

The Texas Commission on Environmental Quality (commission) adopts the amendments to §§101.300, 101.302 - 101.304, 101.311, 101.356, 101.359, 101.370, 101.373, 101.374, and 101.376; and corresponding revisions to the state implementation plan (SIP). Sections 101.300, 101.302, 101.303, 101.356, 101.370, 101.373, and 101.374 are adopted *with changes* to the proposed text as published in the June 25, 2004 issue of the *Texas Register* (29 TexReg 6059). Sections 101.304, 101.311, 101.359, and 101.376 are adopted *without changes* to the proposed text and will not be republished.

The amendments will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In December 2000, the commission adopted rules setting a limit of 10,000 on the total use of discrete emission reduction credits (DERC) in the Houston/Galveston/Brazoria (HGB) ozone nonattainment area beginning on January 1, 2005. At the time of that adoption, the commission instructed the executive director to develop guidance for the distribution of DERCs among applicants requesting their use. The commission is adopting amendments to specify the method for which DERC use may be approved. The commission also identified several areas of the mass emission cap and trade (MECT) program where modifications are needed to either expand flexibility or protect the emission cap established by the SIP.

Industrial facilities that generate emission reduction credits (ERC) must first establish a baseline of emissions from which reductions may be subtracted and credit awarded. In order to give affected industries flexibility and allow them to select years that best represent their level of production activity,

the commission amends the rules to allow industries to select two consecutive calendar years from the ten consecutive years preceding the reduction or from a period including or following the most recent emission inventory used in the SIP. The baseline emissions may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP.

The commission amends the DERC calculation equation to ensure that no credit is awarded for curtailment of activity and to simplify the equation. The commission also adopts amendments that ensure that incidental increases in criteria pollutants or ozone precursors for which an area is nonattainment resulting from discrete mobile source reductions are offset. The amendments also ensure that secondary emission increases from mobile source reductions do not exceed state or federal standards.

The commission amends the relevant sections of Chapter 101 to allow reductions in any criteria pollutants for which an area has been designated as not meeting national ambient air quality standards (NAAQS) to qualify as an ERC. Currently, only nitrogen oxides and volatile organic compounds can be banked as ERCs. These new provisions are intended to provide opportunity to generate emission credits in the El Paso area that is nonattainment for ozone, carbon monoxide, and particulate matter with an aerodynamic diameter less than ten microns (PM_{10}).

SECTION BY SECTION DISCUSSION

General Administrative Amendments

The commission changed the word "shall" to "must" and the word "which" to "that" in numerous locations in the rules to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, October 2002. In response to comment from EPA, the commission changed the term "shall" to the term "must" in §101.356(d)(3) because the "on or before January 30" date is a condition precedent for the ECT-2 Form to be accepted.

The commission spelled out acronyms the first time they are used in each section and deleted acronyms that are only used once in each section.

SUBCHAPTER H, EMISSIONS BANKING AND TRADING

Division 1, Emission Credit Banking and Trading

Section 101.300, Definitions

The amendment to this section deletes the definitions of "Baseline" and "Mobile emissions baseline" because these definitions are redundant with the existing definitions of "Baseline emissions" and "Mobile source baseline emissions." In response to comments, the definitions of "Baseline emissions" and "Mobile source baseline emissions" have been revised to state that the baseline emission rate used in calculating baseline emissions is not to exceed the limitations required by applicable local, state, and federal rules and regulations. The amendment deletes certain specifications in the definitions of "Baseline activity" and "Baseline emissions." These specifications concern years from which a baseline may be determined. The amendment removes the specific requirements for mobile emission

reduction credits (MERC) and describes in general terms what reductions qualify as a MERC. The amendment adds specific requirements by which MERCs may be generated in §101.303 and §101.373 as definitions of variables in equations used to calculate ERCs. The amendment adds a specification to the definition of “Emission reduction strategy” stating that such a strategy must be beyond reductions required by state or federal law. The amendment adds a specification to the definition of “Mobile source baseline emissions” stating that the baseline is calculated prior to the application of a reduction strategy and accounts for all required reductions under state and federal law. The amendment adds a new definition for “Mobile source baseline emission rate” stating that it is a mobile source’s rate of emissions per unit of mobile source baseline activity during the mobile source baseline emissions period. The amendment makes minor changes to improve readability and renumber the definitions.

Section 101.302, General Provisions

The amendment to this section adds all pollutants for which an area may be declared nonattainment for an NAAQS, with the exclusion of lead, to the list of pollutants, the reduction of which, can qualify as an ERC. In response to comment, the commission excluded lead because it is not a suitable contaminant. The commission adopts this amendment because portions of El Paso are nonattainment for PM₁₀ and carbon monoxide, and the amendment will allow reductions in these two pollutants to be certified and banked as an emission credit. The amendment makes minor changes for readability and corrections to citations of federal and state law.

Section 101.303, Emission Reduction Credit Generation and Certification

The amendment to this section adds specifications to the requirements of the term “baseline emissions,” as this term is used as a factor in equations to determine ERC generation. In order to give affected industries flexibility and allow them to select years that best represent their level of production activity, the commission adopts a new subsection (b) that allows industries to select any two consecutive calendar years from either a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years, the ten consecutive years immediately preceding the emission reduction. The baseline emissions may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP. For reductions being certified in accordance with 30 TAC §116.170(b), Applicability of Emission Reductions as Offsets, the baseline emissions may not exceed the quantity of emissions reported in the emissions inventory used in the SIP in place at the time the reduction strategy was implemented. The amendment restructures the rule so that a general concept of baseline emissions is found in definitions, but specifications to the definition are found in the sections containing the equations where the terms are used. The commission changed the language proposed in subsection (b)(2) to make it more consistent with the definitions of “Baseline emissions,” “Baseline emission rate,” and “Baseline activity.” The word “representing” was added to the ERC calculation formula after “any two consecutive years” in the terms “BA1” and “BA2” to more clearly define the terms. The amendment makes minor changes for readability and renumbers paragraphs in the section.

Section 101.304, Mobile Emission Reduction Credit Generation and Certification

The amendment modifies this section to parallel the structure of §101.303 to first state the methods by which MERCs may be generated and to then describe prohibited generation strategies. The amendment adds the requirements that strategies for MERC generation cannot cause secondary emissions increases for certain criteria pollutants or their precursors without being offset at a 1:1 ratio, and that the strategy cannot cause an exceedance of federal or state rules. The commission adopts a new subsection (b) that identifies the requirements for the establishment of mobile source baseline emissions. The content of this new subsection is transferred from the deletion of the definition of “Mobile emissions baseline” as well as existing language in this section. The amendment adds a requirement to record the date of reduction to the requirements for the generation of MERCs in order to verify that the reduction was not a requirement of state or federal law. The amendment makes minor changes for readability and grammatical errors and renumbers paragraphs in the section.

Section 101.311, Program Audits and Reports

The amendment to this section expands the applicability of this section by removing references limiting the rules to ozone precursors and ozone nonattainment areas.

Division 3, Mass Emissions Cap and Trade Program

Section 101.356, Allowance Banking and Trading

The amendment to this section reorganizes this section for ease of use. The amendment also eliminates the requirement from this section for reporting the price paid per ton of allowance if the transfer involves two sites under common ownership or control. This requirement was intended to provide the

general public and regulated community with a market value for allowances traded; however, intra-company transfers typically do not involve a monetary exchange and can skew the market values listed by the commission. The proposed reorganization inadvertently changed the word “may” to “must” when the language in §101.356(e) was proposed to be moved to §101.356(c). In response to comments that this subsection is merely intended to restrict trading to authorized account representatives, not to compel any person to engage in trading, the commission adopts §101.356(c) to read “Only authorized account representatives may trade allowances.”

The amendment adds a new §101.356(d)(3) to specify that all ECT-2 Forms, Application for Transfer of Allowances, involving the transfer of allowances needed for compliance with the control period to be submitted no later than January 30 of the following control period.

In response to comments, the commission revises §101.356(f) to remove the provision that allowances traded on an individual future year basis will be deposited in the transferee’s broker or compliance account on April 1 of the year the allowances are to be allocated and are contingent upon the existence of the allowances in the transferor’s account. The revised language will provide for the deposit of allowances transferred on an individual future year basis to be deposited into the transferee’s broker or compliance account immediately upon approval by the executive director. Although this revision removes the conditional deposit of individual future year allowance trades, it should be noted that it is the responsibility of each transferor to possess in the compliance account sufficient allowances to accommodate any allowance deduction due to compliance or penalty reduction. Additionally, the commission wishes to notify participants in the mass emissions cap and trade market of a change in rule

implementation regarding permanent transfers of allowance ownership. Permanent transfers of allowance ownership, or *stream trades*, may consist of a stream of allowances that starts with a future year's allocation. For example, a permanent transfer of allowance ownership applied for in 2004 may consist of only the allowances to be allocated for 2007 and beyond, but not include the 2005 and 2006 allocation. The commission contends that a rule revision is not necessary to effect this change in rule implementation, but elects to notify potentially affected parties through this preamble publication.

Permanent transfers of allowance streams will continue to take place on a facility-by facility basis and continue to be into perpetuity.

The amendment to §101.356(h) adds a new paragraph (10) to address the issue of DERC allocation in the HGB area. Any application to use 250 DERCs or less will be approved. For any application requesting the use of more than 250 DERCs, 250 DERCs will be approved for use, and DERCs in excess of 250 can be reduced such that the area-wide use of DERCs does not exceed 10,000. If after approval of all requests to use 250 DERCs or less, the total requests for DERC use is less than 10,000, the remaining DERCs will be apportioned among those sites requesting to use more than 250 DERCs. This apportionment will be based on a percentage derived by dividing the amount of DERCs requested by a site in excess of 250 by the total number of DERCs requested in excess of 250 from all sites. This percentage will then be used to calculate the number of DERCs in excess of 250 that will be approved for those sites. At no time can more than 10,000 DERCs be approved for use during a control period. For example, assume the total number of DERCs approved for use in lieu of allowances equals 9,000 DERCs after approving all requests to use 250 DERCs. The remaining number of DERCs up to the 10,000 DERC limit is 1,000 DERCs. Company A has requested to use a total of 750 DERCs or 500

above the 250 DERC approval maximum, Company B has requested to use 1,000 DERCs or 750 above the 250 DERC maximum, and Company C has requested to use 500 DERCs or 250 above the 250 DERC maximum. The total of all three requests above the 250 DERC maximum is 1,500 DERCs. To calculate the apportionment percentage for Company A, 500 is divided by 1,500 to yield 33.3%. The same calculation yields 50% for Company B and 16.7% for Company C. These percentages are then applied to the 1,000 DERCs available. Company A would therefore be approved for 333 DERCs above the 250 DERC maximum or a total of 583 DERCs. Company B would be approved for 500 DERCs above 250 (total of 750 DERCs) and Company C would be approved for 167 DERCs (total of 417 DERCs). In this manner, the 1,000 remaining DERCs up to the 10,000 DERC limit are equally apportioned among the requestors.

Requests for DERC use must be received by October 1 of the control period for which the DERCs or mobile emission reduction credits (MDERC) are to be used. Additionally, the DEC-2 Form, Notice of Intent to Use Discrete Emission Credits, must be accompanied by an original DERC or MDERC certificate. The DEC-3 Form, Notice of Use of Discrete Emission Credits, must be submitted by March 31 of each year along with the site's annual compliance report. The amendment makes minor changes for readability and renumbers the paragraphs in the section.

Section 101.359, Reporting

The amendment to this section requires detailed documentation in support of the reported activity levels and requires that emission factors be included with the submittal of an ECT-1 Form, Annual Compliance Report. This amendment requires that the submittal of an ECT-1 Form include the same

level of supporting documentation that was submitted with the ECT-3 Form, Level of Activity Certification. Sites may reference previously submitted documentation supporting an emission factor if the emission factor is still used in the calculation of actual emissions for the control period. The amendment to this section also gives the executive director authority to suspend trades involving the transfer of allowances for future control periods from any site that has not submitted an annual compliance report. For example, if after March 31, 2003 Site A has not submitted an annual compliance report for the 2003 control period but has submitted an application for transfer of 2003 allowances to another site, the trade would be withheld pending the submittal of Site A's ECT-1 Form and verification of compliance for 2003.

Division 4, Discrete Emission Credit Banking and Trading

Section 101.370, Definitions

The amendment to this section deletes the definitions of "Baseline," "Level of activity," and "Mobile emissions baseline" because these definitions are redundant with the existing definitions of "Baseline emissions," "Baseline activity," and "Mobile source baseline emissions." In response to comments, the definitions of "Baseline emissions" and "Mobile source baseline emissions" have been revised to remove the phrase "surplus to any applicable local, state, and federal rules and regulations" and to replace it with "not to exceed the limitations required by applicable local, state, and federal rules and regulations." This will eliminate any confusion concerning the meaning of "surplus."

The amendment also deletes certain specifications in the definitions of "Baseline activity" and "Baseline emissions." These specifications concern years from which a baseline may be determined. The

amendment adds these specifications to §101.303 and §101.373 as definitions of variables in equations used to calculate ERCs. The amendment to the definitions of “Discrete emission reduction credit” and “Mobile discrete emission reduction credit” replaces the word “creditable” with “certified” to indicate that the credit has been reviewed and approved. The amendment also specifies that ERCs are to be expressed in tons to be consistent with other unit expressions of this subchapter. The amendment to the definition of “Permanent” includes a requirement that a permanent shutdown of a facility be enforceable meaning that the authorization for the facility has been removed. The amendment makes minor changes for readability and renumbers the section.

Section 101.373, Discrete Emission Reduction Credit Generation and Certification

The amendment to this section adds specifications to the requirements of baseline emissions as these terms are used as factors in equations to determine DERC generation. In order to give affected industries flexibility and allow them to select years that best represent their level of production activity, the amendment allows industries to select any two consecutive calendar years from either a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years, the ten consecutive years immediately preceding the emission reduction. If a facility has been in existence for less than two years, a shorter time period not less than 12 months may be considered. The baseline may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP. For reductions being certified in accordance with §116.170(b), the baseline emissions may not exceed the quantity of emissions reported in the emissions inventory used in the state implementation plan in place at the time the reduction strategy was implemented. 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 and SIP emission inventory are established after the first year of generation and are fixed for the life of the strategy. A new baseline is established for each unique emission reduction strategy. The amendment to the DERC calculation equation ensures that no credit is awarded for curtailment of activity and simplifies the equation. The amended equation will only give DERC credit for the difference between the baseline emission rate and the strategic emission rate. The commission changed the language proposed in subsection (b)(2) to make it more consistent with the definition of “Baseline emission,” “Baseline emission rate,” and “Baseline activity.” A new §101.373(c)(2) requires that the sum of the reduction generated and the total strategy emissions shall not exceed the quantity of emissions reported or represented in the emissions inventory used for the SIP or the two-year baseline emission average, whichever is less. The amendment makes minor changes for readability and renumbers the components of the section.

Section 101.374, Mobile Discrete Emission Reduction Credit Generation and Certification

The amendment to this section modifies this section to parallel the structure of §101.373 to state the methods by which MERCs may be generated and to describe prohibited generation strategies. The amendment adds to the prohibited strategies any strategy that results in secondary emission increases that exceed limits in state or federal rules. A new subsection (b) identifies the requirements to establish mobile source baseline emissions. The content of this new subsection consists of deletions of the definition of “Mobile emissions baseline” as well as existing language in this section. MDERCs cannot be funded under a state or federal program unless specifically allowed by the program. MDERCs cannot be generated through the transfer of emissions from one mobile source to another within the

same nonattainment area or from a strategy causing an increase in secondary emissions exceeding state or federal standards. A new subsection (d) requires mobile emission reduction strategies that reduce one criteria pollutant or precursor for which an area is nonattainment and that cause an increase in another criteria pollutant or precursor for which the area is nonattainment to offset any increase at a 1:1 ratio. Subsection (d) was changed from proposal to read “. . . must be offset at a 1:1 ratio . . .” to make the last sentence more readable. The amendments delete the requirement that the owner of the initial emission credit certificate shall be the owner of the facility or mobile source creating the emission reduction because this requirement is already in the existing 30 TAC §101.372(m). The amendment to subsection (a) states that MDERCs cannot be credited for transfer of emissions from one source to another under common ownership because this would not constitute a net reduction by the owner. The amendment deletes the requirement for a calculation protocol for MDERC certification as this requirement is currently in §101.372, General Provisions. The amendment makes minor changes for readability and renumbers components of the section.

Section 101.376, Discrete Emission Credit Use

The amendment to §101.376(d)(2)(C) states that the equation in the subparagraph is used to calculate the number of credits needed to exceed an allowable emission limit rather than comply with allowable emission limits of a permit. The amendment eliminates the requirement to disclose the price paid per ton for DERC transfers between two sites under common ownership or control and adds United States Code (USC) references to citations of sections of the Federal Clean Air Act. The amendment specifies certain variables in the equation in §101.376(d)(2)(A)(ii) instead of referencing other variables in the

section. The amendment makes minor changes for readability and renumbers components of the section.

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” is 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 adopted amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading program is intended to achieve these goals. The primary purpose of this rulemaking action is to develop guidance for the distribution of DERCs among applicants requesting their use under Subchapter H, Division 3, and to amend several areas of the banking and trading program where modifications are needed to either expand flexibility or protect the emission cap established by the SIP. None of these amendments place additional financial burdens on the regulated community. Therefore, the rulemaking action does 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 action does not meet any of these four applicability requirements of a “major environmental rule.” Specifically, the banking and cap and trade systems amendments in this rulemaking action were developed to provide flexibility in meeting the ozone NAAQS set by the EPA under 42 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, §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action. The amendments are adopted to programs that would provide flexibility in meeting the ozone NAAQS set by the EPA under 42 USC, §7409. Promulgation and enforcement of the adopted amendments will not burden private real property. The adopted amendments do not affect private property in a manner that 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, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the adopted amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do 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 these rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible to ensure 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 that provide flexibility to meet the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption that applies to these adopted amendments is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and

policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the adopted amendments will maintain the same level of or reduce the level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

These amendments will not require any changes to outstanding federal operating permits.

PUBLIC COMMENT

A public hearing for this proposed rulemaking was held on July 20, 2004, in Austin and the comment period closed on July 26, 2004. No one provided oral comments. Written comments were received from BakerBotts, L.L.P., on behalf of the Texas Industry Project (TIP); EPA; Sierra Club, Houston Regional Group (Sierra Club); and TexasGenco, LP (TexasGenco). TexasGenco supported the TIP comments.

RESPONSE TO COMMENTS

TIP and TexasGenco supported the proposal to eliminate the requirement to report the price of allowances in a trade between two sites under common ownership or control. TIP also supported this provision as it applies to the transfer of DERCS and MDERCS.

TIP and TexasGenco supported the expansion of the credit generation to any two years in a ten-year period preceding an emission reduction, because the expansion will better represent business and production cycles. EPA commented that the proposed definition of baseline is inconsistent with the current commission definition of actual emissions in 30 TAC §116.12(1), although EPA recognized that this definition will be modified by December 31, 2005. EPA also stated that the proposed definition is inconsistent with federal regulations in 40 CFR §51.165(a)(1)(xxxv)(B), concerning electric utility steam generating units. These regulations require a baseline of any consecutive 24-month period within the first five years immediately preceding a modification with a provision for a different period if that would be more consistent with normal operations.

The commission appreciates the commenters' support and agrees that a credit baseline of any two consecutive calendar years within the ten-year period preceding an emission reduction will allow applicants to best represent normal business and production cycles. The current definition of actual emissions in §116.12(1) differs from the definition of baseline emissions in the adopted rule. The definition of actual emissions found in Chapter 116, Subchapter B, as part of the test to determine whether an emissions increase will trigger review under the new source review program. Additionally, the definition of baseline emissions found at 40 CFR

§51.165(a)(1)(xxxv)(B) is used as part of the test to determine when the new source review program is applicable to electric utility steam generating plants. These definitions are not used to determine credit generation under Chapter 101.

The use of the term “baseline actual emissions” is used in reference to the calculation of actual emissions in the actual-to-future-actual applicability test for major new source review. In the preamble to EPA’s December 31, 2002 final action, the EPA noted that revisions to the new source review applicability regulations, promulgated in 1992, created special rules for physical and operational changes at electric utility steam generating units. As a result, the actual-to-future-actual methodology was adopted for changes at electric utility steam generating units to determine if the physical or operational change would result in a significant emissions increase and trigger major new source review. This new methodology required electric utility steam generating units to use a baseline from any two consecutive years within the five years preceding the physical or operational change. EPA went on to state in the December 31, 2002 issue of the *Federal Register* (67 FR 80191) that “. . . the actual-to-projected-actual applicability test should not be used when determining a source’s actual emissions on a particular date as may be used for other NSR {new source review} -related requirements {emphasis added}. Such requirements include, but are not limited to, air quality impacts analyses and computing the required amount of emissions offsets” and that for these requirements the existing definition of “actual emissions” shall apply. Conversely, the term “baseline emission” as defined in the adopted rule only applies to credit generation under Chapter 101, and does not impact when new source review will be performed. Because these definitions apply to separate programs without crossover,

inconsistencies in definitions should not impact either program. The commission contends that the definition of baseline emissions in the adopted rule is consistent with the EPA definition of actual emissions, as defined in 40 CFR §51.165(a)(1)(xii) and also in 40 CFR Part 51, Appendix S, because the adopted rule requires baseline emissions to equal the average rate at which the unit actually emitted a pollutant during a consecutive 24-month period preceding the reduction and represent normal source operation. The commission further contends that the ability to choose a consecutive 24-month period from the ten years preceding the reduction will allow for the baseline to be most representative of normal operation.

TIP and TexasGenco supported the methodology the commission will use to equitably distribute DERCs in the HGB area. TIP submitted a recommended rule language change to clarify that any request to use 250 or more DERCs will have at least the use of 250 DERCs approved.

The commission agrees that the TIP recommendation that emphasizes the point that all requests to use more than 250 DERCs will have at least 250 DERCs approved.

TIP requested that the commission remove the provision that places conditions on trades of individual future year allowances that a sufficient number of allowances be present in the sellers' account on the day of deposit to the buyer. TIP stated that this practice discourages trading of future allowances and reduces the utility of the program, and that sites cannot rely on conditional trades to make capital investments for pollution control devices. TIP argued that the MECT program automatically corrects for any shortfalls in an account by charging any deficit plus 10% to the account the following control

period. TIP also stated that the provision is not necessary to protect the SIP because of the finite number of allowances in the MECT program. TIP finally noted that a similar provision placing conditions on trades is not included in the highly-reactive volatile organic compound trading program.

The commission agrees with the comment and changed the rule accordingly.

TIP and TexasGenco expressed a belief that the use of the word “must” in §101.356(c), “Only authorized account representatives must trade allowances” was inadvertent and stated that similar provisions have used the word “may.” EPA noted that the word “must” had been used in §101.356(c) when “may” would be more appropriate.

The commission agrees that the word “may” is more appropriate and changed the rule language accordingly.

The Sierra Club commented that the use of any two consecutive years in a ten-year baseline period will allow companies to maximize their emissions for credit generation and could lead to an increase in emissions through the banking and trading of credits.

The commission has not changed the rule in response to this comment. The use of any two consecutive years within the ten years preceding an emission reduction is consistent with federal new source review reform and allows facilities to best represent their normal operations.

Additionally, the chosen baseline cannot exceed the emissions reported to the commission and modeled for the SIP and will, therefore, protect the attainment strategy.

TIP did not support the proposal to add a requirement that baseline emissions be surplus to all limitations required by applicable local, state, and federal rules and regulations. TIP stated that the use of the term “surplus” is confusing and that it is not clear what the term “surplus” means in regard to baselines because “surplus” has normally been used when describing creditable emission reductions. TIP expressed a belief that the intent of the commission is to properly require that baseline emissions are those considering all applicable local, state, and federal regulations.

The commission revised the rule to state that baseline emissions are those emissions occurring prior to a reduction strategy that do not exceed the limitations required by applicable state, local, and federal rules and regulations.

TIP supported the expansion of the ability to generate ERCs to all pollutants for which an area is designated nonattainment. EPA stated that this ability should not be applicable to areas that are nonattainment for lead.

The commission agrees that lead is unsuitable for a credit program. The commission changed the rule to remove lead from the program.

EPA noted several places (§101.356(d)(3), (e)(1) and (2), and (h)(10) and §101.376(a)(1) and (2), (b)(2)(C)(ii) and (iii), and (d)(2)(D) and (3)) where the words “must” or “will” should be substituted for “shall.” EPA also noted that §101.356(h)(9) requires submission of a notice of use of DERCS “on” March 31st of each year, and suggested that submission “by” March 31st would be more appropriate.

The commission used the drafting standards in the *Texas Legislative Council Drafting Manual*, October 2002, to determine the correct use of the words “shall” and “must.” According to the drafting manual, the use of “shall” denotes a duty, i.e., the officer *shall* issue a license; and the use of “must” denotes a condition precedent, i.e., the application *must* be in writing. The term to use in §101.356(d)(3) is “must” because the “on or before January 30” date is a condition precedent for the ECT-2 Form to be accepted. Therefore, the commission changed the term “shall” to the term “must” in §101.356(d)(3). The term to use in §101.356(e)(1) is “shall” because the executive director is obligated to review a request for ownership transfer; therefore, the commission did not change the term “shall.” There are two terms used in §101.356(e)(2). The first term should be “must” because the price paid per allowance is a condition precedent for the ETC-4 Form to be valid and the second term should be “shall” because the owner or operator is obligated to submit the ETC-4 Form. Therefore, the commission did not change either term in §101.356(e)(2). The term to use in §101.356(h)(10) is “shall” because the executive director is obligated to approve the use of DERCS provided certain conditions are met; therefore, the commission did not change the term “shall.” The term to use in §101.376(a)(1) and (2) should be “shall” because the user is obligated to hold or own a sufficient amount of discrete emission credits; therefore, the commission did not change the term “shall.” The term to use in

§101.376(b)(2)(C)(ii) and (iii) is “shall” because the user is obligated to identify the use of discrete emission credits prior to permit issuance and the user is obligated to submit a completed DEC-2 Form prior to start of operation; therefore, the commission did not change the term “shall” in §101.376(b)(2)(C)(ii) and (iii). The term to use in §101.376(d)(2)(D) and (3) is “shall” because the user is obligated to retire 10% more discrete emission credits than are needed to ensure that the facility or mobile source environmental contribution retirement obligation will be met and the user is obligated to include a complete description of the emergency situation in the notice of intent to use discrete emission credits in an emergency situation; therefore, the commission did not change the term “shall” in §101.376(d)(2)(D) and (3). The commission agrees with the suggested revision to §101.356(h)(9) and revised the rule accordingly.

The Sierra Club objected to emissions banking and trading and the MECT program as pollution control measures and argued that the programs allow concentration of contaminants at specific sources and neighborhoods. The Sierra Club characterized the programs as environmental discrimination.

The commission contends that emissions banking and trading programs including the MECT program are flexible and environmentally sound programs that reward good pollution control practices. The commission acknowledges that, under these programs, some sources will purchase allowances for more emissions rather than install additional controls or upgrade equipment, but these sources are still controlled to a level that is protective of human health and may not exceed permitted allowable emissions.

The Sierra Club commented that the Houston emission inventory for volatile organic compounds is inaccurate and underestimates emissions, and that banking and trading programs should be held in abeyance until an accurate emission inventory is available.

The commission has not changed the rule in response to this comment. The commission does not issue credit based on emissions reported for the emissions inventory. Credits are awarded and allowances issued based solely on actual emissions measured using EPA-approved protocols and supported by detailed documentation of activity levels and emission rates.

The Sierra Club disagreed with the commission's assessment that the proposed rules will not have fiscal implications for state and local government, because the emission banking and trading programs require data management and tracking resulting in the need for the agency to expend resources.

The commission disagrees with the comment. The adopted rules do not create any additional tracking, monitoring, or review of emissions banking and trading transactions that would require additional staff.

The Sierra Club did not support the use of mobile source emission estimates as stated in §101.304(b)(1) and §101.374(b)(1). The Sierra Club stated that EPA emission factors are inaccurate and direct testing should be used to document actual mobile emissions.

The commission has not changed the rule in response to this comment. The adopted rules require that emissions from mobile sources creating an emission reduction be measured using direct testing or monitoring methods that have been approved for use by the EPA. In cases where monitoring or direct testing of a mobile source or group of mobile sources is not economically feasible or practical, the commission may allow the use of emission estimates from the most recent mobile source emissions model available from EPA for use in estimating emissions inventories used in a SIP. The current methodology required by EPA to estimate the mobile source emissions inventory used in a SIP is the MOBILE 6 model. Although any emissions estimation method will have some imperfections, the MOBILE model uses correlations based on extensive direct testing of a wide range of vehicle types and classes through tailpipe and evaporative testing. Requiring direct testing of this magnitude for all mobile sources would be economically prohibitive of some mobile source generators and negate the incentive to reduce emissions from mobile sources being established through the MDERC program.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT BANKING AND TRADING

§§101.300, 101.302 - 101.304, 101.311

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended sections are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air. The amended sections are also adopted under Texas Health and Safety Code, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop and emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits.

§101.300. Definitions.

The following words and terms, when used in this division, 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** - The total emissions during a selected time period, using the facility's or mobile source's actual daily operating hours, production rates, or types of materials processed, stored, or combusted during that selected time period.

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

(4) **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 two consecutive calendar years.

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

(6) **Baseline emissions** - The facility's actual emissions, in tons per year, occurring prior to an emission reduction strategy calculated as the product of baseline activity and baseline emission rate not to exceed all limitations required by applicable local, state, and federal rules and regulations.

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

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

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

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

(11) **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.

(12) **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.

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

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

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

(16) **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).

(17) **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.

(18) **Mobile source baseline emissions** - The mobile source's actual emissions, in tons per year, occurring prior to a mobile emission reduction strategy calculated as the product of mobile source activity and the mobile source emissions rate not to exceed all limitations required by applicable local, state, and federal rules and regulations.

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

(20) **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 and regulations.

(21) **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.

(22) **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.

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

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

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

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

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

(28) **State implementation plan** - A plan that 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.

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

(30) **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.

(31) **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.

§101.302. General Provisions.

(a) Applicable pollutants. Reductions of criteria pollutants, excluding lead, or precursors of criteria pollutants for which an area is designated nonattainment, may qualify as emission credits. 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 United States Environmental Protection Agency (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 are certified reductions that 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); 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 are certified reductions that 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;

(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 that 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 shall use a protocol that 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 must 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 nitrogen oxide emissions 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 volatile organic compound 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 shall 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 must be made available for public comment for a period of 30 days and must 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 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 a nonattainment area that has an equal or higher nonattainment classification than the 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 nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the nonattainment area of use; or

(3) a facility is using emission reductions generated outside the United States that 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 shall maintain a copy of all notices and backup information submitted to the registry for a minimum of five years. The user shall 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 shall also make such records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records must 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 the pollutants identified in subsection (a) of this section, unless otherwise defined, in accordance with the provisions of this section, 42 United States Code, §§7401 *et seq.*, and Texas Health and Safety Code, Chapter 382, 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 1/10 ton of credit.

§101.303. Emission Reduction Credit Generation and Certification.

(a) Methods of generation.

(1) Emission reduction credits (ERC) 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 that causes a loss of capability to produce emissions;

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

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

(D) the permanent curtailment in production, that 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 that was not reported or represented in the most recent emissions inventory used in the state implementation plan (SIP).

(b) ERC baseline emissions.

(1) The baseline emissions may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP. For reductions being certified in accordance with §116.170(b) of this title (Applicability of Emission Reductions as Offsets), the baseline emissions may not exceed the quantity of emissions reported in the emissions inventory used in the SIP in place at the time the reduction strategy was implemented.

(2) The two consecutive calendar years for the baseline activity and emissions rate must be selected from either a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years, the ten consecutive years immediately preceding the emission reduction.

(3) 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.

(c) 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(c)

ERC Calculation

$ERC = \left\{ \left[(BA_1 \times BER_1) + (BA_2 \times BER_2) \right] \div 2 \right\} - SE$	
Where:	
BA_1	= the facility's level of activity during the first of any two consecutive years representing the baseline emissions [.
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 representing the baseline emissions.
BER_2	= the facility's actual emission rate measured during the year used for determining BA_2 .
SE	= strategic emissions

(d) ERC certification.

(1) Facilities with potential ERCs must submit, to the executive director, an EC-1 Form, Application for Certification of Emission Credits, within 180 days of the implementation of the

emission reduction strategy. 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 ERCs 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 activity, baseline emission rate, baseline emissions, and strategic emissions;

(E) 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 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 permit to reflect the emission reduction and set a new maximum allowable emission limit;

(B) voiding a new source review permit when a facility has been shut down;

(C) for any facility 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 considered equivalent by the executive director, the emission reduction and the new maximum allowable emission limit;

(D) for any facility that 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 considered equivalent by the executive director, the emission reduction and the new maximum allowable emission limit; or

(E) for any facility that is not required to have authorization by permit, standard permit, standard exemption, or permit by rule, obtaining an agreed order that 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 (MERC) 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 may not be generated from the following strategies:

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

(B) through the transfer of emissions from one mobile source to another mobile source within the same nonattainment area and under common ownership or control; or

(C) reduction strategies resulting in secondary emissions increases that exceed limits established under state or federal rules or regulations.

(b) MERC baseline emissions.

(1) Mobile source baseline emissions shall be calculated with either measured emissions of an appropriately sized sample of the participating mobile sources using a United States Environmental Protection Agency (EPA)-approved test procedure, or by estimating emissions of the participating mobile sources using the most recent edition of the EPA on-road or non-road mobile emissions factor models or other model as applicable.

(2) Mobile source baseline emissions for each year of the proposed mobile source reduction strategy must be the same as, or lower than, those used or proposed to be used in the state implementation plan (SIP) in which the reduction strategy is proposed.

(3) Baseline emissions for quantifying MERCs should include, but not be limited to, the following information and data as appropriate:

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

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

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

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

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

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

(c) MERC calculation. The quantity of MERCs must be calculated from the annual difference between the mobile source baseline emissions 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.

(d) Emission offsets. Mobile source reduction strategies that reduce emissions in one criteria pollutant or precursor for which an area is designated nonattainment, yet result in an emissions increase of another criteria pollutant or precursor for which that same area is nonattainment and from the same mobile source, must be required to offset the resulting increase at a 1:1 ratio with ERCs or MERCs.

(e) MERC certification.

(1) Mobile sources with potential MERCs shall 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) calculations using the most current EPA mobile emissions factor model or other model as applicable; or

(D) calculations using credible emission reduction measurement or estimation methodologies that 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 by each applicable mobile source:

(A) the date of the reduction;

(B) a complete description of the generation strategy;

(C) the amount of emission credits generated;

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

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

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

(G) 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 that sets a new maximum allowable mobile source emission limit.

§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 United States Environmental Protection Agency (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 emission credits generated under this division within each nonattainment area;
- (2) the amount of emission credits used under this division within each nonattainment area; and
- (3) a summary of all trades completed under this division.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

§101.356, §101.359

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended sections are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air. The amended sections are also adopted under Texas Health and Safety Code, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop and emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits.

§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 (g) of this section.

(b) Allowances that 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 (g) of this section.

(c) Only authorized account representatives may trade allowances.

(d) Trades involving individual allowances may be made in accordance with the following.

(1) Submit a completed ECT-2 Form, Application for Transfer of Allowances.

(2) The completed ECT-2 Form must include the price paid per allowance, except for transfers between sites under common ownership or control, and shall be submitted to the executive director at least 30 days prior to the allowances being deposited into the transferee's broker or compliance account.

(3) ECT-2 Forms involving the transfer of allowances needed for compliance with a control period must be submitted on or before January 30 of the following control period.

(4) All information regarding the quantity and sales price of allowances not exempt from reporting under paragraph (2) of this subsection must be immediately made available to the public.

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

(e) 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 must include the price paid per allowance, except for transfers between sites under common ownership or control, 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 not exempt from reporting under paragraph (2) of this subsection must be immediately made available to the public.

(4) The executive director will issue a letter to the purchaser and seller reflecting this transaction. The transfer is final upon issuance of this letter.

(f) Trades involving the transfer of individual future year allowances to be allocated to individual facilities at a site must 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 must include the price paid per allowance, except for transfers between sites under common ownership or control.

(3) All information regarding the quantity and sales price of allowances not exempt from reporting under paragraph (2) of this subsection must be immediately made available to the public.

(4) The executive director will issue a letter to the purchaser and seller reflecting this trade. The transfer is final upon issuance of this letter.

(g) 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 that were allocated in accordance with the variables 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.

(2) Allowances that were allocated prior to January 1, 2005 in accordance 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.

(h) Sites may use nitrogen oxides (NO_x) discrete emission reduction credits (DERC) or mobile discrete emission reduction credits (MDERC) that 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 that 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 United States Environmental Protection Agency to show that the use of VOC DERCs or MDERCs is equivalent, on a one to one basis or other ratio, to the use of NO_x allowances in reducing ozone.

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

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

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

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

(5) 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 ozone nonattainment area during a single calendar year in accordance with paragraph (10) of this subsection. 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, shall be submitted to the executive director on or before October 1 of the control period for which the DERCs or MDERCs will be used and must be accompanied by an original DERC or MDERC certificate. In addition, a DEC-3 Form, Notice of Use of Discrete Emission Credits, must be submitted by March 31 along with the site's ECT-1 Form, Annual Compliance Report.

(10) Beginning January 1, 2005, DERCs shall be approved for use with this division according to the following.

(A) Approval will be given to use 250 or less DERCs per site, per control period.

(B) If a site requests the use of more than 250 DERCs in a control period, the amount in excess of 250 may be reduced so that the total amount of all DERCs used by all sites does not exceed 10,000. For all requests in excess of 250, the excess DERCs up to the 10,000 DERC limit may be apportioned based on the percentage of DERCs in excess of 250 requested for use by those sites relative to the total amount of DERCs available up to the 10,000 DERC limit.

(i) Emission reduction credits (ERC) 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 Houston/Galveston area;

(3) the ERC was generated from a reduction in NO_x;

(4) the ERC has not expired; and

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

§101.359. Reporting.

(a) Beginning March 31, 2003, for each control period, facilities under each compliance account shall submit a completed ECT-1 Form, Annual Compliance Report, to the executive director by March 31 of each year detailing the following:

(1) the amount of actual nitrogen oxides (NO_x) emissions during the preceding control period;

(2) the method of determining NO_x emissions, including, but not limited to, any monitoring protocol and results, calculation methodology, level of activity, and emission factor;

(3) a summary of all final trades for the preceding control period; and

(4) detailed documentation supporting the reported activity level and emission factor for each facility equivalent in kind and detail to that submitted with an ECT-3 Form, Level of Activity Certification. It is acceptable to reference documentation supporting an emission factor if previously submitted with an ECT-1 Form or an ECT-3 Form.

(b) For sites failing to submit an ECT-1 Form by the required deadline in subsection (a) of this section, the executive director may withhold approval of any proposed trades from that site involving allowances allocated for the control period for which the ECT-1 Form is due or to be allocated in subsequent control periods.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING

§§101.370, 101.373, 101.374, 101.376

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended sections are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air. The amended sections are also adopted under Texas Health and Safety Code, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop and emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits.

§101.370. Definitions.

The following words and terms, when used in this division, 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** - The total emissions during a selected time period, using the facility's or mobile source's actual daily operating hours, production rates, or types of materials processed, stored, or combusted during that selected time period.

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

(4) **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 two consecutive calendar years.

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

(6) **Baseline emissions** - The facility's actual emissions, in tons per year, occurring prior to an emission reduction strategy and calculated as the product of baseline activity and baseline emission rate not to exceed all limitations required by applicable local, state, and federal rules and regulations.

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

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

(9) **Discrete emission credit** - A discrete emission reduction credit or mobile discrete emission reduction credit.

(10) **Discrete emission reduction credit** - A certified emission reduction that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons.

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

(12) **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.

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

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

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

(16) **Mobile discrete emission reduction credit or discrete mobile credit** - A certified emission reduction from a mobile source that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons.

(17) **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).

(18) **Mobile source baseline activity** - The level of activity of a mobile source during the applicable mobile source baseline emissions period.

(19) **Mobile source baseline emissions** - The mobile source's actual emissions, in tons per year, occurring prior to a mobile emission reduction strategy calculated as the product of mobile

source baseline activity and mobile source baseline emission rate not to exceed all limitations required by applicable local, state, and federal rules and regulations.

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

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

(22) **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, §2.5.

(23) **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.

(24) **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.

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

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

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

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

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

(30) **State implementation plan** - A plan that 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.

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

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

(33) **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 and has not been otherwise relied upon in the state implementation plan.

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

(35) **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.

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

§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 that causes a loss of capability to produce emissions;

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

(C) a change in the manufacturing process that reduces emissions 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 42 United States Code (USC), Subchapter I regarding tropospheric ozone, or 42 USC, Subchapter IV-A regarding acid deposition control;

(D) emission reductions of hazardous air pollutants, as defined in 42 USC, §7412, from application of a standard promulgated under 42 USC, §7412;

(E) emission reductions that 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 that 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) that portion of emission reductions funded through a state or federal program, 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 baseline.

(1) The baseline emissions may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP. For reductions being certified in accordance with §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets), the baseline emissions may not exceed the quantity of emissions reported in the emissions inventory used in the SIP in place at the time the reduction strategy was implemented.

(2) The two consecutive calendar years for the baseline activity and emissions rate must be selected from either a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years, the ten consecutive years immediately preceding the emission reduction.

(3) For facilities in an area in which a SIP demonstration is not required for a criteria pollutant, the two consecutive calendar years must include or follow the 1990 emission inventory.

(4) For reduction strategies that exceed 12 months, the baseline and SIP emissions inventory are established after the first year of generation and are fixed for the life of the strategy. A new baseline is established for each unique emission reduction strategy.

(5) 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.

(c) DERC calculation.

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

Figure: §101.373(c)(1)

DERC Calculation	
	$(SA) * (BER - SER) = \text{reduction generated}$
Where:	
SA	= emission reduction strategy activity
BER	= baseline emission rate, the lower of the emission rate used in reporting or representing emissions in the emissions inventory used for the state implementation plan or the average of the actual emission rates during the two-year baseline period.
SER	= emission reduction strategy emission rate

(2) The sum of the reduction generated and the total strategy emissions must not be greater than the quantity of emissions reported or represented in the emissions inventory used for SIP determination or the two-year average baseline emissions, whichever is less.

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

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

(d) DERC certification.

(1) A DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, shall 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 must 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 activity, baseline emission rate, strategy emission rate, and 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 division (relating to Discrete Emission Credit Banking and Trading), and is subject to the approval of the commission.

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

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

(B) through the transfer of emissions from one mobile source to another mobile source within the same nonattainment area and under common ownership or control; or

(C) reduction strategies resulting in secondary emissions increases that exceed limits established under state or federal rules or regulations.

(b) MDERC baseline emissions.

(1) Mobile source baseline emissions must be calculated with either measured emissions of an appropriately sized sample for the participating mobile sources using a United States Environmental Protection Agency (EPA)-approved test procedure, or estimated emissions of the participating mobile sources using the most recent edition of the EPA on-road or non-road mobile emissions factor model or other model as applicable.

(2) Mobile source baseline emissions for each year of the proposed mobile source reduction strategy must be the same as, or lower than, those used or proposed to be used in the state implementation plan (SIP) in which the reduction strategy is proposed.

(3) Baseline emissions for quantifying MDERCs should include, but not be limited to, the following information and data as appropriate:

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

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

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

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

(E) the actual activity level, hours of operation, or miles traveled by type and model year.

(c) MDERC calculation. The quantity of MDERCs must be calculated from the annual difference between the mobile source baseline emissions and the strategy emissions. The MDERC must be based on actual in-use emissions of the modified or substitute mobile source.

(d) Emission offsets. Mobile source reduction strategies that reduce emissions in one criteria pollutant or precursor for which an area is designated as nonattainment or near nonattainment, yet result in an emissions increase from the same mobile source in another criteria pollutant or precursor for which that same area is nonattainment or near nonattainment, must be offset at a 1:1 ratio with DERCs or MERCs.

(e) MDERC certification.

(1) An MDEC-1 Form, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits, shall 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 shall 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 that satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies. The generator shall 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 activity, mobile source baseline emission rate, mobile source baseline emissions, and the mobile source strategy emissions;

(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; and

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

§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 shall 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 shall 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 shall 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 or five tons for volatile organic compounds 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 shall 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 shall 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 shall 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 shall also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user shall 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 shall identify the discrete emission credits; and

(iii) prior to start of operation the user shall 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 (as codified in 42 United States Code (USC) Federal Clean Air Act (FCAA)) requirements for:

(A) new source performance standards under FCAA, §111 (42 USC, §7411);

(B) lowest achievable emission rate standards under FCAA, §173(a)(2) (42 USC, §7503(a)(2));

(C) best available control technology standards under FCAA, §165(a)(4) (42 USC, §7475(a)(4)) or Texas Health and Safety Code, §382.0518(b)(1);

(D) hazardous air pollutants standards under FCAA, §112 (42 USC, §7412), including the requirements for maximum achievable control technology;

(E) standards for solid waste combustion under FCAA, §129 (42 USC, §7429);

(F) requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3) (42 USC, §7511a(b)(4) or (c)(3));

(G) ozone control standards set under FCAA, §183(e) and (f) (42 USC, §7511b(e) and (f));

(H) clean-fueled vehicle requirements under FCAA, §246 (42 USC, §7586);

(I) motor vehicle emissions standards under FCAA, §202 (42 USC, §7521);

(J) standards for non-road vehicles under FCAA, §213 (42 USC, §7547);

(K) requirements for reformulated gasoline under FCAA, §211(k) (42 USC, §7545); or

(L) requirements for Reid vapor pressure standards under FCAA, §211(h) and (i) (42 USC, §7545(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 shall 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 shall 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 United States Environmental Protection Agency 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 that 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, except for transfers between sites under common ownership or control;

(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, that 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)

Amount of DERCS

$$\text{Required (tons)} = \sum_{i=1}^N \left[(EH_i \times ER_i) - (H_i \times R_i) \right] \times \left(\frac{d}{2000} \right)$$

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.

(ii) For maximum daily cap:

Figure: 30 TAC §101.376(d)(2)(A)(ii)

Amount of DERCS Required (tons)	$= \sum_{i=1}^N \left[(EH_{Mi} \times ER_i) - (H_{Mi} \times R_i) \right] \frac{1}{2000}$
Where:	
i	= each emission unit in the source or system cap
N	= the total number of emission units in the source or system cap
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 §101.376(d)(2)(B)

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

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 exceed an allowable emissions level 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 shall 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 shall 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, shall 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, except for transfers between sites under common ownership or control;

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

(iii) the actual emissions during the use period for volatile organic compounds and nitrogen oxides;

(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.