductions beyond those required. To be certified as an emission credit, an emission reduction must be enforceable, permanent, quantifiable, real, and surplus. The emission credit must be surplus at the time it is created, as well as when it is used. The certified reduction must have occurred after the most recent year of emissions inventory used for state implementation plan (SIP) determinations for VOC and NO<sub>x</sub>, and the source's annual emissions prior to the emission credit application must have been reported or represented in the emissions inventory used for SIP determinations.

(2) Mobile emission reduction credits (MERCs) are generated from reductions beyond those required, and derived from a calculation of the annual difference between the mobile source emissions baseline and the projected emissions level after the MERC strategy has been put in place. To be certified as a MERC, an emission reduction must be enforceable, permanent, quantifiable, real, and

surplus. The emission credit must be surplus at the time it is created, as well as when it is used. The certified reduction must have occurred after the most recent year of emissions inventory used for SIP determinations for VOC and NO<sub>x</sub>, the mobile source's emissions must have been represented in the emissions inventory used for SIP determinations, and the applicable mobile sources must have been included in the attainment demonstration baseline.

(3) Emission reductions from a source which are certified as emission credits under this division cannot be recertified in whole or in part as credits under another division within this subchapter.

(c) Eligible sources. The following sources are eligible to generate emission credits:

(1) stationary sources (including area sources);

(2) any mobile source;

(3) any stationary source (including area sources) or mobile source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(d) Life of an emission credit.

(1) If an ERC is used prior to its expiration date, the ERC is effective for the life of the applicable user source.

(2) Effective January 2, 2001, an ERC is available for use for 60 months from the date of the emission reduction except to the extent regulatory changes occur after the date of reduction that reduce the certified amount or invalidate the entire reduction for affected emission points. ERCs certified or applied for prior to January 2, 2001 shall be available for use for 120 months from the date of the emission reduction except to the extent regulatory changes occur after the date of the emission reduction that reduce the certified amount or invalidate the entire reduction for affected emission points.

(e) Geographic scope. Except as provided in paragraph (4) of this subsection, only emission reductions generated in ozone nonattainment areas can be certified. The trading of emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern. An emission credit must be used in the nonattainment area in which it is generated unless:

(1) a demonstration has been made and approved by the executive director and the EPA to show that the emission reductions achieved in another county, state, or nation provide an improvement to the air quality in the county of use;

(2) the emission credit was generated in an ozone nonattainment area which has an equal or higher nonattainment classification than the ozone nonattainment area of use, and a

demonstration has been made and approved by the executive director and the EPA to show that the emissions from the ozone nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the ozone nonattainment area of use;

(3) the user has obtained prior written approval of the executive director and the EPA;

or

(4) a facility is using emission reductions generated outside the United States which have been determined by the executive director to be real, permanent, enforceable, quantifiable, and surplus to any applicable international, federal, state, or local law and the result would provide a greater health benefit to the area.

(f) The registry. All emission credit generators and users must register with the executive director. A notice submitted by a generator or user will be posted to the registry. The registry will assign a unique number to each certificate which will include the amount of emission reductions generated. The registry will maintain current listings of all credits available or used for each ozone nonattainment area.

(g) Recordkeeping. The user must maintain a copy of all notices and backup information submitted to the registry during, and for at least two years after, the beginning of the use period. The user must also make such records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records shall include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each unit using emission credits;

(2) the amount of emission credits being used by each unit; and

(3) the specific number, name, or other identification of emission credits used for each unit.

(h) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of an emission credit is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information, may result in the rejection of the emission reduction. All non-confidential notices and information regarding the generation, use, and availability of emission credits may be obtained from the executive director.

(i) Authorization to emit. An emission credit created under this division is a limited authorization to emit VOC and/or NO<sub>x</sub>, unless otherwise defined, in accordance with the provisions of this section, the FCAA, and the TCAA, as well as regulations promulgated thereunder. An emission credit does not constitute a property right. Nothing in this division may be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(j) Program participation. The executive director has the authority to prohibit an organization from participating in emission credit trading either as a generator or user, if the executive director determines that the organization has violated the requirements of the program or abused the privileges provided by the program.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 2: EMISSIONS BANKING AND TRADING OF ALLOWANCES**

**§101.338**

**STATUTORY AUTHORITY**

The new section is adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air. The new section is also adopted under TCAA, §382.0172(b), concerning International Border Areas, as amended by SB 1561, which authorizes the commission to make certain emission reduction substitutions for emission reductions achieved outside the U.S. This new section is also adopted under SB 5 and SB 1561, as passed by the 77th Legislature, 2001.

**§101.338. Emission Reductions Achieved Outside the United States.**

(a) A grandfathered or electing electric generating facility (EGF) may use emission reductions achieved outside the United States in substitution of allowances for the purposes of compliance with this division provided that the emission reductions are enforceable, quantifiable, and surplus to any

applicable international, federal, state, or local law; are of greater health benefit; and are of equal or greater benefit to overall air quality of the area, as determined by the executive director.

(b) A grandfathered or electing EGF may only use subsection (a) of this section if reductions of criteria pollutants for which an area has been designated as nonattainment or air contaminants which lead to the formation of a criteria pollutant for which an area has been designated as nonattainment are substituted for any criteria pollutant for which the area has been designated as nonattainment or for air contaminants which lead to the formation of a criteria pollutant for which an area has been designated as nonattainment. The applicant must:

(1) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(2) submit all supporting information for calculations, modeling, and any additional information requested by the executive director; and

(3) be located within 100 kilometers of the Texas - Mexico border.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM**

**§101.357**

**STATUTORY AUTHORITY**

The new section is adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air. The new section is also adopted under THSC, §386.056, concerning Availability of Emissions Reductions in Certain Nonattainment Areas, as amended by SB 5, which authorizes the commission to allow alternative methods of compliance with air pollution regulations.

**§101.357. Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP).**

(a) An owner or operator of a site as defined in §122.10 of this title (relating to General Definitions) in the Houston/Galveston ozone nonattainment area may use nitrogen oxides (NO<sub>x</sub>)

emission reductions generated under the TERP in lieu of allowances for compliance with this division provided that:

(1) the owner or operator of the site contributes to the TERP fund \$75,000 per ton of NO<sub>x</sub> emissions used, not to exceed 25 tons per year or 0.5 tons per day on a site-wide basis;

(2) the owner or operator of the site demonstrates to the executive director that the site will be in full compliance with the applicable emission reduction requirements of this division and Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) no later than the fifth anniversary of the date on which the emission reductions would otherwise be required;

(3) emissions from the site are reduced by at least 80% of the required reductions;

(4) the reductions accomplished under the TERP have not been previously used to meet reduction requirements under a state implementation plan attainment demonstration;

(5) the reductions accomplished under the TERP are used in the same nonattainment area in which they are generated; and

(6) the executive director approves a petition submitted by the owner or operator of the site that demonstrates that it is technically infeasible to comply with applicable emission reduction

requirements of this division and Chapter 117 of this title above 80% of the required reductions. When considering technical infeasibility the executive director may consider, but will not be limited to:

- (A) current technology;
- (B) adaptability of technology to a particular source;
- (C) age and projected useful life of a source; and
- (D) cost benefits at the time of application.

(b) The emissions reductions funded under the TERP, and used to offset commission requirements, shall be used to benefit the community in which the site using the emissions reductions is located. If there are no eligible emissions reduction projects within the community, the commission may authorize projects in an adjacent community. For purposes of this section, a community means a Justice of the Peace precinct.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING**

**§101.372**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air. The amendment is also adopted under TCAA §382.0172(b), concerning International Border Area, as amended by SB 1561, which authorizes the commission to make certain emission reduction substitutions for emission reductions achieved outside the United States.

**§101.372. General Provisions.**

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), sulfur dioxide (SO<sub>2</sub>), and particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns (PM<sub>10</sub>) may qualify as discrete emission credits

as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, unless:

(1) urban airshed modeling demonstrates that one may be substituted for another or as approved by the executive director and the EPA;

(2) the facility(s) generating the emission reductions is located outside the United States and the substitution:

(A) results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area, as determined by the executive director;

(B) is from the reduction of an criteria pollutant for which the area has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment; and

(C) is for any criteria pollutant for which the area has been designated as nonattainment; or

(3) the user of emission reductions substitutions under paragraph (2) of this subsection:

(A) demonstrates that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(B) submits all supporting information for calculations, modeling, and any additional information requested by the executive director; and

(C) is located within 100 kilometers of the Texas - Mexico border.

(b) Discrete emission credit requirements.

(1) Discrete emission reduction credit (DERC) - To be creditable as a DERC, an emission reduction must be real, quantifiable, and surplus at the time the discrete emission credit is generated. The creditable reduction must have occurred after the most recent year of emissions inventory used for state implementation plan (SIP) determinations for all applicable pollutants and the source's annual emissions prior to the discrete emission credit application must have been reported or represented in the emissions inventory used for SIP determinations.

(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. 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) Emission reductions from a source which are certified as discrete emission credits under this division cannot be recertified in whole or in part as emission credits under another division within this subchapter.

(c) Eligible sources include the following:

(1) stationary sources (including area sources);

(2) mobile sources; or

(3) any stationary source (including area sources) or mobile source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(d) Life of a discrete emission credit. A discrete emission credit is available for use after the notice of generation, DC-1 Form, has been received and deemed creditable by the commission registry in accordance with subsection (h) of this section, and may be used anytime thereafter.

(e) Geographic scope. Except as provided in paragraph (6) of this subsection, only emission reductions generated in the State of Texas may be creditable and used in the state with the following limitations.

(1) VOC and NO<sub>x</sub> discrete emission credits generated in an ozone attainment area may be used in any county or portion of a county designated as attainment or unclassified, but may not be used in an ozone nonattainment area.

(2) VOC and NO<sub>x</sub> discrete emission credits generated in an ozone nonattainment area may be used either in the same ozone nonattainment area in which they were generated, or in any county or portion of a county designated as attainment or unclassified.

(3) VOC and NO<sub>x</sub> discrete emission credits generated in an ozone nonattainment area may not be used in any other ozone nonattainment area, except as provided in this subsection.

(4) CO, SO<sub>2</sub>, and PM<sub>10</sub> discrete emission credits must be used in the same metropolitan statistical area in which the reduction was generated.

(5) VOC and NO<sub>x</sub> discrete emission credits generated in other counties, states, or nations can be used in any attainment or nonattainment county provided a demonstration has been made and approved by the executive director and the EPA to show that the emission reductions achieved in the other county, state, or nation improves the air quality in the county where the credit is being used.

(6) A facility may use discrete emission reductions generated outside the United States provided that the emission reductions are quantifiable, real, and surplus to any applicable international, federal, state, or local law and the result would provide a greater health benefit to the area as determined by the executive director. The applicant must:

(A) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(B) submit all supporting information for calculations, modeling, and any additional information requested by the executive director; and

(C) be located within 100 kilometers of the Texas - Mexico border.

(f) Trading discontinuation. The trading of discrete emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern.

(g) Ozone season. In areas having an ozone season of less than 12 months, VOC and NO<sub>x</sub> discrete emission credits generated outside the ozone season may not be used during the ozone season.

(h) The registry. All required notices of discrete emission credit generators and users must be submitted to the registry. A notice submitted by a generator or user will be reviewed for credibility and

when deemed certified, posted to the registry. The registry will assign a unique number to each ton of emission reductions generated. The registry will maintain current listings of all credits available or used for each ozone nonattainment area. One combined listing for all the counties or portions of counties designated as attainment or unclassified will be provided by the registry.

(i) Recordkeeping. The generator must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years, following the completion of the generation period. The user must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years, following the completion of the use period. Other relevant reference material or raw data must also be maintained on-site by the participating sources. The user must also maintain a copy of the generator's notice and backup information for a minimum of five years after the use is completed. The records shall include, but are not necessarily limited to:

- (1) the name, emission point number (EPN), and facility identification number (FIN) of each unit using discrete emission credits;
- (2) the amount of discrete emission credits being used by each unit; and
- (3) the specific number, name, or other identification of discrete emission credits used for each unit.

(j) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of discrete emission credits is public information and may not be submitted as confidential. Any claim of confidentiality for this type of material or failure to submit all information may result in the rejection of the emission reduction. All non-confidential notices and information regarding the generation, use, and availability of discrete emission credits may be obtained from the registry.

(k) Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the FCAA, and the TCAA, as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(l) Program participation. The executive director has the authority to prohibit a company from participating in discrete emission credit trading either as a generator or user, if the executive director determines that the company has violated the requirements of the program or abused the privileges provided by the program.