

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§101.350, 101.351, and 101.353.

Section 101.353 is adopted *with changes* to the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 7009). Section 101.350 and §101.351 are adopted *without changes* to the proposed text and will not be republished.

The commission will submit the amendments 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 purpose of the adopted amendments to Subchapter H, Division 3, Mass Emissions Cap and Trade Program, is to maintain the integrity of the nitrogen oxides (NO_x) cap in the Houston-Galveston-Brazoria (HGB) ozone nonattainment area and minimize increases in the NO_x cap. The adopted rulemaking will discontinue the acceptance of late ECT-3 forms, Level of Activity Certification, submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO_x, as defined in 30 TAC §117.10. Also, the adopted rulemaking will amend the definition of "Uncontrolled design capacity" to provide additional flexibility for certain stationary diesel engines and clarify both site and facility applicability.

The Mass Emissions Cap and Trade (MECT) program is a market-based component of the SIP that provides stationary sources of NO_x compliance flexibility for the emission specifications under 30 TAC Chapter 117, while establishing a mandatory cap for total NO_x emissions from affected source categories

in the HGB ozone nonattainment area. The MECT program was adopted as a primary control measure of the HGB attainment demonstration for the one-hour ozone National Ambient Air Quality Standard (NAAQS). The MECT program NO_x cap is a product of the emission specifications of Chapter 117 and the submitted levels of activity from applicable facilities. The adopted rulemaking will not affect the submittal of ECT-3 forms from minor sources of NO_x.

In accordance with §101.360(a), to receive an allocation of allowances (one allowance equals one ton of NO_x), sites were required to submit an ECT-3 form with the levels of activity from their applicable facilities by June 30, 2001. Applicable facilities with historical actual emission data were allocated allowances based on actual levels of activity while other applicable facilities without historical actual emission data were allocated allowances based on permitted allowable emissions. Representatives of facilities with allocations based on permitted emissions are required to submit a second ECT-3 form once a historical emissions baseline is established to convert their permit-based allocation to a historical level of activity based allocation in accordance with §101.360(b)(1). The rule did not address late submittals of ECT-3 forms. Therefore, a site that has never complied with the MECT program could submit a late ECT-3 form in accordance with §101.360(a) and receive an allocation of allowances, thus, potentially increasing the NO_x cap. To maintain the integrity and minimize increases in the NO_x cap, the adopted rulemaking will discontinue the acceptance of late ECT-3 forms from sites defined on or before December 31, 2000, as major sources of NO_x if submitted in accordance with §101.360(a) after March 30, 2010. These applicable facilities will have to obtain allowances from the market instead of receiving an allocation of allowances.

Informal comments from industry were received regarding clarification on "air pollution control

equipment" in the definition of "Uncontrolled design capacity." Therefore, the adopted rulemaking will clarify the definition of "Uncontrolled design capacity" by amending this definition to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NO_x without consideration for post-combustion control equipment, enforceable limitations, or operational limitations. The addition of "post-combustion control equipment" to the adopted definition will account for any equipment that can be removed without preventing the facility from operating. NO_x control equipment that is not considered post-combustion control equipment, such as low-NO_x burners, will be considered when calculating the uncontrolled design capacity to emit.

In 2008, Hurricane Ike increased awareness of the need for backup generators during extended power outages for activities such as maintaining water pressure at water treatment plants. To provide additional flexibility to sites that would potentially become subject to the MECT program because of a backup generator, the adopted new sentence to §101.350(14) will provide a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines operating less than 100 hours per year in non-emergency situations and not meeting the applicable EPA Tier standards. The adopted rulemaking will allow a minor source of NO_x with an applicable diesel engine, depending on the site's collective uncontrolled design capacity to emit, to meet the emission specification listed in §117.2010 either by participating in the MECT program and acquiring allowances or not participating in the MECT program and acquiring emission credits or discrete emission credits.

To clarify site and facility applicability, the adopted rulemaking will restructure §101.351 to explain that sites must determine their status as a minor or major source of NO_x in Chapter 117 before determining applicability of their facilities in the MECT program. Along with the restructuring of §101.351, adopted

subsection (c) will clarify a site's duration in the MECT program.

SECTION BY SECTION DISCUSSION

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

In addition to the adopted amendments to §§101.350, 101.351, and 101.353 discussed elsewhere in this preamble, the commission also adopts various stylistic non-substantive changes updating rule language to current *Texas Register* style and format requirements, as well as establishing 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.

§101.350, Definitions

The adopted amendment to §101.350(14) will revise the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NO_x without consideration for post-combustion control equipment (e.g., a selective catalytic reduction system), enforceable limitations (e.g., permit restrictions, such as a restriction on operating hours per year), or operational limitations (e.g., using a number lower than the maximum rated capacity). The addition of "post-combustion control equipment" to the adopted definition will account for any equipment that can be removed without preventing the facility from operating. NO_x control equipment that is not considered post-combustion control equipment, such as low-NO_x burners, will be considered when calculating the uncontrolled design capacity to emit.

The adopted amendment to §101.350(14) will allow flexibility for calculating the uncontrolled design capacity to emit for stationary diesel engines that are modified, reconstructed, or relocated, operate less than 100 hours per year (based on a rolling 12-month average) in non-emergency situations, and do not meet the applicable EPA Tier standards. In conjunction with the adoption of §101.351(c), adopted §101.350(14) will allow minor sources of NO_x not subject to the MECT program the option to calculate the uncontrolled design capacity to emit for an applicable stationary diesel engine using the lower of 876 hours or a federally enforceable limitation on total hours of operation. From the adopted new language, an applicable site with an applicable stationary diesel engine will meet the emission specification listed in §117.2010 either by participating in the MECT program and obtaining allowances or not participating in the MECT program and obtaining emission credits or discrete emission credits, depending on the site's collective uncontrolled design capacity to emit.

For example, on July 21, 2010, a municipal utility district (MUD) installs a stationary diesel engine for use as a backup generator to maintain water pressure during power outages. In this example, the MUD does not have any other applicable facilities subject to §117.2010 and is not subject to the MECT program prior to the installation of this engine. The diesel engine is rated at 150 horsepower, has an emission factor of 7.0 grams of NO_x per horsepower-hour, and is permitted to operate at most 876 hours per year. The engine must comply with the emission specifications listed in §117.2010 since this engine does not meet the criteria necessary to be considered exempt under §117.2003. Therefore, the installation of the backup generator requires recalculation of the site's collective uncontrolled design capacity to emit to determine applicability in the MECT program. Adopted §101.350(14) will allow using 876 hours when calculating the uncontrolled design capacity to emit for the diesel engine, therefore equaling 1.01 tons of NO_x per year. The MUD in this example can also use the conventional method for calculating the

uncontrolled design capacity to emit using 8,760 hours, therefore equaling 10.14 tons per year. The MUD is subject to the MECT program if the collective uncontrolled design capacity to emit is ten tons or more per year of NO_x. Since the MUD has the option of having a collective uncontrolled design capacity to emit above or below ten tons per year, the MUD can either participate in the MECT program and obtain allowances to cover the actual emissions of NO_x from the diesel engine or obtain emission credits or discrete emission credits for the diesel engine to meet the emission specifications listed in §117.2010. Under adopted §101.351(c), if this MUD participates in the MECT program, then this site will remain subject to the MECT program until permanently shut down.

§101.351, Applicability

The adopted amendment to §101.351(a) will require a site first to determine its status as a minor or major source of NO_x in Chapter 117. If the site is a major source of NO_x, the facilities with emission specifications listed in §117.310 or §117.1210 are applicable to the MECT program. If the site is a minor source of NO_x, the collective uncontrolled design capacity to emit is calculated from the facilities with emission specifications in §117.2010. If the collective uncontrolled design capacity to emit is ten tons or more per year of NO_x, then the site is subject to the MECT program.

Adopted §101.351(c) states that once a site becomes subject to the MECT program, the site will remain subject to the MECT program until permanently shut down. Adopted subsection (c) will clarify that a site's collective uncontrolled design capacity to emit will not affect the site's applicability once subject to the MECT program. In addition, adopted subsection (c) will also clarify that once a minor source of NO_x is subject to the MECT program, any of the facilities at the site subject to the emission specifications in §117.2010 are subject to the MECT program until the site is permanently shut down.

§101.353, Allocation of Allowances

The commission adopts the amendment to §101.353(b) with changes from the proposal to correct non-substantive typographical errors and to comply with *Texas Register* formatting requirements. Adopted §101.353(b) will require sites defined on or before December 31, 2000, as major sources of NO_x with facilities that meet the requirements to receive allowances in accordance with §101.360(a), but have not submitted an ECT-3 form by March 30, 2010, to obtain allowance for these facilities from the market. Under the current rule, ECT-3 forms were considered late if submitted in accordance with §101.360(a) after June 30, 2001; however, the forms were accepted. Under the adopted amendment, an ECT-3 form submitted in accordance with §101.360(a) that is received after March 30, 2010, from a site defined on or before December 31, 2000, as a major source of NO_x, will not be accepted and the facilities listed on the ECT-3 form will be required to obtain allowances from the market instead of receiving an allocation of allowances based on historical actual emission data or an allocation of allowances based on permitted allowable emissions.

The existing rule language regarding the 90-day submittal deadline for an ECT-3 form from newly applicable sites or facilities will not be affected by the adopted rulemaking. Also, the adopted rulemaking will not affect ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from minor sources of NO_x.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it

does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading program is intended to achieve these goals. The primary purpose of this rulemaking action is to maintain the integrity of the NO_x cap in the HGB ozone nonattainment area by minimizing potential increases in the cap, to amend the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" for additional clarity and to provide additional flexibility for certain diesel engines, and to clarify site and facility applicability.

None of these amendments place additional financial burdens on the regulated community. The first purpose of this adopted rulemaking is to maintain the integrity of the NO_x cap and minimize cap increases, by discontinuing the acceptance of late ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO_x. Although a major source of NO_x that has not submitted its ECT-3 form by March 30, 2010, will have to purchase MECT allowances, the commission has not received any late ECT-3 forms since before 2003 from a major source of NO_x; therefore, it is unlikely that anyone who needs to submit ECT-3 forms has not done so. The other purpose of this adopted rulemaking is to provide additional flexibility to sites that would enter the MECT program because of a backup generator, by proposing a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines that operate less than 100 hours per year in non-emergency situations and do not meet the applicable EPA Tier standards. This adopted

change will offer additional flexibility for potential applicability of the MECT program to a wider range of sources and will give potentially affected sources additional options, instead of requiring them to participate in the MECT program. Thus, the rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the adopted amendments to the MECT program in this rulemaking action were developed to provide flexibility in meeting the ozone NAAQS set by the EPA under 42 United States Code (USC), §7409, and therefore, meet a federal requirement. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code (THSC), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invited public comment 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 evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments to the MECT program will provide additional flexibility for certain sites in meeting the ozone NAAQS set by the EPA under 42 USC, §7409, and also limit increases in the NO_x cap. Promulgation and enforcement of the amendments will not burden private real property. The adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances that will be affected by these adopted amendments are not property rights. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the adopted amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within these rules were developed in order to meet the one-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible to ensure attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this adopted rulemaking action is to minimize increases in the NO_x cap and to provide additional flexibility for certain sites to meet the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption that applies to these adopted amendments is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this

rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted amendments will update a definition and maintain the integrity of the NO_x cap. No new sources of air contaminants will be authorized, and the revisions will maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 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

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

PUBLIC COMMENT

Public hearings were held in Houston on October 28, 2009, and in Austin on October 29, 2009. The comment period opened on October 9, 2009, and closed on November 9, 2009. No oral comments regarding the MECT program were received.

Written comments regarding the MECT program were provided by the EPA, National Aeronautics and Space Administration (NASA), and the Houston Regional Group and the Lone Star Chapter of the Sierra Club (HSC). In addition, the Kids for Clean Air, the Sustainable Energy and Economic Development Coalition, the Clean Air Institute of Texas, and one individual expressed support for the comments received from the HSC.

RESPONSE TO COMMENTS

The EPA requested clarification on the amendment to §101.353(b) and why it does not require minor sources of NO_x submitting late ECT-3 forms to obtain allowances from the market. The EPA expressed that these minor sources of NO_x could increase the overall cap and jeopardize the attainment demonstration modeling for the HGB ozone nonattainment area.

The MECT NO_x cap is a product of the emission specifications of Chapter 117 and the submitted levels of activity from applicable existing facilities, about an 80% reduction from each existing facility's baseline. A new facility (e.g., a new or modified facility that is part of an administratively complete permit application received on or after January 2, 2001) that is subject to the MECT program cannot receive an allocation of allowances, and the site must obtain allowances to cover the new facility's total emission of NO_x.

Minor sources of NO_x with applicable facilities that are not in the MECT program must meet the emission specifications of Chapter 117 on a unit-by-unit basis. A minor source of NO_x with facilities subject to the emission specifications of Chapter 117 must comply by installing controls, the use of emission credits, or the use of discrete emission credits. A minor source of NO_x is subject to the MECT program once the site has a collective uncontrolled design capacity to emit greater than or equal to ten tons per year of NO_x. If an existing facility at a minor source of NO_x transitions from being a non-MECT facility to a MECT facility, it may receive allowance allocations based on the emission specifications of Chapter 117. If a minor source of NO_x submits a late ECT-3 form but installed controls on an existing facility to comply with Chapter 117 prior to entering the MECT program, the site would undergo both the cost of installing the controls and the cost of purchasing the entire amount of allowances needed to comply with the MECT program for each control period if the late ECT-3 form was not accepted. This would penalize sites that choose to install controls on an existing facility and then become subject to the MECT program. Therefore, the commission is continuing to grant allowances for the portion of an existing facility's emissions at a minor source of NO_x that were previously controlled through compliance with the Chapter 117 emission specifications. If an existing facility required additional allowances for compliance, the allowances

would have to be purchased from the market. Although the existing facility's compliance mechanism transitions from direct compliance with the emission specifications to compliance with the MECT program, there is no actual growth in real emissions because the allowance is based on actual level of activity and the emission specification the existing facility was already required to meet.

Although granting these allowances to minor sources does slightly increase the MECT NO_x cap, it does not interfere with the attainment demonstration modeling for the HGB area. When analyzing future growth in the attainment demonstration model, it is assumed that there is no trading because trading is highly unpredictable from fluctuations in needs and market conditions. Existing facilities subject to the MECT program are modeled at their allowance allocation amount and not allowed any growth. New facilities subject to the MECT program are modeled at zero (i.e., allocated zero allowances), because these facilities are required to obtain allowances from existing facilities through trading. With respect to the model, the sum of the MECT existing facilities and the MECT new facilities is the MECT NO_x cap. With respect to actual emissions, the sum of the MECT existing facilities and the MECT new facilities actual emission of NO_x is less than or equal to the MECT NO_x cap.

New and existing facilities not in the MECT program are allowed growth using modeling values based on EPA-approved growth methodologies. For example, a facility entering late into the MECT program will switch in the model to the allowance allocation amount with zero growth, and the modeling value based on an EPA-approved growth methodology will be discarded. If the modeled MECT NO_x cap were to increase, then that would result in decreases of the non-MECT modeled

NO_x emissions that have this growth applied. This would actually result in a net decrease in the total point source NO_x emissions inventory in the model, if the model were to be run with the new numbers.

If an existing facility at a minor source of NO_x is in the area source inventory, the allowances provided to that facility would still be applied to the total point source inventory modeled MECT NO_x cap. However, the commission has decided not to decrease the area source inventory correspondingly at this time because the change would be so insignificant. Historically, the increase in the MECT NO_x cap due to approved late ECT-3 forms submitted by minor sources of NO_x has been insignificant. Since January 1, 2004, the commission approved 13 late ECT-3 forms that were due by June 30, 2001. These sites were allocated an average of 3.64 tons of allowances per site, or 0.01 tons of NO_x per day (tpd). The collective total from the 13 sites is about 0.13 tpd. The total 2018 modeled baseline area source inventory and point source inventory NO_x emissions are 42.04 tpd and 154.36 tpd, respectively. Adjusting the modeled area source inventory for such an inconsequential decrease is impractical and provides no benefit. Therefore, the commission has chosen to model such changes conservatively and only include the increase in the point source MECT NO_x cap.

Thus, the continued acceptance of late ECT-3 forms from existing facilities at minor sources of NO_x, while slightly increasing the NO_x cap, will not interfere with attainment demonstration modeling for the HGB area. No changes were made in response to this comment.

NASA requested clarification whether the proposed rule would continue to allow major sources of NO_x

with eligible facilities that have lost their exemption status under Chapter 117 to submit ECT-3 forms requesting an allocation of allowances.

The commission will continue to accept ECT-3 forms from major sources of NO_x for facilities eligible under §101.360(c) to receive an allocation of allowances that lose their exemption status under Chapter 117 if their exemption status was lost on or after April 1, 2001. No changes were made in response to this comment.

The HSC commented that the commission should discontinue the MECT program and set command and control emission limits for each emission point.

The commission did not propose discontinuation of the MECT program. This comment is beyond the scope of this rulemaking. The commission adopted the MECT program having determined the MECT program as the most efficient means to achieve cost-effective reductions of NO_x. The MECT program was approved by the EPA and provides compliance flexibility while maximizing the efficiency of emission reductions through market forces. The commission maintains that the MECT program is the most cost-effective means of achieving emissions reductions of NO_x. Individual sources of NO_x emissions also must meet permit limits and any applicable limit as established by rule. The MECT program provides for additional decreases in NO_x emissions limits above and beyond these basic requirements. No changes were made in response to this comment.

The HSC supports the adoption of §101.353(b)(3) - (5). The HSC commented that the commission should change the deadline for an applicable major source of NO_x to submit an ECT-3 form submitted in

accordance with §101.360(a) from March 30, 2010, to January 1, 2010, as the ozone standard should be attained as expeditiously as practical.

The commission appreciates the support. The amendments to the MECT program cannot be enforced until April 1, 2010, the effective date of the adopted rulemaking. Therefore, the March 30, 2010, deadline corresponds with the effective date of the adopted rulemaking. No changes were made in response to this comment.

The HSC is concerned that the definition "Uncontrolled design capacity to emit" is too broad regarding facilities with NO_x control equipment not considered post-combustion control equipment.

The adoption of the definition "Uncontrolled design capacity to emit" will not affect the requirements of the facilities referenced in this comment to meet the emission specifications of Chapter 117, but will clarify how to calculate the uncontrolled design capacity to emit from these facilities. No changes were made in response to this comment.

The HSC is concerned that the definition "Uncontrolled design capacity to emit" allows increased operation of applicable stationary diesel engines. Instead of adopting the proposed new sentence to the definition "Uncontrolled design capacity to emit," the HSC commented that the commission should adopt specific rules covering emergency stationary diesel engines located at MUDs and other water treatment plants.

The definition "Uncontrolled design capacity to emit" does not grant an increase in operation for

applicable stationary diesel engines operating less than 100 hours per year in non-emergency situations that do not meet the applicable EPA Tier standard. No changes were made in response to this comment.

The definition "Uncontrolled design capacity to emit" is only used to determine if a minor source of NO_x is applicable to the MECT program. The commission did not propose rules specifically to exempt or limit the emissions from emergency stationary diesel engines at water treatment plants, so this comment is beyond the scope of this rulemaking.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

§§101.350, 101.351, 101.353

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that 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, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, that 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, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, and FCAA, 42 USC, §§7401 *et seq.*

§101.350. Definitions.

The following words and terms, when used in this division (relating to Mass Emissions Cap and Trade Program), will have the following meanings, unless the context clearly indicates otherwise.

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

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

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

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

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

(6) **Broker account**--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division (relating to Mass Emissions Cap and Trade Program).

(7) **Compliance account**--The account where allowances held by a facility or multiple facilities at a single site are recorded for the purposes of meeting the requirements of this division (relating to Mass Emissions Cap and Trade Program).

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

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

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

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

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

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

(14) **Uncontrolled design capacity to emit**--The maximum capacity of a facility to emit nitrogen oxides without consideration for post-combustion pollution control equipment, enforceable limitations, or operational limitations. The owner or operator of a stationary diesel engine may use the lower of 876 hours or a federally enforceable limitation on total hours of operation to calculate uncontrolled design capacity to emit if the engine would otherwise be exempt from Chapter 117, Subchapter D, Division 1 of this title (relating to Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources) under §117.2003(a)(2)(I) of this title (relating to Exemptions) except that the engine does not meet the emission standard requirements of §117.2003(a)(2)(I)(ii) of this title.

§101.351. Applicability.

(a) This division applies to sites in the Houston-Galveston-Brazoria ozone nonattainment area that:

(1) meet the definition of a major source of nitrogen oxides (NO_x), as defined in §117.10 of this title (relating to Definitions), with facilities subject to §117.310 or §117.1210 of this title (relating to Emission Specifications for Attainment Demonstration); or

(2) do not meet the definition of a major source of NO_x, as defined in §117.10 of this title, and have facilities subject to §117.2010 of this title (relating to Emission Specifications) with a collective uncontrolled design capacity to emit from these facilities of ten tons or more per year of NO_x.

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

(c) Once a site becomes subject to the requirements of this division, the site will remain subject to this division until the site has been permanently shut down.

§101.353. Allocation of Allowances.

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

Figure: 30 TAC §101.353(a) (No change.)

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

Where:

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

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

Where: LA₉₇ = the facility's level of activity, as certified by the executive director for 1997;

LA₉₈ = the facility's level of activity, as certified by the executive director for 1998;

LA₉₉ = the facility's level of activity, as certified by the executive director for 1999;

EF₉₇ = the facility's emission factor for 1997 or the emission specifications under §§117.310, 117.1210, and 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications) (ESAD) whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director;

EF₉₈ = the facility's emission factor for 1998 or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director;

EF₉₉ = the facility's emission factor for 1999 or the emission specifications under ESAD, whichever is higher, in pounds per unit of activity, (not to exceed any applicable federal or state

regulation, rule, or permit limit), as certified by the executive director.

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

$$B = \frac{LA_{ALLOWABLE} * EF_{ALLOWABLE}}{2000}$$

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

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

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

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

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

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

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

EF_{Year-2} = the facility's emission factor or the emission specifications under ESAD, whichever is higher, in pounds per

unit of activity, (not to exceed any applicable federal or state regulation, rule, or permit limit), as certified by the executive director, for the second of any two consecutive years within the first five years of operation.

(3) X = reduction factor, where:

(A) For all boilers, auxiliary steam boilers, and stationary gas turbines (including duct burners used in turbine exhaust ducts) within an electric power generating system, as defined in §117.10(14)(A) of this title (relating to Definitions), located in the Houston-Galveston-Brazoria nonattainment area:

(i) for January 1, 2002 through March 31, 2003, X = 0.00;

(ii) for April 1, 2003 through March 31, 2004, X = 0.50;

(iii) on or after April 1, 2004, X = 1.00;

(B) For facilities subject to the emission specifications under §117.310(a)(1)(A) and (B), (2)(A), (5), (8)(A)(i), (8)(B), (9)(A)(ii), (10), or (11) of this title:

(i) for January 1, 2002 through March 31, 2004, X = 0.00;

(ii) for April 1, 2004 through March 31, 2005, X = 0.47;

(iii) for April 1, 2005 through March 31, 2006, X = 0.80;

(iv) for April 1, 2006 through March 31, 2007, X = 0.93;

(v) on and after April 1, 2007, X = 1.00;

(C) For all other facilities:

(i) for January 1, 2002 through March 31, 2004, X = 0.00;

(ii) for April 1, 2004 through March 31, 2005, X = 0.389;

(iii) for April 1, 2005 through March 31, 2006, X = 0.667;

(iv) for April 1, 2006 through March 31, 2007, X = 0.778;

(v) on and after April 1, 2007, X = 1.00;

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

(i) for January 1, 2002 through March 31, 2005, X=0.00;

(ii) on and after April 1, 2005, X=1.00.

(E) Election to comply with the alternative reduction schedule under subparagraph (D) of this paragraph shall be made by letter to the executive director no later than April 1, 2003.

(F) For calendar years which include two different reduction factors, the reduction factor shall be adjusted using the appropriate ratio to reflect the number of months covered by each reduction factor.

(4) LA_{HA} = historical average level of activity, where:

(A) For facilities in operation on or before January 1, 1997, the average level of activity, as certified by the executive director, for 1997, 1998, and 1999; or

(B) For existing facilities which began operation after January 1, 1997, LA_{HA} is:

(i) the level of activity authorized by the executive director until such time two consecutive calendar years of actual level of activity data is available, beginning after the end of the adjustment period; or

(ii) when two complete consecutive calendar years of actual level of activity data is available, beginning after the end of the adjustment period, the level of activity becomes the average of the facility's actual level of activity over those two consecutive calendar years of actual level of activity data.

(5) EF_{final} = emission factor, as listed in §§117.310, 117.1210, or 117.2010 of this title.

(6) For facilities using alternative emission specifications as allowed in §117.310(a)(17) or §117.2010(c)(6) of this title, the level of activity for any formula will be the lowest of the level of activity as calculated in variables (2)(A), (2)(B), or the level of activity limited by an enforceable limit or commitment necessary to qualify for an alternative emission specification in §117.310(a)(17) or §117.2010(c)(6) of this title.

(b) The owner or operator of the following facilities shall acquire allowances for each control period or the annual allocation rights from facilities already participating under this division in accordance with §101.356 of this title (relating to Allowance Banking and Trading):

(1) new and/or modified facilities that have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application that the executive director has not determined to be administratively complete before January 2, 2001;

(2) new and/or modified facilities that qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have not commenced construction before January 2, 2001;

(3) facilities in operation prior to January 1, 1997, located at a site defined on or before December 31, 2000, as a major source of nitrogen oxides (NO_x), as defined in §117.10 of this title (relating to Definitions), that have not submitted an ECT-3 Form, Level of Activity Certification, in accordance with §101.360(a)(1) of this title (relating to Level of Activity Certification) by March 30, 2010;

(4) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NO_x, as defined in §117.10 of this title, that submitted a permit application that was determined administratively complete before January 2, 2001, but have not submitted an ECT-3 Form in accordance with §101.360(a)(2) of this title by March 30, 2010; and

(5) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NO_x, as defined in §117.10 of this title, that qualified for a permit by rule and commenced construction before January 2, 2001, but have not submitted an ECT-3 Form in accordance with §101.360(a)(2) of this title by March 30, 2010.

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

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

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

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

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

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

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

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

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

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

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