

The Texas Commission on Environmental Quality (commission) adopts the repeal of §101.302, General Provisions; §101.303, Protocols; §101.304, Program Audits; §101.372, General Provisions; §101.373, Protocols; and §101.374, Program Audits. The commission also adopts new §101.302, General Provisions; §101.303, Emission Reduction Credit Generation and Certification; §101.304, Mobile Emission Reduction Credit Generation and Certification; §101.306, Emission Credit Use; §101.309, Emission Credit Banking and Trading; §101.311, Program Audits and Reports; §101.372, General Provisions; §101.373, Discrete Emission Reduction Credit Generation and Certification; §101.374, Mobile Discrete Emission Reduction Credit Generation and Certification; §101.376, Discrete Emission Credit Use; §101.378, Discrete Emission Credit Banking and Trading; and §101.379, Program Audits and Reports. Finally, the commission adopts amendments to §101.300, Definitions; §101.301, Purpose; §101.350, Definitions; §101.351, Applicability; §101.352, General Provisions; §101.353, Allocation of Allowances; §101.354, Allowance Deductions; §101.356, Allowance Banking and Trading; §101.360, Level of Activity Certification; §101.370, Definitions; and §101.371, Purpose. Sections 101.302 - 101.304, 101.353, 101.354, 101.356, 101.360, 101.370, 101.372 - 101.374, 101.376, 101.378, and 101.379 are adopted *with changes* to the proposed text as published in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5369). Sections 101.300, 101.301, 101.306, 101.309, 101.311, 101.350 - 101.352, 101.371, and the repeal of §§101.302 - 101.304 and 101.372 - 101.374 are adopted *without changes* and will not be republished.

The new and amended §§101.300 - 101.304, 101.306, 101.309, and 101.311 are grouped into Subchapter H, Emissions Banking and Trading; Division 1, Emission Credit Banking and Trading. The amended §§101.350 - 101.354, 101.356, and 101.360 are grouped into Subchapter H, Division 3, Mass

Emissions Cap and Trade Program. The new and amended §§101.370 - 101.374, 101.376, 101.378, and 101.379 are grouped into Subchapter H, Division 4, Discrete Emission Credit Banking and Trading. The repealed, new, and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas state implementation plan (SIP).

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

### *Emissions Banking and Trading Background Discussion*

The emissions banking and trading program has been designed to offer flexibility in generating and using emission reduction credits (ERC), mobile emission reduction credits (MERC), discrete emission reduction credits (DERC), and mobile discrete emission reduction credits (MDERC). Flexibility has been built into the rules to create incentives for the early or permanent control of volatile organic compound (VOC), oxides of nitrogen (NO<sub>x</sub>), particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns (PM<sub>10</sub>), carbon monoxide (CO), and sulfur dioxide (SO<sub>2</sub>) emissions.

These revisions are necessary to reorganize Chapter 101, Subchapter H, Divisions 1 and 4 in a manner parallel to each other, with rule structure which follows a logical process of recognizing, quantifying, and certifying reductions as credits, while clearly explaining the guidelines for trading and using creditable reductions. Rule language outlining mobile and stationary source credit use, banking, and trading is consolidated to eliminate redundant language for these generator categories. Rule language outlining mobile and stationary source credit generation and certification is divided into individual sections due to differences in methods of generation, quantification, and information needed for

certification between the two generator categories. For clarity, these revisions replace all references to the term “source” with the terms “facility,” as defined in 30 TAC §116.10, Definitions; or “mobile source,” as defined in §101.300 and §101.370. Also, because a facility is defined as a stationary source, all references to “stationary” are deleted because they are duplicative. In the past, confusion among the regulated community has originated from inconsistencies between federal and state definitions of the term “source.” Emission credits and discrete emission credits are generated and used by the actual emissions-producing equipment (i.e., boiler, flare, automobile, marine vessel) and not by the exhaust point at which emissions enter the atmosphere (i.e., an exhaust stack). A new definition of the term “facility” applies to all stationary generator categories, while mobile source refers to all mobile generator categories.

These revisions also address concerns raised by the EPA regarding the quantification protocols used when measuring baseline emissions for the generation and use of credits. For reductions to be certified as emission credits or discrete emission credits, the reduction must meet the criteria of being quantified with confidence using replicable methodologies. EPA outlines elements necessary for approval of trading programs which will be used within a SIP in guidance titled, *Improving Air Quality with Economic Incentive Plans* (EPA 452/R-01-001, dated January 2001). This guidance contains information listing recommended elements of quantification protocols used to calculate baseline emissions and emission reductions within trading programs submitted as part of a SIP. EPA guidance also suggests that an approved trading program contain provisions for EPA approval of quantification protocols submitted after a trading program has been approved as part of the SIP. These revisions include a 30-day public comment period for each new protocol along with a requirement that the

protocol, along with any comments received by the commission, be submitted to EPA. After a 45-day adequacy review, EPA may approve, disapprove, or take no action on the proposed protocol. Some of the requirements for an EPA approved quantification protocol include: collection of data characterizing the process of all phases of facility operation during credit generation or use; instrumentation possessing the ability to measure the applicable parameters characteristic of facility operation; submittal and adherence to a quality assurance/quality control plan; discussion of testing conditions affecting results; use of applicable EPA test methods; and the use of continuous emissions monitors (CEMS) or predictive emissions monitors (PEMS), if in place.

Rule language outlining emission credit and discrete emission credit protocols is added to require the use of quantification protocols submitted by the executive director to the EPA for approval. Adopted language identifies the testing and monitoring methodologies used to show compliance with the emission specifications and control requirements of 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds, and 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds, as quantification protocols which have been submitted by the executive director to the EPA for approval. In addition, rule language is added to address missing data events. Language covering facilities generating or using emission credits or discrete emission credits for which no protocol has been submitted by the executive director to the EPA for approval is revised to require: 1) quantification methods at least as rigorous as the methods required for demonstrating compliance with an applicable requirement; 2) the collection of data which sufficiently characterizes the facility's emissions during all phases of operation; and 3) the use of CEMS or PEMS, if in place. Protocols not

previously submitted by the executive director to the EPA for approval will be made available for public comment for 30 days prior to submittal.

The revisions also include a change to prohibit the use of DERCs in the eastern portion of Texas that were created in the western portion of Texas. The language defines an area that is generally described as those counties touching or east of the I-35 and I-37 corridor. DERCs used within that area must be created either within the covered attainment counties or within the nonattainment areas within that region. The commission determined that it is important to the success of the reduction strategies implemented within that region to ensure that reductions from outside the region cannot be used to delay compliance.

Revisions to Chapter 101, Subchapter H, Division 3, Mass Emissions Cap and Trade Program, are necessary to clarify and amend the applicability of the division and general provisions of the mass emissions cap and trade (MECT) program. In addition, the commission is adding language stating that the quantity and sales price information on all allowance transactions shall be made immediately available to the public. Revisions to the figure in §101.353(a) amend the existing reduction factors to reflect a total NO<sub>x</sub> emission reduction of 80% for utility and certain non-utility point sources from the 1997 emissions inventory baseline. This revision simultaneously eliminates the reduction factors associated with the referenced emission specifications in §117.106(c)(5), Emission Specifications for Attainment Demonstrations, and §117.206(c)(18), Emission Specifications for Attainment Demonstrations. This change is better explained in a concurrent rulemaking adoption regarding 30 TAC Chapter 117 being published in this issue of the *Texas Register*. The revisions also add language

to offer facilities subject to §117.206 or §117.475, Emission Specifications, an alternative to the existing reduction factors of §101.353(a).

*SIP Background Discussion*

A SIP revision for Houston/Galveston (HGA) ozone nonattainment area was adopted by the commission on December 6, 2000 and submitted to the EPA by December 31, 2000. The December 2000 SIP contained rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP also contained a commitment to perform and submit a mid-course review.

In January 2001, the BCCA Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGA SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO<sub>x</sub> reduction requirement from stationary sources in the HGA area. In May 2001, the parties agreed to a stay in the case, and Judge Margaret Cooper, Travis County District Court, signed a Consent Order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGA attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the Consent Order.

In compliance with the Consent Order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40

research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGA and east Texas regions. The study revealed that while  $\text{NO}_x$  emissions from industrial sources were generally correctly accounted for, industrial VOC emissions were likely significantly understated in earlier emissions inventories. The study also showed that surface monitors were insufficient in capturing the phenomenon of ozone plumes downwind of industrial facilities. On four separate days, ozone levels exceeding 125 parts per billion were recorded by aircraft instruments that were missed by surface monitoring equipment. The findings from the study are constantly evolving and have raised questions about the formation of high ozone in the HGA. To address these findings and to fulfill obligations resulting from the lawsuit settlement negotiations with the BCCA-AG, commission staff have focused on substituting industrial VOC controls for some of the last 10% of reductions required by industrial  $\text{NO}_x$  emission limit rules and determining which VOCs should be controlled if industrial VOC controls are found to be effective.

Results of photochemical grid modeling and analysis of ambient VOC data indicate that it is possible to achieve the same level of air quality benefits with reductions in industrial VOC emissions, combined with an overall 80% reduction in  $\text{NO}_x$  emissions from industrial sources, as would be realized with a 90% reduction in industrial  $\text{NO}_x$  emissions. This conclusion is based on results from several studies, including photochemical grid modeling of the August - September 2000 episode using a top-down emissions inventory adjustment to point source highly-reactive volatile organic compound (HRVOC) emissions, and analyses of ambient HRVOC measurements made by commission automated gas chromatographs and airborne canisters using the maximum incremental reactivity and hydroxal reactivity scales. Four HRVOCs clearly play important roles in HGA's ozone formation, and these

four (ethylene, propylene, 1,3-butadiene, and butenes) seem to be the best candidates for the first round of HRVOC controls.

In order to address these recent scientific findings, the commission is adopting in this issue of the *Texas Register*, revisions to the industrial source control requirements in 30 TAC Chapter 115, one of the control strategies within the existing federally-approved SIP. This revision contains new rules to reduce emissions of HRVOCs from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis to date shows that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO<sub>x</sub> is equivalent in terms of air quality benefit to that resulting from a 90% point source NO<sub>x</sub> reduction requirement. These changes necessitate changes in Chapter 101 for the MECT program. More details about these controls and the associated technical support documentation are included in the SECTION BY SECTION DISCUSSION of the preambles for adoption of revisions to 30 TAC Chapters 115 and 117 being published in this issue of the *Texas Register*.

These amendments add the term “uncontrolled” to clarify that the design capacity used in determining applicability to the cap and trade program shall be without regard to any enforceable or physical limitations, including pollution control equipment, whether installed from the manufacturer or after start-up. Upon adoption on December 6, 2000, Division 3 became the sole compliance mechanism cited in Chapter 117, Subchapter E, Administrative Provisions, for facilities subject to §117.106 or §117.206 at a site in the HGA ozone nonattainment area with a collective uncontrolled design capacity greater than or equal to ten tons per year (tpy) of NO<sub>x</sub>. Previous language in §101.351 exempted sites,

including those classified as major for NO<sub>x</sub>, from the cap and trade program if the facilities subject to the sections previously referenced have a collective uncontrolled design capacity of less than ten tpy of NO<sub>x</sub>. As previously written, a site classified as major for NO<sub>x</sub> would have no compliance mechanism if the bulk of emissions contributing to this classification were from emission specification for attainment demonstration (ESAD) exempt facilities. To provide a compliance mechanism for facilities subject to §117.106(c) or §117.206(c) at a site classified as major with a collective uncontrolled design capacity to emit less than ten tpy of NO<sub>x</sub>, the commission adopts amendments which include these facilities within the cap and trade program. For purposes of this chapter, sources will be considered to be major sources if they were classified as major on or after December 31, 2000, which was the effective date of the MECT program.

Beginning April 1, 2004, allowances allocated to a facility subject to §117.206 or §117.475 are reduced over time by a factor called "X." The commission adopts new language which allows a facility to avoid the reduction in its calendar year 2004 allocation, if the facility commits to controlling emissions to the levels required in §117.206 or §117.475 by April 1, 2005 instead of April 1, 2007. This language allows facilities, which may cease to operate by 2005, the flexibility of avoiding the economic expenditure of additional pollution controls while preserving the emission reductions targeted within a SIP. This language also allows facilities, which expect to make all reductions at once, a schedule which reflects that reality.

Adopted new language requires that allowances be deducted from a site's compliance account when changes made after December 31, 2000 to an ESAD covered facility result in NO<sub>x</sub> emissions increase at

a non-ESAD covered facility at that site. Facilities subject to the MECT program, which combust fuel or waste streams, may potentially reduce NO<sub>x</sub> emissions by redirecting these streams to facilities that are exempted from the ESAD requirements, thus shifting the associated emissions to facilities outside of the MECT program. For example, a waste gas stream containing fuel-bound nitrogen historically fired through a boiler is redirected to a flare, increasing the NO<sub>x</sub> emissions from the flare and reducing emissions at the boiler. A reduction in emissions at the MECT facility could result in excess allowances while the overall benefit to the airshed could be zero due to the increase in NO<sub>x</sub> emissions from the ESAD-exempt facility. In fact, if the stream is directed to a facility with lesser controls, the airshed could see an overall increase. The new language ensures that changes made to MECT facilities after December 31, 2000 which shift NO<sub>x</sub> emissions to ESAD-exempt facilities, be offset by deducting an amount of allowances from the MECT facility equal to that increase.

## SECTION BY SECTION DISCUSSION

### *Division 1*

The commission amends the following definitions in §101.300. The definition of activity is amended to omit the example of mass emitted per unit of activity, as this does not describe an activity, and the acronym VMT is deleted because it is not used again in the definition. In the definitions of the terms “activity,” “actual emissions,” “emission reduction strategy,” “generator,” “most stringent allowable emissions rate,” “permanent,” “surplus,” and “user,” the phrase “facility or mobile” is added before the word “source” to clarify that the definitions apply to stationary and mobile sources. The definition of applicable emission point is deleted from the rule because the term is obsolete. In the definitions of area source, baseline activity, baseline emission rate, baseline emissions, and mobile source baseline

emission, the term “source” is replaced with either the term “facility” or the term “mobile source” to eliminate the inconsistency between the existing federal and state definitions of source. The definitions of baseline, mobile emissions baseline, mobile emission reduction credit, and most stringent allowable emissions rate are amended to include limitations from local regulatory entities and the term “rules” as part of those limitations. The definitions of baseline and baseline activity are amended to clarify that emissions inventories are “used in a SIP” instead of “for SIP determinations.” The definition of baseline activity is also amended to describe a facility’s actual level of activity based on actual data averaged over any two consecutive calendar year period, including or following the most recent year of emissions inventory used in the SIP for the nonattainment area in which the facility is located or year(s) subsequent to the SIP year. For facilities in existence less than 24 months or not having two complete calendar years of data, a shorter time period of not less than 12 months may be considered by the executive director. The definitions of baseline emission rate and baseline emissions are amended to spell out the acronyms for terms that are only used once. The definition of baseline emissions is further amended to clarify that the emissions are measured in tons per year, and the product of baseline activity and baseline emission rate shall be averaged over any two consecutive calendar year period, including or following the most recent year of emissions inventory used in the SIP for the nonattainment area in which the facility is located, or year(s) subsequent to the SIP year. In the definitions of curtailment, emission reduction, and protocol, the term “stationary” is changed to the term “facility” to be consistent. In the definition of emission reduction, the word “of” is changed to the word “in” to be grammatically correct. The definition of emission reduction credit is amended to specify that ERCs are made from a stationary facility, and to move the phrase “expressed in tons per year” adjacent to the term it modifies. The definition of facility is amended to refer only to §116.10 instead of §116.10(4) to

avoid having to change this reference if the definition numbering in §116.10 changes. The definition of mobile source baseline activity is amended to refer to a level of activity at a mobile source, and the definition of mobile source baseline emissions is revised to clarify that these emissions shall be expressed in tpy. The definition of ozone season is deleted, because the term does not apply to this division. The definition of shutdown is revised to include mobile sources. The definition of source is amended to refer only to §101.1 instead of §101.1(90) to avoid having to change this reference if the definition numbering in §101.1 changes. The definition of surplus is amended to clarify that reductions from facilities and mobile sources must be in excess of any reductions relied upon for the SIP.

The following new definitions are added to §101.300. The definition of facility is referenced to §116.10, Definitions, where it is defined as a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source. The definition of site is referenced from 30 TAC §122.10, Definitions, where it is defined as 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). A new definition of state implementation plan is added as a plan providing control strategies for attaining and maintaining a primary or secondary national ambient air quality standard (NAAQS). The term “strategic emissions” is defined as a facility’s or mobile source’s new allowable emission limit following the implementation of an emission reduction strategy. For a reduction to be certified as an emission credit, the new allowable emission limit must be enforceable through permit amendment, permit alteration, permit voidance, submittal of a PI-8 Form (Special Certification Form for Exemptions and Standard Permits), submittal of an OP-CRE1 Form (Certified

Registration of Emissions Form for Potential to Emit), agreed order from the commission, or other form developed for such purpose by the commission.

The commission adopts amendments to existing language in §101.301 which replaces the term “source” with the terms “facility” and “mobile source,” and removes references to the term “stationary” in conjunction with the term “facility.”

The adopted new §101.302 restructures the language found in repealed §101.302, describing the general provisions for the Emission Credit Banking and Trading Program, and improves readability by organizing the rule language to follow a process of identifying applicable pollutant types, eligible generator categories, general emission credit requirements, protocols for quantifying identified reductions, and the geographic limitations for generating and using emission credits. The new subsection (b) clarifies that it is applicable to eligible generator categories. This subsection allows facilities (including area sources), mobile sources, and facilities (including area sources) or mobile sources associated with agencies under §101.30, Conformity of General Federal Actions to State Implementation Plans, to be eligible to generate emission credits. The new subsection (c) clarifies criteria that must be met to qualify a reduction as an ERC or MERC. These criteria have also been listed as subparagraphs to improve clarity and readability of the rule. Rule language governing protocols for quantifying reductions to be certified as emission credits has been relocated from the repealed §101.303 to the new §101.302 and amended to address EPA concerns. The commission will maintain a web site where all quantification protocols will be posted. Proposed protocols will be posted for 30 days to receive public comment. At the end of this period the protocol will be sent to EPA along

with comments. EPA will have 45 days to approve or disapprove the protocol. Any disapproved protocol will not be available for use with this division. In response to comment, the new subsection (e) relocated existing language from §101.303(f)(1) and added new language for credit certification. Language which allows the executive director, with commission approval, to discontinue emission credit trading is relocated to the new §101.309. Language previously located in §101.302(e) has been relocated to subsection (f) and amended to require executive director and EPA approval prior to the use of emission credit outside the nonattainment area in which it was generated. In response to comment, new adopted language in §101.302(f) clarifies restrictions when using emission credits generated outside of the United States. Section 101.302(g) is amended to require both credit generators and users to retain records for five years from the beginning of the use period. Section 101.302(h) is amended to include the sales price of emission credits as information which will be made immediately available to the public. In response to comment, a new subsection (k) includes compliance burden and enforcement language, and a new subsection (l) states that the owner of an emission credit shall be the owner or operator of the facility where the credit is generated unless certain conditions exist. Those conditions include, but are not limited to, cases where someone other than the owner or operator incurs the cost of generating the credit, or the owner or operator does not have the potential to generate the minimum credit needed for transactions (one-tenth of a ton). For example, if an entity implements a mobile source strategy that would reduce emissions from cars in the public fleet, the entity bears the cost of the strategy, and the strategy will not achieve one-tenth of a ton reduction on an individual vehicle, the executive director may assign the reduction credits to that entity instead of the individual car owner or operator. The commission adopts this amendment to provide an incentive for strategies which must be implemented on a large scale in order to achieve measurable reductions.

The new §101.303 contains requirements for ERC generation and certification. New subsection (a) identifies the methods by which ERCs may or may not be generated. This subsection prohibits the generation of ERCs from that portion of reductions funded through state or federal programs unless specifically allowed by that program or from a shutdown of a facility which did not have emissions reported or represented in the most recent emission inventory used in the SIP. This language allows a reduction project to be split between an amount that is funded by another program and an amount for which credits can be claimed. The commission relocated and amended language from §101.303(d)(3) prohibiting generation of ERCs from the shifting of activity from one facility to another facility located at the same site. The new subsection (b) outlines the equation used to calculate the amount of ERCs generated, with a clarification that the baseline activity and the baseline emission rate must be from the same year. The new subsection (c) identifies the requirements for certifying reductions as ERCs. The adopted language will eliminate the opportunity for facilities, which implemented a reduction strategy prior to December 6, 2000, to submit an application by June 1, 2001, because that date has passed. The commission relocated and amended language from §101.302(b)(1) to subsection (c) to clarify that to be creditable as an ERC, the facility's annual emissions prior to the reduction strategy must have been reported or represented in the emissions inventory used for the SIP. New language is added to subsection (c) to require ERCs to be quantified in accordance with the protocols in §101.302(d). Language previously in §101.303(e)(3) identifying an application for ERC certification is relocated to subsection (c) and amended to require that in order to be deemed complete, the application must include a signed EC-1 Form, Application for Certification of Emission Credits, along with supporting documentation. Language previously in §101.303(f)(5) identifying the enforceable mechanisms for ERCs is relocated to subsection (c)(4) and amended to address standard permits. Language has been

included to require that the denial of an application must be in writing, and to allow the application to be resubmitted if all requirements, including those regarding the timing of a submission, are met.

The new §101.304 contains requirements for MERC generation and certification. The commission relocated the language previously found in repealed §101.303(c) to new subsection (a), and amended the language to prohibit the generation of MERCs from specific reductions funded from a local, state, or federal program unless specifically allowed by that program, and reductions from the transfer of emissions from one mobile source to another mobile source in the same nonattainment area. The new subsection (b) contains language previously in §101.303(d)(2) describing MERC generation calculations. The new subsection (c) identifies the requirements to certify reductions as MERCs. The adopted language will eliminate the opportunity for mobile sources, which implemented a reduction strategy prior to December 6, 2000, to submit an application by June 1, 2001, because that date has passed. New language is added to this subsection to require that MERCs be quantified in accordance with the protocols in §101.302(d). Language previously in §101.303(e)(4), identifying an application for MERC certification, is relocated to subsection (d) and amended to require that in order to be deemed complete, the application must include a signed MEC-1 Form, Application for Certification of Mobile Emission Credits, along with supporting documentation. Language previously in §101.303(f)(5)(B), identifying the enforceable mechanism for MERCs, is relocated to subsection (d) and amended to eliminate the use of the MERC-1 Form.

The new §101.306 contains language found in repealed §101.303 outlining the requirements, calculations, and schedule for emission credit use. The adopted section contains new language to

include the use of emission credits as an annual allocation of allowances under Division 3. The adopted new equation in subsection (b)(2) would be used to calculate the amount of emission credits needed for compliance with 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, Chapter 115, and Chapter 117. The new equation would be the product of the maximum annual activity level during the use period and the difference between the projected emission rate during the use period and the emission rate required for compliance with the emission specification. The adopted new equation in subsection (b)(3) would be used to calculate the amount of credits needed to exceed the maximum 30-day rolling average emission cap or maximum daily cap for facilities operating under a system or source cap.

The adopted new §101.309 would relocate language from repealed §101.302 and §101.303 which describes the credit registry, the life of credits, and trading requirements. The relocated language is revised to state that emission credits may be voided instead of withdrawn from the registry at any time prior to expiration by the owner. Adopted new language describes the process for obtaining a creditability review of emission credits.

The adopted new §101.311 relocated language in repealed §101.304 requiring the executive director to review the emission credit program every three years. New adopted language requires the executive director to make available to EPA and the general public reports on the amount of emission credits generated, used, and traded under this division.

### *Division 3*

The commission amends §101.350 to add the definition of uncontrolled design capacity clarifying that applicability to this division shall be based on the maximum capacity of a facility to emit NO<sub>x</sub> without regard to pollution control equipment or any other physical or enforceable limitation.

The commission adopts amendments to §101.351 which clarify and revise the applicability of the MECT program under Division 3. A new subsection (b) is added to the section requiring the existing language to be identified as subsection (a). A new adopted subsection (a)(1) states that Division 3 is applicable to all facilities located at a site which meet the definition of major source as defined in §117.10, Definitions. Subsection (a)(2) is modified to clarify that the design capacity to emit ten tons or more per year of NO<sub>x</sub> means “uncontrolled” design capacity. The adopted new subsection (b) requires any site meeting the definition of major source as of December 31, 2000 to continue to be classified as a major source for the purposes of Chapter 101. The adopted new language also requires a site which does not meet the definition of major source on December 31, 2000, but becomes a major source at any time thereafter to be classified as a major source for the purposes of Chapter 101 from that time forward. These changes might expand the MECT program to include those sites which emit less than ten tons from their units subject to ESADs, but which are, nevertheless, major sources. Facilities at these sites, if any, will be allocated allowances upon submittal of an ETC-3 Form, Level of Activity Certification, to the executive director. The ECT-3 Form shall be submitted within 90 days of the date the facility or site becomes subject to the MECT program. Facilities at these sites will not be treated as new facilities which have to purchase allowances to begin operation.

The commission adopts a revision to §101.352(b) which amends the February 1 deadline requiring sites to hold a quantity of allowances in their compliance account equal to or greater than the previous compliance period's NO<sub>x</sub> emissions. The revision amends this deadline to March 1, paralleling existing language in §101.354, Allowance Deductions. Adopted revisions to subsection (e) clarify that only new or modified facilities subject to federal nonattainment new source review requirements, which are not considered existing as defined in §101.350, may simultaneously use allowances to satisfy the correlating one to one portion of offset requirements as provided in Chapter 116, Subchapter B, Division 7, Emission Reductions: Offsets.

The commission adopts amendments to the figure in §101.353(a) which defines the "X" reduction factor for facilities within an electric generating system as 0.00 for January 1, 2002 through March 31, 2003; 0.50 for April 1, 2003 through March 31, 2004; and 1.00 on and after April 1, 2004. The revision defines "X" for facilities subject to the emission specifications under §117.206(c)(1)(A), (1)(B), (2)(A), (5), (8)(A)(i), (8)(B), (9)(A)(ii), (10), or (11), Emission Specifications for Attainment Demonstrations as 0.00 for January 1, 2002 through March 31, 2004; 0.47 for April 1, 2004 through March 31, 2005; 0.80 for April 1, 2005 through March 31, 2006; 0.93 for April 1, 2006 through March 31, 2007; and 1.00 on and after April 1, 2007. This new schedule applies to those facilities that are subject to an ESAD that is being modified through a concurrent but separate rulemaking revision to Chapter 117 being published in this issue of the *Texas Register*. The new schedule is intended to ensure that the amount of reduction in allowances for years prior to April 2006 remains generally at the same level as required prior to the Chapter 117 changes. The modifications seen by facilities subject to those Chapter 117 changes would occur only in allowances beginning April 2006. For all other facilities X is

defined as 0.00 for January 1, 2002 through March 31, 2004; 0.389 for April 1, 2004 through March 31, 2005; 0.667 for April 1, 2005 through March 31, 2006; 0.778 for April 1, 2006 through March 31, 2007; and 1.00 on and after April 1, 2007. This will maintain the existing schedule for reduction in allowances from facilities subject to ESADs which are not being modified in the concurrent Chapter 117 rulemaking. The commission adopts new language in §101.353(a) which allows facilities subject to the reduction factor outlined under paragraph (3)(B) an alternative reduction factor schedule. The adopted new language states that facilities subject to the reductions factors under subparagraph (B) may elect to receive no reduction in allowances through March 31, 2005 in exchange for reducing emissions to ESAD levels by April 1, 2005 instead of April 1, 2007. Adopted new language requires sites electing to comply with the alternative reduction schedule to notify the executive director by letter no later than April 1, 2003. In addition, revisions to this section clarify the definition of variable  $LA_{HA}$ , historical average activity level, as it pertains to facilities which began operation after January 1, 1997. Revisions to §101.353(g) clarify the number of calendar years available as an alternative baseline period due to extenuating circumstances and the deadline for submittal of an application for extenuating circumstances. The word “calendar” is changed to the correct spelling in §101.353(h).

The commission adopts new language in §101.354 requiring that allowances be deducted for changes made after December 31, 2000 to a facility subject to an emission specification under §117.206 or §117.475 which directly results in a  $NO_x$  emissions increase at a facility exempted from an emission specification under §117.206 or §117.475. The deduction in allowances shall be equivalent to the increase in  $NO_x$  emissions. The new language also requires that supporting documentation verifying the  $NO_x$  increase, such as form of fuel usage and emission factor data, be included with the submittal of the

ECT-1 Form on March 31 following each control period. This language is intended to prevent facilities from avoiding emission reductions at ESAD facilities by shifting emissions to another facility which is not an ESAD facility.

The commission adopts amendments to §101.356 which revise the information required for allowance transfer and the restrictions on banking and trading of unused allowances. Adopted language in this section requires that the price paid per allowance be included on the ECT-4 Form, Application for Permanent Transfer of Allowance Ownership. Revisions to this section also add language stating that all information regarding the quantity and sales price of allowance transactions shall be made immediately available to the public. The amendments also add language which prohibits the banking or trading of allowances issued prior to January 1, 2005, which are not used for compliance during a control period, if allocated in accordance with the alternative reduction factor schedule of §101.353(a)(3)(C). This is to assure that those entities electing the alternative schedule actually achieve their ESAD level by 2005. Subsection (c) has been modified to clarify that the permanent transfer of allowance streams will take place on a facility by facility basis, meaning that the allowance will always be identified by the facility for which it was allocated. This means that any future rule changes which would have covered the original facility could result in the reduction of those sold allowances even if they are no longer being used by that type of facility.

In response to public comment, the commission has added a new subsection (g) which establishes the procedures for the trading of rights to individual future year allocations. These trades would also be based on a facility by facility basis, meaning that the allowance will always be identified by the facility

for which it was allocated. This means that any future rule changes which would have covered the original facility could result in the reduction of those sold allowances even if they are no longer being used by that type of facility. The language in subsection (g) provides that trades involving future year allowances will be finalized around the time of the trade. However, the allowances will not be added to the buyer's account until it is confirmed in the future year that the seller has sufficient allowances to sell. The seller's allowances for that year may be reduced due to noncompliance in the previous year under §101.353(c) or by new rules which reduce the allowances available to that account. In recognizing the trade of future year allowances, the executive director does not warrant that those future year allowances will actually be available for use. The previous subsection (g) is re-lettered to subsection (h) and the word "calendar" is changed to the correct spelling in §101.353(h).

The commission adopts revisions to §101.360 adding new language in subsection (a) to provide an allowance allocation to new or modified facilities which were not in operation prior to January 1, 1997 if the new or modified facility is of a facility category that initially becomes subject to an ESAD under §§117.106, 117.206, or 117.475 after April 1, 2001; and either has submitted an administratively complete permit application under Chapter 116 within 90 days of the effective date of the ESAD, or has qualified for a permit by rule under Chapter 106 and commenced construction within 90 days of the effective date of the ESAD. This provision only applies to facilities for which there was no adopted ESAD prior to April 1, 2001 and does not include facilities subject to ESADs which existed prior to April 1, 2001, but were modified after that date. Examples of facility categories for which there were not adopted ESADs prior to April 1, 2001 include stationary diesel engines and combustion facilities rated less than ten megawatts which are authorized under a standard permit for electric generating units.

This amendment will allow facilities under these facility categories, initially exempt from the MECT because they were not targeted for NO<sub>x</sub> control under the SIP, the opportunity to certify their level of activity, as authorized by the executive director, and receive an allocation in order to operate. For example, prior to October 18, 2001, combustion facilities less than ten megawatts authorized under a standard permit for electric generating units were not subject to an ESAD requirement under Chapter 117, thus exempting those facilities from the MECT. Effective October 18, 2001, an ESAD requirement for these combustion facilities was established and could cause these facilities to now be subject to the MECT. Facilities under this facility category would not have had the prospect of becoming an “existing facility” under the MECT program through the submittal of an administratively complete permit prior to January 1, 2001, or by commencing construction of a permit by rule facility prior to January 1, 2001, and thereby securing an allocation for the facility under the MECT. This amendment to the rule will allow these combustion facilities less than ten megawatts authorized under a standard permit for electric generating units, which may now be subject to the MECT, the opportunity to receive an allocation. The commission believes that the addition of these facilities to the MECT, while slightly growing the cap on NO<sub>x</sub> emissions, will not cause a deterioration in the HGA air quality because their inclusion in the ESAD requirements means that their actual emissions will be decreasing, a benefit to air quality.

Revisions to subsection (b) clarify that an owner or operator of a facility receiving allowances based on an allowable level of activity shall submit an ECT-3 Form, Level of Activity Certification, no later than 90 days from the end of the fifth year of operation, certifying its level of activity for the chosen two consecutive calendar year period. This revision further clarifies that the owner or operator would

receive no benefit of allowances allocated based on the two consecutive years of actual operation until January 1 of the following control period.

Revised language under subsection (c) clarifies which facilities shall certify their level of activity at sites or facilities that become subject to this division on or after April 1, 2001 and the deadline by which the certification shall be made. This amendment requires a newly subject site or facility to submit the ECT-3 Form within 90 days of the date the site or facility becomes subject to the MECT, or within 90 days of the effective date of this rule, whichever is later. Facilities for which a new ESAD is adopted after April 1, 2001 shall be considered subject to the MECT as of the effective date of the new ESAD requirement. Sites that currently have facilities with a collective design capacity of less than ten tpy of NO<sub>x</sub>, which add facilities or increase capacity to bring the collective design capacity to ten tpy or more shall be considered subject upon start of operation of the newly added ESAD facility.

#### *Division 4*

Section §101.370 contains the definitions to be used within Subchapter H, Division 4. The commission amended the definition of activity to add language that specifies that activity is measured in units that have a direct correlation with the economic output and emission rate of the source. The definitions of actual emissions, area source, baseline activity, baseline emission rate, and baseline emissions are amended to replace the terms “unit” or “source” with the term “facility” to be consistent. The definition of applicable emission point is deleted from the rule because the term is obsolete. The definitions of baseline and baseline activity are amended to clarify that emissions inventories are “used in a SIP” instead of “for SIP determinations,” and are also amended to describe a facility’s actual level

of activity based on actual data averaged over any two consecutive calendar year period, including or following the most recent year of emissions inventory used in the SIP for the nonattainment area in which the facility is located or year(s) subsequent to the SIP year. The definition of baseline emissions is amended to clarify that the facility's emissions are averaged over any two consecutive calendar years including and following the most recent year of emissions inventory used in the state implementation plan or subsequent year(s) which precede the emission reduction strategy or credit use period. For facilities in existence less than 24 months or not having two complete calendar years of data, a shorter time period of not less than 12 months may be considered by the executive director. The definitions of discrete emission credit and discrete emission reduction credit are amended to clarify that the credits are measured in tenths of a ton. The definitions of emission reduction strategy, generator, most stringent allowable emissions rate, permanent, strategy activity, strategy emission rate, surplus, and user, are amended to add the words "facility or mobile" before the word "source" because the definitions apply to both facilities and mobile sources. The term "DERCs" is replaced with the term "discrete emission reduction credit." The definition of mobile source baseline emission rate has been added for clarification. The commission amended the definition of ozone season to add the citation in 40 Code of Federal Regulations 58, Appendix D which specifies the ozone seasons by geographic area. The definition of surplus is amended to clarify that reductions from facilities and mobile sources must be beyond any reductions relied upon for the SIP.

The following new definitions are added to §101.370. The definition of facility is referenced to §116.10 where it is defined as a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source. The definition of site is referenced from §122.10 where

it is defined as 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). A new definition for state implementation plan is added as a plan providing control strategies for attaining and maintaining a primary or secondary NAAQS.

The commission adopts amendments to existing language in §101.371 which replaces the term “source” with the terms “facility” and “mobile source,” and removes references to “stationary” in conjunction with the term “facility.”

The adopted new §101.372 contains the general provisions for the Discrete Emission Credit and Trading Program. This section is restructured to improve readability by organizing the rule language to follow a process of identifying applicable pollutant types, eligible generator categories, general discrete emission credit requirements, protocols for quantifying identified reductions, and the geographic limitations for generating and using discrete emission credits. In response to comment, new subsection (a) is amended to match adopted language in §101.302(a). The new subsection (b) clarifies that it is applicable to eligible generator categories which would continue to allow facilities (including area sources), mobile sources, and facilities (including area sources) or mobile sources associated with agencies under §101.30, to be eligible to generate discrete emission credits. The new subsection (c) relocated and amended existing language from 101.372(b)(1) to clarify that to be creditable as a DERC, the facility's annual emissions prior to the reduction strategy must have been reported or represented in the emissions inventory used for the SIP. Rule language governing protocols for quantifying reductions to be certified as discrete emission credits was relocated from §101.373 to §101.372 and amended to

address EPA concerns. The commission will maintain a web site where all quantification protocols will be posted. Proposed protocols will be posted for 30 days to receive public comment. At the end of this period the protocol will be sent to EPA along with comments. EPA will have 45 days to approve or disapprove the protocol. Any protocols disapproved will not be available for use with this division. Subsection (e) clarifies the requirements for certifying discrete emission credits. Existing language from 101.372(e)(5) is relocated and amended to clarify that the applicant will be notified in writing if the executive director denies the discrete emission credit notification and may submit a revised discrete emission credit notification in accordance with the requirements of this division. New language in subsection (f) prohibits the use of NO<sub>x</sub> discrete emission credits within the covered attainment counties, as defined in §115.10, Definitions, if the discrete emission credits were generated outside of the covered attainment counties. In addition, new language under subsection (f) prohibits the use of VOC and NO<sub>x</sub> discrete emission credits within any of the covered attainment counties, as defined in §115.10, if the discrete emission credits were generated outside of these covered attainment counties or certain nonattainment areas. For simplification, subsection (l) consolidates existing requirements defining the generator's and user's compliance burden. A new subsection (m) is adopted that states that the owner or operator of a discrete emission credit shall be the owner or operator of the facility or mobile source where the credit is generated unless certain conditions exist. Examples of those conditions would include cases where the cost of generating the credit is incurred by someone other than the owner or operator, or the owner or operator does not have the potential to generate the minimum credit needed for transactions (one-tenth of a ton). For example, if an entity implements a mobile source strategy that would reduce emissions from cars in the public fleet, the executive director may assign the reduction credits to that entity instead of the individual car owner or operator, if the entity bears the cost of the

strategy and the strategy will not achieve one-tenth of a ton reduction on an individual vehicle. The commission adopts this amendment to provide an incentive for strategies which must be implemented on a large scale in order to achieve measurable reductions.

The commission adopts a new §101.373 which contains requirements for DERC generation and certification. A new subsection (a) contains new language outlining the methods to generate DERCs and relocated existing language describing the methods that are not acceptable for DERC generation. New language prohibits generation of DERCs from the shifting of emissions from one facility to another facility at the same site. The new language also prohibits the generation of DERCs from specific reductions funded through local, state, or federal programs unless specifically allowed under that program. Also prohibited are reductions from a facility subject to Division 3 or reductions from shutdown of a facility which did not have emissions reported or represented in the most recent emission inventory used in the SIP. Adopted new subsection (b) relocates and amends existing language describing DERC calculation. The language clarifies the variables used to calculate DERC generation. The new adopted subsection (c) identifies the requirements for certifying reductions as DERCs. Existing language identifying an application for DERC certification is relocated to this subsection and amended to require the application to include a signed DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, along with supporting documentation in order to be deemed complete.

The commission adopted a new §101.374 which relocates the existing language from §101.373 identifying the requirements for MDERC generation and certification. New language under the adopted

subsection (a) prohibits generation of MDERCs from reductions funded through local, state, and federal programs unless specifically allowed by that program. The adopted new subsection (c) identifies the requirements for certifying reductions as MDERCs. Existing language identifying an application for MDERC certification is relocated to this subsection and amended to require that the application include a signed MDEC-1 Form along with supporting documentation in order to be deemed complete.

The adopted new §101.376 contains existing requirements found in §101.373 for discrete emission credit use. The new §101.376(b)(1)(A) amends existing language from §101.373(f)(6)(A)(i) limiting permitted facilities using discrete emission credits to exceed their permitted allowables to only ten tons for NO<sub>x</sub>. The commission is also clarifying in §101.376(c)(3)(C) that DERCs cannot be used in place of either state-required or federally-required best available control technology. In response to comment, when DERCs are used in lieu of allowances, as allowed under §101.356(g) of this title (relating to Allowance Banking and Trading), the use is not restricted to the limitations of §106.261(3) or (4) or §106.262(3) and the language is clarified to specify that the increase refers to increases over authorized levels of emissions as opposed to rule restrictions. The new equations in subsection (d)(2)(A) will be used to calculate the amount of discrete emission credits needed to exceed the maximum 30-day rolling average emission cap or maximum daily cap for facilities operating under a system or source cap. A new equation in subsection (d)(2)(B) will be used to calculate the amount of discrete emission credits needed to comply with the requirements found in Chapters 114, 115, and 117. A new equation in subsection (d)(2)(C) will be used to calculate the amount of discrete emission credits needed to exceed a permit allowable for up to 12 months within any consecutive 24-month period. In response to comment, the phrase “as applicable” is added to the equations’ variable definition to clarify

that only the equation from the applicable section should be used to determine the  $H_i$  and  $R_i$ . New equations in subsection (e)(2)(A) and (B) will be used to calculate the amount of discrete emission credits used.

The commission adopts new §101.378 which relocates existing language from §101.372 and §101.373 which describes the credit registry, the life of credits, and trading requirements. The adopted new language requires the credit registry to assign a unique certificate and certificate number verifying the amount of discrete credits generated.

The adopted new §101.379 relocates existing language in §101.374 requiring the executive director to review the discrete emission credit program every three years. New language is adopted that requires the executive director to make available, to EPA and the general public, reports on the amount of discrete emission credits generated, used, and traded under this division.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. 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 amendments to Chapter 101 are not

intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying banking program is intended to achieve these goals. The amendments themselves are generally procedural and programmatic changes to the banking rules to improve readability and to clarify the existing program. The substantive changes which are adopted are meant to provide flexibility and to provide a mechanism for EPA approval of certain protocols. There is the potential for a small number of sources to become subject to the MECT program as a result of changes to the applicability language. Incorporation into this program should provide flexibility for these sources in meeting Chapter 117 requirements. None of these revisions place additional financial burdens on the regulated community. Therefore, the adopted rules do not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a “major environmental rule.”

Specifically, the banking and cap and trade systems were revised by this adoption in order to provide flexibility in meeting the ozone NAAQS set by the EPA under 42 United States Code (USC), §7409, and therefore meet a federal requirement. This rulemaking action does not exceed an express

requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code (THSC), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invited public comment on the draft regulatory impact assessment, but received no comment.

#### TAKINGS IMPACT ASSESSMENT

Promulgation and enforcement of these rules will not burden private real property. The adopted revisions to these programs would provide flexibility in meeting the ozone NAAQS set by the EPA under 42 USC, §7409. The new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances created under these rules are not property rights. Consequently, these adopted sections do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, the underlying banking program does prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this program were developed in order to meet the ozone NAAQS set by the EPA under the 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs

that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rulemaking action is to revise programs which provide flexibility in meeting the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these revisions will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the action is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission's preliminary consistency determination for these adopted rules in accordance with 31 TAC §505.22 found that the rulemaking is consistent with the applicable CMP goal to protect and preserve the quality and values of coastal natural resource areas (31 TAC §501.12(1)) and the policy which requires that the commission protect air quality in coastal areas (31 TAC §501.14(q)). The rulemaking action reorganizes those sections of Chapter 101 concerning emission credits and ensures that emission credit generation and use is consistent with EPA protocols. No new emissions are authorized by this action; therefore, the rulemaking is consistent with the applicable CMP goal and policy.

The commission invited public comment regarding the consistency of the proposed rules with the CMP, but received no comment.

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

Because Chapter 101 contains applicable requirements under Chapter 122, Federal Operating Permits, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 101 requirements for each emission unit at their site affected by the revisions to Chapter 101.

#### HEARINGS AND COMMENTERS

Public hearings for this rulemaking were held on July 18, 2002, in Austin; on July 22, 2002, in Houston; and on July 22, 2002, in Channelview. The comment period closed on July 22, 2002. The following persons provided written and/or oral comment: Clark, Thomas & Winters on behalf of the Association of Texas Intrastate Natural Gas Pipelines (ATINGP); Dow Chemical Company (Dow); Emission Credit Brokers (ECB); EPA; Bracewell & Patterson, LLP, on behalf of El Paso Electric Company (EPE); Galveston-Houston Association for Smog Prevention (GHASP); Kaneka Texas Corporation (Kaneka); Kinder Morgan (KM); Bracewell & Patterson, LLP, on behalf of Louisiana-Pacific Corporation (LP); NATSOURCE, LLC (NATSOURCE); BakerBotts, LLP, on behalf of Texas Industry Project (TIP); Lubrizol Corporation (Lubrizol); Sierra Club - Houston Regional Group (Sierra-Houston); Harris County Public Health and Environmental Service, Pollution Control Division (HCPC); and TXU Business Services on behalf of TXU Generation Company, LP (TXU). In addition to its comments, KM endorsed the comments submitted by TIP and Texas Oil and Gas Association

(TXOGA) although the commission did not receive comments from TXOGA by the close of comment date, and ATINGP.

#### RESPONSE TO COMMENTS

LP, Kaneka, and TXU expressed general support of the proposal, while Sierra-Houston and GHASP expressed general opposition to the proposal. ATINGP, Dow, EPA, EPE, Kaneka, KM, LP, NATSOURCE, TIP, and TXU suggested changes and/or stated concerns regarding the rule language.

TIP supported the effort to simplify the language of Chapter 101, Subchapter H, Divisions 1 and 4 and to make the divisions consistent with one another. TIP noted the following inconsistencies: inconsistent use of “and/or” in §101.302(a)(1) and §101.372(a)(1); missing clause between §101.372(a)(2)(A)(iii) and §101.302(a)(2)(A)(iii); unnecessary differences in the credit certification requirements in §101.302(e) and §101.372(e); inconsistent language regarding recordkeeping requirements in §101.302(g) and §101.372(h); no “compliance burden and enforcement” provision in the ERC rule as in §101.372(l); unnecessary difference between the “life of an emission credit” provisions in §101.309(b) and §101.378(b); and the appearance of “credibility review” provisions only in ERC rules, §101.309(b)(4) and (c).

**The commission revised §101.372(a)(1) to make the language consistent with §101.302(a)(1) based on this comment. Urban airshed modeling which demonstrates that one ozone precursor may be substituted for another must be approved by the executive director and the EPA before reductions in one pollutant may be used to meet the requirement for another pollutant.**

**The commission included the missing language from §101.302(a)(2)(A)(iii) in §101.372(a)(2)(A)(iii) to make the rules regarding substitution of one air pollutant for another consistent between Division 1 and Division 4.**

**The commission added new language to §101.302(e) to clarify that applications for emission credit certification shall be reviewed for creditability and certified by the executive director, applicants shall be notified in writing of an executive director denial for certification, and to prohibit the certification of emissions exceeding an allowable emission limit. The commission also eliminated language from §101.302(e) and §101.372(e) regarding the assignment of unique certificate numbers as this language is duplicated in §101.309(a) and §101.378(a).**

**The commission revised §101.302(g) to require a generator of emission credits to maintain records of all notices and backup information submitted to the registry for a minimum of five years.**

**The commission revised §101.302 to add a “compliance burden and enforcement” provision based on this comment, and changed the “compliance burden and enforcement” provision under §101.372 to remove obsolete citations.**

**The commission has not revised §101.309(b) or §101.378(b), because emission credits are a continuous source of emissions, and it would be difficult to incorporate the unlimited life for emission credits into the state’s long-term air quality planning process. Such an approach could create uncertainties in the ozone control strategy and possibly delay attainment. Because the use**

**of discrete emission credits only temporarily increases emissions, providing an unlimited life encourages companies to implement control strategies. If discrete emission credits had an expiration date, companies might attempt to find uses for their own credits prior to the expiration date. Given an indefinite life, there is no pressure on the company to capitalize on its discrete emission credits. Consequently, some discrete emission credits may never be used, resulting in an overall improvement in air quality.**

**The commission has not revised the rules to add credibility review provisions to sections other than §101.309(b)(4) and (c). Emission credits must be surplus at the time of generation and at the time of use. Therefore, emission credits may undergo a credibility review at any time prior to their expiration or use to determine whether the reduction remains surplus to current applicable requirements. Discrete emission credits are generated over a discrete time period and certified after the reduction is made. Therefore, discrete emission credits are only required to be surplus to the applicable requirements in effect at the time of generation and are not subject to any future creditability reviews.**

Dow referenced §101.302(h) and §101.356(f)(3) and asked what would be the disclosure requirement if credits or allowances were transferred in exchange for raw material, other commodity, or emissions of another criteria pollutant. Dow commented that immediate public disclosure should be limited to sales price only.

**The rules have not been revised based on this comment. The inclusion of sales price information is necessary to give the commission accurate market information on credits and allowances for reports and audits due to the EPA. In addition, the commission publicly discloses credit and allowance prices to help promote a fair marketplace for all participants. For trades involving the exchange of raw materials, commodities, or other emissions, the commission recommends that a current market value be assessed for that material, commodity, or emission at the time of the transaction and reported as the sales price.**

Dow commented that §101.302(a) refers to VOC and NO<sub>x</sub>, while §101.372(a) includes SO<sub>2</sub>, PM<sub>10</sub>, and CO and asked if the citations should be consistent. Dow also commented that SO<sub>2</sub>, PM<sub>10</sub>, and CO should be allowed as credits.

**The rules have not been revised based on this comment. The intent of the ERC program is to provide a mechanism for certifying and trading reductions in ozone precursor pollutants to satisfy the offset requirements under the Federal Clean Air Act (FCAA), as codified in 42 USC, §§7401 *et seq.*, for new major sources or modifications to existing major sources in ozone nonattainment areas. The FCAA only requires that emissions of a criteria pollutant be offset if the area is designated as nonattainment for that criteria pollutant. At this time, the Beaumont-Port Arthur (BPA), Dallas-Fort Worth, and HGA areas are the designated nonattainment areas for ozone that are required to offset increases in ozone precursor pollutants only. Alternatively, the DERC program allows for a different type of use which might involve pollutants other than the nonattainment pollutants.**

HCPC commented that the proposed §101.302(f) should be restricted to the use of emission credits generated within the international border area in Mexico.

**The commission revised the rule in response to this comment. The commission believes the legislature intended that Senate Bill (SB) 1561 of the 77th Texas Legislature, 2001, applies to the border area because the statute amended THSC, §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, CO, and PM<sub>10</sub>.**

EPE commented that §101.303 contains language prohibiting the generation of ERCs from the shutdown of facilities that did not have emissions reported in the most recent emissions inventory used in a SIP. This would disallow such reductions in Ciudad Juárez, as facilities in this city are not accounted for in any SIP. EPE expressed a belief that such reductions should be credited because the contribution of emissions from Juárez are recognized as a significant contributor to El Paso's nonattainment status through FCAA-required demonstrations that El Paso would be in attainment if not for emissions outside the United States. EPE recommended that language be added to §101.303 to allow credit for these emission reductions.

**The rules have not been revised based on this comment. The intent of §101.303(a)(2)(C) is to ensure that “emission credits” generated from the shutdown of facilities be surplus to the SIP.**

**This requirement prevents emissions which were not accounted for in the SIP model to be reintroduced at a later date as new emissions via an emission credit. SB 1561 amended THSC, §382.0172 to “authorize the use of emission reductions generated outside the United States to satisfy otherwise required emission reduction requirements.” It is not the intent of the commission, however, to register emission reductions created outside the authority of the State of Texas as emission credits; thus, these reductions may not be required to meet all specific requirements of an emission credit.**

Dow asked how long the approval process is after registration as referenced in §101.309(d)(2), and commented that a time limit should be specified in order to facilitate trading.

**The rule was not revised based on this comment. Realizing the fluidity of the market, the commission makes every effort to expedite approval of credit transfers and does not see a need to set regulatory deadlines for the completion of approvals. Likewise, the commission currently has no regulatory deadlines which govern the processing time for a permit change of ownership. In cases where applicants for credit transfers have identified time constraints, the commission has worked to approve and issue the transfer within those time limitations. Historically the processing time for approval of an application for credit transfer has averaged 14 days. The commission will remain committed to serving the needs of the emissions banking and trading participants and process credit transfers as expeditiously as possible.**

LP supported the proposed alternative reduction factor schedule in the proposed §101.353(a)(3)(C), but requested that the commission consider changing the emission reduction delay date from March 31, 2004 to March 31, 2005 in order to be consistent with the date in §101.353(a)(3)(B). Dow referenced §101.353(a)(3)(C) and §101.356(d)(2), commenting that the banking of allowances should reflect the highest reductions required at the time the allowances were generated. Dow asked why a source must install and operate control devices even if it is to shutdown the year following the control installation.

**The commission revised the rule, which has been renumbered to §101.353(a)(3)(D), because the language in the proposed §101.353(a)(3)(C) contained a typographical error. The intent of this rule is to allow a delay in allowance reduction until April 1, 2005, not 2004. This language will allow facilities, which may cease to operate, the flexibility of avoiding the economic expenditure of additional pollution controls while preserving the emission reductions targeted within a SIP. A facility operating under this alternative reduction schedule would be allowed to bank and trade allowances beginning January 1, 2005.**

TIP, ATINGP, Solutia, and KM commented that the commission is considering modifying the ESADs in the HGA nonattainment area to reflect a smaller reduction in NO<sub>x</sub> emissions. The commenters stated that the commission should retain two sets of ESAD-based allowance reduction factors in §101.353(a), because sources that would not be subject to the proposed modification of the ESAD rates would still have to make reductions at a greater rate with a subsequent loss of allowances in the years 2004 - 2006.

**The commission agrees with these comments, and revised §101.353(a)(3) accordingly. The revised language includes a new schedule in §101.353(a)(3)(B) for facilities with modified ESADs and the existing schedule in §101.353(a)(3)(C) for facilities whose ESADs did not change.**

TIP, Natsource, and an individual commented that §101.356(c) should be modified to allow the transfer of allowances from one person to another for individual future years as opposed to the permanent transfer of a year-to-year stream of allowances. TIP stated that several members expressed an interest in receiving individual future years of allowances; and their alternative, in the absence of individual year transfers, is to purchase the allowances conditioned on the future deposit and registration of the allowances in the seller's account.

**The commission agrees and revised the §101.356(c) accordingly. The commission has several concerns regarding futures trading. First, the selling of allowances for future years could create an expectation on the part of the buyer that those allowances will exist at a certain level in that future year. In actuality, many things could result in the loss of some or all of those allowances. For example, the commission could change the MECT program in a way that reduces the value of those allowances in order to provide additional emission reductions needed for SIP purposes. Also, like streams of allowances, future year allowances will be linked to the original facility which generated the allowance. If a rule is passed which would require additional reductions from that originating facility, the associated allowances could be reduced accordingly. Additionally, there is always the possibility that the commission could cancel the MECT program altogether making the future year allowance worthless. The future year allowance could also be**

**reduced by the seller's compliance in the previous year. Although the future year trade is recognized earlier, the placement of allowances into the buyer's account will not be done until after the seller's account is reconciled for the previous year. The trade is subject to reduction if the seller's account does not contain the allowances sold. The risk of reduced allowances rests on the buyer; the commission and executive director do not warrant the existence of allowances in the future simply by recognizing a future year trade. The commission is also concerned about the amount of staff resources that will be needed to track future year trades. The commission will continue to monitor the resource demand of this portion of the program and may end futures trading if it becomes too resource intensive.**

TIP and Dow commented that the commission should issue allowances for multiple years into the future to facilitate trading of future allowances. TIP stated that the process of transferring rights to future allowances is accomplished through the transfer of all or a portion of a "level of activity" expressed in heat input and not the allowances themselves. TIP further stated that the commission is reluctant to approve transfers of actual allowances until they are deposited into the seller's account and that this procedure is intended to prevent overdrafts on the seller's account in the event the allocation formulas are changed. TIP expressed a belief that this procedure hinders the market for future allowances and recommends that future-year allowances be deposited into compliance accounts for five consecutive control periods and that trades of future year allowances be registered and certified with immediate transfer to the buyer's account upon certification. This would be consistent with trading programs currently in operation in Los Angeles and the northeastern states.

**The commission has not revised the rules based on these comments. The commission has presented various trading mechanisms which it believes will facilitate a healthy marketplace, while providing the necessary flexibility with which companies may choose to meet their allocation. Allocation of allowances on a yearly basis provides the commission the necessary flexibility to adjust attainment plans based on air quality monitoring and the effects of existing rules and policies. Allocation on a yearly basis also provides the commission an enforcement mechanism for facilities whose actual emissions exceed the allowances in their compliance account through the reduction of subsequent yearly allocations. The commission disagrees that allocation on a yearly basis hinders the market for trading future allocations, as there is currently an active market for future allowances based on private agreements.**

TIP commented that the proposed language, which is meant to prevent the shifting of emissions from ESAD-applicable to non-ESAD facilities, is too broadly worded. TIP stated that the language, as worded, would apply to any emission increases at non-ESAD facilities which are connected in any way to a change at an ESAD facility. TIP used the example of an increase in production at an ESAD facility which results in more waste gas being transferred to a flare, which is a non-ESAD facility. The proposed language would require that allowances to the ESAD facility be reduced. TIP stated that the effect of this is an unintended cap on non-ESAD facilities. TIP suggested language which would narrow this requirement to situations where emissions are actually redirected to a non-ESAD facility.

**The commission has not revised the rules in response to these comments. The intent of this rule language is to prevent the shifting of existing emissions from ESAD-subject facilities to non-ESAD**

**facilities for the purpose of generating a reduction and creating excess allowances under the cap and trade program. For example, a boiler subject to the cap and trade program is fueled by natural gas and a waste stream. After December 31, 2000, the waste stream is routed to a flare and the boiler is fueled only by natural gas. The boiler emissions decrease due to the cleaner fuel being burned. Conversely, the NO<sub>x</sub> emissions from the flare increase due solely to the increase in throughput from flaring the waste stream. In this scenario, allowances would be deducted from the boiler's allocation equivalent to the direct NO<sub>x</sub> increase at the flare. The commission does not intend to cap emissions on non-ESAD facilities or deduct allowances for the downstream effects due to process changes or increases in production.**

TIP recommended that the commission add provisions to the MECT rules, which would allow non-ESAD facilities to opt-in to the program. As an alternative, TIP urged the commission to allow the conversion of ERCs generated after December 1, 2000 into MECT allowances. Without this conversion ability, TIP stated that there is no incentive to seek emission reductions at non-ESAD facilities.

**The commission has not revised the rules in response to these comments. In modeling for the HGA attainment demonstration, banked NO<sub>x</sub> emission reduction credits generated prior to December 1, 2000 were accounted for as emissions which would re-enter the airshed. In contrast, the commission had no way of predicting the generation of future emission reduction credits and therefore could not include them in this modeling exercise. The use of ERCs, which were not included in the SIP attainment demonstration, would serve to increase the cap level and be**

**detrimental to the HGA attainment demonstration. Facilities not subject to the MECT have the ability to certify and bank reductions in NO<sub>x</sub> as DERCs, which then can be converted and used as an allowance under the cap and trade program. In addition, non-ESAD facilities are able to certify and bank reductions under the ERC program which will be necessary to offset new major sources and major modifications to existing sources. This should provide sufficient incentive to seek emission reductions at non-ESAD facilities.**

TIP commented that §101.373(a)(2)(J) prohibits the classification of emission reductions at ESAD facilities from being classified as DERCs. TIP expressed a belief that this provision should be modified to apply to only emission reductions made prior to January 1, 2002.

**The commission has not changed the rule in response to this comment. Any reductions made at facilities subject to the MECT program after January 1, 2002 will be seen as excess allowances for that facility. The commission evaluated the generation of DERCs by facilities subject to the cap and trade program after January 1, 2002 and believes that, due to their indefinite bankable life, reductions certified as DERCs, instead of remaining excess allowances, would eventually reappear as emissions and exceed the final level of the NO<sub>x</sub> emissions cap. Additionally, those DERCs which were created prior to January 1, 2002 should have been reported to the commission months ago under §101.373(c). So there should be no more DERC generation certifications for ESAD facilities from this point forward.**

TIP commented that §101.376(c)(4) prohibits using DERCs to exceed an emission limitation in §106.261 or §106.262. This provision could be misinterpreted to prohibit an increase beyond any regulatory limit, such as a MECT or system cap, even if the increase results in an emission level below the facility's permitted maximum.

**The commission revised the rule based on this comment. The purpose of restricting DERC use to the emission limits outlined under the permits by rule contained in §106.261 and §106.262 is to ensure that the emissions increases associated with the use of DERCs are protective of public health. The commission agrees that the prohibition of DERC use in excess of the limitations outlined under these permits by rule applies to the authorized emission rate for a facility, not necessarily the amount of allowances that a site may possess or use and has clarified the rule accordingly. In addition, allowances do not constitute an authorization to exceed an annual emission limitation authorized under Chapter 116, Subchapter B. For example, a site may possess allowances in excess of an annual permit allowable limit but is not authorized, solely through possession of the allowances, to emit above that annual permit allowable. Should a site subject to the MECT program want to exceed an authorized annual emission limit, an amount of DERCs must be retired to cover the allowable exceedance, as well as an amount of allowances to cover the actual emissions associated with the exceedance. The commission modified §101.376(c)(4) to clarify that this limitation is not applicable to DERCs used for the purposes of compliance with Division 3.**

EPA commented that the proposed rules are silent on the public notice requirements for emission quantification protocols prior to their submittal to EPA for approval. EPA expressed an understanding that the commission would use the internet to allow public participation in the ERC, DERC, and MDERC protocol approval process, but recommended that internet notice be used as a supplement to print publication to accommodate the public that does not have easy internet access.

**The commission has not changed the rules in response to this comment. The commission believes that posting of proposed protocols on the internet is superior public notice because public internet access is widespread, including at public libraries; the posting will remain available continuously; and the posting will be easily located from the commission's internet web site. The internet posting can also be more detailed and comprehensive than a newspaper publication and has the advantage of being available statewide. Newspaper publication is expensive and the commission believes that wider public circulation can be achieved for significantly less cost using the internet. A newspaper notice is generally required for one printing and only in the geographic area of the first application for use. The next use of protocol might be across the state but would require a new notice in that area. For this type of notice, internet notice is clearly more effective.**

Dow commented that the commission should clarify §101.309(c)(1). Dow stated that the EC-2 Form, Re-review of Emission Credits, implies that an interested party is the owner of the credits, and also stated that the rule citation refers to any interested party. Dow asked if the commission intended that anyone could make such a request, and whether the commission would document the result so future reviews are not necessary. Dow also asked if such a review applied to DERCs and allowances.

**The commission has not changed the rule, because the intent of the rule is to allow any interested party to request a re-review through submittal of an EC-2 Form, including potential buyers who are not yet the owner. Emission credits are required to be surplus at the time of generation and at the time of use, and therefore, may be reviewed to determine credibility at any time prior to expiration or use. For credits that have recently undergone a re-review, the commission will first determine if there are any new or revised requirements applicable to the generating facility since the last date of re-review. If no new or revised requirements are found, then the emission credits are deemed creditable. If new or revised requirements are found, then the emission credits will undergo a complete re-review. The commission intends to list the date of the last re-review on the emission credit registry to assist interested parties in determining the potential for devaluation of an emission credit certificate. Discrete emission credits are not subject to this creditability review process, because credit is only given for a reduction made retrospectively and only required to be surplus to the requirements in effect at the time of generation.**

Dow supported the change in §101.376(b)(2).

**The commission appreciates this support.**

Dow commented that the terms  $H_i$  and  $R_i$  in §101.376(d)(2)(A)(i) are confusing and the word “actual” should be removed from both.

**The commission agrees that the terms are confusing, but not does not agree that the word “actual” should be removed. The  $H_i$  and  $R_i$  variables represent the actual measured level of activity and emission rate used to determine the system cap or the source cap, and are to be certified by the company as required in Chapter 117 when the system or source cap is established. The commission added the term “as applicable” to both definitions to indicate that calculations will be based on the applicable rule.**

EPE commented that it is currently involved in a program to reduce emissions from open-top brick kilns in Ciudad Juárez. This program has been recognized for its innovation by the Texas Council on Environmental Technology, which issued a preliminary grant of \$225,000 to support the program.

EPE commented that §101.303 contains language that prohibits the generation of reductions generated through the use of state or federal funds, and while these funds are not essential to the success of the project, they would allow the more rapid conversion of some kilns to the new technology and a corresponding decrease in emissions. EPE suggested rewording the rules to only prohibit the specific reductions funded directly through such programs.

**The commission revised the rules based on this comment. The intent of this restriction is to prohibit specific reductions that were directly funded by state, federal, or local funds from certification as an emission credit, or from using that specific reduction in lieu of an emission credit. Some state, federal, or local programs, such as the Texas Emission Reduction Program and congestion mitigation air quality funding, have committed the reductions they fund specifically to SIP strategies. If these reductions were additionally granted emission credit for that**

**same specific reduction, the reduction would result in “double counting.” The intent of this language is not to restrict the generation of emission credits or reductions to be used in lieu of emission credits from facilities retrofitted with the same control technology or reduction strategy where generation of those reductions is funded privately. Additionally, credit may be simultaneously granted if specifically allowed by the funding program.**

Kaneka supported what it perceived to be the intent of §101.354(e), but commented that the first sentence lacks a predicate. Kaneka stated that the first sentence should state that facilities not subject to an emission specification in §117.206 or §117.475 shall receive allowances for emission increases resulting from modifications made after December 21, 2000.

**The commission revised the rule to correct the grammatical error. However, the commission disagrees with Kaneka’s interpretation of this rule. The intent of this rule language is to prevent the shifting of existing emissions from ESAD-subject facilities to non-ESAD facilities for the purpose of generating a reduction and creating excess allowances under the cap and trade program. Allowances will not be allocated to facilities which are not subject to an ESAD requirement and, therefore, are not subject to the cap and trade program.**

TXU commented that the definition of “N” in §101.376(d)(2)(A)(i) should refer to the total number of emission units in the system cap, and also noted that the summation sign is missing in §101.376(d)(2)(A)(ii).

**The commission agrees and revised §101.376(d)(2)(A)(i) and (ii) accordingly.**

Lubrizol opposed the potential reevaluation of MDERCs based on increased accuracy of subsequent test protocols. Lubrizol expressed a belief that potential fluctuation in value not only affects the usefulness of MDERCs currently held, but would also make them less attractive as a compliance tool. In either case, the trading of MDERCs would be inhibited due to uncertainty of their value.

**When certifying and generating MDERCs, the commission will uphold all EPA approved testing and certification requirements. New MDERC quantification protocols must be approved by the commission and EPA. The commission is committed to working with EPA to resolve any deficiencies in new MDERC protocols prior to the protocol being used. This review procedure will ensure that all quantifications of credit are reliable before they are placed into the commission's discrete credit registry. In general, it is not the practice of the commission to reevaluate MDERCs which are already certified and banked. However, in limited circumstances the commission could reevaluate those credits, for example, where the protocol used is later determined to be grossly flawed.**

Lubrizol commented that the language of the MDERC program parallels the DERC program and may not always recognize the uniqueness of the MDERC program. The commenter specifically asked that the MDERC language outline fuel-based options.

**The commission has not changed the rules in response to this comment. With few exceptions, the MDERC program is based on the current rules and policies of the DERC program for stationary sources. The MDERC program does recognize fuel-based options as a reduction strategy, but these strategies must meet the same certification requirements as any other. The commission has provided in §101.372(m) a mechanism to credit strategies which must be implemented on a large scale in order to achieve measurable reductions, such as fuel strategies. Due to the complexities and uniqueness of mobile credit certification, the commission does not currently have any mobile credits certified nor has there been any mobile credit trading. As the commission gains knowledge and experience in mobile credit certification, more detailed rule language, and further written guidance will be developed to assist applicants.**

Sierra-Houston commented that emissions cap and trading rules discriminate against those who live near sources of air pollution by allowing the continuation of higher emissions at older plants, and urged the commission to adopt a command and control system requiring mandatory reductions at each facility.

**The commission made no changes to the rule in response to these comments. The commission's NO<sub>x</sub> reduction strategy is regional and is intended to achieve a target level of reduced regional NO<sub>x</sub> and subsequently a reduction in ozone. The commission believes that this strategy will lead to public health benefits for the entire region. Under the cap and trade program, NO<sub>x</sub> emissions have a finite cap which is reduced over time, effectively requiring facilities to make reductions necessary to stay below this cap. As the implementation schedule proceeds, the HGA area will have fewer allowances available on the market, which means that reductions are more likely to**

**occur at all facilities as emission standards tighten and allowances become more expensive. While operating under the cap and trade program, a facility must still meet the requirements as authorized under its air permit or permit by rule. When establishing these authorized limits, the commission reviews the permitted emission limits for off-property health effects. Generally, NO<sub>x</sub> itself is not the cause of health impacts near a facility. It is the role of NO<sub>x</sub> in the creation of ozone in the region which necessitates the NO<sub>x</sub> reductions required by this program. Depending upon meteorological conditions, the creation of ozone from NO<sub>x</sub> emissions could occur many miles away from the facility which emitted the NO<sub>x</sub>.**

Sierra-Houston opposed the use of mobile emission credits by stationary industrial sources and any program that allows reductions in one source category to be purchased as credits for use by another source category.

**The commission did not revise the rules based on this comment. The commission is able to estimate vehicle emissions in a manner that is applicable for trades to stationary sources, and uses methodology provided by EPA to calculate these reductions. The emission factors used in these calculations are derived from the EPA Mobile Emission Factor Model. The commission believes that because mobile sources contribute to the nonattainment problem of an area, reductions from mobile sources should be encouraged as well.**

Sierra-Houston opposed credit trading among different nonattainment areas as proposed in §101.302(f) and §101.372(f).

**No changes have been made in response to this comment. The trading of credits among different nonattainment areas is allowed under FCAA, §173(c)(1), 42 USC, §7503(c)(1). The commission only supports trading of credits between nonattainment areas if it does not adversely affect air quality for any given area. Such a demonstration would require approval of the executive director and the EPA.**

Sierra-Houston opposed the easing of NO<sub>x</sub> reductions, as demonstrated in the figure in §101.353, and the substitution of VOC reductions for NO<sub>x</sub>.

**The comment is out of scope of this rulemaking package, because the figure in §101.353 is used only for the implementation of the NO<sub>x</sub> standards established in Chapter 117. The issue of the benefits of NO<sub>x</sub> versus VOC reductions is discussed in preambles in previous issues of the *Texas Register* when that language was originally adopted.**

Sierra-Houston commented that the commission should add “permanent and enforceable” to the requirements for DERCs or other credits in §101.372(c)(1)(A) and (2)(A).

**No changes have been made in response to this comment. The method of DERC quantification (retrospective and for a discrete period of time) is a departure from the traditional method of ERC quantification, which assumes that the reduction is continuous and ongoing. Discrete emission credits may only be certified after the reduction has already occurred over the discrete time period; therefore, it is not necessary to make them permanent and enforceable.**

Sierra-Houston, citing §101.372(f)(8), opposed a delay in attainment for the BPA area if the commission makes a determination that pollutants from HGA are affecting BPA. Sierra-Houston also commented that the proposed rule did not require a demonstration of equal or greater benefit and only required an executive director statement that the criteria have been met.

**The commission disagrees with the commenter's interpretation of §101.372(f)(8) and has not revised the rule. The intent of the cited rule language is to establish a means, in accordance with SB 1561, to allow the possible use of reductions from outside the United States, but within the Texas - Mexico border area, provided these reductions meet specific requirements. These requirements include a demonstration that the use of the reduction does not cause localized health impacts and provides a greater health benefit to the overall area. The purpose of these rule revisions is not to support a delay in attainment of the ozone standard for BPA. The commenter might be referring to §101.372(f)(7) which has to do with trading between one nonattainment area and another with a demonstration of improvement of the air quality. That section also does not delay attainment for the BPA nonattainment area, but instead recognizes the possibility that nonattainment areas may impact each other and that reductions in one area could benefit another area.**

**When determining whether an emissions reduction 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. The commission will closely examine any proposed emission reduction under these rules, but does not intend to specify or endorse any particular method of demonstration.**

Sierra-Houston supported retiring 5% or 10% of DERC credit to ensure continued environmental benefits.

**The commission appreciates this support.**

Sierra-Houston commented that program audits under §101.379(a) should occur once every two years instead of every three years, with the results published in three months instead of six months in order to prevent delays in SIP corrections.

**The rules have not been changed based on this comment, because the commission believes that a comprehensive audit every three years will be sufficient to evaluate the program fully.**

**Additionally, a three-year audit schedule is consistent with the requirements for economic incentive evaluation procedures outlined in EPA's guidance, *Improving Air Quality with Economic Incentive Programs*.**

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§§101.300 - 101.304, 101.306, 101.309, 101.311**

**STATUTORY AUTHORITY**

The new and amended sections are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA). The new and amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 develop a general, comprehensive plan for control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants. The new and amended sections are also adopted under 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control

measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§101.300. Definitions.**

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

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

(2) **Actual emissions** - Actual emissions as of a particular date shall equal the total emissions during the selected time period, using the facility or mobile source's actual daily operating hours, production rates, or types of materials processed, stored, or combusted during the selected time period.

(3) **Area source** - Any facility included in the agency emissions inventory under the area source category.

(4) **Baseline** - Emissions that occur prior to an emission reduction strategy, considering all limitations required by applicable local, state, and federal rules and regulations. The baseline may

not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the state implementation plan.

(5) **Baseline activity** - The facility's level of activity based on the facility's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over any two consecutive calendar years including and following the most recent year of emissions inventory used in the state implementation plan or subsequent year(s) which precede the emission reduction strategy or credit use period. For facilities in existence less than 24 months or not having two complete calendar years of activity data, a shorter time period of not less than 12 months may be considered by the executive director.

(6) **Baseline emission rate** - The facility's rate of emissions per unit of activity during the baseline activity period.

(7) **Baseline emissions** - The facility's total actual emissions, in tons per year, based on the product of baseline activity and baseline emission rate averaged over any two consecutive calendar years including and following the most recent year of emissions inventory used in the state implementation plan or subsequent year(s) which precede the emission reduction strategy or credit use period.

(8) **Certified** - Any emission reduction that is determined to be creditable upon review and approval by the executive director.

(9) **Curtailement** - A reduction in activity level at any facility or mobile source.

(10) **Emission Credit** - An emission reduction credit or mobile emission reduction credit.

(11) **Emission Reduction** - An actual reduction in emissions from a facility or mobile source.

(12) **Emission reduction credit** - A certified emission reduction, expressed in tons per year, that is created by eliminating future emissions and quantified during or before the period in which emission reductions are made from a facility.

(13) **Emission reduction strategy** - The method implemented to reduce the facility's or mobile source's emissions.

(14) **Facility** - As defined in §116.10 of this title (relating to Definitions).

(15) **Generator** - The owner or operator of a facility or mobile source that creates an emission reduction.

(16) **Mobile emissions baseline** - Mobile emissions that occur prior to a mobile emission reduction strategy, considering all limitations required by applicable local, state, and federal

rules and regulations. A valid mobile emission baseline can be calculated by either using measured emissions of an appropriately sized sample of the participating mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's on-road or non-road mobile emissions factor models, or other model as applicable. To ensure that mobile emission reduction credits are surplus, mobile source baseline emissions estimates for each year of the proposed mobile source control program must be the same as, or lower than, those used, or proposed to be used, in the state implementation plan in which the control program is proposed.

(17) **Mobile emission reduction credit (MERC)** - A credit representing the amount of emission reductions from a mobile source strategy. These emission reductions are voluntary and must be in addition to compliance with local, state, and federal rules and regulations. MERCs are any enforceable, permanent, and quantifiable emission reduction (exhaust and/or evaporative) generated by a mobile source, which has been banked in accordance with the rules of the commission. MERCs can be banked, purchased, traded, and sold to meet clean air mandates for specified air programs, and MERCs may be applied to the emission reduction obligations of another air quality source or to air quality attainment goals. MERCs are expressed in tons per year.

(18) **Mobile source** - On-road (highway) vehicles (e.g., automobiles, trucks and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels).

(19) **Mobile source baseline activity** - The level of activity of a mobile source based on an estimate for each year for which the credits are to be generated. After the initial year, the annual estimates should reflect:

(A) the change in the mobile source emissions to reflect any deterioration in the emission control performance of the participating source;

(B) the change in the number of mobile sources resulting from normal retirement or attrition, and the replacement of retired mobile sources with newer and/or cleaner mobile sources;

(C) the change in usage levels, hours of operation or vehicle miles traveled in the participating population; and

(D) the change in the expected useful life of the participating population.

(20) **Mobile source baseline emission** - The mobile source's total actual emissions, in tons per year, based on the product of mobile source activity and the mobile source emissions rate.

(21) **Most stringent allowable emissions rate** - The emission rate of a facility or mobile source, considering all limitations required by applicable local, state, and federal rules, or regulations.

(22) **Permanent** - An emission reduction that is long-lasting and unchanging for the remaining life of the facility or mobile source. Such a time period must be enforceable.

(23) **Protocol** - A replicable and workable method of estimating emission rates or activity levels used to calculate the amount of emission reduction generated or credits required for facilities or mobile sources.

(24) **Quantifiable** - An emission reduction that can be measured or estimated with confidence using replicable methodology.

(25) **Real reduction** - A reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions.

(26) **Shutdown** - The permanent cessation of an activity producing emissions at a facility or mobile source.

(27) **Site** - As defined in §122.10 of this title (relating to General Definitions).

(28) **Source** - As defined in §101.1 of this title (relating to Definitions).

(29) **State implementation plan** - a plan which provides for attainment and maintenance of a primary or secondary national ambient air quality standard as adopted in 40 Code of Federal Regulations Part 52, Subpart SS.

(30) **Strategic emissions** - A facility's or mobile source's new allowable emission limit, in tons per year, following implementation of an emission reduction strategy.

(31) **Surplus** - An emission reduction that is not otherwise required of a facility or mobile source by any local, state or federal law, regulation, or agreed order and has not been otherwise relied upon in the state implementation plan.

(32) **User** - The owner or operator of a facility or mobile source that acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

**§101.301. Purpose.**

The purpose of this division is to allow the operator of a facility, as defined in §116.10 of this title (relating to Definitions), or mobile source to generate emission credits by reducing emissions beyond the level required by any local, state, and federal regulation and to allow the operator of another facility or mobile source to use these credits. Participation under this division is strictly voluntary.

**§101.302. General Provisions.**

(a) Applicable pollutants. Reductions of volatile organic compounds (VOC) 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, except as provided in paragraph (2) of this subsection. Reductions of one pollutant may not be used to meet the requirements for another pollutant, unless:

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

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

(A) the substitution:

(i) 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;

(ii) 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

(iii) 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; and

(B) the user:

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

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

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

(b) Eligible generator categories. The following categories are eligible to generate emission credits:

(1) facilities, including area sources;

(2) mobile sources; and

(3) any facility, 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).

(c) Emission credit requirements.

(1) Emission reduction credits (ERCs) are certified reductions which meet the following requirements:

(A) reductions must be enforceable, permanent, quantifiable, real, and surplus;

(B) the certified reduction must be surplus at the time it is created, as well as when it is used;

(C) in order to become certified, the reduction must have occurred after the most recent year of emissions inventory used in the state implementation plan (SIP) for VOC and NO<sub>x</sub>; and

(D) the facility's annual emissions prior to the reduction strategy must have been reported or represented in the emissions inventory used in the SIP.

(2) Mobile emission reduction credits (MERCs) are certified reductions which meet the following requirements:

(A) reductions must be enforceable, permanent, quantifiable, real, and surplus;

(B) the certified reduction must be surplus at the time it is created, as well as when it is used;

(C) in order to become certified, the reduction must have occurred after the most recent year of emissions inventory used in the SIP for VOC and NO<sub>x</sub>;

(D) the mobile source's annual emissions prior to the emission credit application must have been represented in the emissions inventory used in the SIP; and

(E) the mobile sources must have been included in the attainment demonstration baseline emissions inventory.

(3) Emission reductions from a facility or mobile 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.

(d) Protocol.

(1) All generators or users of emission credits must use a protocol which has been submitted by the executive director to the EPA for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols shall be used as follows.

(A) Facilities subject to the emission specifications under §§117.106, 117.206, or 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) shall quantify reductions in NO<sub>x</sub> using the testing and monitoring methodologies identified to show compliance with the emission specification.

(B) Facilities subject to the requirements under §§115.112, 115.121, 115.122, 115.162, 115.211, 115.212, 115.352, 115.421, 115.541, or 115.542 of this title (relating to Control Requirements; and Emission Specifications) shall quantify VOC reductions using the testing and monitoring methodologies identified to show compliance with the emission specifications or requirements.

(C) If the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following requirements apply:

(i) the amount of emission credits from a facility or mobile source, in tons per year, will be determined and certified based on quantification methodologies at least as

stringent as the methods used to demonstrate compliance with any applicable requirements for the facility or mobile source;

(ii) the generator must collect relevant data sufficient to characterize the facility's or mobile source's emissions of the affected pollutant and the facility's or mobile source's activity level for all representative phases of operation in order to characterize the facility's or mobile source's baseline emissions;

(iii) facilities with continuous emissions monitoring systems or predictive emissions monitoring systems in place shall use this data in quantifying actual emissions;

(iv) the chosen quantification protocol shall be made available for public comment for a period of 30 days and shall be viewable on the commission's web site;

(v) the chosen quantification protocol and any comments received during the public comment period shall be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols shall not be accepted for use with this division after a proposed disapproval of the protocol by the EPA in the *Federal Register*.

(2) In the event that the monitoring and testing data required under paragraph (1) of this subsection is missing or unavailable, the facility may report actual emissions for that period of time using these listed methods in the following order of preference to determine actual emissions:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

(E) *EPA Compilation of Air Pollution Emission Factors (AP-42)*, September 2000; or

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator shall use the most conservative method for replacing the missing data, submit the justification for not using the methods in paragraph (1) of this subsection, and submit the justification for the method used.

(e) Credit certification.

(1) The amount of emission credits in tons per year will be determined and certified, to the nearest tenth of a ton per year.

(2) Applications for certification will be reviewed in order to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the emission credit application. The applicant may submit a revised application in accordance with the requirements of this division.

(4) If a facility's or mobile source's actual emissions exceed its allowable emission limit, reductions of emissions exceeding the limit may not be certified as emission credits.

(5) Applications for certification of emission credit from reductions quantified under subsection (d)(1)(C) of this section may only be approved upon completion of the public comment period.

(f) Geographic scope. Except as provided in paragraph (3) of this subsection, only emission reductions generated in ozone nonattainment areas can be certified. An emission credit must be used in

the nonattainment area in which it is generated unless the user has obtained prior written approval of the executive director and the EPA; and:

(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; or

(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; or

(3) 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 as determined by the executive director; and the facility:

(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 and modeling, and any additional information requested by the executive director; and

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

(g) Recordkeeping. The generator must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years. The user must maintain a copy of all notices and backup information submitted to the credit registry from the beginning of the use period and for at least five years after. 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 facility or any other identifying number for each mobile source using emission credits;

(2) the amount of emission credits being used by each facility or mobile source; and

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

(h) Public information. All information submitted with notices, reports, and trades regarding the nature, quantity, and sales price of emissions associated with the use, generation, and transfer 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 credit application. All nonconfidential notices and information regarding the generation, availability, use, and transfer of emission credits shall be immediately made available to the public.

(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.

(k) Compliance burden. Users may not transfer their compliance burden and legal responsibilities to a third party participant. Third party participants may only act in an advisory capacity to the user.

(l) Credit Ownership. The owner of the initial emission credit certificate shall be the owner or operator of the facility or mobile source creating the emission reduction. The executive director may approve a deviation from this subsection considering factors such as, but not limited to:

(1) whether an entity other than the owner or operator of the facility or mobile source incurred the cost of the emission reduction strategy; or

(2) whether the owner or operator of the facility or mobile source lacks the potential to generate one-tenth of a ton of credit.

**§101.303. Emission Reduction Credit Generation and Certification.**

(a) Methods of generation.

(1) Emission reduction credits (ERCs) may be generated using one of the following methods or any other method that is approved by the executive director:

(A) the permanent shutdown of a facility which causes a loss of capability to produce emissions;

(B) the installation and operation of pollution control equipment which reduces emissions below the level required of the facility;

(C) a change in a manufacturing process which reduces emissions below the level required of the facility;

(D) the permanent curtailment in production, which reduces the facility's capability to produce emissions; or

(E) pollution prevention projects that produce surplus emission reductions.

(2) ERCs may not be generated from the following strategies:

(A) reductions from the shifting of activity from one facility to another facility at the same site, as defined in §122.10 of this title (relating to General Definitions);

(B) that portion of reductions funded through state or federal programs, unless specifically allowed under that program; or

(C) reductions in emissions from the shutdown of a facility which was not reported or represented in the most recent emissions inventory used in the state implementation plan (SIP).

(b) ERC calculation. The quantity of ERCs is determined by subtracting the facility's strategic emissions from the facility's baseline emissions, as calculated in the following equation. The facility's

strategic emissions equal the enforceable emission limit for the applicable facilities after the emission reduction strategy has been implemented.

**Figure: 30 TAC §101.303(b)**

**ERC Calculation**

$$ERC = \{[(BA_1 \times BER_1) + (BA_2 \times BER_2)] \div 2\} - SE$$

Where:

- $BA_1$  = the facility's level of activity during the first of any two consecutive years following or including the most recent year of emissions inventory used in the state implementation plan (SIP).
- $BER_1$  = the facility's actual emission rate measured during the year used for determining  $BA_1$ .
- $BA_2$  = the facility's level of activity during the second of any two consecutive years following or including the most recent year of emissions inventory used in the SIP.
- $BER_2$  = the facility's actual emission rate measured during the year used for determining  $BA_2$ .
- $SE$  = strategic emissions

(c) ERC certification.

(1) Facilities with potential ERCs must submit an EC-1 Form, Application for Certification of Emission Credits, within 180 days of the implementation of the emission reduction strategy to the executive director. Applications will be reviewed to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and an ERC certificate will be issued to the owner.

(2) ERCs shall be quantified in accordance with §101.302(d) of this title (relating to General Provisions). The executive director shall have the authority to inspect and request information to assure that the emissions reductions have actually been achieved.

(3) An application for emission reduction credits must include, but is not limited to, a completed EC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

(A) a complete description of the emission reduction strategy;

(B) the amount of emission credits generated;

(C) for volatile organic compound reductions, a list of the specific compounds reduced;

(D) documentation supporting the baseline emission activity, baseline emission rate, baseline total emissions, and strategic emissions;

(E) emissions inventory data from the most recent year of emissions inventory used in the state implementation plan and emissions inventory data for the two consecutive years used to determine baseline activity for each applicable pollutant and facility;

(F) the most stringent emission rate and the most stringent emission level for the applicable facility, considering all the local, state, and federal applicable regulatory and statutory requirements;

(G) a complete description of the protocol used to calculate the emission reduction generated; and

(H) the actual calculations performed by the generator to determine the amount of emission credits generated.

(4) ERCs will be made enforceable by one of the following methods:

(A) amending or altering a new source review (NSR) permit to reflect the emission reduction and set a new maximum allowable emission limit;

(B) voiding an NSR permit when a facility has been shut down;

(C) for any facility which is authorized by standard permit, standard exemption, or permit by rule, certifying emissions on a PI-8 Form, Special Certification Form for Exemptions and Standard Permits, or other form deemed equivalent by the executive director, the emission reduction and the new maximum allowable emission limit;

(D) for any facility which is not required to have authorization by permit, standard permit, standard exemption, or permit by rule, certifying emissions on an OPC-RE1 Form, Certified Registration of Emissions Form for Potential to Emit, or other form deemed equivalent by the executive director, the emission reduction and the new maximum allowable emission limit; or

(E) for any facility which is not required to have authorization by permit, standard permit, standard exemption, or permit by rule, obtaining an agreed order which sets a new maximum allowable emission limit.

**§101.304. Mobile Emission Reduction Credit Generation and Certification.**

(a) Methods of generation.

(1) Mobile emission reduction credits (MERCs) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under these rules and subject to the approval of the commission.

(2) MERCs cannot be generated from specific reductions funded through state or federal programs, unless specifically allowed under that program.

(3) MERCs cannot be generated from a mobile source if the emissions have been transferred from that mobile source to another mobile source.

(b) MERC calculation. The quantity of MERCs must be calculated from the annual difference between the mobile source emissions baseline and the projected emissions level after the MERC strategy has been put in place. The projected emissions must be based on the best estimate of the actual in-use emissions of the modified or substitute on-road or non-road vehicles or transportation system. Any estimate of a projected annual mobile source emissions level based on an assumption of reduced consumer service or transportation service would not be allowed without the support of a convincing analytical justification of the assumption. Emission baselines for quantifying MERCs should include the following information and data as appropriate, but not be limited to:

(1) the emission standard to which the mobile source is subject or emission performance to which the mobile source is certified;

(2) the estimated or measured in-use emissions levels per unit of use from all significant mobile source emissions sources;

(3) the number of mobile sources in the participating group;

(4) the type or types of mobile sources by model year;

(5) the actual or projected activity level, hours of operation or miles traveled by type, and model year; and

(6) the projected remaining useful life of the participating group of mobile sources.

(c) MERC certification.

(1) Mobile sources with potential MERCs must submit to the executive director an MEC-1 Form, Application for Mobile Emission Credits, within 180 days of implementation of the strategy. Upon approval of the application, the executive director shall issue a MERC certificate(s) to the person, company, business, organization, or public entity generating the mobile emission reduction. A MERC certificate will indicate the total amount of certified emission credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires.

(2) MERCs will be determined and certified in accordance with §101.302(d) of this title (relating to General Provisions) using:

(A) EPA methodologies, when available;

(B) actual monitoring results, when available;

(C) otherwise calculated using the most current EPA mobile emissions factor model or other model as applicable; or

(D) otherwise calculated using creditable emission reduction measurement or estimation methodologies which satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies.

(3) An application for MERCs must include, but is not limited to, a completed MEC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable mobile source:

(A) a complete description of the generation strategy;

(B) the amount of emission credits generated;

(C) documentation supporting the mobile source baseline emission activity, mobile source baseline emission rate, mobile source baseline total emissions, and the mobile source strategy emissions;

(D) a complete description of the protocol used to calculate the emission reduction generated;

(E) the actual calculations performed by the generator to determine the amount of emission credits generated; and

(F) a demonstration that the reductions are surplus to all local, state, and federal rules and to emission modeled in the SIP.

(4) MERCs will be made enforceable by obtaining an agreed order which sets a new maximum allowable mobile source emission limits.

**§101.306. Emission Credit Use.**

(a) Uses for emission credits. Unless precluded by a commission order or a condition or conditions within an authorization under the same commission account number, emission credits may be used as the following:

(1) offsets for a new source, as defined in §101.1 of this title (related to Definitions), or major modification to an existing source;

(2) mitigation offsets for action by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans);

(3) an alternative means of compliance with volatile organic compound and nitrogen oxides reduction requirements to the extent allowed in Chapters 114, 115, and 117 of this title (relating to Control of Air Pollution from Motor Vehicles; Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds);

(4) reductions certified as emission credits may be used in netting by the original applicant, if not used, sold, reserved for use, or otherwise relied upon, as provided in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas);

(5) an annual allocation of allowances as provided in §101.356 of this title (relating to Allowance Banking and Trading);

(6) compliance with motor vehicle fleet requirements to the extent allowed by §114.201 of this title (relating to Mobile Emission Reduction Credit Program); or

(7) compliance with other requirements as allowable within the guidelines of local, state, and federal laws.

(b) Credit use calculation.

(1) The number of emission credits needed by the user for offsets shall be determined as provided in §116.150 of this title.

(2) For emission credits used in compliance with Chapters 114, 115, or 117 of this title, the number of emission credits needed should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

**Figure: 30 TAC §101.306(b)(2)**

**Calculation of Emission Credits Needed**

$$EC_s = A \times (EF_p - EF_r)$$

Where:

- $A$  = maximum projected annual activity level during use period
- $EF_p$  = projected emission rate per unit of activity during use period
- $EF_r$  = emission rate per unit of activity required by Chapter 114, 115, or 117

(3) For emission credits used to comply with §§117.108, 117.210, or 117.223 of this title (relating to System Cap; and Source Cap), the number of emission credits needed for increasing the 30-day rolling average emission cap or maximum daily cap should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

**Figure: 30 TAC §101.306(b)(3)**

**Calculation of Emission Reductions Needed for System Cap or Source Cap**

$$ECs = \left[ \sum_{i=1}^N (H_n \times R_n) - \sum_{i=1}^N (H_i \times R_i) \right] \times \frac{365}{2000}$$

Where:

- $N$  = the total number of emission units in the source cap
- $i$  = each emission unit in the source cap
- $H_i$  = actual daily heat input, in million British thermal units (MMBtu) per day, as calculated according to §117.108(c)(1), §117.210(c)(1), or §117.223(b)(1) of this title
- $R_i$  = the facility's emission factor, in pounds (lb)/MMBtu, is defined as in §117.108(c)(1), §117.210(c)(1), or §117.223(b)(1) of this title
- $H_n$  = the maximum daily heat input, in MMBtu per day, expected for an emission unit during the use period
- $R_n$  = the maximum emission factor, in lb/MMBtu, expected for an emission unit during the use period

(4) Emission credits used for compliance with any other applicable program should be determined in accordance with the requirements of that program and must contain at least 10% extra to be retired as an environmental contribution, unless otherwise specified by that program.

(c) Notice of intent to use emission credits.

(1) For emission credits which are to be used as offsets in a New Source Review permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), the emission credits must be identified prior to permit issuance. Prior to construction, the offsets must be provided through submittal of a completed EC-3 Form, Notice of Intent to Use Emission Credits, along with the original emission credit certificate.

(2) For emission credits that are to be used for compliance with the requirements of Chapters 114, 115, or 117 of this title or other programs, the user must submit a completed EC-3 Form along with the original emission credit certificate, at least 90 days prior to the planned use of the emission credit. Emission credits may be used only after the executive director grants approval of the notice of intent to use. The user must also keep a copy of the emission credit certificate, the notice, and all backup in accordance with §101.302(g) of this title (relating to General Provisions).

(3) If the executive director denies the facility or mobile source's use of emission credits, any affected person by the executive director's decision may file a motion for reconsideration within 60 days of the denial. Notwithstanding the applicability provisions of §50.31(c)(7) of this title (relating to Purpose and Applicability), the requirements of §50.39 of this title (relating to Motion for Reconsideration) shall apply. Only an affected person may file a motion for reconsideration.

**§101.309 Emission Credit Banking and Trading.**

(a) The credit registry. All emission credit generators, users, and holders will be included in the commission's credit registry.

(1) All notices of generation, use, and transfer will be posted to the credit registry.

(2) The credit registry will assign a unique number to each certificate which will include the amount of emission reductions generated.

(3) The credit registry will maintain a listing of all credits available for each ozone nonattainment area.

(b) Life of an emission credit.

(1) If an emission credit is used prior to its expiration date, the emission credit is effective for the life of the applicable user facility or mobile source.

(2) Emission credits certified as part of an administratively complete application received prior to January 2, 2001 shall be available for use for 120 months from the date of the emission reduction.

(3) Emission credits certified as part of an administratively complete EC-1 Form, Application for Certification of Emission Credits, received after January 2, 2001 shall be available for use for 60 months from the date of the emission reduction.

(4) Notwithstanding paragraphs (2) and (3) of this subsection, the executive director may invalidate a certificate or portion of a certificate if local, state, or federal regulatory changes occur after the certification of the emission credit which would or would have affected the generating facility or mobile source.

(c) Creditability review of emission credits. Emission credits may be reviewed for creditability at any time during their banked life to insure the reductions generating the emission credit are surplus to all current state and/or federal rules, regulations, or requirements which would have been applicable to the generating facility or mobile source.

(1) A request for a creditability review may be made by any interested party through the submittal of a completed EC-2 Form, Re-review of Emission Credits.

(2) In the event a creditability review identifies a regulatory change invalidating a certificate or portion of a certificate, the executive director shall void the emission credit certificate and issue a new certificate with a unique number to the certificate owner in the amount of remaining surplus credit.

(d) Trading. Emission credits are freely transferable in whole or in part, and may be traded or sold to a new owner any time before the expiration date of the emission credit in accordance with the following.

(1) Prior to the transfer, the executive director must be notified by means of a completed EC-4 Form, Application for Transfer of Emission Credits, accompanied by the original certificate to be transferred.

(2) The executive director will issue a new certificate with a unique certificate number to the emission credit purchaser reflecting the emission credits purchased by the new owner, and a revised certificate to the emission credit seller showing any remaining emission credits available to the original owner. Emission credits will be considered transferred only after the executive director grants final approval of the transaction.

(3) 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.

(e) Emission credit voidance. Emission credits may be voided from the credit registry by the owner at any time prior to the expiration date of the credit and may be held by the owner. Reductions certified as emission credits may still be used by the original owner as an emission reduction for netting

purposes after the emission credits have expired, as provided in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas).

**§101.311. Program Audits and Reports.**

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

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

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

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

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and EPA a report that includes:

(1) the amount of volatile organic compound (VOC) and nitrogen oxides (NO<sub>x</sub>) emission credits generated under this division within each ozone nonattainment area;

(2) the amount of VOC and NO<sub>x</sub> emission credits used under this division within each ozone nonattainment area; and

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

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§§101.302 - 101.304**

**STATUTORY AUTHORITY**

These repealed sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. These repealed sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 develop a general, comprehensive plan for control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants. These repealed sections are also adopted under 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§101.302. General Provisions.**

**§101.303. Protocols.**

**§101.304. Program Audits.**

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§§101.350 - 101.354, 101.356, 101.360**

**STATUTORY AUTHORITY**

The amended sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 develop a general, comprehensive plan for control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants. The amended sections are also adopted under 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§101.350. Definitions.**

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

(1) **Adjustment period** - A period of time, beginning on the first day of operation of a facility and ending no more than 180 consecutive days later, used to make corrections and adjustments to achieve normal technical operating characteristics of the facility.

(2) **Allowance** - The authorization to emit one ton of nitrogen oxides, expressed in tenths of a ton, during a control period.

(3) **Authorized account representative** - The responsible person who is authorized, in writing, to transfer and otherwise manage allowances.

(4) **Banked allowance** - An allowance which is not used to reconcile emissions in the designated year of allocation, but which is carried forward for up to one year and noted in the compliance or broker account as "banked."

(5) **Broker** - A person not required to participate in the requirements of this division who opens an account under this division for the purpose of banking and trading allowances.

(6) **Broker account** - The account where allowances held by a broker are recorded.

Allowances held in a broker account may not be used to satisfy compliance requirements for this division.

(7) **Compliance account** - The account where allowances held by a facility or multiple facilities at a single site are recorded for the purposes of meeting the requirements of this division.

(8) **Control period** - The 12-month period beginning January 1 and ending December 31 of each year. The initial control period begins January 1, 2002.

(9) **Existing Facility** - A new or modified facility that either has submitted an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) which the executive director has determined to be administratively complete before January 2, 2001, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and commenced construction before January 2, 2001.

(10) **Houston/Galveston (HGA) ozone nonattainment area** - As defined in §101.1 of this title (relating to Definitions).

(11) **Level of activity** - The amount of activity at a facility measured in terms of production, fuel use, raw materials input, or other similar units.

(12) **Person** - For the purpose of issuance of allowances under this division, a person includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, or a corporation.

(13) **Site** - As defined in §122.10 of this title (relating to General Definitions).

(14) **Uncontrolled design capacity** - The maximum capacity of a facility to emit a pollutant without regard to any enforceable or physical operational limitations including air pollution control equipment.

**§101.351. Applicability.**

(a) This division applies to all facilities which emit nitrogen oxides (NO<sub>x</sub>) in the Houston/Galveston ozone nonattainment area, as defined in §101.1 of this title (relating to Definitions) which are subject to the emission specifications under §§117.106, 117.206, or 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations and Emission Specifications) and which are:

(1) located at a site which meets the definition of major source, as defined in §117.10 of this title (relating to Definitions), or

(2) located at a site where they collectively have an uncontrolled design capacity to emit ten tons or more per year of NO<sub>x</sub>.

(b) A site which met the definition of major source as of December 31, 2000 shall always be classified as a major source for purposes of this chapter. A site which did not meet the definition of major source (i.e., was a minor source, or did not yet exist) on December 31, 2000, but which at any time after December 31, 2000 becomes a major source, shall from that time forward always be classified as a major source for purposes of this chapter.

**§101.352. General Provisions.**

(a) Allowances are valid only for the purposes described in this division and cannot be used to meet or exceed the limitations of any annual emission limitation authorized under Chapter 116, Subchapter B, of this title (relating to New Source Review Permits), or any other applicable rule or law.

(b) Beginning March 1, 2003, and no later than March 1 following the end of every control period, each site shall hold a quantity of allowances in its compliance account that is equal to or greater than the total emissions of nitrogen oxides emitted during the control period just ending. Compliance with this division will begin with the initial control period beginning January 1, 2002.

(c) An owner or operator of a facility subject to this division may certify reductions from the facility as emission reduction credits, provided that:

(1) an enforceable and permanent reduction of annual allowances is approved by the executive director; and

(2) all applicable requirements of Division 1 of this subchapter (relating to Emission Credit Banking and Trading) are met.

(d) Allowances cannot be used for netting requirements under Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review and Prevention of Significant Deterioration Review).

(e) Allowances may be used simultaneously to satisfy the correlating one to one portion of offset requirements for new or modified facilities which do not meet the definition of an existing facility, as defined in §101.350 of this title (relating to Definitions), subject to federal nonattainment new source review requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions: Offsets).

(f) An allowance does not constitute a security or a property right.

(g) All allowances will be allocated, transferred, or used in tenths of tons. To determine the number of allowances, the number of allowances will be rounded down to the nearest tenth when determining excess allowances and rounded up to the nearest tenth when determining allowances used.

(h) One compliance account shall be used for multiple facilities required to participate under this division and located at the same site and under common ownership or control.

(i) The commission will maintain a registry of the allowances in each compliance account. The registry will not contain proprietary information.

**§101.353. Allocation of Allowances.**

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

**Figure: 30 TAC §101.353(a)**

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

Where:

- (1) A = number of allowances rounded to tenths of tons;
- (2) B = the facility's baseline emission rate and is calculated as follows:
  - (A) For facilities in operation prior to January 1, 1997:

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

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

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

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

$EF_{97}$  = the facility's emission factor for 1997 or the emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) (ESAD) whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director;

$EF_{98}$  = the facility's emission factor for 1998 or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director;

$EF_{99}$  = the facility's emission factor for 1999 or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director.

- (B) For existing facilities not in operation prior to January 1, 1997 and that have been in operation less than five complete consecutive calendar years beginning after the end of the adjustment period and have not established two years of baseline data:

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

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

$EF_{\text{Allowable}}$  = The emission factor or the emission specifications under ESAD, whichever is higher, authorized by the executive director until such time two consecutive calendar years of actual emission data is available.

(C) For existing facilities not in operation prior to January 1, 1997 and that have established two consecutive calendar years of baseline data out of the first five years of operation following the end of the adjustment period:

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

Where:  $LA_{\text{Year} - 1}$  = the facility's level of activity, as certified by the executive director, for the first of any two consecutive years within the first five years of operation;

$LA_{\text{Year} - 2}$  = the facility's level of activity, as certified by the executive director, for the second of any two consecutive years within the first five years of operation;

$EF_{\text{Year} - 1}$  = the facility's emission factor or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for the first of any two consecutive years within the first five years of operation;

$EF_{\text{Year} - 2}$  = the facility's emission factor or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for the second of any two consecutive years within the first five years of operation.

(3) X = reduction factor, where:

(A) For all boilers, auxiliary steam boilers, and stationary gas turbines (including duct burners used in turbine exhaust ducts) within an electric

power generating system, as defined in §117.10(14)(A) of this title (relating to Definitions), located in the Houston/Galveston nonattainment area:

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

(B) For facilities subject to the emission specifications under §117.206(c)(1)(A) and (B), (2)(A), (5), (8)(A)(i), (8)(B), (9)(A)(ii), (10), or (11) of this title (relating to Emission Specifications for Attainment Demonstrations):

- (i) for January 1, 2002 through March 31, 2004, X = 0.00;
- (ii) for April 1, 2004 through March 31, 2005, X = 0.47;
- (iii) for April 1, 2005 through March 31, 2006, X = 0.80;
- (iv) for April 1, 2006 through March 31, 2007, X = 0.93;
- (v) on and after April 1, 2007, X = 1.00;

(C) For all other facilities:

- (i) for January 1, 2002 through March 31, 2004, X = 0.00;
- (ii) for April 1, 2004 through March 31, 2005, X = 0.389;
- (iii) for April 1, 2005 through March 31, 2006, X = 0.667;
- (iv) for April 1, 2006 through March 31, 2007, X = 0.778;
- (v) on and after April 1, 2007, X = 1.00;

(D) Alternatively, facilities subject to the reduction factors under subparagraph B of this paragraph may elect to comply with the following:

- (i) for January 1, 2002 through March 31, 2005,  $X=0.00$ ;
    - (ii) on and after April 1, 2005,  $X=1.00$ .
  - (E) Election to comply with the alternative reduction schedule under subparagraph (D) of this paragraph shall be made by letter to the executive director no later than April 1, 2003.
  - (F) For calendar years which include two different reduction factors, the reduction factor shall be adjusted using the appropriate ratio to reflect the number of months covered by each reduction factor.
- (4)  $LA_{HA}$  = historical average level of activity, where:
- (A) For facilities in operation on or before January 1, 1997, the average level of activity, as certified by the executive director, for 1997, 1998, and 1999; or
  - (B) For existing facilities which began operation after January 1, 1997,  $LA_{HA}$  is:
    - (i) the level of activity authorized by the executive director until such time two consecutive calendar years of actual level of activity data is available, beginning after the end of the adjustment period; or
    - (ii) when two complete consecutive calendar years of actual level of activity data is available, beginning after the end of the adjustment period, the level of activity becomes the average of the facility's actual level of activity over those two consecutive calendar years of actual level of activity data.
- (5)  $EF_{final}$  = emission factor, as listed in §§117.106, 117.206, or 117.475 of this title.
- (6) For facilities using alternative emission specifications as allowed in §117.206(c)(17) or §117.475(c)(6) of this title, the level of activity for any formula will be the lowest of the level of activity as calculated in variables (2)(A), (2)(B), or the level of activity limited by an enforceable limit or commitment necessary to qualify for an alternative emission specification in §117.206(c)(17) or §117.475(c)(6) of this title.
- (b) For a new and/or modified facility that has submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permit for New Construction of Modification), an application

which the executive director has not determined to be administratively complete before January 2, 2001, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and has not commenced construction before January 2, 2001, allowances for each control period or the annual allocation rights shall be acquired from facilities already participating under this division, or in accordance with §101.356(g) of this title (relating to Allowance Banking and Trading).

(c) If actual emissions of nitrogen oxides during a control period exceed the amount of allowances held in a compliance account on March 1 following the control period, allowances for the next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus an additional 10%. This does not preclude additional enforcement action by the executive director.

(d) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2002; and

(2) subsequently, by January 1 of each following year.

(e) The annual deposit for any control period may be adjusted by the executive director to reflect new or existing state implementation plan requirements.

(f) Allowances may be added or deducted by the executive director from compliance accounts following the review of reports required under §101.359 of this title (relating to Reporting).

(g) The owner or operator of a facility may, due to extenuating circumstances, request a baseline period more representative of normal operation as determined by the executive director. Applications for extenuating circumstances must be submitted by the owner or operator of the facility to the executive director:

(1) no later than June 30, 2001 to request an alternative three consecutive calendar year period for facilities in operation prior to January 1, 1997;

(2) no later than 90 days after completion of the baseline period to request up to two additional calendar years to establish a baseline period for facilities whose baseline as described by variable (2)(C) listed in the figure contained in subsection (a) of this section is not complete by June 30, 2001; or

(3) at any time as authorized by the executive director.

(h) Allowances calculated under subsection (a) of this section will continue to be based on historical activity levels, despite subsequent reductions in activity levels. If allowances are being allocated based on allowables and the facility does not achieve two complete consecutive calendar years

of actual level of activity data, then allowances will not continue to be allocated if the facility ceases operation or is not built.

**§101.354. Allowance Deductions.**

(a) Allowances will be deducted in tenths of a ton from a site's compliance account for a control period based upon the monitoring and testing protocols established in §§117.114, 117.214, and 117.479 of this title (relating to Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration; and Monitoring, Recordkeeping, and Reporting Requirements).

(b) In the event that the monitoring and testing data required under subsection (a) of this section is missing or unavailable, the facility may report actual emissions for that period of time using the following equation or other listed methods in the following order to determine actual emissions: continuous monitoring data; periodic monitoring data; testing data; manufacturer's data, and *EPA Compilation of Air Pollution Emission Factors* (AP-42), September 2000. When reporting actual emissions as required under this subsection, the facility must also submit the justification for not using the methods in subsection (a) of this section and the justification for the method used.

**Figure: 30 TAC §101.354(b)**

$$A = \frac{LA_{CP} * EF_{CP}}{2000}$$

Where:

- A = Allowances to be subtracted from the compliance account in tenths of tons
- $LA_{CP}$  = the level of activity during the control period
- $EF_{CP}$  = the emission factor for the control period in pounds of nitrogen oxides per unit of activity

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

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

(e) Allowances shall be deducted from a site's compliance account in an amount equal to the nitrogen oxides ( $NO_x$ ) emissions increases from facilities not subject to an emission specification under §117.206 or §117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) which result from changes made after December 31, 2000 to facilities

subject to this division and §117.206(h)(3) or §117.475(f) of this title. Documentation detailing these increases in NO<sub>x</sub> emissions shall be included with the submittal of the ECT-1 Form, Annual Compliance Report.

(f) Allowances allocated in accordance with the variables in (a)(2)(B) listed in the figure contained in §101.353(a) of this title may only be used by the facility for which they were allocated and may not be used by other facilities at the same site during the same control period.

(g) On March 1 after every control period, a site shall hold a quantity of allowances in its compliance account that is equal to or greater than the total NO<sub>x</sub> emissions emitted during the prior control period.

**§101.356. Allowance Banking and Trading.**

(a) Allowances not used for compliance at the end of a control period may be banked for use in the following control period in compliance with §101.354 of this title (relating to Allowance Deductions) or traded except as provided in subsection (c) of this section.

(b) Allowances which have not expired or been used may be traded at any time during a control period after they have been allocated except as provided in subsection (d) of this section.

(c) The owner or operator of a site receiving allowances on an annual basis may permanently transfer ownership of the allowances allocated to individual facilities at that site to any person in accordance with the following requirements:

(1) a request for transfer of ownership shall be reviewed for approval by the executive director following the submission of a completed ECT-4 Form, Application for Permanent Transfer of Allowance Ownership;

(2) the ECT-4 Form shall include the price paid per allowance and shall be submitted to executive director at least 30 days prior to the allowances being deposited into the transferee's broker or compliance account;

(3) all information regarding the quantity and sales price of allowances shall be immediately made available to the public; and

(4) the executive director will issue a letter to the purchaser and seller reflecting this transaction. The transaction will be considered finalized upon issuance of this letter.

(d) The banking for future use or trading of allowances not used for compliance during a control period shall be restricted in accordance with the following:

(1) allowances which were allocated in accordance with the variable in (2)(B) listed in the figure contained in §101.353(a) of this title (relating to Allocation of Allowances) may not be banked for future use or traded; and

(2) allowances which were allocated prior to January 1, 2005 in accordance with the with the variables in (3)(D) listed in the figure contained in §101.353(a) of this title may not be banked for future use or traded.

(e) Only authorized account representatives may trade allowances.

(f) Trades will be reviewed for approval by the executive director in accordance with the following:

(1) submittal of a completed ECT-2 Form, Application for Transfer of Allowances;

(2) the completed ECT-2 Form shall include the price paid per allowance and shall be submitted to executive director at least 30 days prior to the allowances being deposited into the transferee's broker or compliance account;

(3) all information regarding the quantity and sales price of allowances shall be immediately made available to the public; and

(4) the executive director will issue a letter to the purchaser and seller reflecting this trade. The trade will be considered finalized upon issuance of this letter.

(g) Trades involving the transfer of individual future year allowances to be allocated to individual facilities at a site may be made in accordance with the following:

(1) the application for trade shall be reviewed for approval by the executive director following the submission of a completed ECT-5 Form, Application for Transfer of Individual Future Year Allowances;

(2) the completed ECT-5 Form shall include the price paid per allowance;

(3) transferred allowances will be deposited in the transferee's broker or compliance account on April 1 of the year in which the allowances are allocated and will be subject to the existence of the allowances in the transferor's account on that date;

(4) all information regarding the quantity and sales price of allowances shall be immediately made available to the public; and

(5) the executive director will issue a letter to the purchaser and seller reflecting this trade. The trade will be considered finalized upon issuance of this letter.

(h) Sites may use nitrogen oxides (NO<sub>x</sub>) discrete emission reduction credits (DERC) or mobile discrete emission reduction credits (MDERC) which have been generated and acquired in accordance with Division 4 of this subchapter (relating to Discrete Emission Credit Banding and Trading) in place of allowances for compliance with this division in accordance with paragraphs (1) - (9) of this subsection. Sites may use volatile organic compound (VOC) DERCs or MDERCs which have been generated and acquired in accordance with Division 4 of this subchapter, in place of allowances for compliance with this division in accordance with paragraphs (1) - (9) of this subsection provided that demonstration has been made and approved by the executive director and the EPA to show that the use of VOC DERCs or MDERCs is equivalent, on a one to one basis or other ratio, to the use of NO<sub>x</sub> allowances in reducing ozone.

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

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

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

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

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

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

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

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

(9) DERCs or MDERCs submitted with a DEC-2 Form, Notice of Intent to Use Discrete Emission Credits, for the purpose of compliance with this section, must be submitted to the executive director at least 30 days prior to intended use.

(i) Emission reduction credits (ERCs) may be converted into a yearly allocation of allowances at the rate of one ERC to one allowance per year only if they were generated prior to December 1, 2000 and provided that:

(1) the ERC is quantifiable, real, surplus, enforceable, and permanent as required in §101.302 of this title (relating to General Provisions) at the time the ERC is converted;

(2) the ERC was generated in the HGA area;

(3) the ERC was generated from a reduction in NO<sub>x</sub>;

(4) the ERC has not expired; and

(5) the owner of the ERC has prior approval from the executive director.

**§101.360. Level of Activity Certification.**

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

(1) for facilities in operation prior to January 1, 1997, the level of activity averaged over 1997, 1998, and 1999;

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

(3) for new and modified facilities not in operation prior to January 1, 1997 that are subject to emission specifications under §§117.106, 117.206, or 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) that were first adopted after April 1, 2001, and either have submitted under Chapter 116 of this title an application which the executive director has determined to be administratively complete within 90 days of the effective date of this emission specification, or have qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have commenced construction within 90 days of the effective date of the emission specification, the level of activity authorized by the executive director.

(b) The owner or operator of any facility subject to this division who has certified a facility's allowable level of activity under subsection (a)(2) of this section shall:

(1) certify no later than 90 days from the end of the fifth year of operation the actual level of activity and actual emission factors for the two complete consecutive calendar years chosen as a baseline by submitting to the executive director a completed ECT-3 Form, Level of Activity Certification, along with any supporting information such as usage records, testing or monitoring data, and production records; and

(2) receive no benefit of allowances allocated based on actual operation until January 1 of the control period following the certification in paragraph (1) of this subsection.

(c) Owners or operators of a site or facility that becomes subject to this division on or after April 1, 2001 shall certify the level of activity, as determined by the executive director, in accordance with subsections (a) and (b) of this section. Such certification shall be submitted no later than 90 days from the date the site or facility becomes subject to this division or no later than 90 days from the effective date of this rule, whichever is later.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§§101.370 - 101.374, 101.376, 101.378, 101.379**

**STATUTORY AUTHORITY**

The new and amended sections are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new and amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 develop a general, comprehensive plan for control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants. The new and amended sections are also adopted under 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§101.370. Definitions.**

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

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

(2) **Actual emissions** - Shall equal the total emissions during the selected time period, using the facility's or mobile source's actual daily operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(3) **Area source** - Any facility included in the agency emissions inventory under the area source category.

(4) **Baseline** - Emissions that occur prior to an emission reduction strategy, considering all limitations required by applicable state and federal regulations. The baseline may not exceed the most recent level of emissions reported in the emissions inventory used in a state implementation plan (SIP). For facilities in an area in which a SIP demonstration is not required for a criteria pollutant, the two consecutive calendar years shall include or follow the 1990 emission inventory. For reduction strategies that exceed 12 months, the baseline is established after the first year of generation and is

fixed for the life of the strategy. A new baseline is established for each unique emission reduction strategy.

(5) **Baseline activity** - The facility's actual level of activity based on the facility's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over any two consecutive calendar years including and following the most recent year of emissions inventory used in the SIP or subsequent year(s) which precede the emission reduction strategy or credit use period. For facilities in an area in which a SIP demonstration is not required for a criteria pollutant, the two consecutive calendar years shall include or follow the 1990 emission inventory. For facilities in existence less than two years or not having two complete calendar years of activity data, a shorter time period of not less than 12 months may be considered by the executive director.

(6) **Baseline emission rate** - The facility's rate of emissions per unit of activity during the baseline activity period.

(7) **Baseline emissions** - The facility's total actual emissions based on the baseline activity and baseline emission rate averaged over any two consecutive calendar years including and following the most recent year of emissions inventory used in the state implementation plan or subsequent year(s) which precede the emission reduction strategy or credit use period.

(8) **Certified** - Any emission reduction that is determined to be creditable upon review and approval by the executive director.

(9) **Curtailement** - A temporary or partial reduction in activity level at any facility or mobile source.

(10) **Discrete emission credit** - An emission reduction generated over a discrete period of time, and measured in tenths of a ton. A creditable emission credit such as a discrete emission reduction credit or mobile discrete emission reduction credit.

(11) **Discrete emission reduction credit** - A creditable emission reduction which is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tenths of a ton.

(12) **Emission reduction** - An actual reduction in emissions from a facility or mobile source.

(13) **Emission reduction strategy** - The method implemented to reduce the facility's or mobile source's emissions beyond that required by state or federal law, regulation, or agreed order.

(14) **Facility** - As defined in §116.10 of this title (relating to General Definitions).

(15) **Generation period** - The discrete period of time, not exceeding 12 months, over which a discrete emission reduction credit is created.

(16) **Generator** - The owner or operator of a facility or mobile source that creates an emission reduction.

(17) **Level of activity** - The amount of activity at a facility measured in terms of production, fuel use, raw materials input, or other similar units.

(18) **Mobile discrete emission reduction credit (MDERC or discrete mobile credit)**  
- A credit that is surplus, generated by a mobile source strategy. It is a creditable emission reduction that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons.

(19) **Mobile emissions baseline** - Mobile emissions that occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline can be calculated by either using measured emissions of an appropriately sized sample of the participating mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's on-road or non-road mobile emissions factor models, or other model as applicable. To ensure that mobile credits are surplus, mobile source baseline emissions estimates for each year of the proposed mobile source control program must be the same as, or lower than, those used, or proposed to be used, in the state implementation plan in which the control program is proposed.

(20) **Mobile source** - On-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels).

(21) **Mobile source baseline activity** - The mobile source's level of activity during the applicable mobile source baseline year.

(22) **Mobile source baseline emissions** - The mobile source's total emissions based on the product of mobile source baseline activity and mobile source baseline emission rate.

(23) **Mobile source baseline emissions rate** - The mobile source's rate of emissions per unit of mobile source baseline activity during the mobile source baseline activity period.

(24) **Most stringent allowable emissions rate** - The emissions rate of a facility or mobile source, considering all limitations required by applicable local, state, and federal regulations.

(25) **Ozone season** - The portion of the year when ozone monitoring is federally required to occur in a specific geographic area, as defined in 40 Code of Federal Regulations Part 58, Appendix D.

(26) **Permanent** - An emission reduction that is long-lasting and unchanging for the remaining life of the facility or mobile source.

(27) **Protocol** - A replicable and workable method of estimating emission rates or activity levels used to calculate the amount of emission reduction generated or credits required for facilities or mobile sources.

(28) **Quantifiable** - An emission reduction that can be measured or estimated with confidence using replicable techniques.

(29) **Real reduction** - A reduction in which actual emissions are reduced.

(30) **Shutdown** - The permanent cessation of an activity producing emissions at a facility.

(31) **Site** - As defined in §122.10 of this title (relating to General Definitions).

(32) **Source** - As defined in §101.1 of this title (relating to Definitions).

(33) **State implementation plan** - A plan which provides for attainment and maintenance of a primary or secondary national ambient air quality standard.

(34) **Strategy activity** - The facility's or mobile source's level of activity during the discrete emission reduction credit generation period.

(35) **Strategy emission rate** - The facility's or mobile source's emission rate during the discrete emission reduction credit generation period.

(36) **Surplus** - An emission reduction that is not otherwise required of a facility or mobile source by a state or federal law, regulation, or agreed order.

(37) **Use period** - The period of time over which the user applies discrete emission credits to an applicable emission reduction requirement.

(38) **User** - The owner or operator of a facility or mobile source that acquires and uses discrete emission reduction credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

(39) **Use strategy** - The compliance requirement for which discrete emission credits are being used.

**§101.371. Purpose.**

The purpose of this division is to allow the operator of a facility or mobile source to generate discrete emission credits by reducing emissions beyond the level required by any local, state, and federal regulation, and to allow the operator of another source to use these credits. Participation under this division is strictly voluntary.

**§101.372. General Provisions.**

(a) Applicable pollutants. Reductions of volatile organic compounds (VOC), 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 subject to approval by the executive director and the EPA; or

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

(A) the substitution:

(i) 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;

(ii) is from the reduction of a 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

(iii) is for any criteria pollutant 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; and

(B) the user:

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

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

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

(b) Eligible generator categories. Eligible categories include the following:

(1) facilities (including area sources);

(2) mobile sources; or

(3) any facility, 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).

(c) Discrete emission credit requirements.

(1) To be creditable as a discrete emission reduction credit (DERC), an emission reduction must meet the following:

(A) the reduction be real, quantifiable, and surplus at the time the discrete emission credit is generated;

(B) the reduction must have occurred after the most recent year of emissions inventory used in the state implementation plan (SIP) for all applicable pollutants; and

(C) the facility's annual emissions prior to the reduction strategy must have been reported or represented in the emissions inventory used for the SIP.

(2) To be creditable as a mobile discrete emission reduction credit (MDERC), an emission reduction must meet the following:

(A) the reduction must be real, quantifiable, and surplus at the time it is created;

(B) the reduction must have occurred after the most recent year of emissions inventory used in the SIP for all applicable pollutants;

(C) the mobile source's emissions must have been represented in the emissions inventory used for the SIP; and

(D) the mobile sources must have been included in the attainment demonstration baseline emissions inventory. If a mobile reduction implemented is not in the baseline for emissions, this reduction does not constitute a discrete emission reduction.

(3) Emission reductions from a facility or mobile 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.

(d) Protocol.

(1) All generators or users of discrete emission credits must use a protocol which has been submitted by the executive director to the EPA for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to

deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols shall be used as follows.

(A) Facilities subject to the emission specifications under §§117.106, 117.206, or 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) shall quantify reductions in NO<sub>x</sub> using the testing and monitoring methodologies identified to show compliance with the emission specification.

(B) Facilities subject to the requirements under §§115.112, 115.121, 115.122, 115.162, 115.211, 115.212, 115.352, 115.421, 115.541, or 115.542 (relating to Emission Specifications; and Control Requirements) shall quantify VOC reductions using the testing and monitoring methodologies identified to show compliance with the emission specifications or the requirements.

(C) If the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following applies:

(i) the amount of discrete emission credits from a facility or mobile source, in tons, will be determined and certified based on quantification methodologies at least as stringent as the methods used to demonstrate compliance with any applicable requirements for the facility or mobile source;

(ii) the generator must collect relevant data sufficient to characterize the facility's or mobile source's emissions of the affected pollutant and the facility's or mobile source's activity level for all representative phases of operation in order to characterize the facility's or mobile source's baseline emissions;

(iii) facilities with continuous emissions monitoring systems or predictive emissions monitoring systems in place shall use this data in quantifying actual emissions;

(iv) the chosen quantification protocol shall be made available for public comment for a period of 30 days and shall be viewable on the commission's web site;

(v) the chosen quantification protocol and any comments received during the public comment period shall, upon approval by the executive director, be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols shall not be accepted for use with this division (relating to Discrete Emission Credit Banking and Trading) after a proposed disapproval of the protocol by the EPA in the *Federal Register*.

(2) In the event that the monitoring and testing data required under paragraph (1) of this subsection is missing or unavailable, the facility may report actual emissions for that period of time using these listed methods in the following order of preference to determine actual emissions:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

(E) *EPA Compilation of Air Pollution Emission Factors (AP-42)*, September

2000; or

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator shall use the most conservative method for replacing the missing data, submit the justification for not using the methods in paragraph (1) of this subsection, and submit the justification for the method used.

(e) Credit certification.

(1) The amount of discrete emission credits shall be rounded down to the nearest tenth of a ton when generated and shall be rounded up to the nearest tenth of a ton when used.

(2) Applications for certification will be reviewed in order to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the discrete emission credit notification. The applicant may submit a revised discrete emission credit notification in accordance with the requirements of this division.

(4) If a facility's or mobile source's emissions exceed its allowable emission limit, the amount of emissions exceeding the limit may not be certified as discrete emission credits.

(f) Geographic scope. Except as provided in paragraphs (7) and (8) 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, except as specified in paragraphs (4) and (5) of this subsection and 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) VOC discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), if generated outside of the covered attainment counties. VOC discrete emission credits generated in a nonattainment area may be used in the covered attainment counties, except those generated in El Paso.

(5) NO<sub>x</sub> discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title, if generated outside of the covered attainment counties. NO<sub>x</sub> discrete emission credits generated in a nonattainment area, except those generated in El Paso, may be used in the covered attainment counties.

(6) CO, SO<sub>2</sub>, and PM<sub>10</sub> discrete emission credits must be used in the same metropolitan statistical area (as defined in Office of Management and Budget Bulletin Number 93-17 entitled "Revised Statistical Definitions for Metropolitan Areas" dated June 30, 1993) in which the reduction was generated.

(7) VOC and NO<sub>x</sub> discrete emission credits generated in other counties, states, or nations may 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 improve the air quality in the county where the credit is being used.

(8) 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 and modeling, and any additional information requested by the executive director; and

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

(g) Ozone season. In areas having an ozone season of less than 12 months (as defined in 40 Code of Federal Regulations Part 58, Appendix D) VOC and NO<sub>x</sub> discrete emission credits generated outside the ozone season may not be used during the ozone season.

(h) 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 facilities or mobile 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 not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each facility or any other identifying number for mobile sources using discrete emission credits;

(2) the amount of discrete emission credits being used by each facility or mobile source; and

(3) the specific number, name, or other identification of discrete emission credits used for each facility or mobile source.

(i) Public information. All information submitted with notices, reports, and trades regarding the nature, quantity of emissions, and sales price 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 information, or failure to submit all information may result in the rejection of the discrete emission reduction application. All nonconfidential notices and information regarding the generation, use, and availability of discrete emission credits may be obtained from the registry.

(j) 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.

(k) 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.

(l) Compliance burden and enforcement.

(1) The user is responsible for assuring that a sufficient quantity of discrete emission credits are acquired to cover the applicable facility or mobile source's emissions for the entire use period.

(2) The user is in violation of this section if the user does not possess enough discrete emission credits to cover the compliance need for the use period. If the user possesses an insufficient quantity of discrete emission credits to cover its compliance need, the user will be out of compliance for the entire use period. Each day the user is out of compliance may be considered a violation.

(3) Users may not transfer their compliance burden and legal responsibilities to a third party participant. Third party participants may only act in an advisory capacity to the user.

(m) Credit Ownership. The owner of the initial discrete emission credit certificate shall be the owner or operator of the facility or mobile source creating the emission reduction. The executive director may approve a deviation from this subsection considering factors such as, but not limited to:

(1) whether an entity other than the owner or operator of the facility or mobile source incurred the cost of the emission reduction strategy; or

(2) whether the owner or operator of the facility or mobile source lacks the potential to generate one tenth of a ton of credit.

**§101.373. Discrete Emission Reduction Credit Generation and Certification.**

(a) Methods of generation.

(1) Discrete emission reduction credits (DERC) may be generated using one of the following methods or any other method that is approved by the executive director:

(A) the permanent shutdown of a facility which causes a loss of capability to produce emissions;

(B) the installation and operation of pollution control equipment which reduces emissions below the level required of the facility; or

(C) a change in the manufacturing process which reduces emission below the level required of the facility;

(2) DERCs may not be generated by the following strategies:

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

(B) modification or discontinuation of any activity that is otherwise in violation of a federal, state, or local law;

(C) emission reductions required to comply with any provision under Title I of the FCAA regarding tropospheric ozone, or Title IV of the FCAA regarding acid deposition control;

(D) emission reductions of hazardous air pollutants, as defined in the FCAA, §112, from application of a standard promulgated under FCAA, §112;

(E) emission reductions which have occurred as a result of transferring the emissions to another facility at the same site;

(F) emission reductions credited or used under any other emissions trading program;

(G) emission reductions occurring at a facility which received an alternative emission limitation to meet a state reasonably available control technology requirement, except to the extent that the emissions are reduced below the level that would have been required had the alternative emission limitation not been issued;

(H) emission reductions at a site facility with a flexible permit, unless the reductions are made permanent and enforceable or the generator can demonstrate that the emission reductions were not used to satisfy the conditions for the facilities under the flexible permit.

(I) specific emission reductions funded through state or federal programs, unless specifically allowed under that program;

(J) emission reductions from a facility subject to Division 3 of this subchapter (relating to Mass Emissions Cap and Trade Program); or

(K) emission reductions from the shutdown of a facility that was not included in the state implementation plan (SIP).

(b) DERC calculation.

(1) DERCs, except for shutdowns, are calculated according to the following equations.

**Figure: 30 TAC §101.373(b)(1)**

**DERC Calculation**

(A) If  $SA \geq BA$ , then:

$$(BE) - (SER * SA) = \text{reduction generated}$$

(B) If  $SA < BA$ , then:

$$(BE) - (SER * BA) = \text{reduction generated}$$

Where:

BA = average activity level for the two consecutive year baseline

SA = emission reduction strategy activity

SER = emission reduction strategy emission rate

BE = baseline emission, the lower of the emissions for each pollutant reported or represented in the emissions inventory used for the state implementation plan or the two-year baseline emissions average ( $BE_A$ )

$$BE_A = (BE_1 + BE_2)/2$$

Where:

$BE_1$  = The lowest of the facility's actual emissions, or allowable emissions for the first year used to determine the two-year baseline average.

$BE_2$  = The lowest of the facility's actual emissions, or allowable emissions for the second year used to determine the two-year baseline average.

(2) For shutdown emission reduction strategies, the quantity of emission reduction generated is equivalent to the baseline emissions.

(3) The generation period for a shutdown is five years. Shutdown DERCs must be generated and noticed to the registry on an annual basis.

(c) DERC certification.

(1) A DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, must be submitted to the executive director no later than 90 days after the end of the generation period, or no later than 90 days after the completion of the first 12 months of generation. Submission of the DEC-1 Form should continue every 12 months thereafter for each subsequent year of generation.

(2) DERCs shall be quantified in accordance with §101.372(d) of this title (relating to General Provisions). The executive director shall have the authority to inspect and request information to assure that the emission reductions have actually been achieved.

(3) An application for DERCs must include, but is not limited to, a completed DEC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

(A) the generation period;

(B) a complete description of the generation activity;

(C) for shutdown emission reduction strategies, an explanation as to whether production shifted from the shutdown facility to another facility at the same site;

(D) the amount of discrete emission credits generated;

(E) for volatile organic compound reductions, a list of the specific compounds reduced;

(F) documentation supporting the baseline emission activity, baseline emission rate, emission reduction strategy emission rate, and emission reduction strategy activity;

(G) emissions inventory data from the most recent year of emissions inventory used in the SIP and emissions inventory data for the two consecutive years used to determine the baseline activity for each applicable pollutant and emission point;

(H) the most stringent emission rate for the applicable facility, considering all the local, state, and federal applicable regulatory and statutory requirements;

(I) a complete description of the protocol used to calculate the emission reduction generated; and

(J) the actual calculations performed by the generator to determine the amount of discrete emission credits generated.

**§101.374. Mobile Discrete Emission Reduction Credit Generation and Certification.**

(a) Method of generation.

(1) Mobile discrete emission reduction credits (MDERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this rule, and is subject to the approval of the commission.

(2) MDERCs cannot be generated from specific reductions funded through state or federal programs, unless specifically allowed under that program.

(3) MDERCs cannot be generated from a mobile source if the emissions have been transferred from that mobile source to another mobile source.

(b) MDERC calculation. An MDERC may be calculated from the annual difference between the mobile source emissions baseline and the actual emissions level after the MDERC strategy has been put in place. The MDERC must be based on actual in-use emissions of the modified or substitute mobile source. Emission baselines for quantifying MDERCs should include the following information and data as appropriate, but not be limited to:

- (1) the emission standard to which the mobile source is subject or emission performance to which the mobile source is certified;
- (2) the measured in-use emissions levels per unit of use from all significant mobile source emissions sources;
- (3) the number of mobile sources in the participating group;
- (4) the type or types of mobile sources by model year; and
- (5) the actual activity level, hours of operation or miles traveled by type, and model year.

(c) MDERC certification.

(1) An MDEC-1 Form, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits, must be submitted to the executive director no later than 90 days after the discrete emission reduction strategy activity has been completed, or no later than 90 days after the completion of the first 12 months of generation. Submission of the MDEC-1 Form should continue every 12 months thereafter for each subsequent year of generation.

(2) MDERCs will be determined and certified in accordance with §101.372(d) of this title (relating to General Provisions) using:

(A) EPA methodologies, when available;

(B) actual monitoring results, when available;

(C) calculations using the most current EPA mobile emissions factor model or other model as applicable; or

(D) calculations using creditable emission reduction measurement or estimation methodologies which satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies. The generator must collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which the MDERCs are created or used.

(3) An application for MDERCs must include, but is not limited to, a completed MDEC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced for each mobile source:

(A) the date of the reduction;

(B) a complete description of the generation activity;

(C) the amount of discrete mobile source emission credits generated;

(D) documentation supporting the mobile source baseline emission activity, mobile source baseline emission rate, mobile source baseline total emissions, and the mobile source strategy;

(E) a complete description of the protocol used to calculate the discrete mobile source emission reduction generated;

(F) the actual calculations performed by the generator to determine the amount of discrete mobile source emission credits generated;

(G) the calculation protocol as approved by the executive director and submitted to EPA; and

(H) a demonstration that the reductions are surplus to all local, state, and federal rules and to emissions modeled in the SIP.

(4) The owner of the initial emission credit certificate shall be the owner of the facility or mobile source creating the emission reduction. The executive director may approve a deviation from this paragraph considering factors such as, but not limited to:

(A) an entity other than the owner of the facility or mobile source incurred the cost of the emission reduction strategy; or

(B) the owner of the facility or mobile source lacked the potential to generate one-tenth of a ton of credit.

**§101.376. Discrete Emission Credit Use.**

(a) Requirements to use discrete emission credits. Discrete emission credits may be used if the following requirements are met.

(1) The user must have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(2) The user must hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(3) The user shall acquire additional discrete emission credits during the use period if it is determined the user does not possess enough discrete emission credits to cover the entire use period. The user must acquire additional credits as allowed under this section prior to the shortfall, or be in violation of this section.

(4) Facility or mobile source operators may acquire and use only discrete emission credits listed on the registry.

(b) Use of discrete emission credits. With the exception of uses prohibited in subsection (c) of this section or precluded by commission order or condition within an authorization under the same commission account number, discrete emission credits may be used to meet or demonstrate compliance with any facility or mobile regulatory requirement including the following:

(1) to exceed any allowable emission level, if the following conditions are met:

(A) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than ten tons for nitrogen oxides (NO<sub>x</sub>) or five tons for volatile organic compounds (VOC) in a 12-month period as approved by the executive director. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user must demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested; or

(B) at permitted facilities in counties or portions of counties designated as attainment or unclassified, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations (CFR) §52.21(b)(23), as approved by the executive director prior to use. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user must demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested;

(2) as new source review (NSR) permit offsets if the following requirements are met:

(A) the user must obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified facility in the NSR permit;

(B) the amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user must also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user must purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher; and

(C) the NSR permit must meet the following requirements:

(i) the permit must contain an enforceable requirement that the facility obtain at least one additional year of offsets before continuing operation in each subsequent year;

(ii) prior to issuance of the permit the user must identify the discrete emission credits; and

(iii) prior to start of operation the user must submit a completed DEC-2 Form, Notice of Intent to Use Discrete Emission Credits, along with the original certificate;

(3) to comply with the Mass Emissions Cap and Trade Program requirements as provided in §101.356(g) of this title (relating to Allowance Banking and Trading); or

(4) to comply with Chapters 114, 115, and 117 of this title (relating to Control of Air Pollution from Motor Vehicles; Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds), as allowed.

(c) Discrete emission credit use prohibitions. A discrete emission credit may not be used under this division:

(1) before it has been acquired by the user;

(2) for netting to avoid the applicability of federal and state NSR requirements;

(3) to meet FCAA requirements for:

(A) new source performance standards under FCAA, §111;

(B) lowest achievable emission rate standards under FCAA, §173(a)(2);

(C) best available control technology standards under FCAA, §165(a)(4) or Texas Health and Safety Code, §382.0518(b)(1);

(D) hazardous air pollutants standards under FCAA, §112, including the requirements for maximum achievable control technology;

(E) standards for solid waste combustion under FCAA, §129;

(F) requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3);

(G) ozone control standards set under FCAA, §183(e) and (f);

(H) clean-fueled vehicle requirements under FCAA, §246;

(I) motor vehicle emissions standards under FCAA, §202;

(J) standards for non-road vehicles under FCAA, §213;

(K) requirements for reformulated gasoline under FCAA, §211(k); or

(L) requirements for Reid vapor pressure standards under FCAA, §211(h) and  
(i);

(4) to allow an emissions increase of an air contaminant above a level authorized in a permit or other authorization that exceeds the limitations of §106.261(3) or (4) or §106.262(3) of this title (relating to Facilities (Emission Limitations); and Facilities (Emission and Distance Limitations)) except as approved by the executive director. This paragraph does not apply to limit the use of discrete emission reduction credits (DERC) or mobile discrete emission reduction credits in lieu of allowances under §101.356(h) of this title;

(5) to authorize a facility whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by such major source status; or

(6) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director.

(d) Notice of intent to use.

(1) A completed DEC-2 Form, signed by an authorized representative of the applicant must be submitted to the executive director in accordance with the following requirements.

(A) Discrete emission credits may be used only after the applicant has submitted the notice and received executive director approval.

(B) The application must be submitted at least 45 days prior to the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

(C) A copy of the application must also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area, as listed in 40 CFR Part 81 (2001).

(D) The application must include, but is not limited to, the following information for each use:

(i) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

- (ii) the amount of discrete emission credits needed;
  
- (iii) the baseline emission rate, activity level, and total emissions for the applicable facility or mobile source;
  
- (iv) the actual emission rate, activity level, and total emissions for the applicable facility or mobile source;
  
- (v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable regulatory requirements;
  
- (vi) a complete description of the protocol, as submitted by the executive director to the EPA for approval, used to calculate the amount of discrete emission credits needed;
  
- (vii) the actual calculations performed by the user to determine the amount discrete emission credits needed;
  
- (viii) the date on which the discrete emission credits were acquired or will be acquired;

(ix) the discrete emission credit generator and the original certificate of the discrete emission credits acquired or to be acquired;

(x) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired;

(xi) a statement that due diligence was taken to verify that the discrete emission credits were not previously used, the discrete emission credits were not generated as a result of actions prohibited under this regulation, and the discrete emission credits will not be used in a manner prohibited under this regulation; and

(xii) a certification of use, which must contain certification under penalty of law by a responsible official of the user of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) DERC use calculation.

(A) To calculate the amount of discrete emission credits necessary to comply with §§117.108, 117.138, 117.210, or 117.223 of this title (relating to System Cap; and Source Cap), a user may use the equations listed in those sections, or the following equations.

(i) For the rolling average cap:

**Figure: 30 TAC §101.376(d)(2)(A)(i)**

Where:

- $d$  = the number of days in the use period
- $i$  = each emission unit in the source or system cap
- $N$  = the total number of emission units in the source or system cap
- $H_i$  = actual daily heat input, in million British thermal units (MMBtu) per day, as calculated according to §§117.108(c)(1), 117.138(c), 117.210(c)(1) or (2), or 117.223(b)(1) of this title (relating to System Cap; and Source Cap) as applicable
- $R_i$  = actual emission rate, in pounds (lb)/MMBtu, as defined in §§117.108(c)(1), 117.138(c), 117.210(c)(1) or(2), or 117.223(b)(1) of this title as applicable
- $EH_i$  = expected new daily heat input, in MMBtu per day
- $ER_i$  = expected new emission rate, in lb/MMBtu.

$$\begin{aligned} &\text{Amount of DERCS} \\ &\text{Required} \quad = \sum_{i=1}^N \left[ (EH_i \times ER_i) - (H_i \times R_i) \right] \times \left( \frac{d}{2000} \right) \quad \text{(ii) For maximum} \\ &\text{(tons)} \end{aligned}$$

daily cap:

**Figure: 30 TAC §101.376(d)(2)(A)(ii)**

Where:

$i$  and  $N$  are defined as in the first equation in this paragraph

$R_i$  = in lb/MMBtu, is defined as in §§117.108(c)(2), 117.210(c)(3), or 117.223(b)(1) of this title (relating to System Cap; and Source Cap) as applicable

$H_{Mi}$  = the maximum daily heat input, in MMBtu/day, as defined in §§117.108(c)(2), 117.210(c)(3), or 117.223(b)(1) of this title as applicable

$EH_{Mi}$  = expected new maximum daily heat input, in MMBtu per day

$ER_i$  = expected new emission rate, in lb/MMBtu.

(B) The amount of discrete emission credits needed to demonstrate compliance or meet

a regulatory requirement is calculated as follows.

**Figure: 30 TAC**

$$\text{Amount of DERCS Required (tons)} = \sum_{i=1}^N \left[ (EH_{Mi} \times ER_i) - (H_{Mi} \times R_i) \right] \frac{1}{2000} \quad \text{\textbf{\S 101.376(d)(2)(B)}}$$

$$\text{\textbf{(ELA) x (EER - RER) = discrete emission credits needed}}$$

Where:

ELA = expected level of activity

EER = expected emission rate per unit activity

RER = regulatory emission rate per unit activity.

(C) The amount of discrete emission credits needed to comply with permit

allowables is calculated as follows.

**Figure: 30 TAC §101.376(d)(2)(C)**

$$(ELA - PLA) \times (PER) = \text{discrete emission credits needed}$$

Where:

ELA = expected level of activity

PLA = permitted level of activity

PER = permitted emission rate per unit activity

(D) The user must retire 10% more discrete emission credits than are needed, as calculated in this paragraph, to ensure that the facility or mobile source environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than ten tons, an additional 5.0% of the discrete emission credits needed, as calculated in this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(3) A user may submit a notice late in the case of an emergency, but the notice must be submitted before the discrete emission credits can be used. The user must include a complete description of the emergency situation in the notice of intent to use. All other notices submitted less than 45 days prior to use, or 90 days prior to use for a mobile source, will be considered late and in violation;

(4) The user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating facility or mobile source in the notice of intent to use. If the generator's credits are rejected or the notice of generation is incomplete, the use of discrete emission credits by the user may be delayed by the executive director. The user cannot use any discrete emission credits that have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a facility or mobile source if the credit and use cannot be demonstrated to meet the requirements of this section.

(5) If the facility is in an area with an ozone season less than 12 months, the user shall calculate the amount of discrete emission credits needed for the ozone season separately from the non-ozone season.

(e) Notice of use.

(1) The user shall calculate:

(A) the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, associated with actual use; and

(B) the amount of discrete emission credits not used, including the amount of excess discrete emission credits that were purchased to cover the environmental contribution, as

described in subsection (d)(2)(C) of this section, but not associated with the actual use, and available for future use.

(2) DERC use is calculated by the following equations.

(A) The amount of discrete emission credits used to demonstrate compliance or meet a regulatory requirement is calculated as follows.

**Figure: 30 TAC §101.376(e)(2)(A)**

$$(ALA) \times (AER - RER) = \text{discrete emission credits used}$$

Where:

ALA = actual level of activity

AER = actual emission rate per unit activity

RER = regulatory emission rate per unit activity.

(B) The amount of discrete emission credits used to comply with permit allowables is calculated as follows.

**Figure: 30 TAC §101.376(e)(2)(B)**

$$(ALA - PLA) \times (AER) = \text{discrete emission credits used}$$

Where:

ALA = actual level of activity

PLA = permitted level of activity

AER = permitted emission rate per unit activity

(3) A DEC-3 Form, Notice of Use of Discrete Emission Credits, must be submitted to the commission in accordance with the following requirements.

(A) The notice must be submitted within 90 days after the end of the use period;

(B) The notice must be submitted within 90 days of the conclusion of each 12-month use period, if applicable.

(C) The notice is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that reported in the notice of intent to use, including, but not limited to, the following items:

(i) purchase price of the discrete emission credits obtained prior to the current use period;

(ii) the actual amount of discrete emission credits possessed during the use period;

(iii) the actual emissions during the use period for VOC and NO<sub>x</sub>;

(iv) the actual amount of discrete emission credits used;

(v) the actual environmental contribution; and

(vi) the amount of discrete emission credits available for future use.

(4) Discrete emission credits that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion of the calculated environmental contribution not attributed to actual use is also available.

(5) The user is in violation of this section if the user submits the report of use later than the allowed 90 days following the conclusion of the use period.

**§101.378. Discrete Emission Credit Banking and Trading.**

(a) The credit registry. All discrete emission credit generators, users, and holders will be included in the commission's credit registry.

(1) All notices submitted by a generator, holder, or user will be reviewed for credibility; and when deemed certified, posted to the credit registry.

(2) The credit registry will assign a unique number to each certificate which will include the amount of emission reductions generated to the tenth of a ton.

(3) The credit registry will maintain a listing 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 credit registry.

(4) The registry shall not contain proprietary information.

(b) Life of a discrete emission credit. A discrete emission credit is available for use after the DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, has been received, deemed creditable by the executive director, and deposited in the commission credit registry in accordance with subsection (a) of this section, and may be used anytime thereafter. All credits are deposited in the credit registry and reported as available credits until they are used or withdrawn.

(c) Trading. Discrete emission credits are freely transferable in whole or in part, and may be traded or sold to a new owner at any time after certification.

(1) Prior to the transfer, the executive director must be notified by means of a completed DEC-4 Form, Application for Transfer of Discrete Emission Credits.

(2) The executive director will issue a letter to the discrete emission credit purchaser reflecting the discrete emission credits purchased by the new owner, and a letter to the discrete emission credit seller showing any remaining discrete emission credits available to the original owner. Discrete emission credits are considered transferred only after the executive director grants approval of the transaction.

(3) 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.

**§101.379. Program Audits and Reports.**

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

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

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

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

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the EPA a report that includes:

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

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

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

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

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

**§§101.372 - 101.374**

**STATUTORY AUTHORITY**

These repealed sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The repealed sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 develop a general, comprehensive plan for control of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause emissions of air contaminants to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of emissions of air contaminants. These repealed sections are also adopted under 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

**§101.372. General Provisions.**

**§101.373. Protocols.**

**§101.374. Program Audits.**