

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §101.302, General Provisions and §101.372, General Provisions; new §101.338, Emission Reductions Achieved Outside the United States and §101.357, Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP) and corresponding revisions to the state implementation plan (SIP).

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

The commission proposes these amendments and new sections in order to control ground-level ozone and other criteria pollutants in nonattainment (NA) areas in the state, and to implement Senate Bill 5 (SB 5) and SB 1561, 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) areas. These owners or operators may substitute emissions reductions made under the plan for those reductions otherwise required under the commission's rules and make a contribution to the fund based on the amount of emissions reductions substituted. This proposed rulemaking would implement the relevant portions of SB 5 concerning these contributions to the TERP

fund in the HGA area and are 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 to satisfy emission reduction requirements in Texas by allowing reductions in one air contaminant to substitute for reductions in another criteria pollutant under specific conditions described in the SECTION BY SECTION DISCUSSION portion of this preamble.

#### SECTION BY SECTION DISCUSSION

The proposed amendments to §101.302 address the relationship of the requirements of SB 1561 and the generation of emission reduction credits (ERCs). The amendments would allow emission reductions from facilities located outside the United States to be used to meet the requirements for reductions in another pollutant in Texas, provided 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 (ED) would make this determination. The proposal involves the substitution of a reduction of a criteria pollutant for which the area has been designated as a NA area for a required reduction for another criteria pollutant for which the area is also designated as a NA area, and the substitution must clearly result in greater health benefits for the community as a whole than would reductions at the original facility. In order for the reductions to be eligible for substitution, they must be real, permanent, quantifiable, and surplus to any applicable international, federal, state, or local law. Reductions of contaminants other than volatile organic compounds (VOC) and NO<sub>x</sub> would not qualify as ERCs.

Proposed new §101.338 would apply the provisions of SB 1561 to the existing emission credit system for electric generating facilities created under the implementation of SB 7 from the 76th Legislature, 1999. This new section would allow 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.

Proposed new §101.357 would allow site owners or operators in the HGA NA 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 tons per year (tpy) or 0.5 tons per day (tpd) on a site-wide basis; demonstrates to the ED that the site will be in full compliance with applicable rules no later than the fifth anniversary of the date the emissions reductions would have normally been required; reduces emissions from the site at least 80% from the established baseline; and receives approval from the ED 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.

The proposed amendments to §101.372 address the relationship of SB 1561 requirements and the generation of discrete emission reduction credits (DERCs). The proposed amendments allow the substitution of emission reductions in one criteria pollutant for reductions of another contaminant under the same restrictions as described for §101.302. Reductions of contaminants other than VOC and NO<sub>x</sub> would not qualify as DERCs.

New §117.571, proposed concurrently in Rule Log Number 2001-025d-117-AI, would allow site owners or operators to defer NO<sub>x</sub> emissions reductions in the DFW NA area by using reductions under the TERP. The conditions on the use of these reductions would be identical to those described for §101.357.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for each year of the first five-year period the proposed rulemaking is in effect that there will be no significant fiscal implications for units of state and local government due to administration and enforcement of the proposed rulemaking. The commission anticipates that the majority of affected units of government will use less expensive alternatives for emission reductions than provisions available in this rulemaking. The proposed rulemaking would allow units of state and local government to use emission reductions generated by the TERP to help meet required emission reductions. Units of government using these credits would have to remit to the TERP fund \$75,000 per ton of emission reduction credits used.

The proposed rulemaking is intended to implement certain provisions of both SB 5 (an act relating to the TERP) and SB 1561 (an act relating to the acceptance by the commission of certain emissions reductions in exchange for other emissions reductions). This rulemaking would implement the provisions in SB 5 that allow affected site owners or operators in the HGA NA area to defer a portion of their required NO<sub>x</sub> emissions reductions by using emissions reductions generated under the TERP. Senate Bill 1561 allows affected facilities in Texas to substitute required emission reductions for reductions in air emissions generated at facilities outside the United States.

Senate Bill 5 established the TERP, providing financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment, grants for the development of new emission control technology, and new building energy efficiency standards. The commission anticipates that the provisions in SB 5 will result in a pool of excess emission reductions available for purchase. Affected entities that seek to use TERP emission reductions would have to remit to the TERP fund \$75,000 per ton of TERP emission credits used, and each entity would be limited to 25 tpy or 0.5 tpd per site. The maximum annual expense per site for TERP emission credits would be \$1,875,000. Additional requirements include a demonstration to the ED that the site will be in full compliance within five years of applicable deadlines, reduction in emissions from the site by 80% of the established baseline, and determination by the ED that the required emission reductions are not technically feasible.

Senate Bill 1561 would allow sites in Texas that emit criteria pollutants regulated under the Federal Clean Air Act (FCAA) (VOCs, NO<sub>x</sub>, carbon monoxide (CO), sulfur dioxide (SO<sub>2</sub>), and ten microns (PM<sub>10</sub>)), to use emission reductions in criteria pollutants generated at adjacent facilities across the border in Mexico. In order to utilize the reductions, the emission reductions would have to be 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 ED. An example would be a facility in El Paso that is required to reduce its output of NO<sub>x</sub> by ten tpy. The bill allows this site to utilize a ten-ton reduction of CO or other criteria pollutant generated at a site across the border in Mexico. Sites would be required to provide regulators with proof detailing the reduction in Mexico. Because the site in Texas would not have to purchase these emission reduction credits, there may be cost savings, in an

amount that cannot be determined at this time, for affected entities that would normally have to make reductions.

The voluntary provisions of the proposed rulemaking would affect over 6,000 pieces of equipment, some of which are owned and operated by units of state or local government, at sites and operations operating in the HGA NA area and along the border with Mexico. Owners and operators of affected equipment would have the option to utilize the voluntary provisions of this rulemaking to help meet emission reduction requirements. Examples of equipment and processes at sources that would be affected by the proposed rulemaking include: electric utility boilers and stationary gas turbines; industrial commercial institutional (ICI) boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and boiler and industrial furnace (BIF) units.

The proposed rulemaking is intended to provide affected facilities additional compliance options to meet required emission reductions. The decision to utilize provisions in this rulemaking would be a business decision by owners and operators of affected sites. The proposed rulemaking does not introduce additional regulatory requirements and is not anticipated to result in significant fiscal impacts unless affected entities voluntarily seek to utilize emission reductions generated by the TERP program. The commission does not anticipate significant increases in revenues to the TERP fund due to

implementation of the proposed rulemaking, because the majority of affected entities will utilize less expensive emission reduction compliance alternatives.

#### PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of implementing the proposal will be providing flexibility to those affected sources which will potentially facilitate the reduction of emissions of NO<sub>x</sub> in the HGA ozone NA area and along the Texas/Mexico border.

The proposed rulemaking is intended to implement certain provisions of both SB 5 and SB 1561. This rulemaking would implement the provisions in SB 5 that allows affected site owners or operators in the HGA NA area to defer a portion of their required NO<sub>x</sub> emissions reductions by using emissions reductions generated under the TERP. Senate Bill 1561 allows affected facilities in Texas to substitute required emission reductions for reductions in air emissions generated at facilities outside the United States.

Senate Bill 5 established the TERP, providing financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment, grants for the development of new emission control technology, and new building energy efficiency standards. The commission anticipates that the provisions in SB 5 will result in a pool of excess emission reductions available for purchase. Affected entities that seek to use TERP emission reduction credits would have to remit to the TERP fund \$75,000 per ton of TERP emission credits used, and each entity would be limited to 25 tpy or 0.5 tpd

per site. The maximum annual expense per site for TERP emission credits would be \$1,875,000. Additional requirements include a demonstration to the ED that the site will be in full compliance within five years of applicable deadlines, reductions in emissions from the site by 80% of the established baseline, and determination by the ED that the required emission reductions are not technically feasible.

Senate Bill 1561 allows sites in Texas that emit criteria pollutants regulated under the FCAA (VOCs, NO<sub>x</sub>, CO, SO<sub>2</sub>, and PM<sub>10</sub>), to use emission reductions in criteria pollutants generated at adjacent facilities across the border in Mexico. Sites would be required to provide regulators with proof detailing the emission reduction in Mexico. Because the site in Texas would not have to purchase these emission reduction credits, there may be cost savings, in an amount that cannot be determined at this time, for affected entities that would normally have to make reductions.

The voluntary provisions of the proposed rulemaking would affect over 6,000 pieces of equipment, the majority of which are owned and operated by industry, at sites and operations operating in the HGA NA area and along the border with Mexico. Owners and operators of affected equipment would have the option to utilize the voluntary provisions of this rulemaking to help meet emission reduction requirements. Examples of equipment and processes at sources that would be affected by the proposed rulemaking include: electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and

furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units.

The proposed rulemaking is intended to provide affected facilities additional compliance options to meet required emission reductions. The decision to utilize provisions in this rulemaking would be a business decision by owners and operators of affected sites. The proposed rulemaking does not introduce additional regulatory requirements and is not anticipated to result in significant fiscal impacts unless affected entities voluntarily seek to utilize emission reductions generated by the TERP program.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts for small or micro-businesses, if the affected entities use cheaper alternatives for emission reductions than provisions available in this rulemaking. Small or micro-businesses would only incur fiscal impacts if they voluntarily decided to utilize emissions reductions generated by the TERP program. The proposed rulemaking is intended to implement certain provisions of both SB 5 and SB 1561. This rulemaking would implement the provisions in SB 5 that allow affected site owners or operators in the HGA NA area to defer a portion of their required NO<sub>x</sub> emissions reductions by using emissions reductions generated under the TERP. Senate Bill 1561 allows affected facilities in Texas to substitute required emissions reductions for reductions in air emissions generated at facilities outside the United States.

Senate Bill 5 established the TERP, providing financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment, grants for the development of new emission control

technology, and new building energy efficiency standards. The commission anticipates that the provisions in SB 5 will result in a pool of excess emissions reduction credits available for purchase. Affected entities that seek to use TERP emissions reduction credits would have to remit to the TERP fund \$75,000 per ton of TERP emission credits used, and each entity would be limited to 25 tpy or 0.5 tpd per site. The maximum annual expense per site for TERP emission credits would be \$1,875,000. Additional requirements include a demonstration to the ED that the site will be in full compliance within five years of applicable deadlines, reduction in emissions from the site by 80% of the established baseline, and determination by the ED that the required emissions reductions are not technically feasible.

Senate Bill 1561 would allow sites in Texas that emit criteria pollutants regulated under the FCAA (VOCs, NO<sub>x</sub>, CO, SO<sub>2</sub>, and PM<sub>10</sub>), to use emissions reductions in criteria pollutants generated at adjacent facilities across the border in Mexico. Sites would be required to provide regulators with proof detailing the emission reduction in Mexico. Because the site in Texas would not have to purchase these emissions reduction credits, there may be cost savings, in an amount that cannot be determined at this time, for affected entities that would normally have to make reductions.

Of the more than 6,000 identified pieces of equipment at sources in the affected areas, some will be owned and operated by small or micro-businesses. Examples of likely equipment at sources operated by small or micro-businesses include boilers, process heaters, and internal combustion engines.

The following is an analysis of the potential costs per employee for small or micro-businesses affected by the proposed rulemaking. Small and micro-businesses are defined as having fewer than 100 or no more than 20 employees respectively. A small business that decides to utilize five tons of TERP emissions reductions would incur costs up to approximately \$3,750 per employee. A micro-business that decides to utilize five tons of TERP emissions reductions would incur costs up to approximately \$18,750 per employee.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposal is in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the draft regulatory analysis (RIA) requirements of Texas Government Code, §2001.0225 and has determined that the proposed 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). “Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rules would implement SB 1561 and would allow the substitution of emissions reductions of one criteria pollutant, accomplished outside the United States, for emissions

reductions of another criteria pollutant in Texas. This substitution would occur only under specific conditions as described in the SECTION BY SECTION DISCUSSION. The proposed rules would also implement certain requirements of SB 5 and would allow the deferral of NO<sub>x</sub> emissions reductions in the HGA NA under specific conditions described in the SECTION BY SECTION DISCUSSION portion of this preamble. The proposed rulemaking would increase the compliance options for industries currently regulated by the commission. The proposed 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 proposed rules do not meet any of the four applicability requirements. Specifically, the amendments and new sections would implement the requirements of Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §386.056 and §382.0172. The commission invites public comment regarding the draft RIA determination during the public comment period.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. Promulgation and enforcement of the rules will not burden private real property. The proposed 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 proposed 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 proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the

policy in §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed rulemaking addresses alternative methods of meeting emission reduction requirements and emissions reduction substitutions. No new emissions of criteria pollutants are authorized by these rules. The commission invites public comment regarding the consistency of the proposed rules with the CMP during the public comment period.

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

The proposed 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 would become applicable requirements under the federal operating permit program.

#### ANNOUNCEMENT OF HEARINGS

The commission will hold two public hearings on this proposal at the following locations and times: 1.) in El Paso on December 17, 2001 at 7:00 p.m. at the City Council Chambers, 2nd Floor, 2 Civic Center Plaza; and 2.) in Houston on December 18, 2001 at 7:00 p.m. at the City Hall Chambers, 2nd Floor, 901 Bagby. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal one hour before each hearing and will answer questions before and after each hearing.

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

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments should reference Rule Log Number 2001-063-101-AI. Comments must be received by 5:00 p.m., January 7, 2002. For further information, please contact Beecher Cameron at (512) 239-1495 or Joseph Thomas at (512) 239-4580.

#### STATUTORY AUTHORITY

The amendment is proposed 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 THSC, 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 proposed 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 proposed under §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 United States. The amendment is also proposed under SB 5 (an act

relating to the Texas Emissions Reduction Plan), and SB 1561 (an act relating to the acceptance by the TNRCC of certain emissions reductions in exchange for other emissions reductions) as passed by the 77th Legislature, 2001.

The proposed amendment implements TCAA, §§382.002, 382.011, 382.012, 382.017, and 382.0172(b). The proposed amendment also implements certain sections of SB 5, as passed by the 77th Legislature, 2001, which allows owners or operators to substitute emissions reductions made under the plan for those reductions otherwise required under the commission's rules and to make a contribution to the fund based on the amount of emissions reductions substituted. The new section also implements SB 1561, as passed by the 77th Legislature, 2001, which allows surplus emission reductions achieved outside the United States to satisfy emission reduction requirements in Texas by allowing reductions in one criteria pollutant to substitute for reductions in another criteria pollutant under specific conditions.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§101.302**

**§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: [except at such time as]

(1) urban airshed modeling demonstrates that one ozone precursor may be substituted for another, subject to executive director and the (EPA) [United States Environmental Protection Agency] approval; or [.]

(2) the facility(ies) generating the emission reductions is (are) located outside the United States; and

(A) the substitution 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) the substitution 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) the substitution is for another 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.

(b) - (d) (No change.)

(e) Geographic scope. Except as provided in paragraph (4) of this subsection, only [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 [United States Environmental Protection Agency (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; or

(2) (No change.)

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

[.]

(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) - (j) (No change.)

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§101.338**

**STATUTORY AUTHORITY**

The new section is proposed 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 THSC, 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 proposed under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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 proposed under §382.0172(b), concerning International Border Areas, as amended by SB 1561 and which authorizes the commission to make certain emission reduction substitutions for emission reductions achieved outside the United States. This rulemaking is also proposed under SB 5 (an act relating to the Texas Emissions Reduction Plan), and SB 1561 (an act relating to the acceptance by the TNRCC of certain emissions reductions in exchange for other emissions reductions) as passed by the 77th Legislature, 2001.

The new section implements TCAA, 382.002, 382.011, 382.012, 382.017, and 382.0172(b). The new section also implements certain sections of SB 5, as passed by the 77th Legislature, 2001, which allows owners or operators to substitute emissions reductions made under the plan for those reductions otherwise required under the commission's rules and to make a contribution to the fund based on the

amount of emissions reductions substituted. The new section also implements SB 1561, as passed by the 77th Legislature, 2001, which allows surplus emission reductions achieved outside the United States to satisfy emission reduction requirements in Texas by allowing reductions in one criteria pollutant to substitute for reductions in another criteria pollutant under specific conditions.

**§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 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 may be substituted for another 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.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§101.357**

**STATUTORY AUTHORITY**

The new section is proposed 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 THSC, 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 proposed under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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 proposed under §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.

The new section implements TCAA, §§382.002, 382.011, 382.012, 382.017, and 386.056.

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

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 Texas Emissions Reduction Plan (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% from the established baseline;  
and

(4) 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 established baseline.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§101.372**

**STATUTORY AUTHORITY**

The amendment is proposed 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 THSC, 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 proposed under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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 proposed under §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.

The proposed amendment implements TCAA, §§382.002, 382.011, 382.012, 382.017, and 382.0172(b).

**§101.372. General Provisions.**

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>), carbon (CO), sulfur dioxide (SO<sub>2</sub>), and particulates 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: [except at such time as]

(1) urban airshed modeling demonstrates that one may be substituted for another or as approved by the executive director and the EPA [United States Environmental Protection Agency (EPA)]; or [.]

(2) the facility(s) generating and using the emission reductions is located outside the United States and the following conditions are met:

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

(C) the substitution is for another criteria pollutant for which the area has been designated as nonattainment.

(b) - (d) (No change).

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

(1) - (5) (No change.)

(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.

(f) - (l) (No change.)