

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §101.376 and §101.379.

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 PROPOSED RULES

The proposed rulemaking would create 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 National Ambient Air Quality Standard (NAAQS). The amount of DERCs used in the photochemical modeling submitted as part of the May 23, 2007, DFW Eight-Hour Ozone Attainment Demonstration SIP Revision was overly conservative, but consistent with EPA's growth projections guidance, in the assumption that all existing banked DERCs from the DFW area, 20.4 tons per day of nitrogen oxides (NO_x), would be used to increase emissions in 2009. While historically regulated entities in DFW have 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. EPA Region 6 has indicated that in order to grant conditional approval of the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, anticipated to be adopted in December, 2008, 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 impact the attainment and maintenance of the NAAQS.

The proposed rulemaking would revise Chapter 101, Subchapter H, Division 4, 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 NAAQS. The proposed rulemaking would also change the deadline for the submittal of a DEC-2 Form from 45 days to specify that the forms are due by September 1 of the calendar year immediately prior to the applicable calendar year use period. DEC-2 forms may be submitted after the September 1 deadline but may only be considered after all DEC-2 forms submitted by the September 1 deadline are approved by the executive director, consistent with SIP requirements and the current flow control level. This rulemaking change would allow adequate time for the executive director to determine the amount of available DERCs through an annual review process.

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 there is 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. EIP, Section 16.15 includes safeguards for EIPs with banking provisions, which discusses 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 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 proposed rulemaking would require the executive director to complete an annual review of the submitted DEC-2 Forms to determine the number of DERCs available for potential use in the upcoming calendar year. The number of DERCs available would be developed to ensure noninterference with attainment and maintenance of the NAAQS and would be based on the annual review or on the flow control limit for DERCs prescribed in the most recent SIP adopted by the commission. The annual review would determine the likelihood of emission spiking resulting from the number of potential participants and the amount of DERCs requested for usage.

The flow control limit for a particular year would be determined using the equation in proposed §101.379(c)(2)(A). The flow control limit would be the sum of the 2009 flow control limit in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision plus the estimated emission reductions associated with fleet turnover that are not used to satisfy contingency requirements plus the unused DERCs certified 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 would prevent emission spiking and interference with the attainment and maintenance of the NAAQS from DERC usage.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments to §101.376 and §101.379 discussed elsewhere in this preamble, the commission also proposes to make various stylistic non-substantive changes to update rule language to current Texas Register style and format requirements, as well as establish more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references,

and certain terms such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

Section 101.376, Discrete Emission Credit Use

The commission proposes §101.376(a)(5), which would allow a user to submit additional DEC-2 Form requests for approval by the executive director if the flow control limit for a particular year of DERCs has not yet been met and all other requirements in §101.376(a) are met.

The commission proposes §101.376(a)(6), which would specify that if the flow control limit in the DFW eight-hour ozone nonattainment area has been met, a user may apply for additional DERCs under the emergency provision in subsection (d)(3).

The commission proposes §101.376(a)(7), which would establish that DERC use must be preceded by executive director approval of a DEC-2 Form.

The commission proposes to revise 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 proposes to revise 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 proposes to revise §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 proposes to add §101.376(c)(7) to establish 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).

The commission proposes to revise §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 proposes to add §101.376(d)(1)(B)(i) to extend the submittal deadline for DEC-2 Forms in the DFW eight-hour ozone nonattainment area from 45 days to September 1 of the calendar year immediately prior to the applicable calendar year use period. This extension provides the executive director with the time required to review the total amount of DERCs included in the DEC-2 Forms submitted and to perform the annual review specified in §101.379(c) to determine the appropriate level of DERC flow control consistent with attainment and maintenance of the NAAQS. The commission proposes §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 proposes to revise §101.376(d)(3) by changing "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 proposes to delete §101.376(e)(3)(B) and revise §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 proposes to reformat §101.376(e)(3)(C) to §101.376(e)(3)(B).

The commission proposes §101.376(f) to establish provisions for the executive director to apportion the amount of DERCs for each control period, as determined by the annual review, for the DFW eight-hour

ozone nonattainment area. Proposed §101.376(f)(1) would specify 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 would apportion the number of DERCS for use. Proposed §101.376(f)(1)(A) specifies the executive director would 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 would take into consideration the provisions specified in proposed §101.376(f)(1)(A)(i) to (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.

The commission proposes §101.376(f)(1)(B), which would establish that any credits requested for use by the applicant in the DEC-2 Form that were certified by the executive director after March 1, 2009, would be included in the flow control limit determined by the annual review process, detailed later in this preamble, and approved for use by the executive director for any subsequent control period.

The commission proposes §101.376(f)(2), which would establish 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.

The commission proposes to amend §101.379(b), which would clarify that the report due to the general public and the EPA by February 1 of each year would contain information regarding DERC generation and use from the previous calendar year control period. In addition, proposed language would require the report include the amount of DERCs approved for use under proposed §101.379(c).

The commission proposes §101.379(c), which would establish that no later than November 1 of each year, the executive director would complete and make available to the public an annual review that determines the number of DERCs available for use in DFW under the flow control limit for the upcoming calendar year. The number of DERCs available would be developed to ensure noninterference with attainment and maintenance of the NAAQS for each calendar year beginning in 2009.

The commission proposes §101.379(c)(1), which would specify that for the 2009 control period, the flow control limit for DERCs available for use would be the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard.

For each following calendar year after 2009, the annual review would set the flow control limit for that year using the equation in proposed §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 Eight-Hour Ozone 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 certified on or after March 1, 2009, and approved for use in the previous calendar year control period; variable "D₂" is the DERCs certified on or after March 1, 2009, and used in the previous calendar year control period; and variable "E" is DERCs certified

before March 1, 2009, and approved for use in the previous calendar year control period that remain unused.

The commission proposes §101.379(c)(2)(B), which would specify that if the flow control limit, as calculated in the equation in subparagraph (A), is greater than the number of DERCs available in the bank, then flow control is not necessary, and the annual review would set the number of DERCs potentially available for use as the total number of DERCs in the bank. The commission proposes §101.379(c)(2)(C) to specify that if use of the entire DERC bank would not interfere with attainment and maintenance of the 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. The commission proposes §101.379(c)(2)(D) to specify that if the flow control limit for a particular year, as calculated in the equation in subparagraph (A), is greater than the total number of DERCs requested for use in accordance with §101.376(d), then flow control is not necessary.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency would utilize existing resources to implement the proposed rules. The proposed rules would affect the use of DERCs in the DFW eight-hour ozone nonattainment area. Local governments in the DFW eight-hour ozone nonattainment area are not expected to be impacted since they typically do not generate or use DERCs.

Historically, the only NO_x DERC trade in the DFW eight-hour ozone nonattainment area was between

portfolios within the same business entity. Therefore, no market price has been established for the economic value of DERCs in the DFW eight-hour ozone nonattainment area, and the fiscal effect of the proposed rules can not be determined at this time. However, the estimated capital cost to install selective catalytic reduction (SCR) controls in the DFW eight-hour ozone nonattainment area to control NO_x emissions would average approximately \$2,000 per ton of NO_x reduced. Costs could be as much as \$50 million per regulated entity for those entities most likely to be affected by the proposed rules. It is not expected that the proposed rules would cause a regulated entity to incur this much in capital expenditures, but facilities may be faced with some increased capital expenditures if the executive director is required to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area if ozone attainment standards for the area cannot be met.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be increased protection of public health and the environment.

Two utility electric generation sources operating in the DFW eight-hour ozone nonattainment area own DERCs at this time. If these entities, or any others, plan to utilize these DERCs, they would have to give the executive director additional notice under the proposed rules by meeting a September 1 deadline instead of 45 days notice. The market price of DERCs is not known at this time since no market activity has taken place, and the value of DERCs in the DFW eight-hour ozone nonattainment area is not known. However, the estimated capital cost to install SCR in the DFW eight-hour ozone nonattainment area to control NO_x emissions would average \$2,000 per ton of NO_x reduced. Costs could be as much as \$50 million per regulated entity if the use of DERCs must be restricted.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses in the DFW eight-hour ozone nonattainment area. Small or micro-businesses do not typically own DERCs since they do not typically participate in the activities that would generate them. If a small or micro-business becomes the owner of DERCs, it could expect to be subject to the same conditions as a large business. A small or micro-business would have to meet the same notice deadline and be subject to the executive director's authority to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area to a level consistent with attainment and maintenance of the NAAQS.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are not expected to have adverse impacts on a small or micro-business in a material way for the first five years that the proposed rules are in effect. Small or micro-businesses in the DFW eight-hour ozone nonattainment area typically do not own DERCs, and staff does not expect any of them to become subject to the provisions of the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking action does 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed 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 proposed 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. The proposed amendments are necessary to ensure that potential use of DERCs would not interfere with attainment and maintenance of the NAAQS. The proposed 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 proposed 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 NAAQS. This flow control mechanism is developed in accordance with the *Improving Air Quality with Economic Incentive Programs* of the January 2001 document. The proposed 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 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, a SIP 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 NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the 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. The proposed amendments are necessary to ensure that the DERC program does not interfere with attainment or maintenance of the 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 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 proposed 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 NAAQS; thus, states must develop programs for each nonattainment area to ensure that area would 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 proposed 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 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 Legislative Budget Board, 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 proposed 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 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 unchanged. 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 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 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 Texas Water Code (TWC) 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 invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

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 would not interfere with the attainment and maintenance of the ozone NAAQS in the DFW eight-hour ozone nonattainment area. Promulgation and enforcement of the amendments would 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 would 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 proposed by these rules were developed to ensure that the use of DERCs would not interfere with attainment and maintenance of NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of 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, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and would, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed 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)). 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. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

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. If the proposed amendments to Chapter 101, Subchapter H are adopted, 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.

ANNOUNCEMENT OF HEARING

Public hearings for this proposed rulemaking have been scheduled on September 9, 2008, at 6:30 p.m. in the J. Erik Jonsson Central Library Auditorium, 1515 Young Street, Dallas, and on September 10, 2008, at 10:00 a.m. in the Arlington City Hall Council Chambers, 101 W. Abram Street, Arlington. The

hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposals 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Air Quality Division at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, MC-205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-011-101-EN. The comment period closes September 12, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Luke Baine, Air Quality Division, Stationary Source Programs Team, (512) 239-5856.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: EMISSIONS BANKING AND TRADING

§101.376, §101.379

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. In addition, the amendment is proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which states the policy and purpose of the State of Texas and the Texas Clean Air Act (TCAA); §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning the State Air Control Plan, which requires the commission to develop plans for protection of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require submission information relating to emissions of air contaminants; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe the sampling methods and procedures; and §382.051(d), concerning Permitting Authority of Commission Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under

Chapter 382. In addition, amendment is proposed under federal mandates contained in 42 United States Code, §§7410 *et seq.*, which require states to adopt pollution control measures in order to reach specific air quality standards in particular areas of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.021, and 382.051(d).

§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), if the flow control limit for a particular year of discrete emission reduction credits (DERC), as determined by the annual review in §101.379(c) of this title (relating to Program Audits and Reports) has not yet been met, a user may submit additional Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) requests, which the executive director may approve, if all other requirements of this section are met.

(6) If the flow control limit in the DFW eight-hour ozone nonattainment area as established in §101.379(c)(2)(A) of this title has been met, a user may only apply for additional DERCS under the emergency provision in subsection (d)(3) of this section.

(7) 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 [ten] tons for nitrogen oxides or 5 [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 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 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 [discrete emission reduction credits (DERC)] or mobile DERC [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; 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 [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.]

(i) for DERC use in the DFW eight-hour ozone nonattainment area as defined in §101.1 of this title, no later than September 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 [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 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.)

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

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.)

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

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 [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) (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 [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.

Each use period must not exceed 12 months.

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

(B) [(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.

(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; and

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

(B) Any credits requested for use by the applicant in the DEC-2 Form that were certified by the executive director 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 and approved for use by the executive director for any subsequent control period.

(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 [EPA] and made available for public inspection within six months after the audit begins.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency [EPA] 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; [and]

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

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

(c) No later than November 1 of each year, the executive director will complete, and make available to the general public and the 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 number of DERCs available for use will be calculated based on the technical analysis to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and will be based on the annual review, or on the flow control limit for DERCs prescribed in the most recent state implementation plan (SIP) adopted by the commission.

(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.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year.

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

Figure: 30 TAC §101.379(c)(2)(A)

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

Where:

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 control period;

C_2 = the emission reduction associated with the contingency requirement for the current control period;

D_1 = Discrete Emissions Reduction Credits (DERCs) certified on or after March 1, 2009, and approved for use in the previous calendar year control period;

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

E = DERCs certified before March 1, 2009, and approved for use in the previous calendar year control period that remain unused.

(B) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the number of DERCs available in the bank, then flow control is not

necessary, and the annual review will set the number of DERCs potentially available for use as the total number of DERCs in the bank.

(C) If use of the entire DERC bank would not interfere with attainment and maintenance of the 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.

(D) 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), then flow control is not necessary.