

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §101.376 and §101.379 *with changes* to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6727).

These amendments will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The rulemaking creates an enforceable mechanism that allows the executive director to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area to a level consistent with the attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS).

The TCEQ DERC banking and trading program in the DFW eight-hour ozone nonattainment area is a discretionary economic incentive program (EIP) that uses market-based principles to encourage air pollution reductions in the most efficient manner as specified in EPA's guidance document, *Improving Air Quality with Economic Incentive Programs*, January 2001. In sections 5.3(c) and 6.4(a), the EPA's EIP guidance document specifies that if the state EIP program is part of a SIP for a nonattainment area, and an annual evaluation identifies an uncertainty or a potential for the EIP program to create a shortfall or adversely impact the attainment and maintenance of the NAAQS, then the program must include an enforceable commitment to correct the problem as expeditiously as possible. One reconciliation procedure identified to correct a potential SIP deficit is the restriction of banking and trading activities such as flow control or suspending the use of banked emissions. Section 16.15 of the guidance includes safeguards for EIPs with banking provisions that discuss additional provisions to prevent the EIP from interfering with

the attainment and maintenance of the NAAQS. The safeguards specify that EIPs with banking provisions must demonstrate how likely it is that emission spiking would occur, include safeguards in the EIP to prevent emission spiking and geographic clustering, and include in the EIP SIP submittal a demonstration showing that banking and trading reductions would not interfere with attainment or maintenance of the NAAQS, or Reasonable Further Progress and Rate of Progress requirements.

The photochemical modeling submitted as part of the May 23, 2007, adopted DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard was based on EPA's growth projection analysis that all DERCs in the DFW area would be used to increase emissions of nitrogen oxides (NO_x) in 2009. While regulated entities in the DFW area have historically submitted Notice of Intent to Use Discrete Emission Credits (DEC-2 Forms), no DERCs have ever been used in the region for compliance with the state NO_x emission specifications for attainment demonstration, or to meet the standards of Chapter 117, Control of Air Pollution from Nitrogen Compounds. EPA Region 6 has indicated that in order to grant conditional approval of the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, the TCEQ would need to adopt an enforceable flow control mechanism to limit the use of DERCs in 2009 and in each subsequent calendar year in which the total amount of DERCs could potentially impact the attainment and maintenance of the 1997 eight-hour ozone NAAQS (73 FR 40203, July 14, 2008). Because the DERC program is an integral part of the control strategy for the DFW eight-hour ozone nonattainment area and modeling for the DFW Attainment Demonstration SIP includes the potential use of DERCs in the bank, the adopted changes will ensure that use of DERCs does not interfere with the attainment and maintenance of the 1997 eight-hour ozone NAAQS.

The adopted rules amend Chapter 101, Subchapter H, Division 4, Discrete Emission Credit Banking and Trading, to specifically grant the executive director the authority to approve the amount of DERCs available for use in any calendar year consistent with attainment and maintenance of the 1997 eight-hour ozone NAAQS. The adopted amendments will also change the deadline in DFW for the submittal of a DEC-2 Form from 45 days to specify that the forms are due by August 1 of the calendar year immediately prior to the applicable calendar-year use period. In the case of an emergency, DEC-2 Forms may be submitted after the August 1 deadline but may only be considered after all DEC-2 Forms submitted by the August 1 deadline are reviewed by the executive director and associated DERCs are allocated consistent with attainment and maintenance with the 1997 eight-hour ozone NAAQS, SIP requirements, and the current flow control level. DERC use associated with DEC-2 Forms submitted after the August 1 deadline as a result of a direction to operate under an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency will not be subject to the flow control limit. The adopted change ensures adequate time for the executive director to determine the amount of available DERCs through the replicable annual review process.

The executive director is required to perform an annual review of the DFW DERC program using replicable procedures to determine the flow control limit and apportion available DERCs for potential use. The adopted flow control limit will ensure noninterference with attainment and maintenance of the 1997 eight-hour ozone NAAQS even with use of DERCs in the DFW eight-hour ozone nonattainment area. The executive director will also review the submitted DEC-2 Forms and apportion the number of DERCs approved for use in the upcoming calendar year. The results of the annual review and flow control limit calculation are required to be made available to the public and EPA by October 1 prior to the applicable calendar year control period.

The flow control limit for a particular year will be determined using the equation in new Figure: 30 TAC §101.379(c)(2)(A). The flow control limit will be the sum of the 2009 flow control limit in the November 2008 adopted DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard (Contingency Measures Plan) plus the estimated emission reductions associated with fleet turnover that are not used to satisfy contingency requirements plus the unused DERCs generated on or after March 1, 2009, and approved for use in the previous calendar year control period that remain unused. This flow control limit design will prevent emission spiking and interference with the attainment and maintenance of the 1997 eight-hour ozone NAAQS as a result of using DERCs. In the event that data is not yet available for the calculation of the flow control limit during the annual review, the variables for the contingency requirements and unused DERCs will be assumed to be the values that result in the calculation of the most conservative flow control limit.

SECTION BY SECTION DISCUSSION

In addition to the adopted amendments to §101.376 and §101.379 discussed in this preamble, the commission is also making various stylistic non-substantive changes to update rule language to conform with current Texas Register style and format requirements and to establish more consistency throughout the rules.

Section 101.376, Discrete Emission Credit Use

The commission adopts §101.376(a)(5) with changes from proposal. In response to comments, the commission is not adopting proposed amendments to §101.376(a)(5) regarding limiting late submittals of DEC-2 Forms requests. Paragraph (6) is renumbered as paragraph (5) and clarified to allow a user to submit late DEC-2 Form requests for approval by the executive director only in the case of an emergency and if all other requirements in §101.376(a) are met. In response to comments, the commission has added

the word "not" to ensure that DEC-2 Forms can only be submitted in an emergency situation as long as the flow control limit has not been reached in the DFW eight-hour ozone nonattainment area. An emergency under this section must still meet flow control limits.

In response to comments, the commission adopts §101.376(a)(6), which exempts an ERCOT-declared emergency situation, defined elsewhere in this preamble, from the flow control limit.

The commission adopts §101.376(a)(7), which establishes that DERC use must be preceded by executive director approval of a DEC-2 Form. In response to comments, §101.376(a)(7) is revised to only apply to the DFW eight-hour ozone nonattainment area.

The commission amends the amount of discrete emission credits of NO_x used by permitted facilities in a 12-month period in §101.376(b)(1)(A) to the numerical "10" instead of the word "ten." The commission also adopts the amount of discrete emission credits for volatile organic compounds used by permitted facilities in a 12-month period in §101.376(b)(1)(A) to the numerical "5" instead of the word "five."

The commission amends §101.376(b)(2)(C)(iii) to remove the requirement for DEC-2 Forms to include the original certificate for the amount of DERCs in the applicant's account. The commission has determined that this requirement is not necessary because the original paperwork is retained by the commission.

The commission adopts §101.376(c)(4) to use the acronym "DERC" instead of the phrase "discrete emission reduction credit" in order to conform to current Texas Register drafting standards.

The commission adopts §101.376(c)(7), which establishes that DERCs may not be used in the DFW eight-hour ozone nonattainment area if the DERC usage request exceeds the flow control limit for that year determined by the annual review as specified in §101.379(c), Program Audits and Reports.

The commission amends §101.376(d)(1)(B) to delete deadlines for the submittal of the DEC-2 Forms in order to create distinct regional deadlines. The commission adopts §101.376(d)(1)(B)(i), which changes the submittal deadline for DEC-2 Forms in the DFW eight-hour ozone nonattainment area from 45 days to August 1 of the calendar year immediately prior to the applicable calendar-year use period. The commission adopts §101.376(d)(1)(B)(ii) to specify the submittal deadlines for discrete emission credits for use in all other areas as previously contained in §101.376(d)(1)(B).

The commission amends §101.376(d)(3) by changing the phrase, "notice late" to "late DEC-2 Form" to clarify that the DEC-2 Form is the notice that may be submitted late in the case of an emergency.

The commission deletes §101.376(e)(3)(B) and amends §101.376(e)(3)(A) to include the deleted language specifying that the DERC use period must not exceed 12 months. As a result of these changes, the commission re-letters subparagraph (C) to subparagraph (B).

The commission adopts §101.376(f), which specifies that the executive director will apportion the amount of DERCs for each control period, as determined by the annual review, for the DFW eight-hour ozone nonattainment area. Additionally, §101.376(f)(1) specifies that if the total number of DERCs submitted for the upcoming control period in all DEC-2 Forms received by the deadline is greater than the limit determined by the current annual review, the executive director will apportion the number of DERCs for

use. Furthermore, §101.376(f)(1)(A) specifies the executive director will consider the appropriate amount of DERCs allocated for each DEC-2 Form submitted on a case-by-case basis. In determining the amount of DERCs to approve for each DEC-2 Form application, the executive director will take into consideration the provisions specified in §101.376(f)(1)(A)(i) - (v). These provisions include the total number of DERCs existing in the nonattainment area bank; the total number of DERCs submitted for use in the upcoming control period; the proportion of DERCs requested for use to the total amount requested; the amount of DERCs required by the applicant for compliance with the eight-hour emission specifications; and the technological and economic aspects of other compliance options available to the applicant. In response to comments, the commission adds a new condition in §101.376(f)(1)(A)(vi) that allows the executive director to consider location when apportioning DERCs.

The commission adopts §101.376(f)(1)(B), which establishes that any credits requested for use by the applicant in the DEC-2 Form that were generated after March 1, 2009, will be included in the flow control limit determined by the annual review process, detailed later in this preamble. In response to comments, the commission removed the proposed phrase "and approved for use by the executive director for any subsequent control period" to clarify that requests for DERC use must be resubmitted each year. In addition, the phrase "certified by the executive director" was replaced with "generated" to clarify that DERCs created on or after March 1, 2009, are to represent reductions of emissions in the DFW eight-hour ozone nonattainment area beyond those modeled for the attainment demonstration.

The commission adopts §101.376(f)(2), which establishes that if the total number of DERCs submitted for use is less than the flow control limit determined according to the annual review, the executive director may approve all requests for DERC usage provided that all other requirements of this section are met.

Section 101.379, Program Audits and Reports

The commission amends §101.379(b) by adding language to require the annual report to include the amount of DERCs approved for use under §101.379(c).

The commission adopts §101.379(c), which establishes that no later than October 1 of each year, the executive director will complete an annual review that determines the number of DERCs available for use in the DFW area under the flow control limit for the upcoming calendar year. The annual review will be documented in a publicly available report. In response to comments, the commission is changing the report date from November 1 to October 1. The number of DERCs available will be developed to ensure noninterference with attainment and maintenance of the 1997 eight-hour ozone NAAQS for each calendar year beginning in 2009. In response to comments, the commission adds language to §101.379(c) that specifies that the annual review will include the calculation of the flow control limit to ensure noninterference with attainment and maintenance of the 1997 eight-hour ozone NAAQS and the apportionment of DERCs.

The commission adopts §101.379(c)(1), which specifies that for the 2009 control period, the flow control limit for DERCs available for use will be the number prescribed in the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard. In response to comments, the commission has added language to clarify that flow control is calculated in tons per day, where a day is a 24-hour period from midnight to midnight. This change was also made in §101.379(c)(2).

The commission adopts §101.379(c)(2) to specify how the flow control will be determined for control periods after 2009. The annual review will set the flow control limit for each year using the equation in

§101.379(c)(2)(A). The equation calculates the flow control limit using variable "B" as the 2009 flow control limit prescribed in the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard; variable "C₁" is the estimated emission reductions associated with fleet turnover from mobile sources during the previous calendar-year control period; variable "C₂" is the emission reduction associated with the contingency requirement for the current control period; variable "D₁" is the DERCs generated on or after March 1, 2009, and approved for use in the previous calendar-year control period; and variable "D₂" is the DERCs generated on or after March 1, 2009, and used in the previous calendar-year control period. In the definition of variables "C₁" and "C₂", the current calendar year is the year for which the flow control limit is being calculated. In the definition of variables "D₁" and "D₂", the previous calendar year" is the year immediately prior to the year for which the flow control limit is being calculated. In response to comments, the summation sign has been removed because it is redundant. In response to comments, the commission has removed the "E" term to avoid the potential for double counting of DERCs in the bank. Also in response to comments, the commission has made additional changes to clarify the equation. Specifically, the flow control is calculated in tons per day, where a day is a 24-hour period from midnight to midnight; and the emission reductions represented by C₂ are associated with contingency requirements for the calendar year for which the flow control limit is being calculated. The flow control limit for the 2009 control period, variable "B", is prescribed in the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard. Therefore, variables "C₁, C₂, D₁, or D₂" all equal zero for the 2009 control period. In addition, the commission has revised the definition of the variable "C₂" to clarify its value for the 2010 calendar year control period. Because the attainment status for the DFW area may not be determined by October 1, 2009, the executive director may not know whether the associated contingency measures have been triggered. Therefore, the executive director assumes the value of variable "C₂" to be equal to 12.98 tons per day for the 2010 control period (as demonstrated in Table 4-4: *2009-2010 Fleet Turnover Reductions for Contingency or Surplus* of the

DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard (Contingency Measures Plan)).

In response to comments, the commission is not adopting proposed §101.379(c)(2)(B), because the language was superfluous. The commission re-designates proposed §101.379(c)(2)(C) to adopted §101.379(c)(2)(B) to specify that if use of the entire DERC bank will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, the number of DERCs potentially available for use is the total number of DERCs in the bank. The commission re-designates proposed §101.379(c)(2)(D) to adopted §101.379(c)(2)(C), and adds §101.379(c)(2)(C)(i) to specify that should the flow control limit for a particular year, as calculated in the equation in Figure: 30 TAC §101.379(c)(2)(A), be greater than the total number of DERCs requested for use in accordance with §101.376(d), the executive director may approve all requested DEC-2 Form submittals. In response to comments, the commission adds §101.379(c)(2)(C)(ii) to clarify that emergency submittals will not be approved if the requested DERC use would exceed the flow control limit with the exception established by adopted §101.379(c)(2)(D). The commission adopts §101.379(c)(2)(D), which exempts DEC-2 Forms that are submitted in response to an ERCOT-declared emergency situation from the flow control limit. ERCOT directs and ensures reliable operation of the electric grid for the flow of electric power to 21 million Texas customers, representing 85 percent of the state's electric load. An ERCOT-declared emergency situation includes an operating condition in which the safety or reliability of the ERCOT System is compromised or threatened, as determined by ERCOT. Section 101.379(c)(2)(D) provides a specific definition for an ERCOT-declared emergency situation.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory impact analysis requirements of

Texas Government Code, §2001.0225, and determined that the rulemaking action meets 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, 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 and revisions to the SIP add an enforceable mechanism to allow the executive director to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area and change the deadlines to submit a DEC-2 Form. The control mechanism is a flow control strategy that potentially limits the use of DERCs on an annual basis in the DFW eight-hour ozone nonattainment area. These amendments are necessary to ensure that potential use of DERCs would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS. This rulemaking may potentially prohibit and limit the use and trading of DERCs in the DFW eight-hour ozone nonattainment area.

This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the amendments were developed to provide a flow control mechanism for the DERC program in the DFW eight-hour ozone nonattainment area and to ensure that potential use of DERCs would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS. This

flow control mechanism is developed in accordance with the EPA Economic Incentive Program Guidance document. The rulemaking does not exceed an express requirement of federal or 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 under federal law and authorized under the Texas Health and Safety Code (THSC).

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the ozone NAAQS in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the ozone NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the ozone NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule. These amendments are

necessary to ensure that the DERC program does not interfere with attainment or maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that would have a material adverse impact and would exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill would have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the ozone NAAQS; thus, states must develop programs for each nonattainment area to ensure that the area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state

agencies and the LBB, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules would have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas such as the DFW eight-hour ozone nonattainment area. As discussed earlier in this preamble, the adopted rules would ensure that use of DERCs in the DFW eight-hour ozone nonattainment area would not interfere with the attainment and maintenance of the air quality standards established under federal law as 1997 eight-hour ozone NAAQS.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), *no writ*; *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, Texas Clean Air Act (TCAA), and the Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

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

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of the rulemaking is to add an enforceable flow control process to the DERC program in the DFW eight-hour ozone nonattainment area, so that the use of DERCs will not interfere with the attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area. Promulgation and enforcement of the amendments will not burden private real property. The rules 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 that will be affected by these rules are not property rights (§101.372(j)). Because DERCs are not property, limiting the use of DERCs does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Additionally, Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this rulemaking action because it is reasonably taken to fulfill an obligation mandated by federal law. The changes to the use of DERCs within the DFW eight-hour ozone nonattainment area that are implemented by these rules were developed to ensure that the use of DERCs would not interfere with attainment and maintenance of 1997 eight-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of ozone 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 ozone NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as ozone NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with 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(1)). This rulemaking will advance this goal through the establishment of a daily limit on the use of emission credits to ensure the attainment and maintenance of the 1997 eight-hour ozone NAAQS. No new sources

of air contaminants would be authorized and the revisions would maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that the commission's 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. The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding consistency with the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter H is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 101, Subchapter H requirements.

PUBLIC COMMENT

Public hearings for this rulemaking were held on September 9, 2008, in Dallas, Texas and on September 10, 2008, in Arlington, Texas. No comments were submitted during the hearings. The comment period closed on September 12, 2008. Written comments were provided by the EPA and Luminant Power (Luminant).

RESPONSE TO COMMENTS

EPA recommended revising §101.376(a) to ensure that the DFW flow control provisions section only applies to the DFW ozone nonattainment area. The EPA also recommended restructuring the new paragraphs in §101.376(a) so that the rule clearly states that the emergency provisions will not be used to exceed the flow control limit established in §101.379(c).

The rule has been revised in response to this comment. Section 101.376(a)(6) has been changed to exclusively reference DFW. The commission is not adopting §101.376(a)(5) as proposed and instead adopts new language in §101.376(a)(5) to ensure that late Intent to Use submittals will be accepted and may only be approved in the case of an emergency or other exigent circumstances and if the use will not exceed the flow control limit or hinder attainment and maintenance of the 1997 eight-hour ozone NAAQS. However, as discussed elsewhere in this preamble, the commission includes §101.379(c)(2)(D) to clarify that DERCs used as a result of ERCOT-declared emergencies will not be subject to the flow control limit.

EPA commented that the proposed rule language should be revised such that a consistent term for describing the flow control time period is used. Throughout the proposed rule, "control period," "calendar year," and "calendar year control period" were used interchangeably.

The rule has been revised in response to this comment. The control period for any DERC use is variable and dependent on the time period requested in each Notice of Intent to Use. The 2009 flow control time period is from March 1, 2009, to December 31, 2009. Thereafter, the flow control time period will be the calendar year. In response to this comment, the commission has revised the rule to reference the broader term "control period" when referring to all nonattainment areas or to the

2009 flow control time period, and "calendar year" or "calendar year control period" when referring to the flow control time period in 2010 and thereafter in the DFW area.

EPA requested clarification that the flow control time period runs from January 1 through December 31.

EPA also suggested that the March 1, 2009, date used in §101.376(f)(1)(B) and §101.379(c)(2)(A) should be changed to January 1, 2009, for consistency.

The rule has not been revised in response to this comment. The commission disagrees with the suggested change because the March 1, 2009, date in §101.376(f)(1)(B) and §101.379(c)(2)(A) only refers to the generation and certification of DERCs and not the flow control time period.

EPA is concerned that clusters of requested DERC usage could result in a localized ozone spike, even if the use is within the flow control limit; therefore, §101.376(f)(1)(A) should be revised to account for the location of the requested DERC usage.

The rule has been revised in response to this comment. The commission considers ozone spikes due to clusters of DERC usage to be highly unlikely because of the limited number of DERCs available. However, §101.376(f)(1)(A) is amended with the addition of §101.376(f)(1)(A)(vi) to include location as a factor for consideration in the allocation of approved DERC use. This amendment will allow the executive director to assess whether the potential for geographic clustering will impact attainment and maintenance of the 1997 eight-hour ozone NAAQS.

EPA recommended that "may" should be changed to "will" in proposed §101.376(f)(1)(A) in order to ensure the methodology is replicable.

The rule has not been revised in response to this comment. Section 101.376(f)(1)(A) does not refer to the replicable procedures that determine the flow control limit, but to the apportionment of DERCs approved for use. The executive director reserves the right to apportion the use of approved DERCs on a case-by-case basis with consideration of the relevant technical and economic factors affecting the applicants and the nonattainment area for that particular control period.

EPA requested that §101.376(f)(1)(B) be revised to specify that the Notice of Intent to Use Form must be resubmitted each year under §101.376(d).

The rule has been revised in response to this comment. The commission has removed the phrase "approved for use" from §101.376(f)(1)(B).

EPA commented that the methodology for establishing and increasing the flow control in 2009 and beyond is not replicable. EPA recommended that the flow control limit be calculated as a ton per day limit and not an average over the entire year for 2009 and beyond. EPA also recommended that the methodology for calculating the flow control limit be specified so that it is an approvable and replicable procedure.

The rule has been revised in response to this comment. The rule language now requires the use of the equation in §101.379(c)(2)(A) to calculate the annual flow control limit in tons per day for each

calendar year. In addition, §101.379(c) requires the results of the calculation and numerical values of each term for that control period to be available to the EPA and the public in order to allow the calculation of the flow control limit to be replicated. The commission further revises §101.379(c) to specify that the annual review methodology consists of calculating the flow control limit as stated in §101.379(c)(2)(A). The commission also revises §101.379(c)(1) and §101.379(c)(2) to clarify that the flow control limit for 2009 and beyond establishes a daily limit in tons per day where a day is a 24-hour period from midnight to midnight.

EPA requested further explanation of the equation in §101.379(c)(2)(A) used for calculating the flow control limit in 2010 and beyond to define the summation term used in the equation; to define how C_1 and C_2 will be calculated to ensure the flow control calculation is replicable; explain how the inclusion of the (D_1-D_2) term will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS; and further clarify term E.

The rule has been revised in response to this comment. The commission has removed the summation term because it was redundant. The calculation method of surplus reductions using variables C_1 and C_2 is demonstrated in Table 4-4: *2009-2010 Fleet Turnover Reductions for Contingency or Surplus* of the DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard (Contingency Measures Plan) to address contingency measures for the DFW area. Current values for these terms are based on the 1999 DFW Base Year Emissions Inventory. The commission disagrees with the comment that the D_1-D_2 term represents growth without restrictions that will interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS. Any increase in the D_1 term is derived from emissions removed from the airshed and

certified as DERCs. Growth in the D_2 term represents DERCs used and limits growth in the flow control limit. In the event that DERCs are generated and not used, the flow control limit will increase but this increase will be directly attributable to the removal of emissions from the airshed. The inclusion of DERCs represented by these variables will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS because DERCs generated on or after March 1, 2009, represent reductions of emissions in the DFW ozone nonattainment area beyond what was modeled for the attainment demonstration. Therefore, attainment and maintenance of the 1997 eight-hour ozone NAAQS is preserved either through a limit on flow control or a growth in new DERCs resulting from an emissions decrease. The "E" term of the equation has been removed in order to prevent the potential for double counting.

EPA commented that §101.379(c)(2)(B) and (C) appeared to restate the same provision.

The rule has been revised in response to this comment. The commission agrees that these subparagraphs are redundant and has not adopted proposed §101.379(c)(2)(B). Proposed §101.379(c)(2)(C) is re-designated §101.379(c)(2)(B) and states that if the use of the entire DERC bank in the DFW area will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS, a flow control limit is not necessary and the executive director will approve use of the entire bank.

EPA expressed concern that emergency requests may not be considered before flow control is deemed unnecessary. EPA requested clarification of the cut-off date that will be used to determine that flow

control is not necessary and suggested revising the emergency provisions in §101.376 to reflect the cut-off date for late submittals of Notice of Intent to Use Forms.

The rule has been revised in response to this comment. With regard to EPA's concern that emergency requests may not be considered, the commission cannot consider requests that have not been received at the time of the evaluation. Neither can the commission speculate as to the number of DERCS that might be requested on an emergency basis. However, the commission agrees that revisions to §101.376 are necessary to address emergency situations. In response to EPA's comment, the commission is not adopting §101.376(a)(5) regarding general late submittals of DEC-2 Forms. Additionally, the commission has revised §101.379(c)(2) to provide provisions to address late submittal for emergency situations. Adopted §101.379(c)(2)(C) specifies that if the flow control limit has not been met, any late DEC-2 Forms submitted for emergency purposes will be considered on a case-by-case basis, but the executive director will not approve late DEC-2 Forms that would exceed the flow control limit calculated according to the equation in adopted §101.379(c)(2)(A). In addition, the commission has determined that an exception is necessary to address potential ERCOT-declared emergencies. Therefore, the commission is adopting §101.379(c)(2)(D), which defines and exempts from the flow control limit an ERCOT-declared emergency situation. Without this exemption, a regulated entity could be put into a situation of either non-compliance with TCEQ rules or contributing to electrical grid instability by not responding to an ERCOT emergency notice.

Luminant requested that the annual review described by §101.379(c) be required by an earlier date such that applicants can be notified of the number of DERCS approved for use by October 1. The reason for this recommendation is for advanced operational and budgetary planning purposes.

The rule has been revised in response to this comment. The commission has revised §101.379(c) to move the deadline for completion of the annual review to October 1 in order to provide approved applicants sufficient time for operational and budgetary planning. However, the executive director needs sufficient time to perform the evaluation required by §101.376. Therefore, the commission has changed the submittal date of DEC-2 Forms in §101.376(d)(1)(B)(i) to August 1.

Luminant requested that the rule be revised to allow DEC-2 Forms that are submitted late in the case of an emergency to be faxed or otherwise electronically submitted to the agency, or that the commission indicate in the preamble that it will accept electronic submittal in such a situation.

The rule has not been revised in response to this comment. The commission will accept faxed and other electronically submitted DEC-2 Forms provided the electronic submittal is followed by a hard copy. This is necessary to ensure compliance with 30 TAC Chapter 19, Electronic Reporting.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING

§101.376, §101.379

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which 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 THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amended sections are also adopted under THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; and §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amended sections are also adopted under 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights. The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, and 382.017.

§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.

(5) In the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area as defined in §101.1 of this title (relating to Definitions), a user may only apply to use discrete emission reduction credits (DERCs) under the provision in subsection (d)(3) of this section if the amount to be used would not cause the flow control limit to be exceeded as established in §101.379(c)(2)(A) of this title (relating to Program Audits and Reports).

(6) If a late Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) is submitted in response to an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation, as defined in §101.379(c)(2)(D) of this title, the request will not be subject to the flow control limit and may be approved.

(7) For DERC use in the DFW eight-hour ozone nonattainment area, the executive director has approved the intent to use as prescribed in subsection (f)(1) of this section.

(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 10 tons for nitrogen oxides or 5 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 ;

(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 or §106.262 of this title (relating to Facilities (Emission Limitations); and Facilities (Emission and Distance Limitations)) except as approved by the executive director and the United States Environmental Protection Agency. This paragraph does not apply to limit the use of DERC or mobile DERC 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;

(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; or

(7) in the DFW eight-hour ozone nonattainment area, if the DERC usage requested exceeds the flow control limit for a particular year determined by the annual review as specified in §101.379(c) of this title.

(d) Notice of intent to use.

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

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

(B) The application must be submitted:

(i) for DERC use in the DFW eight-hour ozone nonattainment area , no later than August 1 prior to the beginning of the calendar year that the DERCs are intended for use; and

(ii) for all other discrete emission credit use, at least 45 days prior to the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

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

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

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

(ii) the amount of discrete emission credits needed;

(iii) the baseline emission rate, activity level, and total emissions for the applicable facility or mobile source;

(iv) the actual emission rate, activity level, and total emissions for the applicable facility or mobile source;

(v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable regulatory requirements;

(vi) a complete description of the protocol, as submitted by the executive director to the 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 of 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 §§117.123, 117.223, 117.320, 117.323, 117.423, 117.1020, 117.1120, 117.1220, or 117.3020 of this title (relating to Source Cap; and System 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) (No Change.)

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

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 §§117.123(b)(1), 117.223(b)(1), 117.320(c)(1) and (2), 117.323(b)(1), 117.423(b)(1), 117.1020(c)(1), 117.1120(c)(1), 117.1220(c)(1), or 117.3020(c) of this title (relating to Source Cap; and System Cap) as applicable
- R_i = actual emission rate, in pounds (lb)/MMBtu, as defined in §§117.123(b)(1), 117.223(b)(1), 117.320(c)(1) and (2), 117.323(b)(1), 117.423(b)(1), 117.1020(c)(1), 117.1120(c)(1), 117.1220(c)(1), or 117.3020(c) 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) (No Change.)

$$\text{Amount of DERCS Required (tons)} = \sum_{i=1}^N \left[(EH_{Max} \times ER_i) - (H_{Max} \times R_i) \right] \frac{1}{2000}$$

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

R_i = in lb/MMBtu, is defined as in §§117.123(b)(2), 117.223(b)(2), 117.320(c)(3), 117.323(b)(2), 117.423(b)(2), 117.1020(c)(2), 117.1120(c)(2), or 117.1220(c)(2) of this title (relating to Source Cap; and System Cap) as applicable
 H_{Mi} = the maximum daily heat input, in MMBtu/day, as defined in §§117.123(b)(2), 117.223(b)(2), 117.320(c)(3), 117.323(b)(2), 117.423(b)(2), 117.1020(c)(2), 117.1120(c)(2), or 117.1220(c)(2) 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) (No Change.)

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

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) (No Change.)

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

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 10 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 late DEC-2 Form in the case of an emergency, or other exigent circumstances, but the notice must be submitted before the discrete emission credits can be used. The user shall include a complete description of the 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) (No Change.)

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

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) (No Change.)

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

Where:

ALA = actual level of activity

PLA = permitted level of activity

AER = permitted emission rate per unit activity

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

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

Each use period must not exceed 12 months.

(B) 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.

(f) DFW eight-hour ozone nonattainment area DERC usage.

(1) If the total number of DERCs submitted for the upcoming control period in all DEC-2 Forms received by the deadline in subsection (d)(1)(B)(i) of this section is greater than the flow control limit determined by the annual review specified in §101.379(c) of this title, applicable to the control period specified in the DEC-2 Form, the executive director shall apportion the number of DERCs for use.

(A) The executive director shall consider the appropriate amount of DERCs allocated for each DEC-2 application submitted on a case-by-case basis. In determining the amount of DERC use to approve for each DEC-2 application, the executive director may take into consideration:

(i) the total number of DERCs existing in the nonattainment area bank;

(ii) the total number of DERCs submitted for use in the upcoming control period;

(iii) the proportion of DERCs requested for use to the total amount requested;

(iv) the amount of DERCs required by the applicant for compliance;

(v) the technological and economic aspects of other compliance options available to the applicant; and

(vi) the location of the facilities for which owners or operators are requesting use of DERCs.

(B) Any credits requested for use by the applicant in the DEC-2 Form that were generated after March 1, 2009, will be applied to the flow control limit determined by the annual review as specified in §101.379(c) of this title .

(2) If the total number of DERCs submitted for use is less than the flow control limit for that particular year determined according to the annual review specified in §101.379(c) of this title, the executive director may approve all requests for DERC usage provided that all other requirements of this section are met.

§101.379. Program Audits and Reports.

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

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

availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

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

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

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

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

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

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

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

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

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

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

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

Figure: 30 TAC §101.379(c)(2)(A)

$$\text{Flow Control Limit} = B + (C_1 - C_2) + (D_1 - D_2)$$

Where:

Flow Control Limit = total daily amount of Discrete Emission Reduction Credits (DERCs) allowed for use during any 24-hour period, from midnight to midnight;

B = the 2009 annual flow control limit prescribed in the Dallas-Fort Worth Eight-Hour Ozone Attainment Demonstration State Implementation Plan Revision for the 1997 eight-hour ozone standard;

C_1 = the estimated emission reductions associated with fleet turnover from mobile sources during the previous calendar year ;

C_2 = the emission reduction associated with the contingency requirement for the current calendar year ; For the 2010 calendar year control period this term is equal to 12.98 tons per day;

D_1 = DERCs generated on or after March 1, 2009, and approved for use in the previous calendar year or the 2009 control period; and

D_2 = DERCs generated on or after March 1, 2009, and used in the previous calendar year or the 2009 control period.

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

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

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

(ii) will consider any late DEC-2 Forms submitted as provided under §101.376(d)(3) of this title that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared

emergency situation as defined in subparagraph (D) of this paragraph, but will not otherwise approve a late submittal that would exceed the flow control limit established by the equation under subsection (c)(2)(A) of this section.

(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an emergency notice, as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (April 25, 2006), issued by ERCOT as specified in *ERCOT Protocols, Section 5: Dispatch* (April 26, 2006), is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT.