The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§101.300 - 101.303, 101.306, 101.309, 101.350 - 101.354, 101.356, 101.359, 101.360, 101.370 - 101.373, 101.376, 101.378, 101.379, 101.390 - 101.394, 101.396, 101.399, and 101.400; and the repeal of §101.358.

Sections 101.300 - 101.303, 101.306, 101.309, 101.350 - 101.354, 101.356, 101.359, 101.360, 101.370 - 101.373, 101.376, 101.378, 101.379, 101.393, 101.399, and 101.400 are adopted *with changes* to the proposed text as published in the December 26, 2014, issue of the *Texas Register* (39 TexReg 10186). Sections 101.390 - 101.392, 101.394, and 101.396; and the repeal of §101.358 are adopted *without changes* to the proposed text and will not be republished. The repeal of §101.304 and §101.374 are not adopted and are withdrawn in this issue of the *Texas Register*.

The amended and repealed sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

The Emissions Banking and Trading (EBT) Program rules in Chapter 101, Subchapter H include market-based programs that provide sites with additional flexibility for complying with air regulations, such as the offset requirements in nonattainment new

source review (NNSR) permits or the unit-specific emission limits in various state rules. Two of the EBT programs are voluntary programs designed to incentivize emission reductions beyond regulatory requirements. In 1993, the commission adopted the emission credit (EC) rules in Division 1 to allow sources in nonattainment areas to generate, bank, trade, and use credits from permanent reductions in emissions. In 1997, the commission adopted the discrete emission credit (DEC) rules in Division 4 to allow statewide sources to generate, bank, trade, and use credits from reductions in emissions below regulatory requirements.

The commission has also adopted two mandatory EBT programs that apply in the Houston-Galveston-Brazoria (HGB) ozone nonattainment area. In 2000, the commission adopted the Mass Emissions Cap and Trade (MECT) Program rules in Division 3 to provide additional flexibility in the implementation of the SIP strategy to reduce nitrogen oxides (NO_X) emissions in the HGB ozone nonattainment area. The MECT Program rules specify the allocation, banking, trading, and use of allowances to cover NO_X emissions from affected sources in the HGB area. In 2004, the commission adopted the Highly Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) Program rules in Division 6 to provide additional flexibility in the implementation of the SIP strategy to reduce HRVOC emissions in the HGB ozone nonattainment area. The HECT Program rules specify the allocation, banking, trading, and use of allowances to cover HRVOC emissions from affected sources in Harris

County.

Because the programs are market-based, the costs associated with trades of credits and allowances are not controlled. In response to recent increases in the cost and lack of availability of credits, there has been considerable interest from the regulated community for alternatives that facilitate credit generation and for flexibility in credit use, including options provided in the EBT rules that have historically not been used. Specifically, there has been interest in generating credits by reducing emissions from area and mobile sources. In addition, there has been considerable interest from the regulated community for flexibility in the previous rules for the use of allowances to satisfy NNSR offset requirements. The adopted rulemaking leaves in place the generation of credits from mobile and area sources and revises the EBT Program rules in Chapter 101 to respond to emerging issues and clearly provide additional flexibility where possible or remove options that cannot be practically implemented.

DERC Use in the Dallas-Fort Worth (DFW) Area

In 2008, the commission established a ton per day (tpd) limit on the use of NO_X discrete emission reduction credits (DERCs) in the DFW 1997 eight-hour ozone nonattainment area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties) to ensure that NO_X DERC use does not interfere with the attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality

Standards (NAAQS). The prior methodology used to calculate the NO_X DERC limit incorporates emission reductions from annual mobile fleet turnover. The reliance on fleet turnover requires annual computation of the limit and prevents the affected regulated community from accurately planning the future use of NO_X DERCs. Additionally, diminishing annual reductions from fleet turnover are expected to cause the NO_X DERC limit to become more restrictive in the future, which could eventually restrict regulated entities in these counties from using available NO_X DERCs for compliance. The EPA has not yet acted on this portion of the DERC rules.

On July 20, 2012, the 10-county DFW area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) was designated a moderate nonattainment area for the 2008 eight-hour ozone NAAQS. As part of this rulemaking and the *Attainment Demonstration SIP Revision for the DFW 2008 Eight-Hour Ozone Nonattainment Area* adopted concurrently with this rulemaking, the technical basis of the NO_X DERC limit was reviewed to determine if it is necessary to extend this provision to the DFW 2008 eight-hour ozone nonattainment area. The adopted rulemaking does not extend the NO_X DERC limit to Wise County. The nine-county DFW 1997 eight-hour ozone nonattainment area is currently classified as serious, but under the 2008 eight-hour ozone NAAQS the nine original counties and Wise County are classified as moderate. No NO_X DERCs have ever been generated in Wise County. If NO_X DERCs are generated in Wise County in the future, the use of these DERCs in the nine-county DFW

1997 eight-hour ozone nonattainment area could only be approved in accordance with the restrictions on the inter-area use of DERCs in §101.372(f)(7). Additionally, NO_X DERCs generated in the nine-county DFW 1997 eight-hour ozone nonattainment area could also only be approved for use in Wise County in accordance with the restrictions on the inter-area use of DERCs in §101.372(f)(7). Therefore, it is not necessary to extend the NO_X DERC limit to Wise County at this time.

As part of this rulemaking, the commission also evaluated alternative methodologies that could be used to limit NO_X DERC use in the 1997 eight-hour ozone nonattainment DFW area. The evaluation included a review of the NO_X DERC limits set from 2009 - 2014, and the intent to use and use applications submitted by regulated entities in the DFW area during this same time. The NO_X DERC limits set from 2009 - 2014 range from 3.2 to 24.3 tpd. The intent to use applications submitted by regulated entities from 2009 - 2014 requested the potential use of 3.2 to 11.4 tpd NO_X DERCs. However, the use applications submitted for this same time indicate that the actual NO_X DERC use ranged from 0.1 to 1.5 tpd.

The rulemaking replaces the previous annually-calculated NO_X DERC limit in §101.379(c) with a fixed limit of 17.0 tpd of NO_X DERC use. This limit applies only to NO_X DERCs generated and used in the nine-county DFW 1997 eight-hour ozone nonattainment area. The 17.0 tpd limit was selected based on the 2013 NO_X DERC limit

of 16.9 tpd, which was the second highest limit that had been set at the time the modeling sensitivity was conducted. In addition, the 17.0 tpd limit is consistent with the 16.3 tpd average of all of the NO_X DERC limits established from 2009 - 2015. The limit is one and a half times greater than the largest request to use DERCs submitted from 2009 - 2014 and more than 11 times greater than any actual DERC use from 2009 - 2014. The use of a fixed limit provides certainty to the affected regulated community and facilitates planning for the future use of NO_X DERCs. The limit also provides the affected regulated community with flexibility because it exceeds the amount of DERCs historically requested for use. The 17.0 tpd limit on NO_X DERC use is also consistent with the attainment and maintenance of the 1997 and 2008 eight-hour ozone NAAQS because the modeling sensitivity conducted indicates the adopted limit will not cause any additional monitor to exceed the standard. The *Attainment Demonstration SIP Revision for the DFW 2008 Eight-Hour Ozone Nonattainment Area* adopted concurrently with this rulemaking provides details regarding the modeled ozone impacts of the new NO_X DERC limit in Section 3.7.4.2: *Discrete Emissions Reduction Credit (DERC) Sensitivity*.

Generating Credits from Area Sources

The previous rules allowed an area source to generate emission reduction credits (ERCs) from emission reductions that are demonstrated to be real, quantifiable, permanent, enforceable, and surplus to the SIP and all applicable rules, and DERCs from reductions

that are real, quantifiable, and surplus to the SIP and all applicable rules. However, research into the feasibility of generating area source credits has uncovered significant implementation issues associated with ensuring that area source credits meet the EPA and Federal Clean Air Act (FCAA) requirements.

Under the EBT rules, an area source is a stationary source that is not required to submit an annual emissions inventory (EI) under §101.10(a) based on the quantity of emissions from the source (e.g., an account that emits less than 10 tons per year (tpy) of volatile organic compounds (VOC) or 25 tpy of NO_X in an ozone nonattainment area). Examples of area sources include, but are not limited to, upstream oil and gas production, painting operations, gasoline stations, dry cleaners, and residential fuel combustion. Although emissions from individual area sources are relatively small, area sources are numerous enough to collectively emit significant quantities of air pollution and must be accounted for in the EI. Area sources are too small and too numerous to be inventoried individually. For this reason, emissions from area sources are estimated at the county level using information such as population, emission factors, and activity or production data. County level emission estimates make it very challenging to demonstrate that a particular emission reduction is surplus to the SIP EI.

To effectively implement an area source EBT program, facility-specific EI information is required for an individual site to be eligible to generate credits. It may also be necessary

to require facility-specific EI information from all sites in an area source category to ensure that any credits generated are surplus to the emissions represented in the SIP. Once inventoried as an individual regulated entity, the area source is required to submit detailed EIs annually and this facility-specific information is included in subsequent SIPs. To generate an ERC, an area source is also required to make the emission reductions permanent and federally enforceable through permitting actions or other federally enforceable means. Many of these area sources are typically authorized with a permit by rule, which may not currently require registration. Satisfying these requirements creates a significant regulatory and financial responsibility for these area sources, which are typically small businesses. To be eligible to generate credits, these sources would incur costs associated with the completion and submittal of an annual EI and permitting documents. A *de minimis* reporting threshold for area sources may need to be established so that only sources able to generate a significant amount of credits could submit inventories in recognition of the impact on these sources as well as the commission resources needed to process the inventories and credits.

Based on these implementation issues, the commission proposed to remove the provisions for generating ERCs and DERCs from area sources. The commission received significant public comment opposing the removal of these area source credit provisions. Therefore, the commission is retaining the rules that allow an area source to generate credits. The commission emphasizes that significant issues remain with generating

credits from area sources in a manner consistent with federal requirements. The commission will seek further input from interested parties on how this type of credit generation can be implemented so that area source credits meet FCAA requirements. As noted in the proposal preamble concerning the possibility of retaining these provisions, all of the proposed changes to the ERC and DERC Program rules in Chapter 101, Subchapter H, Divisions 1 and 4 also apply to area sources in the adopted rules.

Generating Credits from Mobile Sources

The previous rules allowed a mobile source to generate ECs from emission reductions that are demonstrated to be real, quantifiable, permanent, enforceable, and surplus to the SIP and all applicable rules, and DECs from reductions that are real, quantifiable, and surplus to the SIP and all applicable rules. However, research into the feasibility of generating mobile source credits has uncovered significant implementation issues associated with ensuring that mobile source credits meet FCAA requirements.

Mobile sources are categorized as on-road and non-road sources and are defined at §101.300(16) and §101.370(17) as "on-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels)." The on-road sources include automobiles, buses, trucks, and other vehicles traveling on local and highway roads. Non-road sources are any mobile combustion sources, such as

locomotives, marine vessels, off-road motorcycles, snowmobiles, lawn/garden equipment, and farm, construction, and industrial equipment.

The mobile source EI used in attainment demonstration (AD) SIP revisions relies on historical and future-year emission estimates. Since there are several million mobile sources in the state, it is unrealistic to have line-item emission estimates in the SIP for each one. Also, since there is no registration database for non-road equipment, it is impossible for the TCEQ to know about individual equipment owners, hours of use, model years of new purchases, ages of in-use equipment, etc. Instead, the commission uses computer models, such as the Motor Vehicle Emission Simulator and Texas NONROAD, to estimate the emissions from mobile sources based on fleet-average characteristics. The models used account for emission reductions from mobile sources that are subject to the EPA rules for engine manufacturers. For these sources, the future-year emission estimates are usually lower than the historical emissions because of the ongoing fleet turnover benefits from replacing older higher-emitting engines with newer lower-emitting units that meet more stringent standards. Proving that an emission reduction from a specific mobile source is surplus to the SIP and not accounted for through fleet turnover is very challenging.

Federal law allows only the EPA and the State of California to establish engine certification standards for mobile sources. In the 1990s, it was feasible to generate ECs

and DECs from mobile sources because California standards were more stringent than the EPA standards, and there was not a requirement for California-certified vehicles or equipment to be used in Texas. However, changes in federal emission standards have essentially aligned the EPA and California standards in regards to emissions certification for mobile sources. In addition, the burden of meeting on-road vehicle and non-road equipment emission standards falls with the manufacturer and not the purchaser. As long as the vehicle or equipment met the standards in place at the time it was manufactured, the owner may operate it in most parts of Texas for years without demonstrating that the equipment consistently meets the original emissions certification standards, although annual emissions testing of on-road vehicles is required in some areas.

Based on these implementation issues, the commission proposed to remove the provisions for generating credits from mobile sources. Similar to the provisions regarding area sources, the commission received significant public comment opposing the removal of these mobile source credit provisions. Therefore, as with the area source credit provisions, the commission is retaining the rules that allow a mobile source to generate credits. The commission emphasizes that significant issues remain with generating credits from mobile sources in a manner consistent with federal requirements. The commission invites input from interested parties on how this type of credit generation can be implemented so that mobile source credits meet FCAA

requirements. Additionally, because the provisions for generating mobile credits (§101.304 and §101.374) were proposed to be repealed without any changes proposed but are being retained at adoption, the provisions in other rule sections that would affect mobile source credits are also not being adopted. In many parts of the rules, the language prior to proposal is being retained, but in places where changes are needed for credits generated by stationary sources, there will be separate provisions for mobile source and stationary source credits.

Using Allowances to Satisfy NNSR Offset Requirements

The rulemaking revises the MECT and HECT rules to provide clarity and additional flexibility for the use of allowances for NNSR offsets. The previous MECT rules limited the use of allowances for offsets to a new or modified facility that either did not have an administratively complete application for a permit under 30 TAC Chapter 116 before January 2, 2001, or did not qualify for a permit by rule under 30 TAC Chapter 106 and commence construction before January 2, 2001. The rulemaking expands the rules to provide for the use of MECT allowances to satisfy NO_X offset requirements for any facility in the HGB area that is required to participate in the MECT Program as described in §101.351. The rulemaking also continues to provide for the use of HECT allowances to satisfy VOC offset requirements for any facility in Harris County that is required to participate in the HECT Program as described in §101.391 and §101.392. The previous MECT and HECT rules only addressed the use of allowances for the one-to-one

portion of the offset requirement. The rulemaking expands the rules to provide for the use of allowances to satisfy any portion of the NNSR offset requirement. The revisions provide additional flexibility and do not adversely affect air quality because the amount of allowances in the MECT and HECT caps will not increase. The expansion of the rules to provide for the use of allowances to satisfy the environmental contribution portion of the NNSR offset requirement could ultimately cause a permanent reduction in the overall MECT and HECT caps because the allowances used to satisfy the environmental contribution portion of the offset requirement will be permanently retired, will not be used to simultaneously comply with the MECT or HECT Programs, and will not be returned when the facility shuts down.

Demonstrating Noninterference under FCAA, Section 110(l)

The commission provides the following information to demonstrate why the adopted amendments do not negatively affect the status of the state's progress towards attainment with the ozone NAAQS, do not interfere with control measures, and do not prevent reasonable further progress toward attainment of the ozone NAAQS.

General Revisions

The adopted rulemaking includes various administrative changes and other changes that are intended to provide flexibility in a manner consistent with the requirements in the SIP. The commission has determined that these rule changes will not increase

emissions (and therefore, will not negatively affect the status of the state's progress towards attainment with the ozone NAAQS), will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS.

DERC Use in the DFW Area

The adopted rulemaking replaces the previous annually calculated NO_X DERC limit with a fixed limit of 17.0 tpd of NO_X DERC use in in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. The prior methodology used to calculate the NO_X DERC limit incorporated emission reductions from annual mobile fleet turnover. The NO_X DERC limits range from 3.2 tpd for 2009 to 42.8 tpd for 2015. These fluctuations are most often related to the use of on-road Federal Motor Vehicle Control Program values that continuously change in a nonlinear manner based in part on the vehicle-age distributions, vehicle populations, and vehicle-miles-traveled distributions by vehicle type.

A modeling sensitivity run was performed for the proposed rulemaking and indicated the 17.0 tpd limit does not substantively affect future design values in the DFW area for the 2008 eight-hour ozone NAAQS by causing any additional monitor to exceed the standard by 2018. Additionally, the modeling sensitivity run and current monitoring data show attainment with the 1997 eight-hour ozone NAAQS by 2018. However, on

December 23, 2014, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) ruled on a lawsuit filed by the Natural Resources Defense Council, which resulted in vacatur of the EPA's December 31 attainment date for the 2008 ozone NAAQS. As part of the EPA's *Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements*; *Final Rule* (2008 ozone standard SIP requirements rule), published in the *Federal Register* on March 6, 2015 (80 FR 12264), the EPA modified 40 Code of Federal Regulations (CFR) §51.1103 consistent with the D.C. Circuit Court decision to establish attainment dates that run from the effective date of designation, i.e., July 20, 2012, rather than the end of the 2012 calendar year. As a result, the attainment date for the DFW moderate nonattainment area has changed from December 31, 2018 to July 20, 2018. In addition, because the attainment year ozone season is the ozone season immediately preceding a nonattainment area's attainment date, the attainment year for the DFW moderate nonattainment area has changed from 2018 to 2017. While the modeling sensitivity run at proposal was for 2018, the results of that modeling run represent the best data available at this time concerning the effect of the 17.0 tpd limit on DERC use in the DFW 1997 eight-hour ozone nonattainment area. Details regarding the modeled ozone impacts of the new NO_X DERC limit are provided in Section 3.7.4.2: *DERC Sensitivity* of the *Attainment Demonstration SIP Revision for the DFW 2008 Eight-Hour Ozone Nonattainment Area* adopted concurrently with this rulemaking. Since this current modeling shows attainment with the 1997 eight-hour

ozone NAAQS and that this limit does not substantively affect future design values in the DFW area for the 2008 eight-hour ozone NAAQS, the commission considers the 17.0 tpd limit on NO_X DERC use consistent with the attainment and maintenance of the 1997 and 2008 ozone NAAQS.

Given the large fluctuations in the prior DERC limit and the results of the modeling sensitivity, the commission has determined that the rule change will not negatively affect the status of the state's progress towards attainment with the 1997 and 2008 ozone NAAQS, will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the 1997 and 2008 ozone NAAQS.

Allowances Used for NNSR Offset Requirements

The adopted rulemaking revises the MECT and HECT rules to provide clarity and additional flexibility for the use of allowances for NNSR offsets. The rulemaking expands the rules to provide for the use of MECT allowances to satisfy NO_X offset requirements for any facility in the HGB area that is required to participate in the MECT Program. The rulemaking for the MECT and HECT Programs expands the rules to provide for the use of allowances to satisfy any portion of the NNSR offset requirement. The additional flexibility provided by the revisions does not adversely affect air quality because the amount of allowances in the MECT and HECT caps will not increase. Additionally, the use of allowances to satisfy the environmental contribution portion of

the NNSR offset requirement will ultimately cause a permanent reduction in the overall MECT and HECT caps because these allowances will be permanently retired and not be returned when the facility shuts down. Therefore, the commission has determined that these adopted rule changes do not negatively affect the status of the state's progress towards attainment with the 1997 and 2008 ozone NAAQS, do not interfere with control measures, and do not prevent reasonable further progress toward attainment of the 1997 and 2008 ozone NAAQS.

Based on this analysis, the commission has determined that the adopted rulemaking will not negatively affect the status of the state's progress towards attainment with the 1997 and 2008 ozone NAAQS, will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the 1997 and 2008 ozone NAAQS.

Section by Section Discussion

General Revisions

The commission proposed grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the *Texas Legislative Council Drafting Manual,* August 2014. Such changes include the appropriate and consistent use of acronyms, defined terms, singular nouns, punctuation, section references, and certain terminology like "may," "may not,"

"shall," and "must." Revisions are adopted throughout the rules where needed to conform to the *Texas Legislative Council Drafting Manual* guidance for rule language, such as changing "in the event that" to "if," "on or after" a date to "after" with one calendar day earlier, "prior to" to "before," "pursuant to" to "under," "provided in" to "provided by," and "Web site" to "website." However, these changes are not adopted in provisions relating to mobile source credits because these provisions were originally proposed for deletion.

In the rules, the term "executive director" is used as defined at 30 TAC §3.2(16) to include any staff member designated to act on behalf of the executive director of the agency; for the adopted rules, this use also means the staff in the EBT Program. Except in parts of the rule that were proposed for repeal but retained at adoption, for consistency, references to "owner" or "operator" are changed to "owner or operator" to indicate that these entities share the responsibility for certain actions in the rules. Throughout the parts of the rules not related to mobile source credits, the phrase "law, rule, regulation, or agreed order" in its entirety or in part is changed to "requirement" for conciseness. In many cases, this phrase is used in conjunction with "local, state, and/or federal." Where these words are in a different order, they are changed to this order for consistency. Where the phrase "local, state, and/or federal requirements" is used in the rules or where the prior variations in wording are retained for mobile source credits, the commission means any such requirement that is legally enforceable against

the owner or operator of the facility, including all laws, ordinances, rules, regulations, agreed orders, authorization limits, and similar requirements. The use of this phrase in the rules refers to the most stringent requirement rather than allowing the applicant to choose among all the requirements. Additionally, if there are requirements that limit emissions in different ways (e.g., an annual emission limit and a limit on operating hours), all of these must be considered as a group to determine the actual regulatory limit for a facility.

Throughout the rules, references to the NNSR permitting rules are revised to Chapter 116, Subchapter B for consistency and to ensure the references include all appropriate NNSR rules. These changes are adopted even in provisions affecting mobile source credits because the original citation to 30 TAC §116.150 only applies to ozone nonattainment areas, so clarity that the provisions apply to nonattainment areas for other criteria pollutants that may be designated by the EPA are needed throughout the rules for credits that may be generated for other criteria pollutants to be available for offsetting purposes in the future. In some parts of the rules, the term "transfer" is changed to "trade" for consistency with the section titles; the use of "trade" is considered synonymous with "transfer" and is intended to include all types of transfers as well.

In the introductory paragraph of the definition section for each division, a sentence is added to specify that terms used in the rules have the normal meaning in the field of air

pollution control unless defined differently in 30 TAC §3.2 or §101.1 or in the Texas Clean Air Act. The prior sentence in the introductory paragraph of each definition section is revised slightly for readability. The revisions are consistent with the definition sections in other subchapters in Chapter 101.

At adoption, the proposed revisions to replace the phrase "emission credit" with "emission reduction credit" or "ERC" and "discrete emission credit" with "discrete emission reduction credit" or "DERC" are not made because of the retention of credit generation by mobile sources. Additionally, the proposed revisions to update form names and form designations to include the program acronym are not made in these rules to avoid having outdated form names and designations in the rules; the wording is changed to generic phrasing such as "application," "form," etc. The use of these more generic application form names does not change the content of the required information.

Division 1: Emission Credit Program

Related to the retention of credit generation by mobile sources, the title of this division is changed from "Emission Credit Banking and Trading" to "Emission Credit Program" rather than the proposed change to "Emission Reduction Credit Program." In the rules, "emission credit" is used to refer to credits in general (i.e., from stationary and mobile sources), "emission reduction credit" or "ERC" for credits only from stationary sources,

and "mobile emission reduction credit" or "MERC" for credits only from mobile sources. Throughout the division, the commission is removing requirements to submit EC certificates. The term "certificate" is not intended to mean a printed certificate but rather the record of the credit in the credit registry for consistency with current practice. This revision does not affect the way credits are generated, used, or traded. To ensure consistency with the retained provisions for mobile source credits, the commission is not adopting the proposed change of "certificate" to "identification number." Throughout the division, the commission is removing references to 30 TAC Chapter 114 because there are no longer any provisions therein for which credits can be used for compliance.

Section 101.300, Definitions

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any substantive proposed revisions to the following terms: "activity," "actual emissions," "curtailment," "emission reduction," "emission reduction strategy," "facility," "generator," "permanent," "protocol," "quantifiable," "real reduction," "shutdown," "strategic emissions," "surplus," and "user." The commission is not adopting the proposed revisions to avoid inconsistencies and confusion that may occur because of non-substantive differences between the definitions of the same term for facilities and mobile sources. These terms will continue to be defined as they were in the prior rules.

In addition, the commission is retaining the definitions that were proposed to be removed for the following terms: "emission credit," "mobile emission reduction credit," "mobile source," "mobile source baseline activity," "mobile source baseline emissions," and "mobile source baseline emission rate." The commission is not adopting the proposed removals because these definitions apply to mobile sources. These terms will continue to be defined as they were before proposal. The subsequent definitions are renumbered from proposal as needed.

As part of retaining provisions related to area sources, the definition of "area source" at §101.300(3) is not deleted, and the proposed numbering of subsequent definitions are revised. The definitions of "baseline activity" previously at §101.300(4) and "baseline emission rate" previously at §101.300(5) are deleted because they were not consistent with the calculation methodology used to generate ERCs and are redundant due to the adopted definition of "historical adjusted emissions."

The commission is amending the definition of "baseline emissions," renumbered as §101.300(4), to: 1) remove "actual" before "emissions" because the amount of actual emissions may be reduced in calculating emission reductions if they exceed a limit on the baseline emissions value; 2) change "prior to" to "before" for consistency with the *Texas Legislative Council Drafting Manual*; 3) add "implementation of" before "an

emission reduction strategy" for clarity; and 4) replace the phrase "the product of baseline activity and baseline emission rate not to exceed all limitations required by applicable local, state, and federal rules and regulations" with "the lowest of the facility's historical adjusted emissions or state implementation plan emissions" to better describe the values that limit baseline emissions. Because the definitions relevant to mobile sources are being retained, the commission notes that the definition of "baseline emissions" (i.e., for facilities) is adopted in a form that is significantly different than the definition of "mobile source baseline emissions," which reflects the differences in the provisions for generating credits from each of these types of sources.

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed definition of "compliance account" in §101.300(5) and the subsequent definitions are renumbered from proposal. This definition is not adopted to promote consistency between the rules for stationary and mobile sources and instead the commission will continue to generally refer to an account (also known as a portfolio) to specify where credits are held. The commission is not adopting the proposed removal of the definition of "emission credit," which will be renumbered as §101.300(7). At §101.300(8), a definition of "emission rate" is added to specify the facility's rate of emissions per unit of activity. The definition is the same as the prior definition of "baseline emission rate" and is being renamed because the term is used to describe a facility's emission rate in contexts other than determining the two-

year average baseline emissions. In renumbered §101.300(10), a change is made to the definition of "emission reduction credit" to specify that an ERC is expressed in tenths of a "ton per year" (rather than "tons per year") because ERCs are generated and used in these units.

A definition of "historical adjusted emissions" is added as §101.300(14), and the subsequent definitions are renumbered. The definition specifies that the facility's historical adjusted emissions before implementing the emission reduction strategy are calculated as the average emissions during any two consecutive years selected in accordance with §101.303(b)(2), not to exceed any (i.e., the most stringent overall) applicable local, state, or federal requirement. The definition contains the applicable portions of the previous definition of "baseline emissions" and the previous equation for calculating baseline emission in previous §101.303(c). Throughout the division, this term replaces other references to the facility's emissions before implementing the emission reduction strategy calculated as the average emissions during any two consecutive years. This term does not apply to ERCs generated from mobile sources, as it only applies to facilities.

The definition of "most stringent allowable emissions rate" previously at §101.300(20) is deleted because the term is not used in Division 1. Subsequent definitions are renumbered. The definition of "source" previously at §101.300(27) is deleted because it

is not needed. The only use of the word "source" in Division 1 is in terms like "area source" or "mobile source" that are defined separately.

For conciseness throughout Division 1, the term "state implementation plan emissions" is added as §101.300(27), and subsequent definitions are renumbered. In response to comments, this term was revised from proposal to make updates for area sources, clarify which SIP revisions are applicable, and to provide an additional option for generating ERCs once the area is designated nonattainment. Throughout the division, the commission uses this new term to replace other references to the EI used in the SIP.

SIP emissions are based on the emissions data for a full year (rather than just for part of a year, such as ozone season or winter months for carbon monoxide) in the state's EI required under 40 CFR Part 51, Subpart A for the year used to represent the facility's emissions in a SIP revision. However, these EI values are adjusted if necessary to ensure the SIP emissions used for the facility do not exceed any (i.e., the most stringent overall) applicable local, state, or federal requirement, regardless of whether the exceedances were included in the state's EI. The applicable SIP revision must be for the nonattainment area where the facility is located and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. For example, if an area were designated nonattainment for sulfur dioxide (SO_2) and ozone, the SO_2 SIP revision would not be used to determine the SIP emissions for a facility

applying for NO_X ERCs emissions; rather the ozone SIP would be used because it includes NO_X emissions, which are precursors to that criteria pollutant.

Subparagraph (A) requires a facility's SIP emissions to be determined from the EI year that was used to develop the projection-base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision for the current NAAQS, whichever was most recently submitted to the EPA. If neither of these SIP revisions has been submitted for the nonattainment area and the relevant pollutant, the applicable SIP revision listed in subparagraphs (B) - (D) must be used.

Subparagraph (B) requires a facility's SIP emissions to be determined from the EI year that was used to develop the projection-base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS, whichever was most recently submitted to the EPA. The SIP revisions specified in subparagraph (B) only apply if the AD or maintenance SIP revisions identified in subparagraph (A) have not been submitted to the EPA. If neither of these SIP revisions has been submitted for the nonattainment area and the relevant pollutant, the applicable SIP revision listed in subparagraph (C) or (D) must be used.

Subparagraph (C) requires a facility's SIP emissions to be determined from the EI year

that corresponds to the EI for the most recent EI SIP revision submitted to the EPA. For a new nonattainment area, an EI SIP revision is typically required to be submitted within two years after the effective date of the designation. The SIP emissions will no longer be determined from the EI SIP after an AD or maintenance plan SIP revision is submitted to the EPA for the current (or subsequent) NAAQS for the applicable criteria pollutant. The SIP revision specified in subparagraph (C) only applies if neither of the SIP revisions identified in subparagraphs (A) and (B) has been submitted to the EPA.

Subparagraph (D) requires a facility's SIP emissions to be determined from the EI year that corresponds to the EI that will be used for the EI SIP revision that will be submitted to the EPA. Subparagraph (D) only applies if the SIP revisions identified in subparagraphs (A) - (C) have not been submitted to the EPA. This option is being added in response to comments to ensure that credits can be generated beginning on the effective date of the nonattainment designation as opposed to restricting credit generation until after an EI SIP revision is submitted to the EPA, which could be two years after the effective date of the designation. The commission anticipates that the executive director will have determined the inventory year for the EI SIP either when, or shortly after, an area is designated nonattainment as part of the SIP planning process because there is a limited amount of time before the EI SIP is required to be submitted to the EPA. The commission encourages anyone interested in generating credits in a newly designated nonattainment area to contact the EBT program to determine the

appropriate year required to determine the SIP emissions.

An AD or maintenance plan SIP revision submitted for the previously issued NAAQS could be used even if this standard has been revoked, but only if it is for the same averaging time and form of the criteria pollutant. For example, the SIP emissions would be based on the EI year used in the AD or maintenance plan SIP revision most recently submitted to the EPA for the 1997 eight-hour ozone NAAQS until an AD or maintenance plan SIP is submitted for the 2008 (or any subsequent year) eight-hour ozone NAAQS for that area. However, if no AD or maintenance plan SIP has been submitted for any eight-hour ozone NAAQS, the SIP emissions would be based on the inventory year that was, or will be, used in the EI SIP submitted for that area even if an AD SIP revision was previously submitted for the one-hour ozone NAAQS in the area. If an AD or maintenance plan SIP has been submitted for the 1997 eight-hour ozone NAAQS and an EI SIP was later submitted for the 2008 eight-hour ozone NAAQS, the SIP emissions would continue to be based on the AD or maintenance plan SIP submitted for the 1997 eight-hour ozone NAAQS. However, if an AD or maintenance plan SIP was submitted for the one-hour ozone NAAQS and an EI SIP was later submitted for the 2008 eight-hour ozone NAAQS, the SIP emissions would be based on the EI SIP for 2008 eight-hour ozone NAAQS.

Section 101.301, Purpose

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the substantive proposed revisions to this section, except to remove the reference to the definition of facility in 30 TAC §116.10 since the term facility is already defined in this division; the word "another" is changed to "a" because the owner or operator of the facility whose emission reductions resulted in the generation of an ERC might choose to use the ERC for compliance purposes or netting; and the phrasing "reducing emissions beyond the level required by any local, state, and federal regulation" is changed to "reducing emissions beyond the level required by any applicable local, state, or federal requirement." The commission retains the phrase "or mobile source" that was proposed for removal.

Section 101.302, General Provisions

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting many of the proposed revisions to this section to avoid inconsistencies and confusion that may occur because of non-substantive differences for facilities and mobile sources.

In §101.302(a)(1), proposed as §101.302(a), the commission changes wording for clarity and consistency and changes the provisions for the inter-pollutant use of ERCs to a citation of §101.306(d) where the provisions for inter-pollutant use are covered. The

commission is also adopting §101.302(a)(2), which includes the prior rule language in §101.302(a) specific to mobile sources. The commission is keeping this language to ensure that the existing requirements for mobile sources are not affected by this rulemaking.

As part of retaining the provisions for mobile and area sources to generate credits, the commission is not adopting any of the proposed changes in §101.302(b) except that a citation to the federal conformity rules, 40 CFR Part 93, Subpart B, is added at adoption to §101.302(b)(3) (instead of to §101.302(b) as proposed) to replace the reference to §101.30, which no longer exists.

The commission is not adopting the proposed revision to the catch line in §101.302(c). At proposal, the commission requested comment on whether it was necessary to retain §101.302(c)(1)(D) or if the added definition of "SIP emissions" had made this subparagraph obsolete. Based on comments that it is not needed with the added definition of "SIP emissions," the commission is removing at adoption the proposed language in §101.302(c)(1)(D). As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed removal of §101.302(c)(2) or the proposed revisions to §101.302(c)(3), proposed as §101.302(c)(2), and these provisions will not be changed by this rulemaking.

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed changes to §101.302(d)(1). In §101.302(d)(1)(A) and (B), the phrase "the owner or operator of" is added to clarify that this person (rather than the facility) must quantify reductions. In §101.302(d)(1)(A), the citations of §117.210 and §117.1110 are deleted because these sections are in the process of being repealed from 30 TAC Chapter 117. At adoption, the commission is changing the phrase "the testing and monitoring methodologies identified" in the last sentence to "the testing and monitoring methodologies required under Chapter 117" because neither the provision nor the cited sections identify the testing and monitoring methodologies. The phrase "for that pollutant" is added to clarify that the testing and monitoring methodology in Chapter 117 must be for the same pollutant because there are different methodologies provided for different pollutants and the methodology for one pollutant is not appropriate for a different pollutant. Additionally, the commission notes that, in addition to the emission specifications for NO_X, there are emission specifications for carbon monoxide in some of the sections cited. The commission intends that this provision apply to both NO_X and carbon monoxide, as well as any other criteria pollutants if any emission specifications and testing requirements are adopted in the future. The commission recognizes that the emission specifications for carbon monoxide have not been submitted to the EPA for SIP approval, but the testing requirements that the provision requires to be used have been submitted.

In §101.302(d)(1)(B), a citation of 30 TAC Chapter 115 as a whole replaces the citations of specific sections to ensure that all monitoring and testing requirements are reflected. The clause "quantify volatile organic compound reductions using the testing and monitoring methodologies" is changed to "use the testing and monitoring methodologies" for conciseness and the word "identified" is changed at adoption to "required under Chapter 115" because §101.302(d)(1)(B) does not identify the testing and monitoring methodologies.

In response to an EPA comment about the protocol of any area source having to be submitted for EPA approval before use, the commission adds §101.302(d)(1)(C) at adoption, and the previous §101.302(d)(1)(C) is re-lettered as §101.302(d)(1)(D). Further, the commission intends adopted §101.302(d)(1)(C) to mean that the owner or operator of a facility (including an area source) that is not subject to any specific testing and monitoring requirements may use a protocol or EPA method that is approved by the executive director and submitted to the EPA for quantifying emissions from that source category, as long as it is the same specific type of facility. Therefore, the commission intends that only new protocols for facilities must be submitted for EPA approval, rather than requiring such review when there is already a protocol approved by the EPA for the same type of facility.

Because of the addition of §101.302(d)(1)(C), the commission adds at adoption to the

start of re-lettered §101.302(d)(1)(D) the clause "except as specified in subparagraph (C) of this paragraph" for clarity but is not removing the reference to mobile sources as was proposed. Because of the retention of credit generation by mobile sources, the commission is not adopting any of the proposed changes to §101.302(d)(1)(D)(i) and (ii) and these clauses will not be affected by this rulemaking.

In re-lettered §101.302(d)(1)(D)(iii), the phrase "the owner or operator of" is added to clarify that this person (rather than the facility) must use continuous emission monitoring system data if available for the facility. In re-lettered §101.302(d)(1)(D)(iii), the word "actual" is removed before "emissions" for clarity because the use of a continuous emissions monitoring system or predictive emissions monitoring system is not consistent with how the term "actual emissions" are defined. The commission is adopting the proposed non-substantive changes to §101.302(d)(1)(D)(iv) - (vi) to clarify the provisions.

In §101.302(d)(2), the phrase "required under" is changed to "specified in" because the referenced paragraph (1) does not itself require monitoring and testing data. At adoption, the commission is also adding "the facility" to clarify that these data substitution procedures only apply to facilities and not mobile sources, which is consistent with the prior rule. For clarity, the provision previously in §101.302(d)(3) requiring the use of the most conservative method is moved to paragraph (2). The word

"conservative" is intended to mean the method that results in the fewest ERCs generated or the most ERCs used (i.e., conservative of air quality). However, the requirement to use the most conservative method is not intended to override the requirement for using the methods listed in subparagraphs (A) - (F) in order of preference. Additionally, in the last sentence, the clause "the data is missing or unavailable" is inserted after the phrase "period of time" to clarify that the data substitution can only be used for the period when the monitoring required by Chapter 115 or 117 is not available. Using the data replacement requirements in Chapters 115 and 117 when monitoring equipment is not functioning properly does not require the use of alternate data for ERC generation or use. However, for ERC generation, adjustments may be required (such as cases where data substitution requires the use of higher values) to ensure that the reductions are real. For ERC use, the replaced data is used to determine the excess emissions to be covered. The provision in §101.302(d)(3) is changed to clarify that both a generator and user of ERCs who uses the alternative data allowed under §101.302(d)(2) must provide justification for not using the methods in §101.302(d)(1) and for the method used.

The provisions in §101.302(e)(2) are rewritten for clarity to specify that the executive director (i.e., program staff) must review an application. The changes also indicate that a number will be assigned to each ERC certified. Although not explicitly stated in the rule, the commission plans to continue the prior practice of assigning one number for multiple ERCs that are generated from the same site and expire on the same date. The

changes also indicate that a new number will be assigned when an ERC is partly used or traded. Although not explicitly stated in the rule, this provision includes separate numbers for the traded and retained credits if only part of an ERC is traded. For clarity, the phrase "and in compliance with all other requirements of this division" is added after the word "creditable" in the last sentence. The phrase "upon completion of the public comment period" in §101.302(e)(5) is changed to "after the EPA's 45-day adequacy review of the protocol" because the prior language is not consistent with the requirements of §101.302(d)(1)(D)(v) and (vi). Reductions quantified under a protocol that has not been submitted to the EPA for review after approval by the executive director cannot be certified until the EPA has received the protocol and had time to review it. The EPA can deny the use of a protocol even after the 45-day period has expired by printing its finding in the *Federal Register*; however, the commission does not want to delay the processing of Forms ERC-1 and ERC-3 more than necessary. If the EPA should deny the use of a protocol through *Federal Register* publication after that protocol has been used to certify ERCs, the commission will review the ERCs and make appropriate adjustments to the amount certified.

The commission revises §101.302(g) to make non-substantive wording changes to clarify that credit notices are submitted to the executive director rather than the credit registry. In §101.302(h) the word "immediately" is changed to "as soon as practicable" because all non-confidential information is added to the credit registry as the forms are processed,

so complete information is not available until the processing is complete. Upon completion, the information will be available in the registry. The revisions do not change the way EBT information is made available to the public and are only intended to more accurately reflect the process that has historically been used to disseminate this information.

Changes are adopted in §101.302(j) to change the term "an organization" to "a person" in two locations. The term "person," as defined in §3.2(25), includes organizations, individuals, and other legal entities and is used in the adopted language to better describe all that can participate in the ERC Program. As part of retaining provisions for mobile sources, other proposed changes are not made to the subsection.

The commission had proposed to remove prior §101.302(l), but it is retained as part of retaining provisions for mobile sources. The determination of ownership of ERCs has always been based on ownership of the facility at the time the emissions reduction is generated.

Section 101.303, Emission Reduction Credit Generation and Certification

In §101.303(a), the catch line "methods of generation" is changed to "emission reduction strategy" to have consistent use of the latter term throughout the division. In §101.303(a)(1), the word "methods" is changed to "strategies" to be consistent with the

use of "emission reduction strategy" elsewhere in Division 1. In §101.303(a)(1)(B) and (C), the phrase "level required of the facility" is changed to "baseline emissions for the facility" for consistency with the defined term and to clarify that the level is any (i.e., the most stringent overall) applicable local, state, or federal requirement. In §101.303(a)(2)(A), extra wording regarding "site" that is in the definition of "site" is removed. In §101.303(a)(2)(C), the phrase "the shutdown of" is deleted and wording is clarified to say that reductions from a facility that does not qualify as having SIP emissions are not eligible because all emission reductions from stationary sources that generate ERCs (not just those from shutdowns) must be from facilities that have SIP emissions.

In §101.303(b)(1), language changes specify that the SIP emissions set one possible upper limit for the baseline emissions used in certifying an ERC. Language pertaining to 30 TAC §116.170(b) is removed from §101.303(b)(1) because the applicable deadlines specified in §116.170(b) have passed and the language is no longer relevant. The commission revises §101.303(b)(2) to specify that the two years selected must be the same for the activity and emission rate used to calculate historical adjusted emissions. The commission also limits the period available for selecting the historical baseline years to the ten years before the emission reduction occurred. Since ERCs have been predominantly used for NNSR offsets, the change ensures consistency with the NNSR program by preventing the use of historical adjusted emissions from a period longer

than ten years if the year used to determine the facility's SIP emissions is more than ten years old.

In §101.303(c), the second sentence is deleted because it is not needed and only recapitulates how the term "strategic emissions" is defined. The equation for calculating ERCs generated in Figure: 30 TAC §101.303(c) is changed. The prior equation has been incorporated into the definition of historical adjusted emissions. The changes are intended to reflect the previous requirement that the baseline emissions value is the lowest value among the historical adjusted emissions, the SIP emissions, and any applicable local, state, or federal requirement. Therefore, a replacement equation is adopted that shows the amount of ERCs generated are the difference between the baseline emissions (i.e., whichever of the above values is lowest) and the strategic emissions.

The commission extends the deadline to submit an application for ERCs in §101.303(d)(1) from 180 days to two years after the implementation of the emission reduction strategy. The commission notes that with the retention of §101.304 at adoption without changes, applications for mobile ERCs will still have a deadline of 180 days. Because the commission proposed to repeal §101.304, the commission did not propose to change the deadline for submitting an application to certify mobile ERCs and did not take comment on any change of the deadline for submitting applications to

certify mobile ERCs. Therefore, the deadline in §101.304 for submitting an application to certify mobile ERCs remains at 180 days after implementation of the emission reduction strategy and will be different from the deadline for applications to certify ERCs from stationary sources. This change for stationary source ERCs does not alter the lifespan of an ERC, which continues to be five years after the implementation of the emission reduction strategy, but allows more time to submit the paperwork. This additional flexibility was requested by some stakeholders at the initiation of this rulemaking. A two-year period was chosen based on precedent in Pennsylvania's rules and because it should provide sufficient time for preparing the form while still leaving a substantial portion of the lifespan after certification. The use of "no more than two years after" is intended to mean two years to the day after the emission reduction strategy is implemented, so if implementation occurs on February 1, 2014, the owner or operator would have until February 2, 2016, to submit the application. The prior 180-day period in §101.303(d)(1) was originally promulgated to allow the commission to determine which reductions would be banked as ERCs and which would be permanently removed from the airshed since the minimum time needed for a modeling demonstration for a SIP revision is about six months. However, the adopted two-year period does not negate the provision in §101.302(c)(1)(C) that limits emission reductions used to generate ERCs to those that occurred after the year used to determine the SIP emissions. Because of the provisions of §101.302(c)(1)(C), the full two-year period in §101.303(d)(1) will not be available after adoption of a revised SIP until two years have passed after the EI year

used to determine the SIP emissions. If a SIP revision is adopted between the time the emission reduction strategy is implemented and the time the application is submitted, the commission will determine the amount of ERCs certified based on the most recently adopted SIP revision and not the SIP in place at the time the reduction is made. It is also possible that an application submitted after the commission proposes a SIP revision that affects the amount of ERCs that could be certified may not be approved before the commission adopts the SIP revision.

Non-substantive changes are made in §101.303(d)(3) to remove redundant language and ensure the consistent use of defined terms. In §101.303(d)(3)(D) and (E), the newly defined terms "historical adjusted emissions" and "SIP emissions" are specifically added to the list of required documentation. However, this change does not require the applicant to submit any information that is not currently required. Amendments in §101.303(d)(3)(F) remove the redundant phrase "for the applicable facility" because §101.303(d)(3) already requires this information to be submitted for all facilities and pollutants or precursors.

For conciseness, §101.303(d)(4)(C) is revised to cover the provisions previously in §101.303(d)(4)(D) and (E). The references to the Special Certification Form for Exemptions and Standard Permits (Form PI-8) are updated to the current Certification of Emission Limits (Form APD-CERT). Revisions to subparagraph (C) also indicate that

any facility without an NNSR permit that is otherwise authorized by commission rule (e.g., standard permit, standard exemption, or permit by rule) could make the reduction enforceable by certifying the emission reduction and the new maximum emission limit on a Form APD-CERT, other form considered equivalent by the executive director, or an agreed order. Prior §101.303(d)(4)(D) and (E) are deleted because they are no longer needed.

Section 101.304, Mobile Emission Reduction Credit Generation and Certification

The proposed repeal of §101.304 is not adopted, and this section will remain in the rules unchanged. Because no changes were proposed, the public had no opportunity to provide public comment; therefore, no changes are made in this section to be consistent with the other changes adopted for this division.

Section 101.306, Emission Credit Use

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed changes in §101.306(a) except as follows. A citation to the federal conformity rules, 40 CFR Part 93, Subpart B, is added to §101.306(a)(2) to replace the reference to §101.30, which no longer exists. The reference to Chapter 114 in §101.306(a)(3) is deleted because there are no longer any provisions in Chapter 114 for which credits can be used for compliance. In §101.306(a)(4), the reference to §116.150 is changed to Chapter 116, Subchapter B, and

at adoption the name of the chapter is referenced since the proposed mention of this chapter in a previous paragraph is not being adopted. Prior §101.306(a)(5) is deleted because the provisions for converting credits to allowances under the MECT Program have expired and the provisions for converting credits to allowances under the HECT Program are removed. Prior §101.306(a)(6) is deleted because the motor fleet requirements in §114.201 have been repealed. Because of the deletions, prior §101.306(a)(7) is renumbered as §101.306(a)(5), and rewording is made for conciseness.

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed changes in §101.306(b) except as follows. In §101.306(b)(1), the citation of §116.150 is changed to Chapter 116, Subchapter B. In §101.306(b)(2), references to Chapter 114 are removed because Chapter 114 no longer has any provisions for which credits can be used for compliance. The equations in Figure: 30 TAC §101.306(b)(2) and Figure: 30 TAC §101.306(b)(3) are updated to current figure format requirements. In §101.306(b)(3), references to §117.223 and §117.1120 are removed because these sections are repealed concurrent with this rulemaking.

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting many of the proposed revisions in §101.306(c). The catch line of §101.306(c) is not changed. The provision previously in §101.306(c)(1) is not

being removed and is instead being renumbered at adoption as §101.306(c)(2). The requirement to identify the ERCs to be used as offsets before permit issuance is deleted to allow additional time for obtaining the ERCs and to avoid the need to modify the permit if different ERCs are used as offsets than were originally intended. A catch line is being added to new paragraph (1) at adoption to clearly indicate that the provisions in this paragraph apply to applications to use ERCs. New paragraph (1) clarifies that the executive director will not accept an application to use ERCs until an ERC is available in the account (also known as a portfolio) for the site where the ERC will be used. Section 101.306(c)(1) also specifies that, if the ERC will be used for NNSR offsets, the executive director will not accept the use application before the applicable NNSR permit application is administratively complete.

Section 101.306(c)(1)(A), which was proposed as §101.306(c)(2)(A), is renumbered at adoption and requires the user to submit a completed application to use ERCs at least 90 days before the start of operation for an ERC used to satisfy NNSR offsets requirements. Adopted subparagraph (A) revises the requirement previously in §101.306(c)(1) to change the deadline for submitting the application from before construction to before the start of operation for consistency with NNSR requirements for the new or modified facility to obtain offsets before beginning operation. For consistency with NNSR requirements, adopted subparagraph (A) also removes the requirement previously in §101.306(c)(1) for users to identify ERCs prior to permit

issuance because this is not a requirement in the commission's NNSR permit program in Chapter 116, Subchapter B. However, any facility using the ERCs as NNSR offsets could not start operation until the use of the ERC as an offset is approved. Section 101.306(c)(1)(B), which was proposed as §101.306(c)(2)(B), is renumbered at adoption and requires the user to submit a completed application to use ERCs at least 90 days before the planned use for an ERC used for compliance with the requirements of Chapter 115 or 117 or any other program. Adopted subparagraph (B) revises the requirement previously in §101.306(c)(2) to remove the obsolete references to Chapter 114 and the original ERC certificate. Adopted subparagraph (B) also removes the redundant provision that users must keep records since this requirement is in §101.302(g). The provision that ERCs can only be used after executive director approval is deleted for consistency with the amendments made to §101.306(c)(1). Adopted §101.306(c)(1)(C), which was proposed as §101.306(c)(4), specifies that if the executive director approves the ERC use, the date the application is submitted will be considered the date the ERC is used.

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed removal of prior §101.306(c)(1) and is instead renumbering the provision as §101.306(c)(2)(A). A catch line is being added to paragraph (2) at adoption to clearly indicate that the provisions in this paragraph apply to applications to use MERCs. Adopted subparagraph (A) retains the prior requirements

except that some wording changes are included to indicate that these provisions only apply to MERCs, to remove a reference to the title of Chapter 116, and to remove the requirement to submit the original credit certificate. The commission notes that unlike the new provisions for ERCs in §101.306(c)(1)(A), the rules will continue to require MERCs used as NNSR offsets to be identified prior to permit issuance and require the application to use MERCs to be submitted prior to construction. As part of retaining the provisions for mobile sources to generate credits, at adoption the commission is renumbering prior §101.306(c)(2) as §101.306(c)(2)(B). Adopted subparagraph (B) retains the prior requirements except that some wording changes are included to indicate that these provisions only apply to MERCs, to remove the reference to Chapter 114 because there are no longer any provisions in Chapter 114 for which credits can be used for compliance, and to remove the requirement to submit the original credit certificate. In §101.306(c)(3), the proposed removal of language is not adopted, except for the removal of the unnecessary phrase "by the executive director's decision" after "affected person" since affected persons are those affected by the executive director's decision.

The commission is moving the specific provisions for the inter-pollutant use of ERCs (i.e., the substitution of an ERC certified for one criteria pollutant or precursor for another criteria pollutant or precursor) from §101.302(a) to §101.306(d) because this is the section pertaining to ERC use. Adopted subsection (d) revises the language moved

from §101.302(a) to limit inter-pollutant use to NO_X and VOC ERCs used as NNSR offsets. The changes are consistent with EBT guidance on inter-pollutant use of ERCs as offsets for NNSR permits. Adopted subsection (d) also revises the language moved from §101.302(a) to specify that NO_X and VOC ERCs may be used to meet the NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution. In response to comments, subsection (d) was revised to further clarify the requirements. The term "photochemical modeling" is used in place of the prior term "urban airshed modeling" because this older type of photochemical modeling software is no longer used extensively. The commission expects that any acceptable demonstration will use the photochemical modeling system used by the commission for the area's AD SIP. The language moved to §101.306(d) continues to require that the user receive approval from the executive director and the EPA before inter-pollutant use occurs.

Section 101.309, Emission Credit Banking and Trading

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed revisions in §101.309(a) and (b)(1), except for a non-substantive substitution of "before" for "prior to" in §101.309(b)(1). All ERCs with a ten-year lifespan have been used or have expired so the obsolete language in §101.309(b)(2) is deleted, and the subsequent paragraphs renumbered, but the

commission is not adopting any of the proposed revisions to the language in renumbered §101.309(b)(2). The language in renumbered §101.309(b)(3) is amended to remove the obsolete reference to paragraph (3) but none of the other proposed changes to this paragraph are being adopted. As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed revisions in §101.309(c), except changing the word "insure" to "ensure" for clarity and the phrasing "all current state and/or federal rules, regulations, or requirements which" to "all current local, state, and federal requirements that" for conciseness and consistency. In §101.309(d)(1), the proposed change to specify that a seller must submit the trade form is adopted, as well as substituting "before" for "prior to," but no other proposed changes are made. In §101.309(d)(2), the proposed wording changes for conciseness are adopted, but other proposed changes are not made. In §101.309(e), the proposed changes are not adopted, except that the reference to §116.150 is changed to Chapter 116, Subchapter B.

Division 3: Mass Emissions Cap and Trade Program

Section 101.350, Definitions

In §101.350(2), the commission defines the term "affected facility" as a facility subject to an emission specification in §§117.310, 117.1210, or 117.2010 that is located at a site subject to this division, and the subsequent definitions are renumbered. The definition of "banked allowance" at §101.350(4) is renamed as "vintage allowance" in adopted

paragraph (14) because this is the term commonly used.

In the definition of "broker account" at §101.350(6), the phrase "held in a broker account" is moved and "while" added at the beginning to make it clear that allowances can be used for compliance after being transferred from a broker account. The definition of "compliance account" at §101.350(7) is revised to clarify that the owner or operator (rather than a facility) holds allowances and that a compliance account must cover each affected facility at that site. In the definition of "control period" at §101.350(8), the word "begins" is changed at adoption to "began" because the initial control period is in the past.

A change is made to the definition of "existing facility" at §101.350(9). The first letter of "facility" is not capitalized to be consistent with the rest of the definitions and *Texas Register* formatting requirements. In §101.350(10), the definition of "Houston-Galveston-Brazoria ozone nonattainment area" is changed from a citation of the definition in §101.1 to a list of the counties in that area. This change is made to allow for flexibility if it is needed by the commission.

The definition of "person" at §101.350(12) is deleted and the subsequent definitions are renumbered. The term "person" is defined somewhat more broadly in §3.2, and that definition does not cause any issue with the single use of this term in Division 3. The

definition of "vintage allowance" is adopted as §101.350(14). The definition is meant to replace the definition of "banked allowance" with wording changes for clarity and conciseness.

Section 101.351, Applicability

In §101.351(a), the clause "and each affected facility at that site" is added to clarify that the division applies both to sites and the affected facilities located there. In §101.351(a)(1) and (2), rewording changes are made for conciseness, and the phrase "one or more" is added before "facilities" to clarify the division applies to a site with only one facility as well as with multiple facilities if the applicability criteria are met. In both paragraphs, the newly defined term "affected facility" is added. In §101.351(a)(2), the word "ten" is changed to the figure "10.0" for clarity only and is not intended to expand applicability to any sites not currently subject to the division.

Non-substantive changes are made to improve the readability of §101.351(b) and (c). Additionally, an error in §101.351(b) is corrected by changing the word "chapter" to "division" to clarify that the applicability section only applies to this division and not to the rest of Chapter 101. Brokers use broker accounts for holding MECT allowances for trading purposes, but neither is currently covered in §101.351; therefore, adopted subsection (d) clarifies that the requirements of this division also apply to brokers and broker accounts.

Section 101.352, General Provisions

Revisions in §101.352(a) clarify that an allowance can only be used by an affected facility and can only be used for a purpose described in the division. For clarity, §101.352(b) is amended to change "following the end of every control period" to "after each control period" and to specify that a site's compliance account must hold sufficient allowances to cover emissions from affected facilities. Amendments to §101.352(c) incorporate the newly defined term "affected facility" and to clarify that this provision only applies to generating NO_X ERCs. Revisions to §101.352(c)(1) require the permanent reduction of 1.0 tpy of allowances for 1.0 tpy of ERCs generated. In §101.352(c)(2), reference to the title of Division 1 is updated to reflect the change made to the title.

The provisions for using allowances for offsets in §101.352(e) are substantially rewritten for clarity and completeness. The prior provision only addressed using allowances for the one-to-one portion of the offset requirement and limits the use to facilities that do not meet the definition of an existing facility. This language is replaced with new provisions that are more complete and specify the requirements for using MECT allowances for offset purposes in NNSR permits. Subsection (e) specifies that allowances could be used for any part of the offset requirement if the use is authorized in the NNSR permit for an affected facility that is subject to the MECT Program.

Adopted §101.352(e)(1) requires the owner or operator to use a permanent allowance allocation equal to the amount specified in the NNSR permit to offset NO_X emissions from an affected facility. Only current allowances can be used for NO_X offsets. Adopted §101.352(e)(1) clarifies that a vintage allowance or an allowance allocated based on permit allowable emissions, as described under §101.353, cannot be used as an offset. Vintage allowances cannot be used to satisfy offsets because the amount of available vintage allowances cannot be determined until after the end of a control period, but the NO_X emission increase from the affected facilities must be offset at all times. The use of vintage allowances results in a lapse in compliance for the period between the start of a control period and the determination that vintage allowances remain in the compliance account. Adopted §101.352(e)(1) clarifies that an allowance used for offsets may not be banked, traded, or used for any other purpose other than simultaneous use for MECT compliance. Adopted §101.352(e)(1) also indicates that allowances used for offsets may be used simultaneously for compliance with the MECT Program as allowed in §101.354(g), which is consistent with the previous requirements in this subsection.

Adopted §101.352(e)(2) requires the owner or operator to permanently set aside allowances for offsets by submitting an application form at least 30 days before the start of operation of the affected facility. Adopted §101.352(e)(2)(A) specifies that the executive director will permanently set aside in the site's compliance account an allowance allocation equal to the amount specified to be used for the one-to-one portion

of the offset ratio. Allowances that are no longer required to be "used" for the one-to-one portion of the offset ratio may be returned in accordance with paragraph (3) of this subsection. The permanent set-aside will help ensure that the total amount of allowances allocated to the compliance account is at least the amount required to be used for the one-to-one portion of the offset ratio because the owner will not be able to trade allowances that would cause the account to drop below that amount. Adopted subparagraph (A) specifies that if the allowances set aside for offsets devalue in accordance with §101.353(d), such that the total allocation balance in the compliance account falls below the amount required in the NNSR permit for offsets, the owner or operator is required to submit an application at least 30 days before the shortfall to revise the amount of allowances set aside for offsets. The owner or operator can either obtain an additional permanent allocation of allowances sufficient to ensure the compliance account balance is equal to the amount of allowances required to be set aside for the one-to-one portion of the offset ratio or, if the NNSR permit authorizes the use of credits for offsets, the owner or operator can revise the amount of allowances set aside for offsets. The owner or operator also needs to submit the appropriate form for the credit use in accordance with the requirements in §101.306 or §101.376.

Instead of being permanently retired to satisfy the offset requirement for the life of the facility, allowances must be surrendered annually in order to be used to satisfy both the annual MECT compliance obligation and the one-to-one portion of the offset ratio for

each year the facility is in operation. Therefore, if the annual allocation is later reduced to reflect new or existing SIP requirements in accordance with §101.353(d), it is possible for the amount of allowances deposited into the site's compliance account to be less than the amount of allowances required to be set aside for the one-to-one portion of the offset ratio. An owner or operator that elects to use allowances for the one-to-one portion of the offset ratio is responsible for ensuring the site's compliance account contains sufficient allowances at all times to ensure compliance with the offset requirement in the NNSR permit and for MECT compliance. Adopted subparagraph (A) also clarifies that at the end of each control period, the executive director will deduct from the site's compliance account all allowances set aside as offsets regardless of whether the actual NO_X emissions from the affected facility are less than this amount.

Adopted §101.352(e)(2)(B) specifies that the executive director will permanently retain an allowance used for the environmental contribution portion of the offset ratio. Adopted subparagraph (B) prohibits an allowance used for the environmental contribution portion of the offset ratio from being used for compliance with this division. Subparagraph (B) also specifies that allowances set aside for this purpose will not devalue due to regulatory changes because this portion of the offset requirement is met when the allowances are permanently retired prior to the start of operation. If an allowance used for the environmental contribution portion of the offset ratio is later released in accordance with §101.352(e)(3)(A), the allowance could then be used for

compliance with this division and would again be subject to any devaluation due to regulatory changes, including any devaluations that occurred while the allowances were being used for offsets.

Adopted §101.352(e)(3)(A) allows the user to submit a request to the executive director to release allowances set aside for any portion of the offset ratio if the user receives authorization in the NNSR permit for the affected facility to use an alternative means of compliance (i.e., credits) for the NO_X offset requirement. Adopted §101.352(e)(3)(B) allows the user to submit a request to the executive director to release allowances set aside for the one-to-one portion of the offset ratio if the user permanently shuts down the affected facility, but not for allowances set aside for the environmental contribution portion of the offset requirement. If a request submitted under §101.352(e)(3)(A) or (B) is approved, the release becomes effective in the control period following the date that the alternative means of offsetting takes effect, and allowances will not be released retroactively for any previous control periods.

For consistency, non-substantive amendments are made in §101.352(g) to use the term "traded" and to indicate that allowances are expressed in tenths of a ton. The phrase "to determine the number of allowances" is deleted because it is not necessary. Because the calculation of retained allowances is done in conjunction with subtracting the amount used, the clause "the number of allowances will be rounded down to the nearest tenth

when determining excess allowances and rounded up to the nearest tenth when determining allowances used" is shorted to "the number of allowances will be rounded up to the nearest tenth of a ton when determining allowances used." An amendment is made in §101.352(h) to specify the owner or operator is responsible for using a single compliance account for all affected facilities at a site under common ownership or control. In §101.352(i), an amendment specifies that the executive director (rather than the commission) will maintain a registry of the allowances in both compliance and broker accounts.

Adopted §101.352(j) is added to specify that if there is a change in ownership of a site subject to the MECT Program, the new owner of the site is responsible for complying with the requirements of this division beginning with the control period during which the site was purchased. The owner of the site at the end of the control period (December 31) is responsible for demonstrating compliance for the entire control period. This provision is intended to clarify which party the commission will hold accountable for MECT compliance and does not preclude the two parties from arranging for compliance as part of the sale of the site. Subsection (j) requires the new owner to contact the EBT Program to request a compliance account for the site. The provision ensures that the executive director has accurate information about the owner or operator that is responsible for demonstrating compliance with the MECT Program. Subsection (j) also clarifies that the new owner must acquire allowances in accordance with the banking

and trading provisions in §101.356. If any allowances are being transferred to the new owner as part of the change of site ownership, the original owner must submit the appropriate trade forms in accordance with the rules in §101.356.

Section 101.353, Allocation of Allowances

Amendments in §101.353(a) clarify that the executive director deposits allowances. The prior equation for allocating MECT allowances in Figure: 30 TAC §101.353(a) is replaced with a simpler equation and updated to current formatting standards. The obsolete factors B (baseline emission rate) and X (reduction factor) in the prior equation are removed because the deadlines have passed where these would affect the calculation. In the prior equation the product of X times B is subtracted from B; since X became equal to 1.00 in 2004, B minus B times 1.00 is zero, which does not affect the calculation. The revisions retain the main portion of the equation wherein allocations are determined based on the average historical level of activity and the emission factor from Chapter 117.

Non-substantive changes in §101.353(b)(1) - (4) replace "and/or" with "or" because a facility is either new or modified, indicate that the owner or operator rather than a facility submits an application, and update terminology. The provisions previously in §101.353(b)(5) are combined into §101.353(b)(4) by using the defined term "existing facility."

The requirements previously in §101.353(c) are moved to §101.354(h) because this section contains the provisions related to deducting allowances from a site's compliance account.

The obsolete provision previously in §101.353(d)(1) that the executive director will allocate allowances initially by January 1, 2002, is removed. The provision for subsequent allocations previously in §101.353(d)(2) is re-lettered as §101.353(c) and specifies that the executive director will allocate and deposit allowances into each compliance account by January 1 of each year. Prior §101.353(e) and (f) are re-lettered as §101.353(d) and (e) respectively with non-substantive changes to use active rather than passive voice. In re-lettered subsection (e), the word "following" is changed to "based on" to clarify that the addition or deduction of allowances from a compliance account is based on the reported emissions with possible adjustments to correct errors noted in review of an annual compliance report, rather than in an unspecified manner after the review. The deadline previously in §101.353(g)(1) has passed, so this obsolete provision is deleted, with §101.353(g)(2) and (3) redesignated as §101.353(f)(1) and (2), respectively. Revisions to redesignated §101.353(f)(1) include updating the citation for the variable related to allowances allocated based on permit allowable emissions. In prior §101.353(h), which is re-lettered as §101.353(g), the phrase "activity levels" is changed twice to "level of activity" for consistency with the defined term.

Section 101.354, Allowance Deductions

In §101.354(a), amendments specify that the deduction of allowances is the responsibility of the executive director and that the amount deducted is equal to the NO_X emissions from all affected facilities. The phrase "based upon" is changed to "quantified using" for clarity.

Amendments in §101.354(b) clarify that the substitute data will be used to quantify (rather than report) emissions. The provision to use the equation currently provided in Figure: 30 TAC §101.354(b) instead of the listed substitute data sources is deleted because there are no limitations or accuracy requirements for the substitute data used with the equation; changing the provision to make the equation the required method for calculating emissions using the listed substitute data is not made because the equation is not appropriate for all the substitute data (such as a continuous emissions monitoring system that directly monitors emissions). The last sentence previously in §101.354(b) is moved with non-substantive changes to §101.354(b)(1) and requires the owner or operator to submit the justification for not using the monitoring required by Chapter 117 and for using the method selected. In §101.354(b)(2), the commission specifies that the executive director will deduct allowances equal to the NO_X emissions quantified under this subsection plus an additional 10% if emissions are quantified under subsection (b) due to non-compliance with the Chapter 117 monitoring and testing requirements. This

additional amount of allowances ensures that the emissions reported using alternate data are at least the amount that would have been deducted if required monitoring data had been used to calculate emissions. The temporary failure of a monitoring device is not considered noncompliance for the purpose of this subsection if the owner or operator repairs or replaces it in a reasonable time. In such cases, any applicable Chapter 117 data substitution provisions will be used to calculate emissions. If no data substitution provisions are specified in Chapter 117 for a monitoring device that failed, the substitute data in §101.354(b) will be used to quantify the NO_X emissions for the period of time the required data is missing.

In §101.354(d) the term "banked" is changed to "vintage" for consistency with the revisions to these terms in §101.350. Changes in §101.354(e) specify the executive director is responsible for the deduction of allowances and clarify that the owner or operator is required to submit the documentation.

In §101.354(f), the citation for allowable allowances is updated to reflect the changes to the equation in Figure: 30 TAC §101.353(a), and the phrase "other facilities at the same site during the same control period" is changed to "any other facility" for conciseness. Allowable allowances can only be used by the specific facility to which the allowances are allocated in the control period in which the allowances are allocated and cannot be banked, traded, used for offsets, or used for any purpose other than compliance with

this section.

The redundant provision in §101.354(g) is removed because §101.352(b) already requires the site's compliance account to hold a quantity of allowances equal to or greater than the total NO_X emissions emitted by March 1 after every control period. Adopted §101.354(g) specifies that the amount of allowances deducted from a site's compliance account to cover the actual NO_X emissions from the affected facilities as calculated under subsection (a) will be reduced by the amount of allowances deducted for the one-to-one portion of the NNSR offset requirement in accordance with §101.352(e)(2)(A). Consistent with the previous provisions in §101.352(e), adopted subsection (g) provides a mechanism for deducting allowances when used simultaneously for the one-to-one portion of the NNSR offset requirement and compliance with the MECT Program. The executive director will first deduct from a site's compliance account all allowances set aside for the one-to-one portion of the NNSR offset requirement in accordance with §101.352(e)(2)(A). Then, the executive director will deduct from a site's compliance account allowances equal to the amount of allowances required to cover the actual NO_X emissions from affected facilities as calculated under §101.354, less the amount of allowances already deducted for the one-to-one portion of the NNSR offset requirement under §101.352(e)(2)(A). If the amount of allowances deducted under §101.352(e)(2)(A) is greater than the amount of allowances calculated under §101.354, no additional allowances will be deducted to

demonstrate compliance with §101.354.

The requirements previously in §101.353(c) are moved to §101.354(h) and (h)(2) because §101.354 contains provisions related to allowance deductions. Consistent with previous §101.353(c), §101.354(h) specifies that if the NO_X emissions from the affected facilities during a control period exceed the amount of allowances in the site's compliance account on March 1 following that control period, the executive director will reduce allowances for the next control period by an amount equal to the emissions exceeding the allowances in the site's compliance account plus an additional 10%. Adopted §101.354(h)(1) specifies that if the site's compliance account does not hold sufficient allowances to accommodate this reduction, the executive director will issue a Notice of Deficiency and require the owner or operator to obtain sufficient allowances within 30 days of the notice. This new requirement is based on a similar requirement in the HECT rule and is necessary to ensure an owner or operator resolves any deficiencies in a timely manner. Consistent with previous §101.353(c), §101.354(h)(2) clarifies that these actions do not preclude additional enforcement action by the executive director.

Section 101.356, Allowance Banking and Trading

Non-substantive changes in §101.356(a) - (c) update the formatting. Changes in §101.356(a) also include the use of the new term vintage allowance. The provisions previously in §101.356(d) - (f) are consolidated to minimize repetition and shorten the

rules. The provisions previously in §101.356(d)(2), (e)(2), and (f)(2) are combined in §101.356(d). Adopted subsection (d) requires the seller to submit the appropriate trade application to the executive director at least 30 days before the allowances are deposited into the buyer's account and specify that the completed application must show the amount of allowances traded and, except for trades between sites under common ownership or control, the purchase price per ton of allowances traded.

The provisions previously in §101.356(d)(1) and (3), (e)(1), and (f)(1) are combined into subsection (d)(1) - (3), respectively. Subsection (d)(1) requires the seller to submit an application in order to trade a current allowance or vintage allowance for a single year and specify that trades involving allowances needed for compliance with a control period must be submitted on or before January 30 of the following control period. Subsection (d)(2) requires the seller to submit an application to permanently trade ownership of any portion of the allowances allocated annually to an individual facility. Subsection (d)(3) requires the seller to submit an application to trade any portion of the individual future year allowances to be allocated annually to an individual facility.

The provisions previously in §101.356(d)(4), (e)(3), and (f)(3) are combined in §101.356(e) and revised to indicate that information regarding the quantity and sales price of allowances will be made available to the public as soon as practicable because time is needed for the submitted forms to reach the EBT and to be processed before

information is posted on the MECT website. The information will be available in the registry. The revisions do not change the way EBT information is made available to the public and are only intended to more accurately reflect the process that has historically been used to disseminate this information. The provisions previously in §101.356(d)(5), (e)(4), and (f)(4) are combined in §101.356(f) and revised to indicate that the executive director will send letters to the seller and buyer if the trade is approved or denied. If approved, the trade is final on the date of the letter from the executive director.

There are still allowances based on permit allowable limits rather than historical emissions for certain facilities at three sites. Although no more allowable allowances will be certified, the previous provisions limiting trading are still needed until those allowances are recertified or voided. Therefore, the provision that allowable allowances cannot be banked or traded previously in §101.356(g)(1) is redesignated as §101.356(g). The provision previously in §101.356(g)(2) for allowances allocated before January 1, 2005 is no longer needed because these allowances have expired and is deleted.

Non-substantive changes are made to the provisions for using DECs for MECT compliance in §101.356(h) to update terminology and references. The provisions in §101.356(h)(2) - (4) are deleted because they are obsolete and subsequent paragraphs are renumbered. Prior §101.356(h)(5) and (6) are renumbered as §101.356(h)(2) and (3) with non-substantive changes to be clear that a ton-for-ton substitution is intended. At

adoption, changes are made to §101.356(h), §101.356(h)(1), and renumbered §101.356(h)(5) to reinstate the use of "MDERCs" where this acronym was proposed for deletion, and in renumbered §101.356(h)(3), the proposed addition of "by a stationary source" is removed. In renumbered §101.356(h)(5) changes improve the grammar and specify that the owner or operator of the site must submit the required application and to remove the requirement to submit the DEC certificate(s). Prior §101.356(h)(7) and (10) are combined as §101.356(h)(6) with changes to remove the obsolete dates, update formatting, and change the word "shall" to "may" to clarify that the executive director has discretion in whether to approve the use of DERCs for MECT compliance. Similar to this last change, in §101.356(h)(6)(A) the wording "approval will be given to use" is changed to "the executive director may approve the use of" to specify that the executive director has discretion to deny the use if needed. In §101.356(h)(6)(B), non-substantive changes clarify the meaning, and the word "ton" is added at adoption in the location where it was inadvertently left out at proposal. The obsolete provisions in §101.356(i) are removed since all ERCs that could be converted to MECT allowances have been used or have expired.

Section 101.358, Emission Monitoring and Compliance Demonstration

Section 101.358 is repealed. In 2000, more specific provisions were adopted in §101.354, so these provisions are now obsolete.

Section 101.359, Reporting

In §101.359(a), amendments change the clause "beginning March 31, 2003, for each control period" to "no later than March 31 after each control period" because the start date is now obsolete and the new language is clearer. Revisions clarify that the owner or operator, rather than a facility, is required to file the annual compliance report. The phrase "by March 31 of each year" is deleted because it is not needed with the initial change made to the subsection. The word "detailing" is changed to the phrase "which must include" because the listed information is all required for an annual compliance report. In §101.359(a)(1) the phrase "from applicable facilities at the site" is added to clarify that only NO_X emissions subject to Division 3 are to be reported. The term "affected facility" is not used here because §101.354(e) may require reporting information for a facility that is not an affected facility. In §101.359(a)(4), the phrase "activity level" is changed to "level of activity" to be consistent with how the term is defined in §101.350; in the second sentence, the term "level of activity" is inserted before emission factor because it is appropriate to reference previously submitted documentation of either of these factors instead of appending another copy with each report submitted.

The commission adopts §101.359(a)(5) to require detailed documentation on NO_X emissions from each facility not subject to an emission specification under §117.310 or §117.2010 that result from changes made after December 31, 2000, to an affected facility

as required in §101.354(e).

In §101.359(b), an amendment clarifies that the owner or operator of a site, rather than the site itself, is responsible for submitting an annual compliance report. Subsection (c) provides a mechanism to allow the owner or operator of a site that has been subject to Division 3 to stop filing an annual compliance report annually if the site no longer has any affected facilities. To do so, the owner or operator must send a letter documenting why the site no longer has any affected facilities. Once approved by the executive director, the owner or operator can stop submitting an annual compliance report. The subsection provides that if an affected facility is brought back onto the site, reporting must resume; the criteria for site applicability in §101.351(a) are not relevant to determining if the new facility is subject to Division 3 because the site remains subject to MECT until it is permanently shut down.

Section 101.360, Level of Activity Certification

The deadline of June 30, 2001, for certifying historical level of activity in §101.360(a) is deleted because it is obsolete; although the deadline for filing an application to certify the level of activity has passed, certain facilities could still certify activity if any provision in §101.360(a)(1) - (3) is met. For clarity, a new sentence is added to put "as follows" near "historical level of activity" rather than after the list of supporting documentation. For consistency, the revisions in §101.360(a)(2) use the term "existing facility" instead of

including a description of this already defined term.

In §101.360(b)(1), the word "certify" is moved and the word "from" changed to "after" to improve the readability. In §101.360(c) "such" is changed to "the" because a specific certification is referenced. In the last sentence of §101.360(c) "or no later than 90 days from the effective date of this rule, whichever is later" is deleted so that the certification period is not restarted by revisions to this section for facilities that have been subject to the division for more than 90 days.

Division 4: Discrete Emission Credit Program

Related to the retention of credit generation by mobile sources, the title of this division is changed from "Discrete Emission Credit Banking and Trading" to "Discrete Emission Credit Program" rather than the proposed change to "Discrete Emission Reduction Credit Program." Throughout the division, the commission removes requirements to submit DEC certificates but is not adopting the proposed revision to change the term "certificate" to "identification number" for consistency with the retained rules for mobile sources. This revision does not affect the way DERCs are generated, used, or traded. Throughout the division, the commission removes references to Chapter 114 because there are no longer any provisions therein for which DECs can be used for compliance.

Section 101.370, Definitions

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the substantive proposed revisions to the following terms: "activity," "actual emissions," "curtailment," "emission reduction," "emission reduction strategy," "facility," "generator," "protocol," "real reduction," strategy activity," "strategy emission rate," "surplus," "use period," and "user." The commission is not adopting the proposed substantive revisions to avoid inconsistencies and confusion that may occur because of non-substantive differences between the definitions of the same term for facilities and mobile sources, but some non-substantive revisions are adopted for conciseness and consistency. These terms will continue to be defined as they were in the prior rules.

In addition, the commission is retaining the definitions that were proposed to be removed for the following terms: "area source," "discrete emission credit," "mobile discrete emission reduction credit," "mobile source," "mobile source baseline activity," "mobile source baseline emissions," and "mobile source baseline emissions rate." The commission is not adopting the proposed deletion of these terms because these definitions apply to mobile and area sources. These terms will continue to be defined as they were before proposal. The definitions of "baseline activity" at §101.370(4) and "baseline emission rate" at §101.370(5) are deleted because the terms are not needed with revisions to the definition of baseline emissions. The subsequent definitions are

renumbered.

The definition of "baseline emissions," renumbered as §101.370(4) is revised to add the phrase "implementation of" before "an emission reduction strategy" for consistency; and add the phrase "the lowest of the facility's historical adjusted emissions or state implementation plan (SIP) emissions" to describe the values that limit baseline emissions. In response to a comment from the EPA, wording is added at adoption to §101.370(4) to clarify that the SIP emissions are only considered for a facility in a nonattainment area (i.e., for a facility in an attainment area or unclassifiable area, the fact that there are no SIP emissions does not mean that the value for SIP emissions equals zero but instead that only the baseline emissions and regulatory limits are used to calculate the amount of reduction). However, if an attainment or unclassifiable area is redesignated nonattainment for a criteria pollutant, for generating DECs after the redesignation, SIP emissions are used in calculating any DECs for the criteria pollutant for which the area is designated nonattainment or its precursors. At adoption, the word "actual" is removed before "emissions" because it is inconsistent with the definitions of "historical adjusted emissions" and "state implementation plan emissions," which may be lower than actual emissions.

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed definition of "compliance account" in

§101.370(5), and the subsequent definitions are renumbered. This definition is not adopted to promote consistency between the rules for stationary and mobile sources, and instead the commission will continue to generally refer to an account (also known as a portfolio) to specify where credits are held. The commission is not adopting proposed §101.370(7) to define the "Dallas-Fort Worth area" as the counties that have been designated by EPA as nonattainment for the 1997 eight-hour ozone NAAQS. Instead, the rules are revised to indicate the specific affected counties to more clearly indicate the area subject to the limit on the use of NO_X DERCs in §101.376(f). This term is only used in the rule in regards to the NO_X DERC limit in the DFW area. The subsequent definitions are renumbered.

The definition of "emission rate" is added as §101.370(9), defining the term as the facility's rate per unit of activity, not to exceed regulatory limits. The definition is the same as the previous definition of "baseline emission rate" and is being renamed because the term is used to describe a facility's emission rate in context other than determining the two-year average baseline emissions.

The definition of "historical adjusted emissions" is added as §101.370(15), and the subsequent definitions are renumbered. The definition specifies that a facility's historical adjusted emissions before implementing the emission reduction strategy are calculated as the average emissions during any two consecutive years selected in

accordance with §101.373(b)(2), not to exceed any applicable local, state, or federal requirement. Throughout the division, the commission uses this term to replace other references to the facility's emissions before implementing the emission reduction strategy calculated as the average emissions during any two consecutive years.

At adoption in the definition of "mobile discrete emission reduction credit" at §101.370(16), the commission removes the alternate term "discrete mobile credit" because it is not used in Division 4. The definition of "most stringent allowable emissions rate" previously at §101.370(21) is deleted because the term is not used in Division 4. The definition of "permanent" previously at §101.370(23) is deleted because this term is not relevant to DECs, which are normally certified from temporary emission reductions. The renumbering of subsequent definitions is revised.

Although the term "real reduction" is not used in Division 4, the proposed changes to the definition of the term at §101.370(25) are not made at adoption as part of retaining the provisions for mobile source credits. In the definition of "shutdown" at §101.370(26), the word "permanent" is deleted because a shutdown can be permanent or temporary; the use of the term "shutdown" in the rules includes "permanent" where appropriate, so it is not needed in the definition. The definition of "source" previously at §101.370(29) is deleted because it is not needed because all terms using this word in Division 4 are defined separately.

For conciseness throughout Division 4, the term "state implementation plan emissions" is added as §101.370(29), and subsequent definitions are renumbered. In response to comments, this term was revised from proposal to make updates for area sources, clarify the applicable SIP revisions, and to provide an additional option for generating ERCs once the area is designated nonattainment. Throughout the division, the commission uses this new term to replace other references to the EI used in the SIP.

SIP emissions are based on the emissions data for a full year (rather than just for part of a year, such as ozone season or winter months for carbon monoxide) in the state's EI required under 40 CFR Part 51, Subpart A for the year used to represent the facility's emissions in a SIP revision. However, these EI values are adjusted if necessary to ensure the SIP emissions used for the facility do not exceed any (i.e., the most stringent overall) applicable local, state, or federal requirement, regardless of whether the exceedances were included in the state's EI. The applicable SIP revision must be for the nonattainment area where the facility is located and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. For example, if an area is designated nonattainment for SO_2 and ozone, the SO_2 SIP revision would not be used to determine the SIP emissions for a facility applying for NO_X ERCs emissions; rather the applicable ozone SIP would be used because it includes NO_X emissions, which are precursors to that criteria pollutant.

Subparagraph (A) requires a facility's SIP emissions to be determined from the EI year that was used to develop the projection-base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the EPA for the current NAAQS. If neither of these SIP revisions has been submitted for the nonattainment area and the relevant pollutant, the applicable SIP revision listed in subparagraphs (B) - (D) must be used.

The AD and maintenance SIP revisions specified in subparagraph (B) only apply if the AD and maintenance SIP revisions identified in subparagraph (A) have not been submitted to the EPA. Subparagraph (B) requires a facility's SIP emissions to be determined from the EI year that was used to develop the projection-base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the EPA for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS. If neither of these SIP revisions has been submitted for the nonattainment area and the relevant pollutant, the applicable SIP revision listed in subparagraph (C) or (D) must be used.

The SIP revision specified in subparagraph (C) only applies if neither of the SIP revisions identified in subparagraphs (A) and (B) has been submitted to the EPA.

Subparagraph (C) requires a facility's SIP emissions to be determined from the EI year that corresponds to the EI for the most recent EI SIP revision submitted to the EPA. For a new nonattainment area, an EI SIP revision is typically required to be submitted within two years after the effective date of the designation. The SIP emissions will no longer be determined from the EI SIP after an AD or maintenance plan SIP revision is submitted to the EPA for the current (or subsequent) NAAQS for the applicable criteria pollutant.

Subparagraph (D) only applies if the SIP revisions identified in subparagraphs (A) - (C) have not been submitted to the EPA. Subparagraph (D) requires a facility's SIP emissions to be determined from the EI year that corresponds to the EI that will be used for the EI SIP revision that will be submitted to the EPA. This option is being added in response to comments to ensure that credits can be generated beginning on the effective date of the nonattainment designation as opposed to restricting credit generation until after an EI SIP revision is submitted to the EPA, which could be two years after the effective date of the designation. The commission anticipates that the executive director will have determined the inventory year for the EI SIP, either when or shortly after an area is designated nonattainment as part of the SIP planning process, because there is a limited amount of time before the EI SIP is required to be submitted to the EPA. The commission encourages anyone interested in generating credits in a newly designated nonattainment area to contact the EBT program to determine the appropriate year

required to determine the SIP emissions.

An AD or maintenance plan SIP revision submitted for the previously issued relevant NAAQS could be used even if this standard has been revoked, but only if it is for the same averaging time and form of the criteria pollutant. For example, the SIP emissions would be based on the EI year used in the AD or maintenance plan SIP revision most recently submitted to the EPA for the 1997 eight-hour ozone NAAQS until an AD or maintenance plan SIP is submitted for the 2008 (or any subsequent year) eight-hour ozone NAAQS for that area. However, if no AD or maintenance plan SIP has been submitted for any eight-hour ozone NAAQS, the SIP emissions would be based on the inventory year that was, or will be, used in the EI SIP submitted for that area even if an AD SIP revision was previously submitted for the one-hour ozone NAAQS in the area. If an AD or maintenance plan SIP has been submitted for the 1997 eight-hour ozone NAAQS and an EI SIP was later submitted for the 2008 eight-hour ozone NAAQS, the SIP emissions would continue to be based on the AD or maintenance plan SIP submitted for the 1997 eight-hour ozone NAAQS. However, if an AD or maintenance plan SIP was submitted for the one-hour ozone NAAQS and an EI SIP was later submitted for the 2008 eight-hour ozone NAAQS, the SIP emissions would be based on the EI SIP for 2008 eight-hour ozone NAAQS.

Section 101.371, Purpose

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed substantive revisions to this section to avoid inconsistencies and confusion that may occur because of non-substantive differences for facilities and mobile sources. Two proposed non-substantive changes are adopted for consistency with other changes in the rules: the phrase "operator of a facility" is changed to "the owner or operator of a facility;" and the phrasing "reducing emissions beyond the level required by any local, state, and federal regulation" is changed to "reducing emissions beyond any applicable local, state, or federal requirement."

Section 101.372, General Provisions

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting many the proposed revisions to this section to avoid inconsistencies and confusion that may occur because of non-substantive differences for facilities and mobile sources. In some subsections, separate provisions are adopted for stationary and mobile sources; the differences between the provisions for each type of source are not intended to convey significant differences between the types of sources, but only reflect the differences in the prior and amended language.

For consistency with the corresponding provision in Division 1, revisions to §101.372(a)

for stationary sources specify that DERCs can be generated from a reduction of a criteria pollutant, excluding lead, or a precursor of a criteria pollutant instead of specifically listing the criteria pollutants and precursors. This change allows for new federal criteria pollutants, such as particulate matter with an aerodynamic diameter of 2.5 micrometers or less. The provisions for the inter-pollutant use of DERCs is moved to §101.376 where the other provisions for use are already covered. For mobile sources, at adoption the commission is adding back the original language on the applicable pollutants.

For §101.372(b), the commission is retaining at adoption the original language as part of the retention of provisions for area and mobile source credits, except that the prior citation of §101.30, which no longer exists because it was made obsolete by 40 CFR Part 93, is replaced with a citation of 40 CFR Part 93, Subpart B.

At adoption, the proposed change to the catch line of §101.372(c) is not made so that the subsection will continue to apply to both DERCs and MDERCs. The revisions in §101.372(c)(1) remove unnecessary language for conciseness, update the language to reflect the definition of SIP emissions, and clarify that the requirement for the emission reduction to occur at a facility with SIP emissions only applies in a nonattainment area. The proposed deletion of §101.372(c)(2) and proposed changes to §101.372(c)(3) are not adopted so that the provisions for mobile sources are retained at adoption.

As part of retaining the provisions for mobile source credits, the proposed changes to §101.372(d)(1) are not adopted, so the language remains unchanged in this specific part of the rule, but changes are made in the subparagraphs under this paragraph. In §101.372(d)(1)(A) and (B), which apply to stationary sources only, the addition of "the owner or operator of" clarifies that the person (rather than the facility) must quantify reductions, but the proposed addition of the pollutants covered in Chapters 115 and 117 is changed at adoption to a reference to the methodologies required by each chapter. The proposed deletion of two citations in §101.372(d)(1)(A) and the change of the listed citations in §101.372(d)(1)(B) to a citation of all of Chapter 115 are adopted as well as the proposed wording changes for conciseness. In response to comments from the EPA that all protocols for credits from area sources must be approved by the EPA, the commission is revising at adoption subparagraph (A) by adding "for that pollutant" at the end to help clarify that, while the state has only submitted the Chapter 117 emission specifications for NO_X to the EPA, the monitoring and testing protocols for other pollutants regulated under Chapter 117 have been submitted to the EPA for approval and therefore could be used to quantify emissions from affected facilities. A similar provision for other criteria pollutants was proposed as §101.372(d)(1)(C) to clarify that monitoring and testing required by commission rules must be used to quantify reductions, but based on the EPA comment, the commission is rewriting at adoption this provision to specify that the executive director can approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility

or mobile source. Because the change at adoption in §101.372(d)(1)(C) is a case where the provision in §101.372(d)(1)(D) would not be followed, the clause "except as specified in subparagraph (C) of this paragraph" is added at adoption to the beginning of §101.372(d)(1)(D). In §101.372(d)(1)(D)(i), the proposed changes are not adopted as part of the retention of mobile source credits. In §101.372(d)(1)(D)(ii) - (vi), only the proposed non-substantive wording changes for clarity are adopted.

In §101.372(d)(2), the phrase "required under" is changed to "specified in" because the referenced paragraph (1) does not itself require monitoring and testing data. Based on EPA comment, the phrase "that period of time" is changed at adoption to "the period of time" for consistency with the similar provision for ERCs; additionally "the facility's" is added at adoption before "emissions" for clarity. For clarity, the provision previously in §101.372(d)(3) requiring the use of the most conservative method is moved to paragraph (2). In the last sentence of §101.372(d)(2), the phrase "the data is missing or unavailable" is inserted after the revised phrase "the period of time" to clarify that the data substitution can only be used for the period when the monitoring required by Chapter 115 or 117 is not available. Using the data replacement requirements in Chapters 115 and 117 when monitoring equipment is not functioning properly does not require the use of alternate data for DERC generation or use. However, for DERC generation, adjustments may be required (such as cases where data substitution requires the use of higher values) to ensure that the reductions are real. For DERC use, the replaced data is

used to determine the excess emissions to be covered. In §101.372(d)(3), the proposal to expand the provision to users as well as generators is adopted.

In §101.372(e) - (l), only the proposed non-substantive changes for clarity and consistency are adopted to avoid making any substantive changes that could affect provisions for mobile source credits, except that in §101.372(k), the proposed change of the word "company" to "person" in two locations is adopted for consistency with the definition of "person" in §3.2. For consistency, in §101.372(e)(4) the phrase "its allowable emission limit" is replaced with "any applicable local, state, or federal requirement." The commission had proposed to remove §101.372(m). However, as part of retaining the provisions for mobile sources to generate credits, previous §101.372(m) is being retained.

Section 101.373, Discrete Emission Reduction Credit Generation and Certification

In §101.373(a), the catch line "methods of generation" is changed to "emission reduction strategy" to have consistent use of the latter term throughout the division. In §101.373(a)(1)(A) and (B), a wording change was proposed to clarify that the emissions "level required of the facility" is any applicable local, state, or federal requirement, but at adoption, the proposed wording "any applicable local, state, or federal requirement for the facility" is changed to "the baseline emissions for the facility" in both §101.373(a)(1)(A) and (B) for consistency with the definition of "baseline emissions." In

§101.373(a)(1)(B), the phrase "other than a shutdown or curtailment" is added after "a change in the manufacture process" because emission reductions from a shutdown or curtailment are not eligible for generating DERCs.

Non-substantive changes are made throughout §101.373(a)(2) for clarity and to update terms. In §101.373(a)(2)(A), wording changes clarify that DERCs cannot be generated from temporary or permanent curtailments consistent with the EPA's *Improving Air Quality with Economic Incentive Programs,* January 2001. In §101.373(a)(2)(E), the term "emissions" is changed as proposed to "activity" and the wording "that occurred as a result of transferring activity to another facility" is changed at adoption to "from the shifting of activity from one facility to another facility" for increased clarity. Emissions are not transferred between facilities but emissions from a facility will increase if the activity of another facility is transferred to it. Language changes in §101.373(a)(2)(H) clarify that, for a facility under a flexible permit, the sum of the emission reduction and the emissions from all facilities in the group under the permit limit (including the facility with the reduction) does not exceed the permit limit for the entire group. For consistency among the divisions in this subchapter, in §101.373(a)(2)(J) the addition of "Division 2" and "Division 6" is adopted. The revision is consistent with current practice and the EPA's Economic Incentive Programs (EIP) guidance that DERCs cannot be generated from facilities subject to a cap and trade program to avoid double-counting of the emission reduction (since the allowance would still be available for use). In

§101.373(a)(2)(K), the phrase "the shutdown of" is deleted because the prohibition on shutdowns is already in subparagraph (A), the phrase "located in a nonattainment area" is added to clarify that the requirement for the facility to have SIP emissions only applies in nonattainment areas, and wording changes are made to be consistent with the defined term "state implementation plan emissions."

The catch line of §101.373(b) has "emissions" added for clarity and consistency with the ERC rules. In §101.373(b)(1), language changes specify that the SIP emissions set one possible upper limit for the baseline emissions used in certifying a DERC only for a facility in a nonattainment area. At adoption, the wording is changed to clarify that the pollutant being reduced must be the same criteria pollutant for which the area is designated nonattainment or a precursor of that criteria pollutant. Language pertaining to §116.170(b) is removed from §101.373(b)(1) since the applicable deadlines specified in §116.170(b) have passed and the language is no longer relevant. The commission revises §101.373(b)(2) to specify that the two years selected must be the same for the activity and emission rate used to calculate historical adjusted emissions. The commission also limits the period available for selecting the historical baseline years to the ten years before the emission reduction occurred. The change ensures consistency with the NNSR program by preventing the use of historical adjusted emissions from a period longer than ten years if the year used to determine the facility's SIP emissions is more than ten years old. At adoption, "emissions rate" is changed to "emission rate" to be consistent

with the definition of the term.

Non-substantive changes in §101.373(b)(3) clarify that it is the historical adjusted emissions that are being determined. At adoption, the wording changed to clarify that the pollutant being reduced may not be the same criteria pollutant for which the area is designated nonattainment or a precursor of that criteria pollutant. The commission revises §101.373(b)(4) to clarify that a new baseline must also be established if the commission adopts a revision to the SIP for the area where the facility is located to account for potential changes to the facility's SIP emissions. Because the emission reduction must be surplus to the SIP and former emission reductions are included in a new or revised SIP, continuing to use an emission reduction strategy that has since been incorporated into a SIP is not allowed. The sentence clarifies that ongoing emission reduction strategies can only be used to generate DERCs until they are incorporated into a SIP.

Changes in §101.373(c) reformat the equation and update language. Because DERCs can no longer be generated from emission reductions from shutdowns, reference to shutdowns previously in §101.373(c)(1) is deleted, and prior §101.373(c)(3) and (4) are deleted. The previous equation was adopted to preclude generating DERCs from a curtailment, as prohibited by §101.373(a)(2)(A), and does not contemplate a scenario where the strategic activity is higher than the average actual activity used for calculating

the historical adjusted emissions. However, if the strategic emission rate is sufficiently lower than the SIP emission rate, the previous equation could calculate an amount that exceeds the actual emission reduction, although certification of DERCs that are not real reductions is prohibited by §101.372(c)(1)(A). Additionally, the amount of emission reduction calculated using the equation must be adjusted using the provision previously in §101.373(c)(2) to determine the actual quantity of DERCs certified. At adoption, the commission is updating the definitions of the variables of the equation for consistency with definitions of the terms; this change is a non-substantive correction that was inadvertently not revised at proposal. At adoption, wording is added to §101.373(b)(1) and (3) and §101.373(c)(2) to clarify that the pollutant being reduced must be the same criteria pollutant for which the area is designated nonattainment or a precursor of that criteria pollutant (e.g., NO_X and VOC for ozone). In response to comments from the EPA, the commission adds at adoption §101.373(c)(3) to clarify that the pollutant being reduced must be the same criteria pollutant for which the area is designated nonattainment or a precursor of that criteria pollutant. The removal of prior §101.373(c)(3) and (4) is adopted because these paragraphs are not needed since DERCs can no longer be generated from shutdowns.

In §101.373(d)(1), the changes include substituting at adoption the generic wording "the application form designated by the executive director" in place of the specific form name and designation, as well as changing as proposed the word "or" to "and" to simplify the

requirement to submit an application to use DERCs within 90 days after each 12-month generation period and 90 days after the generation period ends, regardless of length. This submission schedule is consistent with the definition of "generation period" in the current and revised rules because each generation period cannot exceed 12 months.

In §101.373(d)(3), the generic wording "application form" is substituted at adoption for the proposed form designation. The provision at §101.373(d)(3)(C) is deleted because generation from shutdowns has been prohibited for several years, and subsequent subparagraphs are re-lettered. Prior §101.373(d)(3)(D) is re-lettered as §101.373(d)(3)(C). Prior §101.373(d)(3)(F) and (G) are re-lettered as §101.373(d)(3)(E) and (F) respectively and amended to specifically add the newly defined terms "historical adjusted emissions" and "SIP emissions" to the list of required documentation. This change does not require the applicant to submit any information that is not currently required. The proposed revision to re-lettered §101.373(d)(3)(E) to change the word "strategy" to "strategic" is not made at adoption because the proposed changes to the definitions in §101.370 are not adopted. Amendments to re-lettered §101.373(d)(3)(G) remove the word "applicable" before the word "facility" because it is not needed. Prior §101.373(d)(3)(I) and (J) are re-lettered as §101.373(d)(3)(H) and (I) respectively with non-substantive updates to terminology. The prior use of "discrete emission credits" in re-lettered §101.373(d)(3)(I) was not appropriate because §101.373 only applies to DERCs, not MDERCs.

Section 101.374, Mobile Discrete Emission Reduction Credit Generation and Certification

The proposed repeal of §101.374 is not adopted, and this section will remain in the rules unchanged. Because no changes were proposed, there was no opportunity for public comment; therefore, no changes are made in this section to be consistent with the other changes adopted for this division.

Section 101.376, Discrete Emission Credit Use

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed changes in §101.376(a) except as follows. In §101.374(a)(4), the proposed change of the phrase "facility or mobile source operators" to "the user" is adopted for clarity and conciseness. Because §101.376(a)(5) only applies to DERCs, for conciseness, this paragraph is rewritten and rule references are updated. The commission is adding at adoption new paragraph (6), which is based on the requirements in paragraphs (1) and (2) that DECs be in the user's account (also known as a portfolio) before and during the use period. New paragraph (6) specifies that a DERC may not be used unless it is available in the account for the site where it will be used. Because of the retention of provision for mobile sources, the proposed changes to §101.376(a)(1) and (2) are not made since the provisions therein will apply to all DECs, but this proposed provision is moved at adoption to the added §101.376(a)(6) and will

only apply to DERCs but not MDERCs. Prior §101.376(a)(6) and (7) are deleted because these requirements are included in §101.376(f).

As part of retaining provisions for mobile source credits, the proposed revisions in §101.376(b) are not made at adoption. At adoption, the commission is adding language to the retained provisions for new source review permits in §101.376(b)(2)(C) to limit the requirements to applying only to MDERCs. At adoption, §101.376(b)(2)(D), proposed as §101.376(b)(2)(E) for using DERCs for NNSR offsets, requires the user to submit an application form specified by the executive director at least 90 days before the start of operation and before continuing operation for any subsequent period for which the offset requirement was not covered under the initial application. The commission will allow the user to submit one application to use DERCs for offsets to reduce the regulatory burden associated with the previous requirement to submit an application annually. The submission deadline is consistent with corresponding provisions in the ERC Program. In §101.376(b)(3), the prior citation of §101.356(g) is changed to §101.356(h) because of reformatting in that section. In §101.376(b)(4), the obsolete reference to Chapter 114 is deleted.

In §101.376(c), proposed changes that would affect mobile source credits are not adopted except the following: 1) the proposed revision of the citation to the MECT rule in §101.376(c)(4) is retained because it was made for reformatting in the MECT rule and

the insertion of the acronym "EPA" is also retained because it is used later in this section; and 2) the proposed changes in §101.376(c)(7) are adopted because they only apply to DERCs, with a change at adoption to remove a reference to flow control that was inadvertently not proposed for removal, which is non-substantive and helps ensure consistency with other changes made in this division.

As part of retaining provisions for mobile source credits, the commission is not adopting the proposed revision in §101.376(d) except as follows. The submittal deadline for the application in §101.376(d)(1)(B)(i) for NO_X DERC use in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties was proposed to be changed from August 1 to October 1 of the year before the DERC is requested to be used as provided by §101.376(f)(4). However, because of public comment that this change would not allow adequate time to find an alternative method of compliance if needed, this proposed change is not adopted and the August 1 deadline is substituted at adoption for October 1. In §101.376(d)(1)(B)(ii), the commission provides the submission date for using DERCs and MDERCs for MECT compliance that is currently in §101.356(h). At adoption, the commission is adding §101.376(d)(1)(B)(iii), which was proposed as §101.376(d)(6), to specify that the application to use DERCs for NNSR offsets is required to be submitted by the date in §101.376(b)(2)(E) (i.e., 90 days prior to the start of operation). The provisions currently in §101.376(d)(1)(B)(ii), which was proposed as clause (iii), is renumbered as clause (iv) at adoption but the proposed non-substantive

changes are not adopted. In §101.376(d)(1)(D)(v), which was proposed to be renumbered §101.376(d)(1)(D)(iv), the proposed renumbering and removal of "or mobile source" are not adopted, but the proposed change of "applicable regulatory requirements" to "applicable local, state, and federal requirements" is adopted for consistency with the rest of the rules. At adoption, the commission is adding the word "number" in §101.376(d)(1)(D)(ix) to indicate that the certificate number, but not the certificate itself, is required to be included in the application.

The catch line for §101.376(d)(2) was for DERCs rather than DECs, although the provisions for this paragraph are for DECs; therefore, as part of retaining provisions for mobile source credits, the catch line is corrected at adoption. The language in §101.376(d)(2)(A) is modified to remove references to §117.223 and §117.1120 because these sections are repealed concurrent with this rulemaking. These citations are also deleted where they appear in the definitions of variables in the equations in this subparagraph. Revisions to the equations in clauses (i) and (ii) update Figure: 30 TAC §101.376(d)(2)(A)(i) and Figure: 30 TAC §101.376(d)(2)(A)(ii) to current formatting standards and define variables in the order that they appear in the equation. Revisions to the equations in §101.376(d)(2)(B) and (C) update Figure: 30 TAC §101.376(d)(2)(B) and Figure: 30 TAC §101.376(d)(2)(C) to current formatting standards and define variables in the order that they appear in the equation. At adoption, the first variable in the equations in Figure: 30 TAC §101.376(d)(2)(B) and Figure: 30 TAC

§101.376(e)(2)(B) is changed to "DECs" for readability. At adoption, the commission moved the requirements proposed in §101.376(d)(6) to §101.376(d)(1)(B)(iii).

As part of retaining provisions for mobile source credits, the commission is not adopting the proposed revisions in §101.376(e) except as follows. The proposed paragraphs (1) - (3) in §101.376(e) are not adopted, and the proposed renumbering of subsequent paragraphs is not made at adoption. The citations in §101.376(e)(1)(A) and (B) are corrected to refer to the environmental contribution in §101.376(d)(2)(D). In adopted §101.376(e)(2), the acronym "DERC" had been used in error in the rule prior to proposal, as evidenced by the equations that indicate it applies to all DECs, so a change is made at adoption to correct. In the equation in Figure: 30 TAC §101.376(e)(2)(A) and Figure: 30 TAC §101.376(e)(2)(B), the first variable in the equation is revised at adoption from "DERCs" to "DECs."

The form that was specified in §101.376(e)(3) is changed at adoption to "a form specified by the executive director for using credits."

The catch line for §101.376(f) is revised to "DERC use in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties" instead of "Dallas-Fort Worth area DERC use" as proposed. The NO_X DERC limits for these counties that are currently in §101.376(f) and §101.379(c) are combined in §101.376(f), with significant

changes as discussed in the Background and Summary of the Factual Basis for the Adopted Rules section of this preamble. Because the rules establish a fixed 17.0 tpd limit on NO_X DERC use in these counties, the report provisions in §101.379(c) related to the prior calculation methodology are deleted. Adopted §101.376(f)(1) provides the limit of 42.8 tpd on NO_X DERC use in these counties for the 2015 calendar year, which was calculated using the existing methodology. Adopted §101.376(f)(2) provides the 17.0 tpd limit for Calendar Year 2016 and beyond. The prior §101.376(f)(1) is renumbered as §101.376(f)(3) and revised to remove the phrase "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." At adoption, the submittal date of August 1 is specified in §101.376(f)(3) and (4) for clarity after public comment indicated that the date should not change. Additionally, the phrase "control period" is changed to "calendar year" for clarity because the limit applies to annual DERC use. The requirement previously in §101.376(f)(3)(B) is removed as part of the fixed limit on DERC use in these counties. The prior §101.376(f)(3)(A) that the executive director consider the appropriate amount of DERCs allocated for each application submitted on a case-by-case basis is moved to §101.376(f)(3)(B). At adoption, the form designations in §101.376(f)(3) - (5) are made generic, and the word "limit" in §101.376(f)(3) is changed to the phrase "applicable limit in paragraph (1) or (2) of this subsection" for clarity. In renumbered §101.376(f)(4), wording is added to specify that the provision applies to all DERCs for use in the upcoming calendar year that were submitted by the deadline for filing an application

and add subparagraphs (A) and (B). Subparagraph (A) contains the previous portion of §101.376(f)(2) that indicates the executive director may approve all requests for DERC usage provided that all other requirements of this section are met. Subparagraph (B) contains the previous portion of §101.379(c)(2)(C)(ii) that indicates the executive director may consider any late application submitted as provided under §101.376(d)(3) that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation but will not otherwise approve a late submittal that exceeds the limit. Paragraph (5) includes the requirement previously in §101.379(c)(2)(D) that specifies that, if the applications are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the limit and may be approved provided all other requirements are met.

The commission is moving the specific provisions for the inter-pollutant use of DERCs (i.e., the substitution of a DERC certified for one ozone precursor for the other precursor) from §101.372(a) to §101.376(g) because this is the section dealing with DERC use. Subsection (g) revises the language moved from §101.372(a) to limit inter-pollutant use to NO_X and VOC DERCs used as NNSR offsets. The changes are consistent with EBT guidance on inter-pollutant use of DERCs as offsets for NNSR permits. Adopted subsection (g) also revises the language moved from §101.372(a) to specify that NO_X and VOC DERCs may be used to meet the NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and

the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution. In response to comments, subsection (g) was revised to further clarify the requirements. The term "photochemical modeling" is used in place of the prior term "urban airshed modeling" since this older type of photochemical modeling software is no longer used extensively. The commission expects that demonstration will use the photochemical modeling system used by the commission for the area's AD SIP. The language moved to §101.376(g) continues to require that the user receive approval from the executive director and the EPA before inter-pollutant use occurs.

Section 101.378, Discrete Emission Credit Banking and Trading

As part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed revisions in §101.378 except subsection(b)(1) and (2) are deleted because the provisions are obsolete and the prohibition on using a DERC from a shutdown is moved to the end of §101.378(b). This final provision is not made applicable for mobile credits it has only previously applied to stationary source credits. Additionally, in §101.378(b) and (c)(1) the proposed form name is changed at adoption to the generic "application form specified by the executive director."

Section 101.379, Program Audits and Reports

In §101.379, revisions are made for conciseness and conformity with other changes in Division 4. For §101.379(a), the language is changed to specify that an audit will be conducted every three years to clarify that the audit schedule will not be delayed by the new effective date of the amendment to §101.379. Because the limit on the use of NO_X DERCs in the DFW area are moved to §101.376(f), the reference in §101.379(b)(4) is updated, and all provisions previously in §101.379(c) are deleted.

Division 6: Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program

In the title and throughout the division, the hyphen is removed from the term "highly reactive" to correct the grammar. Hyphens are generally not used between an adverb and the adjective that it modifies. Although the hyphen is used in the definition of the term at §115.10(21), the removal here does not indicate any difference in the term used in this division and the definition in §115.10.

Section 101.390, Definitions

Adopted §101.390(1) defines the term "affected facility" as a facility subject to 30 TAC §115.720 or §115.760 that is located at a site subject to this division, and the subsequent definitions are renumbered. The definition of "banked allowance" at §101.390(3) is renamed as "vintage allowance" in paragraph (15) because this is the term commonly used. In §101.390(4), the words "calendar-year" are deleted from the definition of

"baseline emissions period" because they are unneeded with the definition of "control period," and citations are updated to be consistent with reformatting of that section.

The definition of "broker" at §101.390(5) is changed to specify that a broker is a person who opens an account only for the purpose of banking and trading allowances. In the definition of "broker account" at §101.390(6), the phrase "held in a broker account" is moved and "while" added at the beginning to make it clearer that allowances can be used for compliance after being transferred from a broker account. The definition of "compliance account" at §101.390(7) is revised to clarify that the owner or operator (rather than a site) holds allowances and that a compliance account must cover each affected facility at that site.

The term "control period" is defined in §101.390(8), consistent with the same term in the MECT Program, as the 12-month period beginning January 1 and ending December 31 of each year and indicate that the initial control period began January 1, 2007. The definition of "highly reactive volatile organic compound" is adopted as §101.390(9), which references the definition of this term in §115.10; the lack of a hyphen in "highly reactive" does not change the meaning. A definition of "Houston-Galveston-Brazoria ozone nonattainment area" is added as §101.390(10), which lists the counties as Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the subsequent definitions are renumbered. A typographic error is revised

in the definition of "industry sector" renumbered §101.390(11) by changing "carbons" to "compound."

In the definition of "level of activity" renumbered §101.390(12), the reference to §115.10 is deleted because of the addition of a definition of the term "highly reactive volatile organic compound" that includes this citation. The definition of "site" is adopted as §101.390(13), which references the definition in 30 TAC §122.10 and is the same as the definition in the MECT Program, and the subsequent definitions are renumbered. The definition of "vintage allowance" is adopted as §101.390(15), which replaces the definition of "banked allowance" with wording changes for clarity and conciseness.

Section 101.391, Applicability

In §101.391, the prior provisions are designated as subsections (a) and (b) and one additional subsection is adopted. In §101.391(a), the citations for the terms "site" and "highly reactive volatile organic compound" are removed because they are no longer needed due to the new definitions of these terms. The phrase "with one or more affected facilities" is added after "nonattainment area" to clarify the division applies to a site with only one facility as well as with multiple facilities if the applicability criteria are met. Because the definition of "affected facility" references the HRVOC provisions in Chapter 115, the references to Chapter 115 in this section are deleted. For consistency with the definition, the phrase "applicable facility" in the second sentence is changed to "affected

facility." Brokers use broker accounts for holding HECT allowances for trading purposes, but neither is currently covered in §101.391; therefore, §101.391(c) explains that the banking and trading provisions apply to brokers and broker accounts.

Section 101.392, Exemptions

Non-substantive changes in §101.392(a) update terms and correct rule references. The word "ten" is changed to "10" for clarity only and is not intended to expand applicability to any sites not currently subject to Division 6. Non-substantive changes are also in §101.392(b) to clarify the counties that qualify for the exemption, specify the owner or operator (rather than the site itself) is responsible for compliance, and remove the obsolete January 1, 2007 deadline.

Section 101.393, General Provisions

Revisions in §101.393(a) clarify that an allowance can only be used by an affected facility and can only be used for a purpose described in Division 6. Revisions in §101.393(b) remove language made obsolete by the definition of "control period," incorporate the newly defined term "affected facility," and clarify that allowances must be in the appropriate compliance account because an owner or operator may have different accounts for multiple sites.

The provision for using allowances for offsets in §101.393(d) is substantially rewritten

for clarity and completeness. The prior provision only addressed using allowances for the one-to-one portion of the offset requirement. This language is replaced with new provisions that are more complete and specific on the requirements for using HECT allowances for offset purposes in NNSR permits. The changes specify that allowances can be used for any part of the offset requirement if the use is authorized in the NNSR permit for an affected facility that is subject to the HECT Program. The Section by Section Discussion section included at proposal was consistent with the substantive requirements included in the proposed rule revisions; however, errors were made in describing the proposed format of the rule requirements. Those errors have been corrected.

Adopted §101.393(d)(1) requires the owner or operator to use a permanent allowance allocation equal to the amount specified in the NNSR permit to offset VOC emissions from an affected facility. Only current allowances may be used for VOC offsets. Adopted §101.393(d)(1) clarifies that a vintage allowance cannot be used as an offset. The commission is not adopting the proposed portion of paragraph (1) that indicated an allowance allocated based on permit allowable emissions, as described under §101.394, cannot be used as an offset because, unlike MECT allowances, HECT allowances were never issued based on permit allowable emissions. This provision was inadvertently included at proposal. Vintage allowances may not be used to satisfy offsets since the amount of available vintage allowances cannot be determined until after the end of a

control period. The VOC emission increase from the affected facilities must be offset at all times. The use of vintage allowances would result in a time lapse in compliance. Paragraph (1) clarifies that an allowance used for offsets may not be banked or traded. Paragraph (1) also indicates that allowances used for offsets may be used simultaneously for compliance with the HECT Program as allowed in §101.396(e), which is consistent with the previous requirements in this subsection.

Adopted §101.393(d)(2) requires the user to permanently set aside allowances for offsets by submitting an application at least 30 days before the start of operation of the affected facility. Adopted §101.393(d)(2)(A) specifies that the executive director will permanently set aside in the site's compliance account an allowance allocation equal to the amount specified to be used for the one-to-one portion of the offset ratio. Allowances that are no longer required to be "used" for the one-to-one portion of the offset ratio may be returned in accordance with subsection (d)(3). The permanent set-aside will ensure that the total amount allowances allocated to the compliance account is at least the amount required to be used for the one-to-one portion of the offset ratio. Adopted subparagraph (A) specifies that if the allowances set aside for offsets devalue in accordance with §101.394(a)(1) or (f), such that the total allocation balance in the compliance account falls below the amount required in the NNSR permit for offsets, the owner or operator is required to submit an application at least 30 days before the shortfall to revise the amount of allowances set aside for offsets. The owner or operator can either obtain an

additional permanent allocation of allowances sufficient to ensure the compliance account balance is equal to the amount of allowances required to be set aside for the one-to-one portion of the offset ratio or, if the NNSR permit authorizes the use of credits for offsets, the owner or operator can revise the amount of allowances set aside for offsets. The owner or operator also needs to submit the appropriate form for the credit use in accordance with the requirements in §101.306 or §101.376.

Instead of being permanently retired to satisfy the offset requirement for the life of the facility, allowances must be surrendered annually in order to be used to satisfy both the annual HECT compliance obligation and the one-to-one portion of the offset ratio for each year the facility is in operation. Therefore, if the annual allocation is later reduced to reflect new or existing SIP requirements in accordance with §101.394(a)(1) or (f), it is possible for the amount of allowances deposited into the site's compliance account to be less than the amount of allowances required to be set aside for the one-to-one portion of the offset ratio. An owner or operator that elects to use allowances for the one-to-one portion of the offset ratio is responsible for ensuring the site's compliance account contains sufficient allowances at all times to ensure compliance with the offset requirement in the NNSR permit and for HECT compliance. Adopted subparagraph (A) also clarifies that at the end of each control period, the executive director will deduct from the site's compliance account all allowances set aside as offsets regardless of whether the actual HRVOC emissions from the affected facility are less than this

amount.

Adopted §101.393(d)(2)(B) specifies that the executive director will permanently retain an allowance used for the environmental contribution portion of the offset ratio. Adopted subparagraph (B) prohibits an allowance used for the environmental contribution portion of the offset ratio from being used for compliance with this division. Subparagraph (B) also specifies that allowances set aside for this purpose will not devalue due to regulatory changes because this portion of the offset requirement is met when the allowances are permanently retired prior to the start of operation. If an allowance used for the environmental contribution portion of the offset ratio is later released in accordance with §101.393(d)(3)(A), the allowance could then be used for compliance with this division and would again be subject to any devaluation due to regulatory changes, including any devaluations that occurred while the allowances were being used for offsets.

Adopted §101.393(d)(3) allows the user to submit a request to the executive director to release allowances set aside for any portion of the offset ratio if the user receives authorization in the NNSR permit for the affected facility to use an alternative means of compliance (i.e., credits) for the VOC offset requirement. Adopted §101.393(d)(3)(B) allows the user to submit a request to the executive director to release allowances set aside for the one-to-one portion of the offset ratio if the user permanently shuts down

the affected facility, but not for allowances set aside for the environmental contribution portion of the offset requirement. If a request submitted under §101.393(d)(3)(A) or (B) is approved, the release becomes effective in the control period following the date that the alternative means of offsetting takes effect, and allowances will not be released retroactively for any previous control periods.

In §101.393(f) the phrase "allocated, transferred, deducted, or used" is changed to "allocated, traded, and used" because "traded" is a more encompassing term and because all of these actions (not just one) are conducted in increments of a tenth of a ton. Section 101.393(g) is amended to specify that it is the responsibility of the owner or operator to use one compliance account for all affected facilities at a site. Amendments to §101.393(h) specify that the executive director rather than the commission will maintain a registry of the allowances in each compliance account and broker account.

Adopted §101.393(i) allows the owner or operator of a facility subject to the HECT Program to generate VOC ERCs from the reduction of HRVOC emissions if 1.0 tpy of HECT allowances is surrendered for each 1.0 tpy of ERCs generated from HRVOC emissions. At adoption, §101.393(i)(1) was revised to clarify the HECT allowances are only required to be surrendered for ERCs generated from HRVOC emission reductions, regardless of whether ERCs were simultaneously generated from other VOCs. The change is intended to provide greater flexibility to owners and operators in the

generation of ERCs. An owner or operator will not be required to retire an allocation of HECT allowances when generating VOC ERCs, except to generate ERCs from HRVOC reductions by affected facilities. If this provision is used, permanent ownership of the HECT allowances will be transferred to the commission retirement account so that 1.0 tpy of HECT allowances are surrendered for each 1.0 tpy of ERCs generated from reducing HRVOC emissions. Because excessive use of this provision could substantially reduce the total HECT allowances available for compliance, the executive director is given discretion on whether to approve the retirement of allowances. At adoption, the reference to Division 1 of Subchapter H in §101.393(i)(2) is revised to be consistent with changes made at adoption to the name of Division 1.

Adopted §101.393(j) specifies that if there is a change in ownership of a site subject to the HECT Program, the new owner of the site is responsible for complying with the requirements of Division 6 beginning with the control period during which the site was purchased. Subsection (j) also clarifies that the new owner must acquire allowances in accordance with the banking and trading provisions in §101.399.

Section 101.394, Allocation of Allowances

In §101.394(a)(1), the citation to §115.10 for HRVOCs, which is added to the definition for HRVOCs in §101.390(9), is removed, and the reference to two equations is changed to a reference to the one equation retained. In the equation in §101.394(a)(1)(A), which

is redesignated as §101.394(a)(1), the format is made consistent with other figures in the rules: the equation is put in a more accessible format; the spelled-out factors are changed to acronyms; and the factors are defined in the order that they appear in the equation. In the definition of factor AC^1, a citation is changed for re-lettering in the cited subsection, and the tons of HRVOC allowances for 2011 - 2013 are deleted because this information is obsolete (the value for 2014 is retained in case it is needed after the effective date of this rule for processing annual compliance reports for the 2014 control period). In §101.394(a)(1)(A), obsolete language for the allocation of allowances for the 2007 - 2010 control periods is deleted. The obsolete equation in Figure: 30 TAC §101.394(a)(1)(A) and paragraph (1)(B) are deleted.

Because of the restructuring of the rule, prior §101.394(a)(1)(C) is redesignated as §101.394(a)(2) and clauses (i) - (iii) as subparagraphs (A) - (C). The subsequent paragraphs are renumbered. The provision is amended to allow the owner or operator of a qualifying site (rather than the site itself) to request the use of acquired allowance streams. The provisions previously in §101.394(a)(1)(D) are obsolete because the request for the alternate baseline was required by July 1, 2010, per §101.394(a)(1)(D)(iv). However, because subparagraph (D) is referenced in the definition of "baseline emission period" at §101.390(4), the provision is retained as §101.394(a)(3).

In renumbered §101.394(a)(4), the equation is changed to a more accessible format. Factor AC, which is currently shown as "AC^2" in the definitions under the current equation, is defined as "AC" so it appears in the equation the same as in the definition. The alternative of using "AC^2" in the equation is not used to avoid any confusion that the superscripted "2" means that the factor is squared in the calculation. Because the two equations are separate in the rules and §101.394(a)(1) uses "AC^1" as the factor, this change is not expected to cause any confusion.

For consistency with the new definition, "applicable facility" is changed to "affected facility" in renumbered §101.394(a)(5) and (5)(D). In renumbered §101.394(a)(5)(E) the reference to §101.394(a)(1), which is deleted, is changed to "the previous allocation methodology." Additionally, the owner or operator is made responsible for the addition covered, rather than leaving the person doing the addition unspecified.

Because the allocation methodology previously in §101.394(a)(1)(A) is obsolete, the provision at §101.394(c) for augmenting allocations under that allocation methodology is also obsolete. Therefore, §101.394(c) is deleted, and the subsequent subsections re-lettered. The deletion of §101.394(a)(1)(A) leaves prior §101.394(a)(1)(B) as the only allocation methodology. Therefore, the two references to §101.394(a)(1)(B) in prior §101.394(d), which is re-lettered as §101.394(c), are no longer needed and are deleted. For clarity, a sentence is added to the end of re-lettered §101.394(c) to specify that the

provisions do not apply if a site's allocation is below 5.0 tons because of transfer of part of the site's original allocation. The intent of this provision has always been that only sites that received original allocations below 5.0 tons could be raised to 5.0 tons.

The provisions from §101.394(e) are moved with changes to §101.396(e) and (f) because these provisions are more appropriate in the rule section covering allowance deductions. Subsequent subsections are re-lettered. The provision in prior §101.394(f)(1) that allowances will first be allocated in 2007 is obsolete. Therefore, the January 1 deadline in §101.394(f)(2) is moved to §101.394(f), which is re-lettered as §101.394(d), and paragraphs (1) and (2) are deleted. For conciseness, the wording in relettered §101.394(d) is changed from "Allowances will be allocated by the executive director, who will deposit allowances into each compliance account: ... initially, by January 1, 2007; and ... subsequently, by January 1 of each following year" to "The executive director will deposit allowances into each compliance account by January 1 of each year."

Section 101.396, Allowance Deductions

In §101.396(a), amendments are made for clarity, grammar, and consistency. The deductions of allowances are specified as the responsibility of the executive director, and, consistent with prior §101.393(f), the amount is specified as being deducted in tenths of a ton. The first sentence is reformatted to improve the grammar and readability. In the second sentence, the HRVOC emissions are required to be based on

monitoring and testing protocols in §115.725 and §115.764, but an introductory clause provides exceptions for this requirement for subsections (b) and (c) because the HRVOC emissions covered in subsection (b) are based on other sections of Chapter 115 and because subsection (c) provides for alternative calculation methods if the monitoring required in subsection (a) is not available.

Section 101.396(b) requires HRVOC emissions to be calculated for each hour of the year and summed to determine the annual emissions for compliance. During rulemaking in 2010, the TCEQ inadvertently deleted the portion of §101.396(b) that specified for emissions from emissions events subject to the requirements of §101.201, the hourly emissions included in the calculation must not exceed the short-term limits in §115.722(c) and §115.761(c). The revision to §101.396(b) was initially proposed for deletion as part of an attempt to create an emissions event set-aside pool for affected facilities. In response to public comments, the rule revisions adopted by the commission did not include the emissions event set-aside. The preamble to the adopted rulemaking indicates that the commission's intent was to continue to treat emissions events in the same manner for purposes of the HECT Program and only deduct allowances for emissions during emissions events up to the short-term limits in §115.722(c) and §115.761(c) (March 26, 2010, issue of the *Texas Register* (35 TexReg 2537)). The revision replaces the previous language in §101.396(b) with the version of the rule that existed before the prior revision.

In §101.396(c), amendments are made for clarity and consistency. In the first sentence "referenced in subsection (a)" is changed to "required under subsection (a)" because the subsection requires certain monitoring; the phrase "the owner or operator of" is added before "the site" to clarify that the owner or operator of the site is responsible for using the first available specified method in the order listed to determine emissions; and in the listed methods, "data from manufacturers" is changed to "manufacturer's data" to specify that the data must come from the manufacturer of the facility rather than any manufacturer of similar facilities. The last sentence in subsection (c) is deleted and moved to §101.396(c)(1) with changes to make the provision more similar to the comparable provision in §101.354(b) in the MECT rules, as well as the following changes: "determining" is changed to "reporting" because the submission is made with the annual compliance report; the owner or operator is specified as responsible for providing the justifications; and a requirement to provide justification of the method used is added for consistency with §101.354(b) and because explanation of why the method used is appropriate and will allow better evaluation of the emissions reported.

Adopted §101.396(c)(2) specifies that the executive director will deduct allowances equal to the HRVOC emissions quantified under this subsection plus an additional 10% if emissions are quantified under subsection (c) due to non-compliance with the Chapter 115 monitoring and testing requirements. This additional amount of allowances ensures

that the emissions reported using alternate data are at least the amount that would have been deducted if required monitoring data had been used to calculate emissions. The temporary failure of a monitoring device is not considered noncompliance for the purpose of this subsection if the owner or operator repairs or replaces it in a reasonable time. In such cases, the additional 10% deduction does not apply, and any applicable Chapter 115 data substitution provisions are used to calculate emissions. If no data substitution provisions are specified in Chapter 115 for a monitoring device that failed, the substitute data in §101.396(c) will be used to quantify the HRVOC emissions for the period of time the required data is missing.

Adopted §101.396(e) specifies that the amount of allowances deducted from a site's compliance account under §101.396(a) will be reduced by the amount of allowances deducted in accordance with §101.393(d)(2)(A). Consistent with the provisions previously in §101.393(d), subsection (e) provides for the simultaneous use of allowances for the one-to-one portion of the NNSR offset requirement and compliance with the HECT Program.

The provisions previously in §101.394(e) are moved to §101.396(f) because this section contains provisions related to allowance deductions. As in the prior rule, subsection (f) specifies that, if the total actual HRVOC emissions from the affected facilities at a site during a control period exceed the amount of allowances in the compliance account for

the site 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%. Paragraph (1) specifies that if the site's compliance account does not hold sufficient allowances to accommodate this reduction, the executive director will issue a Notice of Deficiency and require the owner or operator to obtain sufficient allowances within 30 days of the notice. Paragraph (2) clarifies that these actions do not preclude additional enforcement action by the executive director.

Section 101.399, Allowance Banking and Trading

Non-substantive changes are made in §101.399(a) and (b) to update the formatting. Changes in §101.399(a) also include the use of the new term "vintage allowance." The provisions previously in §101.399(b) - (d) are consolidated to minimize repetition and shorten the rules. The provisions previously in §101.399(b)(2), (c)(2), and (d)(2) are combined in §101.399(c). Subsection (c) requires the seller to submit the appropriate trade application to the executive director at least 30 days before the allowances are deposited into the buyer's account and specifies that the completed application must show the amount of allowances traded and, except for trades between sites under common ownership or control, the purchase price per ton of allowances traded.

The provisions previously in §101.399(b)(1), (c)(1), and (d)(1) are combined into §101.399(c)(1) - (3) respectively. Paragraph (1) requires the seller to submit an

application to trade a current allowance or vintage allowance for a single year and specify that trades involving allowances needed for compliance with a control period must be submitted on or before January 30 of the following control period. Although the prior rule did not specify a deadline for submitting the application, the form must be submitted 60 days before the deadline of March 1 for having allowances in the compliance account in order to allow time for the transfer to be processed. Paragraph (2) requires the seller to submit an application to permanently trade ownership of any portion of the allowances allocated annually to an individual facility. Paragraph (3) requires the seller to submit an application to trade any portion of the individual future year allowances to be allocated to an individual facility.

The provisions previously in §101.399(b)(3), (c)(3), and (d)(3) are combined in §101.399(d) and revised to indicate that information regarding the quantity and sales price of allowances will be made available to the public as soon as practicable because time is needed for the submitted forms to reach the EBT and to be processed before information is posted on the HECT website. However, the information will be available to the public as well as in the registry. The revisions do not change the way EBT information is made available to the public and are only intended to more accurately reflect the process that has historically been used to disseminate this information. The provisions previously in §101.399(b)(4), (c)(4), and (d)(4) are combined in §101.399(e) and revised to indicate that the executive director will send letters to the seller and

buyer if the trade is approved or denied. If approved, the trade is final upon the date of the letter from the executive director.

Although no more allowances based on permit allowable emissions rather than historical emissions will be certified, the provisions limiting trading are still needed until those allowances are recertified or voided. Therefore, the provision that allowable allowances cannot be banked or traded previously in §101.399(e) are re-lettered as §101.399(f). Non-substantive changes are made to the provisions in §101.399(f), (g), and (h), which are re-lettered as §101.399(g), (h), and (i) respectively.

Section 101.399(i) is deleted because the provision has only been used once and, because of the cost of VOC ERCs compared to HECT allowances and the great reduction in allowances from the ERCs that are converted, is unlikely to be used in the future. The commission did not receive public comment that this provision is needed for future flexibility in providing additional HECT allowances. The deletion also addresses a stakeholder comment to eliminate the limit of 5% of the initial allocation for allowances at a site that have already been converted. The deletion of this limit will not adversely affect the HECT Program because there are only 1.7 tpy of HECT allowances from an ERC conversion (converted from 22.5 tpy of VOC ERCs).

Section 101.400, Reporting

In §101.400(a), revisions are made for clarity. The responsibility of filing an annual compliance report is made the responsibility of the owner or operator of a site, rather than the site itself. The annual compliance report is also required to have the listed information to be complete. Prior §101.400(a)(4) is deleted. It required that information about the total amounts of HRVOCs released in emission events be provided with an annual compliance report, but it is not needed because the agency already receives this information.

In §101.400(b), a change clarifies that the executive director may suspend the trading by an owner or operator of a site (rather than the site itself) if the report is not filed.

Adopted §101.400(c) allows the owner or operator to request a waiver from the reporting requirements in this section if a site subject to Division 6 no longer has authorization to operate any affected facilities. If approved, the annual compliance report will not be required until a new affected facility is authorized at the site.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking meets the definition of a "major environmental rule" as defined in

that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a "major environmental rule," which are listed in Texas Government Code, §2001.0225(a). 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.

The EBT rules in Chapter 101, Subchapter H define several market-based programs that provide sites with additional flexibility for complying with air regulations, such as the offset requirements in NNSR permits or the unit-specific emission limits in various state rules. These programs include the EC Program rules in Division 1 that allow sources in nonattainment areas to generate, bank, trade, and use credits from permanent reductions in emissions; the MECT Program rules in Division 3 to provide additional

flexibility in the implementation of the SIP strategy to reduce NO_X emissions in the HGB area; the DEC Program rules in Division 4 to allow sources statewide to generate, bank, trade, and use credits from reductions in emissions below regulatory requirements; and the HECT Program rules in Division 6 to provide additional flexibility in the implementation of the SIP strategy to reduce HRVOC emissions in the HGB area.

Because these programs are market-based, the costs associated with trades of credits and allowances are not controlled. In recent years, the cost of credits has risen substantially. In response, there has been significant interest from the regulated community for alternatives that facilitate generation and for flexibility in use. This increased interest has uncovered several implementation issues in the existing EBT rules. This rulemaking proposes to revise the EBT rules in Chapter 101 to respond to these issues and improve the workability and functionality of the rules.

Additionally, the commission is adopting changes to the NO_X DERC limits in Division 4 as part of the AD for the DFW 2008 eight-hour ozone nonattainment area. In 2008, the commission adopted the NO_X DERC limit for the DFW area to ensure that DERC use does not interfere with the attainment and maintenance of the 1997 eight-hour ozone standard. On July 20, 2012, the ten-county DFW area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) was designated a

moderate nonattainment area for the 2008 eight-hour ozone standard. The FCAA requires states to submit plans to demonstrate attainment of the NAAQS for nonattainment areas within the state. As part of the AD SIP revision for the 2008 eight-hour ozone NAAQS for the DFW area, the commission evaluated the provisions setting the DERC limit, and determined that a hard-capped limit was more feasible than the current provisions, which require the limit to change on a yearly basis based on an equation in the rules. Because of variation in the amount allowed each year, companies cannot effectively plan their long-term usage of NO_X DERCs in the DFW area, and the allowed amount is expected to drop to zero at some time in the future. The adopted rules make changes to the DERC limit provisions to replace the current equation for setting the limit with a hard cap of 17.0 tpd.

The adopted rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the 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 (42 USC, Chapter 85, Air Pollution Prevention

and Control). 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 for attaining 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. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. The adopted rulemaking will revise the EBT rules in Chapter 101, Subchapter H to respond to issues with flexibility and use of the rules, and to improve the workability and functionality of the rules. Additionally, the adopted rulemaking includes changes to the technical basis of DERC limit as part of the SIP revision for the 2008 eight-hour ozone standard for the DFW nonattainment area.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will 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 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will 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, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, 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 (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on

information provided by state agencies and the LBB, the commission believes 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 will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed 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); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *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).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to revise the EBT rules in Chapter 101, Subchapter H to respond to issues with flexibility and use of the rules and to improve the workability and functionality of the rules. Additionally, the adopted rulemaking includes changes to the technical basis of DERC limit as part of the SIP revision for the 2008 eight-hour ozone standard for the DFW area. The adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the adopted rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a "major environmental rule."

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

Takings Impact Assessment

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of the rulemaking is to revise the EBT Program rules in Chapter 101, Subchapter H to respond to issues with flexibility and use of the rules, and to improve the workability and functionality of the rules. Additionally, the adopted rulemaking includes changes to the technical basis of DERC limit provisions as part of the SIP revision for the 2008 eight-hour ozone standard for the DFW nonattainment area. Promulgation and enforcement of the amendments will not burden private real property. The rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the allowances and credits that would be affected by these rules are not property rights (*see* §§101.302(i), 101.332(f), 101.352(f), 101.372(j), and 101.393(e)). Because these allowances and credits 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 Texas Government Code, 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 area that are adopted 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 adopted rulemaking and found the adoption 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 (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal

Coordination Advisory Committee and determined that the adopted 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 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 the commission's rules comply with federal regulations in 40 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 CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The requirements of 42 USC, §7410 are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permit Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order

to include the adopted rules.

Public Comment

The commission held public hearings on January 15, 2015 and January 20, 2015, and received oral comments from three individuals. The comment period closed on February 11, 2015. The commission received written comments from Baker Botts, LLP, on behalf of Texas Industry Project (TIP); Delek Refining, Ltd. (Delek); El Paso Electric Company (EPEC); the EPA; Linn Energy, LLC (LINN); Luminant; Sage Environmental Consulting, LP (Sage); The Law Office of C. William Smalling, PC (Smalling), which were later revised; Stolt-Nielsen USA, Inc. (Stolt); SuperAll Environmental, LLC (SAE); Texas Chemical Council (TCC); Texas Pipeline Association (TPA); Total Petrochemicals & Refining USA, Inc. (Total); two comments from the Texas Oil & Gas Association (TXOGA); Western Refining, Inc. (Western); Wisdom Law, PLLC, on behalf of the Texas Association of Manufacturers (TAM); and one individual. Specific changes to the rules were suggested in five comments.

Response to Comment

General comments

Comment

TXOGA commented that the comment period on the proposal should be extended for an additional 60 days beyond the 12-day extension to February 11, 2015, to allow more time

for its members to evaluate potential impacts from the proposal. TXOGA also asked that the EBT stakeholder group be expanded to include oil and gas operators who might be impacted by the new ozone standard proposed by the EPA. LINN supported these comments.

Response

For a rule revision to be adopted, it must be submitted to the *Texas Register* within six months of the date that the proposal was published. Providing more than half of this period for public comment and additional stakeholder input is not feasible. The EBT Stakeholder Group is an open-participation group, so any interested party is able to attend the meetings. The commission may request and consider additional input from stakeholders in the future when developing guidance under the adopted rules. All interested parties are encouraged to participate in any future stakeholder meetings or outreach. Information about the stakeholder group and links to sign up for notifications about the group are available at http://www.tceq.texas.gov/airquality/banking/air_banking_advisory.html. Notifications of any future meetings will be provided by e-mail to anyone who signs up to receive information.

Comments

TIP commented that the agency should not make changes to the existing SIP-approved rule language simply to make the rules consistent with guidance and historical practices. Existing guidance has been effective in settling issues at stake in the rule changes. The specific changes that TIP opposed were amendments to §101.302(e)(4) and §101.372(e)(4) providing that ERCs cannot be generated from emissions that exceed any local, state, or federal requirement, amendments to §101.352(e) and §101.373(g) that allow the use of MECT and HECT allowances for the full offset requirements in NNSR permits, and proposed §101.306(d) and §101.373(g) that condition the inter-pollutant use of ERCs and DERCs on a demonstration of no adverse impact on overall air quality or the regulatory design value in the nonattainment area of use. The benefit of greater clarity must be weighed against the risks of a gap between the rules and the approved SIP. TIP commented that it supports targeted changes to the rules for consistency with EPA regulations while preserving needed flexibility but oppose broader revisions that would change large portions of the rules such as provisions for area and mobile sources. An individual commented that the rule revisions perceived as positive for industry, such as extending the ERC application time to two years, are really unnecessary because many of the clarifications in the proposed rules have already been addressed in guidance or could be addressed through reinterpretation of the existing rules. The individual commented further that there is no need to reopen the rules, which have been approved by the EPA, because if implemented as written, the existing rules allow for the generation of ERCs that are or will be needed. TCC commented that the current EBT

program rules are fully SIP-approved and stated that it would be difficult for Texas to reincorporate these options in the future.

Response

The commission does not generally agree that it is inappropriate to update rules to reflect current guidance and agency practices. Although many changes included at proposal are not adopted, there are some updates that are warranted to provide flexibility and clarification for certain issues. In regards to the specific example given by the individual, some stakeholders requested that the commission make adjustments to the deadline for submitting requests to certify ERCs, and the change to two years was made after careful consideration, including reviewing programs in other states. Such a change could not be accomplished through guidance or policy changes, as the rule previously had a specific deadline, which was extended with the adopted rule change. No change to the rules was made solely in response to these comments.

Comment

Sage commented that the ERC program was promulgated as a voluntary program but has since been made mandatory. Sage commented further that the ERC program is currently the only mechanism by which credits can be created for use as offsets.

Response

The EC program has been voluntary since promulgation and continues to be voluntary for both generators and users. The owner or operator of a facility chooses whether to make voluntary emission reductions and whether to certify them. An owner or operator also has options other than ECs to use for offsetting, including DECs, HECT and MECT allowances, and internal offsets. The commission recognizes that the EC program is the primary source of credits for offsets, but other parts of this rule package are specifically designed to increase the flexibility for using DECs and MECT and HECT allowances for offsetting. Therefore, the commission disagrees that the EC program is mandatory or that there is no other mechanism for creating credits for use as offsets.

Comments

One individual commented that the preamble for the proposed rules incorrectly implied that the term "surplus to the SIP" is the same as the use of "surplus" as a required characteristic of ERCs and that the preamble discussion shows that these concepts are different with "surplus to the SIP" only applied to area source ERC applications. The individual commented further that the rule proposal should be withdrawn and all concepts therein fully defined so affected parties can comment on the full and complete

impact of the proposal. Another individual agreed with these comments. Another individual commented that the proposal does not properly address the concept of "surplus to the SIP," stated that the term is not defined, and stated that the concept is used subjectively in the review of ERC applications.

Response

In §101.300(30) in the rule prior to proposal and §101.300(29) in the adopted rule, the term "surplus" is defined as meaning that a reduction is surplus to all legal requirements and has not been otherwise relied upon in the applicable SIP. Therefore, "surplus" will continue to mean that reductions are surplus to the applicable SIP and all legal requirements. This limitation applies equally to any emission reduction included in an application to generate ECs. Decisions on previous ERC generation applications are beyond the scope of this rulemaking.

Additionally, it is not accurate that surplus is different for area and point sources; however, point sources are specifically represented in the SIP through their reported emissions in the EI. Area sources are represented in the SIP in the aggregate because these sources are not required to report individual emissions to the EI. Therefore, determining that emissions from reductions at an area source are surplus to the emissions represented in the

SIP is much more complicated than looking at the EI, as can be done for point sources. No change to the rules was made in response to these comments.

Comments

Sage commented that the agency is concerned about the lack of staff to handle increased applications to generate credits from mobile and area sources, but should be more concerned about the potential for significant growth in the number of nonattainment counties. Sage suggested that the commission could adopt a reasonable application fee in the future. Sage further recommended that the EBT program have pre-application meetings to discuss proposed projects at a high level and that staff provide pre-application guidance to help companies submit better applications. TCC commented that it understands the TCEQ's concerns that area and mobile sources must have quantifiable emissions in the inventory, and that quantifying and verifying them could drain resources at the agency and that there are numerous viable options for the TCEQ to consider, and therefore the TCEQ should retain this flexibility in the rule.

Response

The commission is aware of the current market price of and need for ECs and the impacts related to a lower NAAQS and additional areas becoming nonattainment. EBT staff has and will continue to provide advice to the

regulated community both before and after applications are submitted. However, potential applicants must understand that staff can only evaluate the information provided so there is a potential for significant change in the number of credits that might ultimately be approved even after any pre-application meeting because of changes in the information available and regulatory changes. The evaluation of applications to generate credits is a very complicated and detailed process that cannot be accomplished within the scope of a meeting but rather through the review of complete and accurate applications. In response to this and other comments, the commission is currently retaining the options in the rules to generate ECs from area and mobile sources.

Comment

Sage commented that companies should be allowed to adjust the emissions reported to EI for years that will be used in a SIP if a facility was undergoing substantial turnaround or maintenance activities to emissions that more accurately reflect "normal operations." Sage stated that the use of actual emissions in such cases artificially reduces the site's SIP representation. Sage recommended that the agency notify companies several months in advance of SIP revisions to allow time to change the reported emissions.

Response

The commission understands the commenter's concerns. While some sites reported lower than "normal" emissions during the year chosen as the SIP baseline EI, other sites reported higher than normal emissions during that year. There is no definition of "normal" emissions; only actual emissions are reported. The TCEQ requires owners or operators to report actual emissions that occurred during the calendar year for which the EI is requested per §101.10(b). The commission expects companies to accurately report emissions data to the EI in accordance with the rules. The reported emissions cannot include adjustments to reflect "normal operations" that did not actually occur in the year reported. Under the FCAA, emission reductions used as offsets must reflect actual emissions. Since the primary use of ECs is for offsetting, it would be inappropriate to certify ECs based on emissions that were not real. Any change to this requirement is beyond the scope of this rulemaking.

The TCEQ accounts for the commenter's concern during calculation of the baseline emissions rate for ERCs. The baseline emissions rate is the highest two-year average of emissions in the last 10 years, not to exceed the quantity reported in the most recent SIP emissions. This two-year averaging approach normalizes actual emissions in the manner suggested by the commenter. These normalized emissions cannot exceed SIP EI

values from the applicable SIP (as shown in the definition of "state implementation plan emissions") to ensure progress towards attainment of the NAAQS.

The commission does provide notice of SIP revisions in advance. For the most recent DFW AD SIP revision, on April 1, 2014, the commission notified potentially affected sites that 2012 was being used as the credit generation EI year for the 2008 10-county DFW eight-hour ozone nonattainment area. A month-long revision window was provided for sites to submit 2012 EI revisions, and EI revision instructions were provided on the point source EI webpage. Approved revisions were ultimately included in the SIP revision. In addition, the SIP, including EI and AD SIP revisions, are open for public comment, and we would appreciate being notified of EI concerns during that time period. No change to the rule was made in response to this comment.

Comment

TCC thanked the TCEQ for working on the rule proposal and stated its support of many of the program revisions.

Response

The commission appreciates the support.

Comment

TAM recommended that the agency should not go forward with this rulemaking at this time and conduct additional stakeholder meetings with industry partners, specifically those in the area source category to determine the best path forward for the submission of annual EIs and obtaining federal approval of the reductions credits.

Response

The commission has proceeded with this rulemaking to make other necessary changes but has retained the options to generate credits from area and mobile sources. At the start of this rulemaking, the commission held a series of stakeholder meetings on the changes that might be proposed. Stakeholders were asked to provide input on what changes might be made to make the generation of credits by area and mobile sources workable both at the stakeholder meetings and in the preamble of the proposed rules. Requests were made to keep the rules that allow for area and mobile credit generation, but stakeholders indicated that no rule changes were necessary to implement these programs and no viable ideas for potential revisions were submitted. For future information related to area and mobile source credit generation and other EBT activities,

interested parties are encouraged to sign up to receive e-mail updates regarding the program (as outlined in the response to the first comment in this preamble) and to attend any future stakeholder meetings. In response to this and other comments, the commission is currently retaining the options in the rules to generate credits from area and mobile sources.

Area and mobile source credits

Comments

Western, Delek, Sage, and two individuals commented that the removal of the opportunity for mobile and area sources to generate ERCs would significantly reduce the number of ERCs that could be available at a time when federal regulatory changes are likely to increase the need for ERCs and that the rule changes could stifle economic development. TAM and LINN made similar comments in regards to removal of area sources only. Hamman commented that removing area source ERCs would remove incentives for small businesses to look for ways to voluntarily reduce emissions at a time that such reductions should be encouraged. One of the individuals further commented that area source ERCs have not been generated previously because there was little need for them but that increases in the price of ERCs demonstrates that the need now exists. Smalling commented that area sources should remain eligible to generate ERCs and DERCs to allow area sources to earn revenues. Smalling also commented that the EPA's proposed changes to the ozone NAAQS will significantly affect the value of ERCs.

Smalling further commented that the timing of the rule proposal to eliminate area and mobile ERCs appears curious in relation to the EPA proposal to revise the ozone NAAQS. LINN commented that the removal of area sources from the ERC rules is shortsighted and arbitrary. Sage commented that area and mobile sources should continue to be allowed to generate ERCs. Sage commented that the provisions for area sources to certify ERCs should be retained in the rules because of the potential for increased need. TIP commented that provisions for area and mobile sources to generate ERCs and DERCs should be retained because the EPA may not approve reinstatement of this option, because credits from these sources may be needed in areas that may be designated as nonattainment under the federal rules that have been proposed for revision, because areas already designated as nonattainment may need credits from these sources, because credits have already been certified from mobile sources in Texas and elsewhere, because the commission's rules should be no less flexible than federal rules, and because there are some possible ways that credit programs for these types of sources could be implemented. SAE commented that the upstream oil and gas industry should be allowed to use emission reductions from area sources to generate ERCs because the agency already has substantial information related to these sources and they contribute significantly to the SIP EI for some parts of Texas. SAE commented further that the inability of area sources to generate ERCs will reduce incentives for the owners and operators to make voluntary emission reductions. One individual commented that the removal of provisions for area source ERCs would significantly impact the Texas

economy and increase greenhouse gas emissions from the burning of natural gas instead of conversion to ethylene to be used as a raw material in chemical manufacturing. EPEC commented that credits from mobile sources should be retained because, although most reductions from Title II emission standards have already been incorporated into the SIP, additional mobile reductions might be generated from fleets outside of Title II and related programs. EPEC commented further that area source credits should be retained because it may be possible to certify some in the future. Total commented that the area source credits should be retained but only for a narrower universe of facilities with regulatory requirements similar to those for major sources and minor new source review permits. Stolt commented about retaining provisions for credits from mobile sources and especially for mobile DERCs, which Stolt has generated in the past under a protocol approved by the commission and the EPA. Stolt commented that these credits provide incentives for voluntary emission reductions and are needed for permit offsets. Stolt also commented that removal of the provisions for generating mobile DERCs may put the existing mobile DERCs in jeopardy. TPA opposed the removal of provisions for area and mobile sources to generate credits because its members would be impacted both for not being able to generate credits and by a reduced supply of credits for the members' offset needs. TPA commented that the need for more credits is already high and will rise if federal requirements are tightened, with economic consequences for Texas. TPA also commented trade associations are ready to help develop the guidance and revisions needed for area source programs. TPA disagreed that there would not be a fiscal impact

from removal of these programs. TPA also commented that enforceability of reductions to generate area source ERCs, and ensuring that such reductions are and remain surplus to the SIP could be achieved through existing permitting, certification, and inspection mechanisms, while acknowledging TCEQ's concerns given past difficulties. Smalling commented that mobile sources should also remain in the banking rules and no changes are required. Mobile sources could be an important source of ERCs to the regulated community. The suggestions for mobile sources are contained in elements outlined by the EPA necessary for approval of trading programs that would be used within a SIP in guidance. The EPA guidance lists some reasonably simple steps that the state could take to obtain approval for mobile source credits if the TCEQ wanted to take a "belt and suspenders" approach to the issue. Western commented that the commission should develop guidance on how credits from area and mobile sources can be quantified and certified. TCC opposed the proposed repeal of mobile and area source ERCs and DERCs and suggested this flexibility be retained in the rule. TCC requested that TCEQ retain this flexibility as it will be needed in the future to address the EPA's recent proposal to lower the ozone NAAQS, potentially significantly. TCC added that it is important that Texas and the TCEQ retain as many tools as possible to address the significant restrictions that would be imposed on new and existing nonattainment areas. TCC requested the commission retain the option of using area and mobile source credits to maintain future flexibility in responding to the possibility of a lower ozone standard and stated that this program is essential to the progress of the state in maintaining our

business climate as well as making steps toward better air quality. TXOGA commented that the commission should retain the provisions for area source and mobile source ERCs and DERCs and that its members will work with the commission to develop suitable strategies to implement programs consistent with EPA and FCAA requirements while minimizing the burden on applicants and the agency. TXOGA stated that the programs are critical to Texas' future economy and that areas designated nonattainment for ozone in the future may not have enough point sources with capacity for additional reductions to generate the emissions credits needed for growth. TAM expressed concern about the proposed repeal of provisions for area sources but understood the significant regulatory and financial responsibility for implementing a program consistent with federal requirements. TAM requested that the commission continue to work with industry partners to find a workable solution.

Response

In response to comments, the commission is not removing the language relating to area and mobile sources generating credits. For mobile sources, the commission is adding back at adoption all provisions in Divisions 1 and 4 that applied to mobile sources before this rulemaking. Retention of these provisions does not signify that the requirements are being lessened, but rather that the requirements are exactly as they had been. Mobile sources are therefore not subject to any of the proposed revisions for stationary

sources. However, since area sources are a subset of facilities (i.e., stationary sources), the revisions adopted for facilities will also apply to area sources, as was noted in the proposal preamble discussion about the possibility of the changes for area sources not being adopted. The proposal of these rules was not related to and was developed prior to the EPA's proposal to reduce the ozone NAAQS, but retention of the provisions for area and mobile sources is based in part on the current uncertainty of the stringency of the ozone NAAQS revision and its impact on Texas. The commission continues to provide input to the EPA about the ozone NAAQS proposal and will maintain the current flexibility for further consideration to meet current market demands and any future demands associated with a potentially more stringent NAAQS. The commission will continue to evaluate ways in which the use of these provisions may be effectively implemented to generate credits and welcomes input from interested parties on the related issues.

The disposition of previous applications for ECs is beyond the scope of this rulemaking. The commission evaluated the fiscal impact of the repeal of these provisions based on conditions as they actually exist and confirms again that there would be little impact because generating credits from area or mobile sources has not historically been utilized or in most cases met all

the applicable requirements. The commission notes that the purpose of the EC and DEC programs is not to generate revenue for sites making reductions, but to allow market-based flexibility in reducing emissions in a manner that is consistent with the FCAA and the SIP.

Comment

TPA commented that based on cyclical trends, 100 - 300 tons of ERCs may be available at one point in time in the HGB ozone nonattainment area and that it is not unusual for a single project to consume all the available supply of credits, thus limiting the next major project to a point in time when more credits become available.

Response

The commission understands that ERCs can be a scarce and valuable resource in an ozone nonattainment area, and that major sources may have to wait until credits become available before moving forward with major expansions or new construction. The reduction in the amounts of credits generated is mostly related to the fact that the easiest and most cost-efficient emissions reductions from point sources have already been done, such that costs for reducing emissions have increased at the same time that supply has not kept up with demand. The FCAA offset requirements are designed to allow growth to continue in a nonattainment area, while still

improving air quality so that such an area can come into attainment. Real reductions in emissions are necessary for credits to be generated, as the credits will be used to offset new emissions in the airshed, with an additional environmental contribution that should still allow air quality to improve. No changes to the rules were made in response to this comment.

Comment

Smalling and Sage commented that removing area and mobile ERCs would increase prices for credits.

Response

At adoption, the commission is retaining the provisions for area and mobile sources to generate credits. The reduction in the amounts of credits generated and the increase in prices is mostly related to the fact that the easiest and most cost-efficient emissions reductions have already been done, such that costs for reducing emissions have increased at the same time that supply has not kept up with demand. No changes to the rules were made in response to this comment.

Comment

Sage commented that the commission should not be concerned about potential liability

for certifying reductions from area sources and recommended adding a statement to correspondence that the agency is not liable if credits are later disallowed.

Response

The commission takes its responsibilities of reviewing and approving projects that generate and use credits very seriously. Staff ensures that all criteria are met, including that reductions and certified credits are surplus to the SIP and regulatory requirements, properly calculated, and compliant with all relevant rule requirements. The rules have and will continue to specify that credits are not a property right and can be reduced or cancelled as needed and appropriate. No change to the rules was made in response to this comment.

Comment

TPA and TIP commented that in new areas of the state that may become nonattainment for ozone under EPA's proposed 2015 ozone NAAQS, area and mobile sources are the source of the majority of NO_X and VOC emissions. TPA and Western commented that the ability to generate ERCs from area and mobile sources could be very important in these areas; otherwise new major source construction could be largely eliminated. Western Refining added that if El Paso becomes designated as nonattainment under a future ozone standard, the options for generating ERCs from areas sources would be

necessary to allow ERCs to be generated for further growth.

Response

The commission acknowledges that some areas that may become nonattainment for ozone in the future under a 2015 NAAQS may have few point sources available to generate ERCs. However, this does not negate the challenges associated with generating ECs from area and mobile sources. In response to this and other comments, the commission is not removing the language relating to area and mobile sources generating credits. Because input is desired to determine a more effective way to implement the generation of credits by area and mobile sources, the commission encourages interested parties to participate as outlined in the response to the first comment on this rulemaking.

Comments

TPA commented that Texas may be putting itself at a competitive disadvantage with Louisiana if it removes the area and mobile source options to generate credits from the rules. Smalling commented further that expanded domestic oil and gas production has increased the need for ERCs for use as offsets for new and expanded facilities in the HGB area and that not allowing area sources to generate ERCs would result in jobs, wages, and tax revenue leaving Texas.

Response

As previously discussed, the reduction in the amounts of credits generated in Texas ozone nonattainment areas is mostly related to the fact that the easiest and most cost-efficient emissions reductions have already been done, such that costs for reducing emissions have increased at the same time that supply has not kept up with demand. Although oil and gas production does not require offsets in most cases, the commission realizes that increased petroleum refining may require more credits for offsets. In response to this and other comments, the commission is not removing the language relating to area and mobile sources generating credits.

Comment

The EPA commented that it is not taking a formal position on the need to repeal the rules for generating credits from area and mobile sources. The EPA commented that it cannot provide specific guidance on generating credits from area sources, specifically in regards to future use as nonattainment NNSR offsets. The EPA indicated that if the provisions were repealed it would be willing to work with the TCEQ to develop viable area and mobile source strategies for future inclusion in the Texas SIP. The EPA expressed interest in taking part in any future discussions so that it can help address viability of area source credit generation. The EPA also noted that area source reduction

strategies have been successfully used for AD purposes and encourage the TCEQ to consider this approach for area sources as well. The EPA added that if the existing SIP-approved flexibility is retained, area and mobile source credit generation generally requires the EPA's review on the generation protocol, through which the EPA could assist the TCEQ in determining whether the reduction strategy would be viable.

Response

The commission appreciates the EPA's willingness to work with the commission on these complex issues. However, the commission does not agree that generating credits from area and mobile sources would necessarily require additional EPA review of the generation protocol as long as the EPA approved rule requirements are followed. If a methodology that is substantively the same as a methodology that has been approved by the EPA is submitted to quantify emissions from the same type of facility or source as was represented in the approved protocol, it is not reasonable or necessary to expect the newly submitted protocol to be submitted for additional EPA review. In response to this comment, the commission is adding subparagraph (C) in §101.302(d)(1) and in §101.372(d)(1) to indicate that the executive director may approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility or mobile source. The commission intends that only new protocols for sources must

be submitted for EPA approval, rather than requiring such review when there is already an approved protocol for the same type of facility or mobile source. The commission agrees that any unapproved protocols will need EPA review and approval under the provisions of §101.302(d), but any SIP-approved protocols can be used without further EPA review. The commission will continue working with the EPA on these issues.

Comment

EPA requested that the TCEQ provide a current inventory of banked MDERCs, including location and pollutant, and a demonstration of how the applicable SIP ADs have accounted for the use of these banked MDERCs.

Response

All credits that are available are included in the ERC and DERC registries website. All MDERCs to date have been generated in Harris County from NO_X reductions. The MDERC certificates currently remaining (totaling 235.5 tons) are the following: D-2077 (2.0 tons), D-2283 (1.5 tons), D-2316 (0.3 ton), D-2341 (10.0 tons), D-3029 (19.5 tons), D-3030 (22.6 tons), D-3031 (19.3 tons), D-3032 (23.8 tons), D-3033 (25.9 tons), D-3034 (29.4 tons), D-3035 (20.9 tons), D-3036 (23.1 tons), D-3037 (25.0 tons), D-3038 (9.2 tons), and D-3168 (3.0 tons).

The available MDERCs in the registry as of June 2013, banked in HGB, totaled 247.1 tons of NO_X. The commission added these to the maximum potential DERCs that could be used for MECT compliance (in lieu of allowances) in any one year of 1,000 tons. As documented in Appendix B, Section 2.3 of the *Attainment Demonstration SIP Revision for the DFW 2008 Eight-Hour Ozone Nonattainment Area* adopted concurrently with this rulemaking, the commission made a worst-case assumption that all of these DERCs and MDERCs could come back into the airshed (credits used) in the attainment year in its calculation of growth for modeling. Table 2-15, titled Banked Emissions as of June 2013, of Appendix B documents this total of 1,247.1 tpy (3.4 tpd) of NO_X as emissions growth for the HGB MECT sources that potentially can be modeled. The entire MECT cap was modeled, plus this 3.4 tpd of NO_X growth for MECT sources. The commission makes no changes in response to this comment.

Comment

Delek and Western commented that while there has been discussion of allowing oil and gas production facilities to generate ERCs and DERCs, this possibility would not help in their counties because there are few production facilities.

Response

The commission recognizes that there are different circumstances in the various counties of the state. These rules apply statewide and are designed to be as flexible and inclusive as possible for the benefit or all Texans. The commission makes no changes in response to this comment.

Comment

Smalling commented that the TCEQ staff has arbitrarily not approved any area source applications although the current rules clearly allow it.

Response

Any commission action on previous ERC applications is beyond the scope of the rulemaking.

Comment

Smalling commented that removal of area sources from the ERC rules is contrary to EPA guidance for EIP.

Response

The EIP guidance from the EPA allows states considerable latitude in determining the specific features of these programs. The EIP guidance does

allow for the generation of credits by area sources, but only based on historical emissions levels. Emissions of area sources have been estimated rather than relying on requiring these sources to monitor or report source-specific emissions. However, in response to this and other comments, the commission is not removing the provisions for area and mobile sources to generate credits.

Comment

Smalling commented that removal of area source ERCs is not consistent with the SIP. The commenter stated that previous changes to the EBTP rules were made to address EPA comments, and that EI rules contain provisions allowing sources to file emissions data with the commission. Smalling stated that therefore a specific source could submit such data and be included in the SIP in both the area source inventory and as a line item within the inventory. Smalling stated that the commission can request specific sources file such information with the commission. The commenter also included additional information about the commission's EI reporting requirements.

Response

The commission's proposed removal of the area and mobile source credit provision was based on the significant implementation issues associated with these programs and ensuring the programs are consistent with FCAA

requirements for the SIP. Removal of options that have not been used or that the commission has determined cannot be effectively implemented is consistent with how the commission implements SIP revisions. Although the commission has the authority to require specific sources to report emissions, even if they are below the normal EI reporting threshold, this does not solve the broader challenges associated with fully implementing area or mobile source credits. However, in response to this and other comments, the commission is not removing the language relating to area and mobile sources generating credits.

Deadline to Submit an Application to Generate ERCs

Comment

TCC and TPA supported extending the deadline to submit an Application to Generate ERCs from 180 days to two years after the implementation of an emissions reduction strategy. TPA commented that Pennsylvania allows applications to be submitted for two years after "initiating a reduction" and stated that TCEQ's rules would benefit from a similar provision.

TIP and Luminant suggested extending the application deadline to 54 months after implementation of the emission reduction strategy. Western and Delek recommended extending the application deadline to five years, adding that the suggested change is

especially important for areas designated as nonattainment in the future. Sage recommended removing the deadline from the rule so that applications could be submitted up to the expiration date of the potential ERCs. TCC requested the commission consider allowing reductions in new nonattainment areas to be claimed anytime "before the next nonattainment SIP" consistent with a five-year ERC expiration and requested the change in deadline apply retroactively.

Response

In research done before drafting the proposal, the longest period found for applying for ERCs was the two-year period allowed by Pennsylvania (under 25 Pennsylvania Code §127.207), which in some cases requires additional documents to be submitted within one year of the reduction for the source to be eligible. In considering a revision to the time limit, the commission is trying to provide ample time for an applicant to submit the application while ensuring any ERCs generated are included in the modeling demonstration for an applicable SIP revision. The two-year period provides the applicant more time to submit an application to generate ERCs while still leaving a significant portion of the five-year lifespan of an ERC to provide the flexibility needed by users. The five-year lifespan of an ERC starts with the implementation of the emission reduction strategy rather than submittal of the application to certify the reductions or certification of

the credits. The commission makes no changes in response to these comments.

Comment

Luminant commented that a company that achieves emission reductions before an area is designated as nonattainment or before a SIP revision is adopted in an existing nonattainment area should not lose use of the emission reductions.

Response

The commission agrees that credits may be needed for use soon after an area is designated as nonattainment. In response to this comment, the commission has revised the definition of "SIP emissions" to allow sources to use the EI data that will be used in the EI SIP revision required for that area until the EI SIP is submitted to the EPA, which is currently required within two years after the effective date of the nonattainment designation. Emission reductions achieved before a SIP is revised can only be certified if the reduction occurred after the year of EI used in the modeling for the revised SIP. Reductions before or during the year of EI used in the modeling for the revised SIP are not surplus to the SIP EI and are therefore not eligible to be certified.

Comment

One individual commented that the increased time for submitting an ERC application could be beneficial, but the agency has not defined or addressed what constitutes a final event in a company's implementation of an emission reduction strategy. The individual also commented that the agency is not consistent in how this is used in ERC applications. The individual commented further that the agency should implement a policy, as opposed to rulemaking, in which implementation of the emission reduction strategy is not complete until the company has satisfied all criteria for emission banking and trading.

Response

The commission did not propose a definition for "final event" in this rulemaking, and is therefore precluded from introducing a new definition upon adoption of the rulemaking. Furthermore, discussion of future policymaking is beyond the scope of this rulemaking. Any commission action on previous ERC applications is also beyond the scope of this rulemaking. No change to the rules was made in response to this comment.

DERC Use in the DFW Area

Comments

The EPA supported the proposed revisions to the NO_X DERC limit in the DFW 1997

eight-hour ozone nonattainment area and stated that a flat limit would provide certainty to industry and easier implementation for the TCEQ. Luminant and TIP supported the replacement of the annually calculated NO_X DERC limits for the DFW area with a fixed limit of 17.0 tpd. Luminant stated that the annually calculated values could be unnecessarily restrictive in the future and the fixed limit is projected to provide flexibility while not harming air quality.

Luminant did not support the proposed change of the submittal deadline for the notice of intent to use DERCs from August 1 to October 1 and requested to retain the additional time provided by the deadline before proposal, which may be needed to arrange alternative compliance methods if the requested amounts of DERCs are not approved.

Response

The commission appreciates the support for establishing a fixed limit on NO_X DERC use in the DFW 1997 eight-hour ozone nonattainment area. In response to Luminant's comment, the commission is not adopting the proposed changes to the application deadline in §101.376(d)(1)(B)(i) to allow adequate time to arrange alternative compliance methods.

Comment

The EPA noted that the TCEQ has difficulty demonstrating that the DFW area will reach

attainment for the 2008 standard by the FCAA deadline. The EPA recommended reducing the proposed 17.0 tpd NO_X DERC limit in the DFW 1997 eight-hour ozone nonattainment area to improve the possibility of reaching attainment for the 2008 standard by the FCAA deadline and stated historical DERC use indicates the lower limit could be reduced without any impact on actual usage rates.

Response

The *Attainment Demonstration SIP Revision for the DFW 2008 Eight-Hour Ozone Nonattainment Area* adopted concurrently with this rulemaking demonstrates attainment of the 2008 eight-hour ozone NAAQS by 2018 based on a photochemical modeling analysis of reductions in NO_X and VOC emissions from existing control strategies and a weight of evidence analysis. The support for this demonstration does not rely on emission reductions associated with the DERC limit; Appendix B of the DFW AD SIP revision explains that the growth projected by the Eastern Research Group, Inc. growth factors was actually the limiting factor. DERC use in the DFW 1997 eight-hour ozone nonattainment area is historically small, and further reduction below the 17.0 tpd limit is not necessary as part of the DFW AD SIP revision. The commission makes no changes in response to this comment.

Comment

The EPA supported the exclusion of Wise County from the DFW area NO_X DERC limit, under the assumption that DERCs generated in Wise County would not be used under the DFW limit unless the inter-area use restrictions are followed. The EPA added that the same would apply to DERCs generated from the DFW area but used in the Wise County area.

Response

The commission appreciates the support for not extending the NO_X DERC limit to Wise County. The nine-county DFW 1997 eight-hour ozone nonattainment area is currently classified as serious, but under the 2008 eight-hour ozone NAAQS the nine original counties and Wise County are classified as moderate. Given the different classifications, NO_X DERCs generated in Wise County could only be approved for use in the nine-county DFW 1997 eight-hour ozone nonattainment area in accordance with the restrictions on the inter-area use of DERCs in §101.372(f)(7). Additionally, NO_X DERCs generated in the nine-county DFW 1997 eight-hour ozone nonattainment area could also only be approved for use in Wise County in accordance with the restrictions on the inter-area use of DERCs in §101.372(f)(7).

Comment

The EPA stated that the TCEQ adopted and submitted revisions to the DERC program to establish an exemption from the DFW DERC limit for ERCOT-declared emergencies in a SIP revision dated August 16, 2013. The EPA asked how the current revisions to the DFW AD for the 2008 ozone NAAQS accounted for the exemption or the ERCOT-declared emergencies. The EPA requested the commission provide a historical accounting of how the ERCOT-declared emergency exemption has been used in the DFW area and its impact on the AD.

Response

This exemption is outside the scope of the rulemaking. The commission did not propose to revise this provision but only moved it within the rule. The original provision was added to clarify that emergencies that threaten the stability of the grid would not be treated the same as other emergencies in regards to the DERC limit. The commission determined that the effects on air emissions from an electrical grid emergency and potential blackouts could be more significant than the use of DERCs above the limit. The commission notes that the provision has not been used in the past but may still be needed in the future. The commission makes no changes in response to this comment.

Use of credits as offsets

Comment

The EPA requested confirmation that proposed subparagraph (C) in §101.376(b)(2) still requires that a user of DERCs for NNSR offsets is required to obtain and retire an amount of DERCs equal to either the portion greater than 1:1 of the offset requirement or 10% of the amount of DERCs used as an environmental contribution. The EPA commented that as written, there is no requirement that this amount of DERCs be retired. The EPA added that if it is not the TCEQ's intent to require retirement of this environmental contribution, the TCEQ should provide a demonstration under FCAA, §110(l) as to the justification for reducing the stringency of this provision.

Response

The proposed changes in §101.376(b)(2)(B) and (C), were only to indicate that it is the user's responsibility to obtain the amount of DECs specified as offsets in the NNSR permit. However, as part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed changes in §101.376 referenced by the commenter. This requirement will remain as it was in the prior SIP-approved rules.

Comment

TCC supported deletion of the requirement to identify the ERCs to be used as offsets

before permit issuance to allow additional time to obtain the ERCs. TCC, TIP, and Luminant supported the proposed requirement for ERC users to submit a completed Application to Use ERCs at least 90 days before the start of operation for an ERC used as offsets in an NNSR permit.

Response

The commission appreciates the support for these provisions.

Comment

TIP offered a technical correction to §101.376(b)(2)(E), pointing out that an application to use DERCs for offsets should not be required to be submitted more than once.

Response

The commission agrees with this comment. The proposed revision was intended to allow the user to submit one application to use DERCs for NNSR offsets to reduce the regulatory burden associated with the previous requirement to submit applications annually. However, the commission also recognizes that there may be circumstances when the user may need to provide additional DERCs to continue operation beyond the initial period covered by the original application. Therefore, in response to this comment the commission is revising §101.376(b)(2)(D) to require the user to submit

the application at least 90 days before the start of operation and before continuing operation for any subsequent period for which the offset requirement was not covered under the initial application.

Use of allowances as offsets

Comment

TCC expressed concerns regarding the impacts associated with the devaluation of MECT allowances used for the 1:1 portion of the offset ratio due to future regulatory changes because it creates too great of an uncertainty for projects. TCC suggested that during SIP development, new facilities that are built to Best Available Control Technology or Lowest Achievable Emission Rate requirements and utilize MECT allowances as ERCs should be kept "whole" and not be subject to adjustments in a future SIP process. TIP requested an option be added to the rule to allow a company to permanently retire MECT allowances used for the 1:1 portion of the offset requirement rather than using these allowances simultaneously for MECT compliance as provided in §101.352(e). This change would prevent the allowances used as offsets from devaluing.

Response

These suggested revisions are outside the scope of this rulemaking. The requirement for a new or modified major source to offset new emissions is a requirement of the FCAA. For a permit to continue to be valid, a source

that uses allowances to meet this requirement on an on-going basis, instead of using credits for a one-time offset, must surrender enough allowances on a yearly basis to meet the full offset amount. If allowances are devalued though future regulatory actions, it will be necessary for a source using allowances to obtain enough allowances to continue to meet the full offset requirement. This is necessary because, although the allowances will no longer have the same emissions value, the offset requirement will not be decreased. The commission makes no changes in response to this comment.

Comment

TIP opposed the amendments to §101.352(e) and §101.393(d) that allow MECT and HECT allowances to be used for the full offset requirements in NNSR permits because these issues could be handled through guidance. TIP commented that the commission should not make changes to the existing SIP-approved rule language simply to make the rules consistent with guidance and historical practices. TIP stated that TCEQ's existing guidance has been effective in settling these issues.

Response

The commission does not agree that it is inappropriate to update rules to reflect current guidance and agency practices. No change to the rules was made in response to these comments.

Comment

The EPA supported the new provisions in §101.352(e) and §101.393(d) that clarify how allowances can be used for the 1:1 portion of the NNSR offset requirement, as well as the portion of the offset requirement that is greater than 1:1, which is referred to as the environmental contribution. TCC supported adding language to allow use of current MECT allowances (but not vintage MECT allowances) for offset purposes in NNSR permits for any part of the offset requirement (the 1:1 or the 0.3:1). TPA supported the proposed revisions to provide for use of MECT allowances to satisfy NO_X offset requirements for any facility in the HGB area that is required to participate in the MECT program, as it would increase sources' access to the EBT program and would be beneficial.

Response

The commission appreciates the support.

Generating ERCs from facilities in the MECT and HECT Programs

Comment

TIP requested that §101.352(c) be revised to require that MECT allowances be retired when NO_X ERCs are generated by MECT-applicable facilities only when those facilities are existing facilities, as defined in §101.350, which were permitted and built before

2001.

Response

The prior requirements in §101.352(c) already require an owner or operator that generates ERCs from any facility subject to the MECT rules to make an enforceable and permanent reduction of annual allowances. The commenter's suggested revision would not require MECT-applicable sources without an annual allocation to retire a MECT allowance, but this change would require a demonstration of noninterference under FCAA, §110(l) showing why those amendments do not negatively affect the status of the state's progress towards attainment with the ozone NAAQS, do not interfere with control measures, and do not prevent reasonable further progress toward attainment of the ozone NAAQS. The commission makes no changes in response to this comment.

Comment

TPA supported proposed §101.393(i), which would allow the owner or operator of a facility subject to the HECT Program to generate VOC ERCs from the reduction of HRVOC emissions if one ton per year of HECT allowances is surrendered for each ton per year of ERCs generated from HRVOC emissions. TPA supported the proposal as it would add flexibility to the EBT program by enhancing a source's ability to generate

VOC ERCs, which are currently in short supply.

Response

The commission appreciates the support.

Inter-pollutant use of credits

Comment

The EPA supported revisions to the inter-pollutant provisions for DERCs and ERCs to require photochemical modeling for each inter-pollutant request as opposed to the urban airshed modeling language. The EPA expressed concern that the new language creates a two-part test for approvability - the substitution could be approved if it is shown either not to adversely affect the overall air quality or not to adversely impact the regulatory design value - and suggested revising the proposed rules to either satisfy both parts or remove the design value test entirely. The EPA added that relying on the design value test could result in relatively large changes in an area's ozone levels being approved without the design value changing due to truncating to 1 ppb in the calculation of ozone DVs. Further, relying solely on the design value test would not be in keeping with the EIP Appendix 16.9, which focuses on ensuring that trades reduce or maintain ozone levels. The EPA noted that the revised provisions maintain the existing SIP requirement for prior approval from the EPA and TCEQ before substituting one ozone precursor for another ozone precursor. The EPA added that it should be consulted

during the development of the protocol so that its concerns about the photochemical modeling could be incorporated at the beginning of the process.

Response

Based on the comments, the commission is revising the language in §101.306(d) and §101.376(g) to clarify that both parts of the modeling demonstration are required. The proposed rules state that a credit may be used to meet the NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution.

Comment

TIP opposed the proposed provisions in §101.306(d) and §101.373(g) that require a showing that inter-pollutant use of ERCs or DERCs will not adversely affect the overall air quality or regulatory design value in the nonattainment area of use.

Response

The commission considers this change necessary under the FCAA. The proposed provisions in §101.306(d) and §101.373(g) add specificity to the prior requirement that the user demonstrate that one ozone precursor may

be substituted for another. Although the TCEQ has issued guidance on how to make the required demonstration, the commission considers this change necessary to establish the standard by which the executive director will base approval of the inter-pollutant use of credits. The proposed rules state that a credit may be used to meet the NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution. No changes are made in response to this comment.

Comment

TCC commented that revising the ERC inter-pollutant modeling requirements from the urban air shed model to photochemical modeling is consistent with TCEQ's current software usage and with TCEQ's existing inter-pollutant guidance document.

Response

The commission appreciates the comment.

Comment

TCC encouraged the agency to consider additional ways to calculate use of inter-pollutant ERCs in order to provide flexibility to the regulated community.

Response

The commission developed the method for calculating the use of inter-pollutant ERCs to be consistent with federal and state requirements. Based on comments from the EPA on this provision, the method, as clarified at adoption, appears to be consistent with EPA requirements. Since both commission and EPA approval of the inter-pollutant use of ERCs is required, no changes to the rule were made in response to this comment.

Comment

TCC commented that companies should be able to adjust the EI to evaluate emissions based on recent, actual performance testing in lieu of emission factors if such factors were used in the baseline emission inventory.

Response

The EI requires actual emissions to be reported using the best available method during the reported calendar year. When revised or updated emissions factor data become available for a particular emissions unit, owners or operators can use that data to determine emissions from that point in time forward.

The TCEQ reviews EI revisions on a case-by-case basis. The TCEQ might approve test data to revise an EI if the test was conducted during the calendar year for which the inventory was requested. However, the TCEQ's processing of such a revision will not necessarily change the baseline inventory amount for credit generation, since the revision must be represented in the EI used in the most recent AD SIP revision.

Additionally, the TCEQ does not allow retroactive emissions revisions using test data; for example, a performance test conducted during 2014 cannot be used to revise EIs for calendar years prior to 2014. The TCEQ does not allow retroactive revisions because the emissions unit did not necessarily operate in the same manner in the past as it did during testing. Additionally, if EI revisions were required every time a unit was tested or emissions factors were updated, additional permitting requirements (such as NNSR), emissions fee requirements, SIP revisions, and other air quality-related program requirements could be triggered and would need to be reviewed and reassessed on a case-by-case basis.

Comment

TIP opposed amendments to §101.302(e)(4) and §101.372(e)(4) that provide that ERCs and DERCs cannot be certified from emissions that exceed any local, state, or federal

requirement.

Response

The revisions noted by TIP were proposed as clarifications rather than substantive changes to the rules. The definition of "surplus" has and continues to require that emission reductions certified as ERCs and DERCs cannot have been relied upon in the SIP and cannot be mandated by any local, state, and federal requirement. Because the provisions had only included one requirement, allowable emissions, the commission proposed to clarify that the rest of what is needed to be surplus also applies to these provisions. However, as part of retaining the provisions for mobile sources to generate credits, the commission is not adopting any of the proposed changes to §101.302(e)(4) and §101.372(e)(4) referenced by the commenter. This requirement will remain as it was in the prior SIP-approved rules.

SIP emissions

Comment

The EPA requested clarification on and examples of how the new definitions of "SIP emissions" in the ERC and DERC rules would apply to the generation and use of credits as currently approved in the Texas SIP. The EPA questioned if the definition expanded the ERC program to attainment areas. The EPA stated that it interprets the proposed

definition of SIP emissions to allow credits to be generated before an area is designated nonattainment, such that credit would be available for use as offsets when an area becomes nonattainment. The EPA added that it is unable at this time to identify what set of regulations would be approvable or allow for the generation of credits in an attainment area that could be used for NNSR offsets if the same area becomes nonattainment in the future.

Response

The commission does not agree with the assumption that the proposed definition of SIP emissions expands ERC generation to areas that are not designated nonattainment. As noted by the EPA, the SIP-approved ERC rules clearly only apply in nonattainment areas and therefore the requirements of that division (including the definition of SIP emissions) do not apply to sources located in an area that has not been designated nonattainment. The SIP emissions definition is intended to provide a mechanism for the generation of ERCs and DERCs upon the effective date of the area's nonattainment designation, which is consistent with when new or modified facilities become subject to the NNSR offset requirements.

While the SIP-approved DERC rules currently allow DERCs to be generated in any county, the commission only intends the definition of SIP emissions

to apply to credits generated in an area designated nonattainment by the EPA. It is not clear to the commission that the FCAA necessarily prohibits DERCs certified prior to a nonattainment designation from being used in the same county where they were certified after a nonattainment designation. In response to this comment, the commission has revised the definition to clearly indicate that SIP emissions are only considered for a facility located in a nonattainment area.

In response to comments, the commission is expanding the definition to ensure that credits can be generated between the effective date of the designation and the date the EI SIP is required to be submitted to the EPA. The expanded definitions indicate that in absence of any of the other specified SIP revisions, the SIP emissions may be determined from the calendar year of the EI that will be used in the EI SIP revision that will be submitted to the EPA. This option is being added in response to comments, to ensure that credits can be generated beginning on the effective date of the nonattainment designation as opposed to restricting credit generation until after an EI SIP revision is submitted to the EPA, which could be two years after the effective date of the designation. The commission anticipates that the executive director will have determined the inventory year for the EI SIP at approximately the same time an area is designated nonattainment

as part of the SIP planning process since there is a limited amount of time before the EI SIP is required to be submitted to the EPA.

An AD or maintenance plan SIP revision submitted for the previously issued NAAQS could be used even if this standard has been revoked. For example, the SIP emissions would be based on the inventory year used in the AD SIP revision most recently submitted to the EPA for the 1997 eight-hour ozone NAAQS until an AD or maintenance plan SIP is submitted for the 2008 (or any subsequent year) eight-hour ozone NAAQS for that area. However, if no AD or maintenance plan SIP has been submitted for either the 1997 or 2008 eight-hour ozone NAAQS, the SIP emissions would be based on the inventory year that was, or will be, used in the EI SIP submitted for that area even if an AD SIP revision was previously submitted for the one-hour ozone NAAQS in the area. If an AD or maintenance plan SIP has been submitted for the 1997 eight-hour ozone NAAQS and an EI SIP was later submitted for the 2008 eight-hour ozone NAAQS, the SIP emissions would continue to be based on the AD or maintenance plan SIP submitted for the 1997 eight-hour ozone NAAQS. However, if an AD or maintenance plan SIP was submitted for the one-hour ozone NAAQS and an EI SIP was later submitted for the 2008 eight-hour ozone NAAQS, the SIP emissions would be based on the EI SIP for the 2008 eight-hour ozone

NAAQS.

Comment

TIP offered two technical corrections for the new definition of "state implementation plan emissions" at §101.300(21). TIP requested that the proposed definition of "state implementation plan emissions" be made the same as the term used to implement the new definition at §101.303(b)(1) to limit baseline emissions. This could be done by changing §101.300(21) to define "SIP emissions" or by changing §101.303(b)(1) to refer to "state implementation plan emissions."

Response

The commission rules are drafted in accordance with current *Texas Register* style and format requirements, which include a requirement to define acronyms the first time the term is used in each section of the rules. In response to this comment, the commission has revised the defined term to also include the SIP acronym in an effort to improve readability and ensure that it is clear that "state implementation plan" and "SIP" have the same meaning.

Comment

Sage commented that, for counties newly designated as nonattainment, the rule change

related to using an EI or maintenance SIP instead of only the AD SIP should be expanded to keep the emissions used in the EI or maintenance SIP available after an AD SIP is adopted if they have not already been used for an offset.

Response

When an AD SIP is developed or revised, the prior emission reductions are incorporated into the modeling used to demonstrate attainment. Therefore, allowing credits to be generated from reductions that are no longer surplus to the SIP would be inappropriate and could have a negative impact on air quality. As discussed in the Section by Section Discussion section of this preamble, the need to avoid this occurrence was the basis for the prior 180-day deadline for submitting applications to certify ERCs and will also limit some applications submitted under the new two-year deadline. However, changing the SIP used when generating credits does not affect credits that were previously issued, only credits that are issued afterwards. Any banked credits generated based on the EI or maintenance SIP revisions would be included in the AD SIP and therefore available for use as long as all other requirements are met. No change to the rules was made in response to this comment.

Comment

TCC expressed concern that the proposed definition of SIP emissions would reset the baseline year in the HGB area and requested further discussion on this point. TIP suggested revising the definition of SIP emissions at §101.300(21) to prevent an unintended resetting of the baseline-limiting year for areas such as HGB for which an EI SIP revision, but not an AD or maintenance plan SIP revision, has been submitted for the current NAAQS. TIP suggested this change could be implemented by adding "if an attainment demonstration or maintenance plan SIP revision for the current NAAQS" to §101.300(21)(B). TIP stated that such a change would also be consistent with federal rules.

Response

The definition of "SIP emissions" does not reset the baseline year in the HGB area. However, the year used as the baseline year in the HGB SIP will change upon the next revisions to the AD SIP for the HGB area. As discussed in the response to an EPA comment on this issue, the other provisions for this definition in Division 1 and Division 4 are intended to provide a mechanism to certify credits soon after an area is designated nonattainment rather than affecting areas that are already designated nonattainment. No changes were made in response to this comment.

Miscellaneous

Comment

TCC and TIP opposed the proposed 10% allowance penalty for MECT sources because the standard for "non-compliance" is unclear and tightens the MECT cap without improving emissions quantification. TIP commented further that it would be inappropriate to impose a MECT penalty for circumstances where the alleged noncompliance results from generality in the rules, especially if the owner or operator has used the best available method to quantify the emissions. TCC stated that if the commission moves forward with the proposed penalty then the rules should allow 60 days to respond to the Notice of Deficiency.

Response

The additional 10% of allowances will only be assessed in cases where there is a clear requirement for monitoring or testing in Chapter 117 but the owner of operator of the facility has failed to meet that requirement. By providing a greater incentive for companies to meet the Chapter 117 requirements, which provide more accurate data than the alternative data sources, this provision should improve emission quantification over time. The use of this provision does not in itself constitute enforcement and will not be reflected in a company's compliance history, although the provision also does not preclude an enforcement action from being taken for the

Chapter 117 violation. Therefore, this issue for MECT allowances will be addressed in the annual compliance letter for a site rather than a Notice of Deficiency. The commission will continue to allow an owner or operator to provide revisions to an annual compliance report within 90 days of the issuance of an annual compliance letter, and if the owner or operator demonstrates that the noncompliance with Chapter 117 has been addressed within that period, the additional allowance assessment will be voided.

Comments

Western and Delek supported the commission's decision to not make any changes to provisions allowing credits be generated for reductions in Mexico.

Response

The commission appreciates the support for leaving these provisions the same.

Comment

Sage commented that the second sentence of the proposed revision to the definition of "real" at §101.300(17) is not necessary and may be confusing. Sage suggested as alternate language "An emission reduction based solely on reducing a facility's allowable emissions which is not related to and part of an approved method of generation

described in 30 T.A.C. § 101.303(a) of this rule, is not considered real."

Response

Based on inquiries on the issue of generating ERCs solely from reducing permit limits for emissions, the commission added at proposal the second sentence to the definition of "real" (now renumbered as §101.300(23) because of changes made at adoption) to provide additional clarity on this specific issue. Sage's suggested language appears to allow the reduction of only allowable emissions as long as this is related to a method of generation, which is not consistent with FCAA requirements. No change to the rules was made in response to this comment. However, as part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed revisions to this term.

Comment

The EPA commented that it is not necessary to include proposed §101.302(c)(1)(D) because it is redundant given the proposed new definition of "SIP emissions" in §101.300(21).

Response

The commission agrees that the provision is not needed with the definition

of SIP emissions. Revised §101.302(c)(1)(C) requires that the emission reductions occur after the year used to determine the SIP emissions, and the definition of SIP emissions applies only to a facility that reported emissions used in the appropriate SIP. Therefore, saying in §101.302(c)(1)(D) that the facility must have reported emissions used in the SIP is not needed. In response to this comment, the commission is removing the requirement in §101.302(c)(1)(D).

Comment

The EPA agreed with the proposed deletion of the ERC and DERC "ownership" provisions in §101.302(l) and §101.372(m), respectively. The EPA also agreed that the revised general ERC and DERC provisions in §101.302(b) and §101.372(b) were clear that the owner or operator of a stationary source is the owner of the credit. The EPA noted that upon a trade, the ownership would transfer to whoever has purchased the EC.

Response

The commission appreciates the support. However, as part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed repeal of the provisions in §101.302(l) and §101.372(m).

Comment

The EPA noted inconsistency between the protocol provisions for the ERC and DERC programs. The EPA provided an example of the noted inconsistencies in §101.302(d)(1)(A) and §101.372(d)(1)(A) and added that it preferred the language in §101.372(d)(1)(A) because it assists the reader in understanding these are the protocols to use for NO_X. The EPA encouraged the commission to review both sections and to identify common language for use, as consistency between the ERC and DERC rules was a driving factor in the proposed revisions.

Response

The commission agrees and has reviewed these sections of the ERC and DERC rules to identify non-substantive changes to promote consistency between these rules. In response to this and other comments, the commission revised §101.302(d)(1)(A) and §101.372(d)(1)(A) but did not incorporate the EPA's preferred language because the SIP-approved monitoring and testing requirements in Chapter 117 include quantification protocols for NO_X, carbon monoxide, and ammonia.

Comment

The EPA supported the repeal of the Emission Monitoring and Compliance

Demonstration in §101.358 and agreed that the provisions in §101.354 provide more detailed requirements regarding emissions monitoring and compliance demonstration.

Response

The commission appreciates the support.

Comment

The EPA noted that under the proposed revisions to §101.372(c), the DERC requirements could only be satisfied for a facility that was included in a nonattainment area SIP. The EPA recommended revising §101.372(c) since the DERC program applies statewide in both attainment and nonattainment areas.

Response

The proposed revisions to §101.372(c)(1)(B) and (C) were intended to clarify that subparagraphs (B) and (C) only apply to facilities in a nonattainment area. Proposed §101.372(c)(1)(B) and (C) were revised in response to this comment to further clarify that these subparagraphs will only apply if the emission reduction is made at a facility that is located in an area designated as nonattainment for the pollutant for which the DERC will be generated. New §101.372(c)(1)(B) and (C) do not apply to a facility that is outside an area designated as nonattainment for the pollutant for which the DERC will

be generated.

Comment

The EPA commented that the proposed new provisions at §101.372(d)(1)(C) are intended to provide certainty on how DERC generation and use is calculated for carbon monoxide, sulfur dioxide, PM_{10}, and $PM_{2.5}$ by using "commission rules" for the calculations. The EPA questioned if the TCEQ intended to submit these "commission rules" to the EPA for SIP approval. The EPA noted that the NO_X methodologies in §101.372(d)(1)(A) and the VOC methodologies in §101.372(d)(1)(B) have all been submitted to the EPA for SIP approval. The EPA added that other criteria pollutant methodologies should also be submitted to the EPA for SIP approval or the individual methodologies should be developed under the existing SIP requirements for EPA review and approval of protocols at §101.372(d)(1)(D).

Response

The commission agrees that the DERC rules require the use of an approved quantification protocol to determine the amount of DERCs generated or used; the proposed phrase "commission rules" was intended to reference rules submitted as part of the SIP. However, the commission does not agree that only the monitoring methods in Chapters 115 and 117 have been submitted to the EPA for approval. The commission has approved protocols

from the EPA for quantifying carbon monoxide and particulate matter in Chapters 117 and 111, respectively. In addition, quantification protocols have also been submitted to the EPA as part of the NNSR and Title V permitting programs. In response to comments related to quantification protocols, the commission is not adopting the proposed provision to ensure the rules clearly require the use of an EPA-approved quantification protocol. The commission is instead adopting subparagraph (C) in §101.302(d)(1) and in §101.372(d)(1) to specify that, in cases where a protocol has not been submitted to the EPA for the applicable facility, the executive director can approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility or mobile source.

Comment

The EPA noted what it considered a typographical error in §101.372(d)(1)(A) and suggested using "as a criteria pollutant" instead of "or a criteria pollutant."

Response

The commission disagrees that the noted word is a typographical error. In addition to the emission specifications for NO_X, there are emission specifications for carbon monoxide in some of the sections cited. The commission intended that this provision apply to both NO_X and carbon

monoxide, as well as any other criteria pollutants if any emission specifications and testing requirements are adopted in the future. The commission recognizes that the emission specification for carbon monoxide has not been submitted to the EPA for SIP approval, but the testing requirements that the provision requires to be used have been approved by the EPA as part of the SIP.

Comment

The EPA noted a typographical error in §101.372(h) and suggested revising the first sentence to read "date the DERC is generated" instead of "date of the DERC is generated".

Response

The commission agrees that there was a typographic error in the proposed language. However, as part of retaining the provisions for mobile sources to generate credits, the commission is not adopting the proposed revision to §101.372(h) that contained the error.

Comment

TCC commented that the proposed revisions to the ERC rule would redefine "baseline emissions" to include the facility's emissions before implementation of an emission

reduction strategy calculated as the lowest of the facility's historical adjusted emissions or SIP emissions. TCC expressed concern that the language seems to imply that any source shutdown after the SIP baseline year is not creditable, and would unnecessarily penalize point sources. TCC added that credit should be available for sources that were shut down, even when those sources were not included in the SIP baseline year.

Response

No changes were made in response to this comment. The revisions to the definition of "baseline emissions" in §101.300 were proposed to ensure that the definition of this term was consistent with other portions of this division but did not impose any new requirements or restrictions on ERC generation. The revised definition of "baseline emissions" does not prevent a source that is shut down after the SIP year from generating ERCs. In addition, §101.302(c) limits ERCs to emission reductions that occur after the year used to determine the SIP emissions for the facility. The commission does not agree that ERCs should be generated from sources that were not included in the SIP baseline year.

Comment

TCC commented that the proposal notes an ERC cannot be generated from shutdown of a facility that is not in the SIP, and requested confirmation that emissions covered by

Permits by Rule are "in the SIP."

Response

As discussed in regards to provisions for area sources to certify ERCs and DERCs, some facilities authorized under a permit by rule are represented in the EI data used for modeling for the SIP, and others are not but may be included in the modeling in a general way under an area source category. If emissions from a facility were reported to EI for the year of EI data used in the SIP modeling, then the facility is included in the SIP modeling. If the emissions were not reported, then the facility would only potentially be eligible for certifying credits as determined for the specific area source category in which it is represented in the SIP modeling.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT PROGRAM

§§101.300 - 101.303, 101.306, 101.309

Statutory Authority

The amended sections 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 amended sections 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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 amended sections 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 amended sections 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 in which the National Ambient Air Quality Standards 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*.

§101.300. Definitions.

Unless specifically defined in the Texas Clean Air Act or in §3.2 or §101.1 of this title (relating to Definitions), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition, the following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise.

(1) Activity--The amount of activity at a facility or mobile source measured in terms of production, use, raw materials input, vehicle miles traveled, or other similar

units that have a direct correlation with the economic output and emission rate of the facility or mobile source.

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

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

(4) Baseline emissions--The facility's emissions, in tons per year, occurring before implementation of an emission reduction strategy calculated as the lowest of the facility's historical adjusted emissions or state implementation plan emissions.

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

(6) Curtailment--A reduction in activity level at any facility or mobile source.

(7) Emission credit--An emission reduction credit or mobile emission reduction credit.

(8) Emission rate--The facility's rate of emissions per unit of activity.

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

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

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

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

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

(14) Historical adjusted emissions--The facility's emissions occurring before implementation of an emission reduction strategy and adjusted for any local, state, or federal requirement, calculated using the following equation.

Figure: 30 TAC §101.300(14)

$$E_H = \frac{(A_1 \times ER_1) + (A_2 \times ER_2)}{2}$$

Where:

E_H = The historical adjusted emissions for a facility.

A_1 = The facility's activity during the first of any two consecutive calendar years selected in accordance with §101.303(b)(2) of this title (relating to Emission Reduction Credit Generation and Certification), not to exceed any applicable local, state, or federal requirement.

ER_1 = The facility's emission rate during the first of any two consecutive calendar years selected in accordance with §101.303(b)(2) of this title, not to exceed any applicable local, state, or federal requirement.

A_2 = The facility's activity during the second of any two consecutive calendar years selected in accordance with §101.303(b)(2) of this title, not to exceed any applicable local, state, or federal requirement.

ER_2 = The facility's emission rate during the second of any two consecutive calendar years selected in accordance with §101.303(b)(2) of this title, not to exceed any local, state, or federal requirement.

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

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

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

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

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

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

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

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

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

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

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

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

(23) Real reduction--A reduction in which actual emissionsare reduced.

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

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

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

(27) State implementation plan (SIP) emissions--The emissions data in the state's emissions inventory (EI) required under 40 Code of Federal Regulations Part 51, Subpart A for the year used to represent the facility's emissions in a SIP revision. The applicable SIP revision must be for the nonattainment area where the facility is located and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. The SIP emissions may not exceed any applicable local, state, or federal requirement. A facility's SIP emissions are determined from the EI year that:

(A) was used to develop the projection-base year inventory for the modeling included in an attainment demonstration (AD) SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the United States Environmental Protection Agency (EPA) for the current National Ambient Air Quality Standard (NAAQS);

(B) if the SIP revisions identified in subparagraph (A) of this paragraph have not been submitted to the EPA, was used to develop the projection-base year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the EPA for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS;

(C) if the SIP revisions identified in subparagraphs (A) and (B) of this paragraph have not been submitted to the EPA, corresponds to the EI for the most recent EI SIP revision submitted to the EPA; or

(D) if the SIP revisions identified in subparagraphs (A) - (C) of this paragraph have not been submitted to the EPA, corresponds to the EI that will be used for the EI SIP revision that will be submitted to the EPA.

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

(29) Surplus--An emission reduction that is not otherwise required of a facility or mobile source by any applicable local, state, or federal requirement and has not been otherwise relied upon in the state implementation plan.

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

§101.301. Purpose.

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

§101.302. General Provisions.

(a) Applicable pollutants.

(1) An emission reduction credit (ERC) may be generated from a reduction of a criteria pollutant, excluding lead, or a precursor of a criteria pollutant for which an area is designated nonattainment. An ERC generated from the reduction of one pollutant or precursor may not be used to meet the requirements for another pollutant or precursor, except as provided by §101.306(d) of this title (relating to Emission Credit Use).

(2) Reductions of criteria pollutants, excluding lead, or precursors of criteria pollutants for which an area is designated nonattainment, may qualify as mobile emission reduction credits (MERCs). MERCs generated from reductions of one pollutant may not be used to meet the requirements for another pollutant, unless urban airshed modeling demonstrates that one ozone precursor may be substituted for another, subject to executive director and United States Environmental Protection Agency (EPA) approval.

(b) Eligible generator categories. The following categories are eligible to generate emission credits:(1) facilities, including area sources;(2) mobile sources;

and(3) any facility, including area sources, or mobile source associated with actions by federal agencies under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans .

(c) Emission credit requirements.

(1) An ERC is a certified emission reduction that:

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

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

(C) must occur after the year used to determine the state implementation plan (SIP) emissions for the facility.

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

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

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

(C) in order to become certified, the reduction must have occurred after the most recent year of emissions inventory used in the SIP;

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

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

(3)Emission reductions from a facility or mobile source that are certified as emission credits under this division cannot be recertified in whole or in part as credits under another division within this subchapter .

(d) Protocol.

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

(A) The owner or operator of a facility subject to the emission specifications under §§117.110, 117.310, 117.410, 117.1010, 117.1210, 117.1310, 117.2010, or 117.2110 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Eight-Hour Attainment Demonstration; and Emission Specifications) shall use the testing and monitoring methodologies required under Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) to show compliance with the emission specification for that pollutant .

(B) The owner or operator of a facility subject to the requirements under Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) shall use the testing and monitoring methodologies required under Chapter 115 of this title to show compliance with the applicable requirements.

(C) The executive director may approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility or mobile source.

(D) Except as specified in subparagraph (C) of this paragraph, if the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following requirements apply:

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

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

(iii) the owner or operator of a facility with a continuous emissions monitoring system or predictive emissions monitoring system in place shall use this data in quantifying emissions;

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

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

(vi) quantification protocols may not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA adopts disapproval of the protocol in the *Federal Register*.

(2) If the monitoring and testing data specified in paragraph (1) of this subsection is missing or unavailable, the generator or user shall determine the facility's emissions for the period of time the data is missing or unavailable using the most conservative method for replacing the data and these listed methods in the following order:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

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

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator or user shall submit the justification for not using the methods in paragraph (1) of this subsection and submit the justification for the method used.

(e) Credit certification.

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

(2) The executive director shall review an application for certification to determine the credibility of the reductions. Each ERC certified will be assigned a certificate number. A new number will be assigned when an ERC is traded or partly used. Reductions determined to be creditable and in compliance with all other requirements of this division will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the emission credit application. The applicant may submit a revised application in accordance with the requirements of this division. If a facility's or mobile source's actual emissions exceed any applicable local, state, or federal requirement, reductions of emissions exceeding the requirement may not be certified as emission credits. An application for certification of emission credit from reductions quantified under subsection (d)(1)(D) of this section may only be approved after the EPA's 45-day adequacy review of the protocol.

(f) Geographic scope. Except as provided in §101.305 of this title (relating to Emission Reductions Achieved Outside the United States), only emission reductions generated in nonattainment areas can be certified. An emission credit must be used in the nonattainment area in which it is generated unless the user has obtained prior written approval of the executive director and the EPA; and

(1) a demonstration has been made and approved by the executive director and the EPA to show that the emission reductions achieved in another county or state provide an improvement to the air quality in the county of use; or

(2) the emission credit was generated in a nonattainment area that has an equal or higher nonattainment classification than the nonattainment area of use, and a demonstration has been made and approved by the executive director and the EPA to show that the emissions from the nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the nonattainment area of use.

(g) Recordkeeping. The generator shall maintain a copy of all notices and backup information submitted to the executive director for a minimum of five years . The user shall maintain a copy of all notices and backup information submitted to the executive director from the beginning of the use period and for at least five years after. The user shall make the records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records must include, but not necessarily be limited to:

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

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

(3) the certificate number of emission credits used for each facility or mobile source.

(h) Public information. All information submitted with notices, reports, and trades regarding the nature, quantity, and sales price of emissions associated with the use, generation, and transfer of an emission credit is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information, may result in the rejection of the emission credit application. All nonconfidential information will be made available to the public as soon as practicable.

(i) Authorization to emit. An emission credit created under this division is a limited authorization to emit the pollutants identified in subsection (a) of this section, unless otherwise defined, in accordance with the provisions of this section, 42 United

States Code, §§7401 *et seq.*, and Texas Health and Safety Code, Chapter 382, as well as regulations promulgated thereunder. An emission credit does not constitute a property right. Nothing in this division may be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(j) Program participation. The executive director has the authority to prohibit a person from participating in emission credit trading either as a generator or user, if the executive director determines that the person has violated the requirements of the program or abused the privileges provided by the program.

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

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

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

(2) whether the owner or operator of the facility or mobile source lacks the potential to generate 1/10 ton of credit.

§101.303. Emission Reduction Credit Generation and Certification.

(a) Emission reduction strategy.

(1) An emission reduction credit (ERC) may be generated using one of the following strategies or any other method that is approved by the executive director:

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

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

(C) a change in a manufacturing process that reduces emissions below baseline emissions for the facility;

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

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

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

(A) reductions from the shifting of activity from one facility to another facility at the same site;

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

(C) reductions from a facility without state implementation plan (SIP) emissions.

(b) ERC baseline emissions.

(1) The baseline emissions may not exceed the facility's SIP emissions.

(2) The activity and emission rate used to calculate the facility's historical adjusted emissions must be determined from the same two consecutive calendar years selected from the ten consecutive years immediately before the emission reduction is achieved.

(3) For a facility in existence less than 24 months or not having two complete calendar years of activity data, a shorter period of not less than 12 months may be considered by the executive director.

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

Figure: 30 TAC §101.303(c)

$$ERC = BE - SE$$

Where:

ERC = The amount of emission reduction credits generated, in tenths of a ton per year.

BE = The facility's baseline emissions, which is the lowest of the historical adjusted emissions or the state implementation plan emissions.

SE = The facility's strategic emissions, which is the enforceable emission limit for the facility after implementation of the emission reduction strategy.

(d) ERC certification.

(1) The owner or operator of a facility with potential ERCs shall submit to the executive director an application for ERCs no more than two years after the implementation of the emission reduction strategy. Applications will be reviewed to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and an ERC will be issued to the owner.

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

(3) An application for ERCs must include, but is not limited to, a completed application form specified by the executive director signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

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

(B) the amount of ERCs generated;

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

(D) documentation supporting the activity, emission rate, historical adjusted emissions, SIP emissions, baseline emissions, and strategic emissions;

(E) emissions inventory data for each of the years used to determine the SIP emissions and historical adjusted emissions;

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

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

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

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

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

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

(C) for any facility without a new source review permit that is otherwise authorized by commission rule, certifying the emission reduction and the new maximum emission limit on a Certification of Emission Limits (Form APD-CERT) or other form considered equivalent by the executive director or an agreed order.

§101.306. Emission Credit Use.

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

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

(2) mitigation offsets for action by federal agencies under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans;

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

(4) reductions certified as emission credits may be used in netting by the original applicant, if not used, sold, reserved for use, or otherwise relied upon, as provided by Chapter 116, Subchapter B of this title (relating to New Source Review Permits); or

(5) compliance with other requirements as allowed in any applicable local, state, and federal requirement.

(b) Credit use calculation.

(1) The number of emission credits needed by the user for offsets shall be determined as provided by Chapter 116, Subchapter B of this title.

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

Figure: 30 TAC §101.306(b)(2)

$$EC = A \times \left(ER_p - ER_r \right)$$

Where:

EC = The amount of emission credits needed .
A = The maximum projected annual activity level during use period.
ER_p = The projected emission rate per unit of activity during use period.
ER_r = The emission rate per unit of activity required by Chapter 115 or 117 of this title (relating to Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds).

(3) For emission credits used to comply with §§117.123, 117.320, 117.323, 117.423, 117.1020, or 117.1220 of this title (relating to Source Cap; and System Cap), the number of emission credits needed for increasing the 30-day rolling average emission cap or maximum daily cap should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

Figure: 30 TAC §101.306(b)(3)

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

Where:

ECs = The amount of emission credits needed .

N = The total number of emission units in the source cap.

i = Each emission unit in the source cap.

H_n = The maximum daily heat input, in million British thermal units (MMBtu) per day, expected for an emission unit during the use period.

R_n = The maximum emission factor, in pounds per MMBtu (lb/MMBtu), expected for an emission unit during the use period.

H_i = The actual daily heat input, in MMBtu per day, as calculated according to §§117.123(b)(1) or (2), 117.320(c)(1) - (3), 117.323(b)(1) or (2), 117.423(b)(1) or (2), 117.1020(c)(1) or (2), or 117.1220(c)(1) or (2) of this title.

R_i = The facility's emission factor, in lb/MMBtu, as defined in §§117.123(b)(1) or (2), 117.320(c)(1) - (3), 117.323(b)(1) or (2), 117.423(b)(1) or (2), 117.1020(c)(1) or (2), or 117.1220(c)(1) or (2) of this title.

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

(c) Notice of intent to use emission credits.

(1) Application to use ERCs. The executive director will not accept an application to use ERCs before the ERC is available in the compliance account for the site where it will be used. If the ERC will be used for offsets, the executive director will

not accept the ERC application before the applicable permit application is administratively complete.

(A) The user shall submit a completed application at least 90 days before the start of operation for an ERC used as offsets in a permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) The user shall submit a completed application at least 90 days before the planned use of an ERC for compliance with the requirements of Chapter 115 or 117 of this title or other programs.

(C) If the executive director approves the ERC use, the date the application is submitted will be considered the date the ERC is used.

(2) Application to use mobile emission reduction credits (MERCs).

(A) For MERCs which are to be used as offsets in a New Source Review permit in accordance with Chapter 116 of this title , the MERCs must be identified prior to permit issuance. Prior to construction, the offsets must be provided through submittal of a completed application form specified by the executive director.

(B) For emission credits that are to be used for compliance with the requirements of Chapter 115 or 117 of this title or other programs, the user must submit a completed application at least 90 days prior to the planned use of the MERC . MERCs may be used only after the executive director grants approval of the notice of intent to use. The user must also keep a copy of the notice and all backup in accordance with §101.302(g) of this title (relating to General Provisions).

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

(d) Inter-pollutant use of ERCs. With prior approval from the executive director and the United States Environmental Protection Agency, a nitrogen oxides or volatile organic compound ERC may be used to meet the offset requirements for the other ozone precursor if photochemical modeling demonstrates that the overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution.

§101.309. Emission Credit Banking and Trading.

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

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

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

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

(b) Life of an emission credit.

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

(2) Emission credits certified as part of an administratively complete application received after January 2, 2001 shall be available for use for 60 months from the date of the emission reduction .

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

(c) Creditability review of emission credits. Emission credits may be reviewed for creditability at any time during their banked life to ensure the reductions generating the emission credit are surplus to all current local, state, and federal requirements that would have affected the generating facility or mobile source.

(1) A request for a creditability review may be made by any interested party through the submittal of a completed application form specified by the executive director.

(2) If a creditability review identifies a regulatory change invalidating a certificate or portion of a certificate, the executive director shall void the emission credit

certificate and, issue a new certificate with a unique number to the certificate owner in the amount of remaining surplus credit.

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

(1) Before the transfer, the seller shall submit a completed application form specified by the executive director.

(2) The executive director will issue a new certificate number to the purchaser reflecting the emission credits purchased, and a new certificate number to the seller reflecting any remaining emission credits available to the original owner. A trade is considered final only after the executive director grants approval of the transaction.

(3) The trading of emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern.

(e) Emission credit voidance. Emission credits may be voided from the credit registry by the owner at any time prior to the expiration date of the credit and may be

held by the owner. Reductions certified as emission credits may still be used by the original owner as an emission reduction for netting purposes after the emission credits have expired, as provided by Chapter 116, Subchapter B of this title (relating to New Source Review Permits).

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

§§101.350 - 101.354, 101.356, 101.359, 101.360

Statutory Authority

The amended sections 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 amended sections 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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 amended sections 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 amended sections 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 in which the National Ambient Air Quality Standards 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.

Unless specifically defined in the Texas Clean Air Act or in §3.2 or §101.1 of this title (relating to Definitions), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition, the following words and terms, when used in this division, 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) Affected facility--A facility subject to §§117.310, 117.1210, or 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications) that is located at a site that is subject to this division.

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

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

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

(6) Broker account--The account where allowances held by a broker are recorded. Allowances may not be used to satisfy compliance requirements for this division while held in a broker account.

(7) Compliance account--The account where allowances held by the owner or operator of a site subject to this division are recorded for the purposes of meeting the requirements of this division for an affected facility at that site.

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

(9) Existing facility--A new or modified facility that either 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 determined to be administratively complete before January 2, 2001, or 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--An area consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

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

(13) 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 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.

(14) Vintage allowance--An allowance that is not used for compliance during the control period in which it is allocated and remains available for use only in the control period following the one in which it was allocated.

§101.351. Applicability.

(a) This division applies to a site, and each affected facility at that site, in the Houston-Galveston-Brazoria ozone nonattainment area that:

(1) is a major source, as defined in §117.10 of this title (relating to Definitions), with one or more affected facilities subject to §117.310 or §117.1210 of this title (relating to Emission Specifications for Attainment Demonstration); or

(2) is not a major source, as defined in §117.10 of this title, and has one or more affected facilities subject to §117.2010 of this title (relating to Emission Specifications) with a collective uncontrolled design capacity to emit from these facilities of 10.0 tons or more per year of nitrogen oxides.

(b) A site that met the definition of major source as of December 31, 2000, is always classified as a major source for purposes of this division. 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, is from that time forward always classified as a major source for purposes of this division.

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

(d) The banking and trading requirements of this division apply to a broker and a broker account.

§101.352. General Provisions.

(a) An allowance may be used only for the purposes described in this division and only for an affected facility. An allowance may not be used for any purpose that is not described in this division or to meet or exceed the emission limitations authorized under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) or any other applicable requirement.

(b) No later than March 1 after each control period, the quantity of allowances in a site's compliance account must be equal to or greater than the total tons of nitrogen oxides (NO_X) emitted from all affected facilities at the site during the control period.

(c) The owner or operator of an affected facility may certify reductions from the facility as NO_X emission reduction credits (ERCs), provided that:

(1) an enforceable and permanent reduction of annual allowances is approved by the executive director at a ratio of 1.0 ton of allowances per year for each 1.0 ton per year of ERCs generated; and

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

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

(e) An allowance may be used to offset NO_X emissions from an affected facility if such use is authorized in a nonattainment new source review (NNSR) permit issued under Chapter 116, Subchapter B of this title with the following conditions.

(1) The owner or operator shall use a permanent allowance allocation equal to the amount specified in the NNSR permit to offset NO_X emissions from an affected facility. A vintage allowance or an allowance allocated based on allowable emissions in accordance with variable (B)(i) in the figure in §101.353(a) of this title (relating to Allocation of Allowances) cannot be used as an offset. An allowance used for offsets may not be banked, traded, or used for any other purpose except as allowed in §101.354(g) of this title (relating to Allowance Deductions).

(2) At least 30 days before the start of operation of an affected facility using allowances as offsets, the owner or operator shall submit an application form specified by the executive director .

(A) Except as provided in paragraph (3) of this subsection, the executive director shall permanently set aside in the site's compliance account an allowance used for the one-to-one portion of the offset ratio. If an allowance set aside for offsets devalues in accordance with §101.353(d) of this title, the owner or operator shall submit the application at least 30 days before the shortfall to revise the amount of allowances set aside for offsets. At the end of each control period, the executive director shall deduct from the site's compliance account all allowances set aside as offsets.

(B) The executive director shall permanently retain an allowance used for the environmental contribution portion of the offset ratio. An allowance used for this purpose cannot be used for compliance with this division or devalued due to future regulatory changes.

(3) The owner or operator may submit a request to the executive director to release an allowance used for offsets. If approved, the executive director will release the allowances for use in the control period following the date that the request is

submitted. Allowances will not be released retroactively for any previous control periods. A request may be submitted if the owner or operator:

(A) receives authorization in the NNSR permit to use an alternative means of compliance for any portion of the NO_X offset requirement equivalent to the amount of allowances the owner or operator requests to have released for the affected facility; or

(B) permanently shuts down the affected facility, except that an allowance used for the environmental contribution portion of the offset ratio does not qualify for release under this paragraph.

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

(g) An allowance will be allocated, traded, and used in tenths of a ton. The number of allowances will be rounded up to the nearest tenth of a ton when determining allowances used.

(h) The owner or operator shall use one compliance account for all affected facilities located at the same site and under common ownership or control.

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

(j) If there is a change in ownership of a site subject to this division, the new owner of the site is responsible for complying with the requirements of this division beginning with the control period during which the site was purchased. The new owner shall contact the executive director to request a compliance account for the site. The new owner must acquire allowances in accordance with §101.356 of this title (relating to Allowance Banking and Trading).

§101.353. Allocation of Allowances.

(a) The executive director shall deposit allowances into a compliance account according to the following equation except as provided by subsection (b) or (g) of this section.

Figure: 30 TAC §101.353(a)

$$A = \frac{LA_{HA} \times EF_{FINAL}}{2000}$$

Where:

A= The number of allowances in tenths of a ton;

LA_{HA} = The historical average level of activity, which:

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

(B) for an existing facility that began operation after January 1, 1997, is:

(i) the level of activity authorized by the executive director until 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; or

(C) for a facility using alternative emission specifications in §117.310(a)(17) or §117.2010(c)(6) of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications), is the lower of the level of activity as calculated in variable (A) or (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.

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

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

(1) a new or modified facility for which the owner or operator 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 did not determine to be administratively complete before January 2, 2001;

(2) a new or modified facility that qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) for which the owner or operator did not commence construction before January 2, 2001;

(3) a facility in operation before January 1, 1997 located at a site defined on or before December 31, 2000 as a major source, as defined in §117.10 of this title (relating to Definitions), for which the owner or operator did not submit the application form specified by the executive director in accordance with §101.360(a)(1) of this title (relating to Level of Activity Certification) by March 30, 2010; and

(4) an existing facility located at a site defined before January 1, 2001, as a major source, as defined in §117.10 of this title, for which the owner or operator did not submit the application form specified by the executive director in accordance with §101.360(a)(2) of this title by March 30, 2010.

(c) The executive director will allocate and deposit allowances into each compliance account by January 1 of each year.

(d) The executive director may adjust the deposits for any control period to reflect new or existing state implementation plan requirements.

(e) The executive director may add or deduct allowances from compliance accounts based on the review of reports required under §101.359 of this title (relating to Reporting).

(f) 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 90 days after completion of the baseline period to request up to two additional calendar years to establish a baseline period for a facility whose baseline as described by variable (B)(i) listed in the figure in subsection (a) of this section is not complete by June 30, 2001; or

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

(g) An allowance calculated under subsection (a) of this section will continue to be based on historical level of activity, despite subsequent reductions in the level of activity. If an allowance is being allocated based on allowables and the facility does not

achieve two complete consecutive calendar years of actual level of activity data, then the allowance will not continue to be allocated if the facility ceases operation or is not built.

§101.354. Allowance Deductions.

(a) The executive director shall deduct allowances in tenths of a ton from a site's compliance account in an amount equal to the nitrogen oxides (NO_X) emissions from each affected facility during the previous control period. The amount of NO_X emissions must be quantified using the monitoring and testing protocols established in §§117.335, 117.340, 117.1235, 117.1240, and 117.2035 of this title (relating to Initial Demonstration of Compliance; Continuous Demonstration of Compliance; and Monitoring and Testing Requirements).

(b) If the monitoring and testing data required under subsection (a) of this section is missing or unavailable, the NO_X emissions from an affected facility may be quantified for that period of time using the following methods in the following order: continuous monitoring data; periodic monitoring data; testing data; manufacturer's data, and *EPA Compilation of Air Pollution Emission Factors* (AP-42), September 2000.

(1) When quantifying NO_X emissions under this subsection, the owner or operator of the affected facility shall submit the justification for not using the methods in subsection (a) of this section and the justification for the method used.

(2) If NO_X emissions are quantified under this subsection due to non-compliance with the monitoring and testing required under subsection (a) of this section, the executive director shall deduct allowances from a site's compliance account in an amount equal to the NO_X emissions quantified under this subsection plus an additional 10%.

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

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

(e) The executive director shall deduct allowances from a site's compliance account in an amount equal to the NO_X emissions increases from a facility not subject to an emission specification under §117.310 or §117.2010 of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications) that result from changes made after December 31, 2000, to a facility subject to this division and §117.310(e)(3) or §117.2010(f) of this title. The owner or operator shall submit detailed documentation on these increases in NO_X emissions with the annual compliance report .

(f) An allowance allocated based on allowable emissions in accordance with variable (B)(i) in the figure in §101.353(a) of this title may only be used by the facility for which it was allocated and may not be used by any other facility.

(g) The amount of allowances deducted from a site's compliance account under subsection (a) of this section will be reduced by the amount of allowances deducted in accordance with §101.352(e)(2)(A) of this title (relating to General Provisions).

(h) If the NO_X emissions from the affected facilities during a control period exceed the amount of allowances in the site's compliance account on March 1 following that control period, the executive director will reduce allowances for the next control period by an amount equal to the emissions exceeding the allowances in the site's compliance account plus an additional 10%.

(1) If the site's compliance account does not hold sufficient allowances to accommodate this reduction, the executive director shall issue a Notice of Deficiency requiring the owner or operator to obtain sufficient allowances within 30 days of the notice.

(2) These actions do not preclude additional enforcement action by the executive director.

§101.356. Allowance Banking and Trading.

(a) An allowance not used for compliance in the control period it was allocated may be banked as a vintage allowance for use in the following control period in compliance with §101.354 of this title (relating to Allowance Deductions) or traded except as provided by subsection (g) of this section.

(b) An allowance that has not expired or been used may be traded at any time during a control period after it has been allocated except as provided by subsection (g) of this section.

(c) Only an authorized account representative may trade an allowance.

(d) At least 30 days before the allowances are deposited into the buyer's account, the seller shall submit the appropriate trade application to the executive director. The completed application must show the amount of allowances traded and, except for trades between sites under common ownership or control, the purchase price per ton of allowances traded.

(1) To trade a current allowance or vintage allowance for a single year, the seller shall submit the application form specified by the executive director . Trades involving allowances needed for compliance with a control period must be submitted on or before January 30 of the following control period.

(2) To permanently trade ownership of any portion of the allowances allocated annually to an individual facility, the seller shall submit the application form specified by the executive director .

(3) To trade any portion of the individual future year allowances to be allocated annually to an individual facility, the seller shall submit the application form specified by the executive director .

(e) All information regarding the quantity and sales price of allowances will be

made available to the public as soon as practicable.

(f) The executive director will send letters to the seller and buyer if the trade is approved or denied. If approved, the trade is final upon the date of the letter from the executive director.

(g) Allowances that were allocated based on allowable emissions in accordance with variable (B)(i) in the figure in §101.353(a) of this title (relating to Allocation of Allowances) may not be banked for future use or traded.

(h) Nitrogen oxides (NO_X) discrete emission reduction credits (DERCs) or mobile discrete emission reduction credits (MDERCs) generated and acquired in accordance with Division 4 of this subchapter (relating to Discrete Emission Credit Program) may be used in place of allowances for compliance with this division in accordance with this subsection. Volatile organic compound (VOC) DERCs or MDERCs generated and acquired in accordance with Division 4 of this subchapter may be used in place of allowances for compliance with this division in accordance with this subsection if the user satisfies the inter-pollutant requirements in §101.376(g) of this title (relating to Discrete Emission Credit Use).

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

(2) DERCs generated by a stationary source before January 1, 2005 may be used in lieu of allowances at a ratio of ten tons of DERCs for one ton of allowances.

(3) DERCs generated after December 31, 2004 may be used in lieu of allowances at a ratio of one ton of DERCs for one ton of allowances.

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

(5) To use DERCs or MDERCs for the purpose of compliance with this division, the required application must be submitted to the executive director on or before October 1 of the control period for which the DERCs or MDERCs will be used. In addition, the required application must be submitted by March 31 with the site's annual compliance report .

(6) No more than 10,000 tons of DERCs generated from stationary sources may be used for compliance with this division in any combination totaled over

all sites in the Houston-Galveston-Brazoria area during a single calendar year. DERCs may be approved for use with this division according to the following.

(A) The executive director may approve the use of 250 tons or less of DERCs per site, per control period, unless the 10,000 ton per year limit has been reached.

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

§101.359. Reporting.

(a) No later than March 31 after each control period, the owner or operator of a site subject to this division shall submit a completed annual compliance report specified by the executive director to the executive director, which must include the following:

(1) the amount of actual nitrogen oxides (NO_X) emissions from applicable facilities at the site during the preceding control period;

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

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

(4) detailed documentation supporting the reported level of activity and emission factor for each affected facility. It is acceptable to reference documentation supporting a level of activity or an emission factor if previously submitted with an annual compliance report or level of activity certification form ; and

(5) detailed documentation on NO_X emissions from each facility not subject to an emission specification under §117.310 or §117.2010 of this title (relating to Emission Specifications for Attainment Demonstration and Emission Specifications) that result from changes made after December 31, 2000, to an affected facility as required in §101.354(e) of this title (relating to Allowance Deductions).

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

(c) The owner or operator of a site subject to this division that no longer has authorization to operate any affected facilities may request a waiver from the reporting requirements in this section. If approved, the annual compliance report will not be required until a new affected facility is authorized at the site.

§101.360. Level of Activity Certification.

(a) The owner or operator of any site subject to this division shall certify the historical level of activity for each affected facility by submitting to the executive director a completed application along with any supporting information such as usage records, testing or monitoring data, emission factors, and production records. The historical level of activity must be determined as follows:

(1) for a facility in operation before January 1, 1997, the level of activity averaged over 1997, 1998, and 1999;

(2) for an existing facility the level of activity authorized by the executive director; and

(3) for a new or modified facility not in operation before January 1, 1997, that is subject to an emission specification under §§117.310, 117.1210, or 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications) first adopted after April 1, 2001, and either has submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) an application determined by the executive director to be administratively complete within 90 days of the effective date of this emission specification, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and commenced construction within 90 days of the effective date of the emission specification, the level of activity authorized by the executive director.

(b) The owner or operator that certified a facility's allowable level of activity under subsection (a)(2) of this section shall:

(1) no later than 90 days after the end of the fifth year of operation, certify the actual level of activity and actual emission factors for the two complete consecutive calendar years chosen as a baseline by submitting to the executive director a completed

application, along with any supporting information such as usage records, testing or monitoring data, and production records; and

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

(c) The owner or operator of a site or facility that becomes subject to this division after March 31, 2001 shall certify the level of activity, as determined by the executive director, in accordance with subsections (a) and (b) of this section. The certification must be submitted no later than 90 days after the date the site or facility becomes subject to this division.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

[§101.358]

Statutory Authority

The repealed section is 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 repealed section is 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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 repealed section is 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 repealed section is 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 in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The repealed section implements THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017; and FCAA, 42 USC, §§7401 *et seq*.

§101.358. Emission Monitoring and Compliance Demonstration.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT PROGRAM

§§101.370 - 101.373, 101.376, 101.378, 101.379

Statutory Authority

The amended sections 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 amended sections 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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 amended sections 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 amended sections 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 in which the National Ambient Air Quality Standards 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*.

§101.370. Definitions.

Unless specifically defined in the Texas Clean Air Act or in §3.2 or §101.1 of this title (relating to Definitions), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition, the following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise.

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

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

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

(4) Baseline emissions--The facility's emissions, in tons per year, occurring before implementation of an emission reduction strategy and calculated as the lowest of the facility's historical adjusted emissions or state implementation plan (SIP) emissions, except that the SIP emissions value is only considered for a facility in a nonattainment area.

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

(6) Curtailment--A reduction in activity level at any facility or mobile source.

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

(8) Discrete emission reduction credit--A certified emission reduction that is created by reducing emissions from a facility during a generation period, quantified after the generation period, and expressed in tenths of a ton.

(9) Emission rate--The facility's rate of emissions per unit of activity.

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

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

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

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

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

(15) Historical adjusted emissions--The facility's emissions occurring before implementation of an emission reduction strategy and adjusted for any local, state, or federal requirement, calculated using the following equation.

Figure: 30 TAC §101.370(15)

$$E_H = \frac{(A_1 \times ER_1) + (A_2 \times ER_2)}{2}$$

Where:

E_H = The historical adjusted emissions for a facility.

A_1 = The facility's activity during the first of any two consecutive calendar years selected in accordance with §101.373(b)(2) of this title (relating to Discrete Emission Reduction Credit Generation and Certification), not to exceed any applicable local, state, or federal requirement.

ER_1 = The facility's emission rate during the first of any two consecutive calendar years selected in accordance with §101.373(b)(2) of this title, not to exceed any applicable local, state, or federal requirement.

A_2 = The facility's activity during the second of any two consecutive calendar years selected in accordance with §101.373(b)(2) of this title, not to exceed any applicable local, state, or federal requirement.

ER_2 = The facility's emission rate during the second of any two consecutive calendar years selected in accordance with §101.373(b)(2) of this title, not to exceed any applicable local, state, or federal requirement.

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

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

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

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

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

(22) Ozone season--The portion of the year when ozone monitoring is federally required to occur in a specific geographic area, as defined in 40 Code of Federal Regulations Part 58, Appendix D, §2.5.

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

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

(25) Real reduction--A reduction in which actual emissionsare reduced.

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

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

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

(29) State implementation plan (SIP) emissions--The emissions data in the state's emissions inventory (EI) required under 40 Code of Federal Regulations Part 51, Subpart A for the year used to represent the facility's emissions in a SIP revision. The applicable SIP revision must be for the nonattainment area where the facility is located and must be for the criteria pollutant, or include the precursor pollutant, for which the applicant is requesting credits. The SIP emissions may not exceed any applicable local, state, or federal requirement. A facility's SIP emissions are determined from the EI year that:

(A) was used to develop the projection-base year inventory for the modeling included in an attainment demonstration (AD) SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the United States Environmental Protection Agency (EPA) for the current National Ambient Air Quality Standard (NAAQS);

(B) if the SIP revisions identified in subparagraph (A) of this paragraph have not been submitted to the EPA, was used to develop the projection-base

year inventory for the modeling included in an AD SIP revision or the attainment inventory for a maintenance plan SIP revision, whichever was most recently submitted to the EPA for an earlier NAAQS issued in the same averaging time and the same form as the current NAAQS;

(C) if the SIP revisions identified in subparagraphs (A) and (B) of this paragraph have not been submitted to the EPA, corresponds to the EI for the most recent EI SIP revision submitted to the EPA; or

(D) if the SIP revisions identified in subparagraphs (A) - (C) of this paragraph have not been submitted to the EPA, corresponds to the EI that will be used for the EI SIP revision that will be submitted to the EPA.

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

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

(32) Surplus--An emission reduction that is not otherwise required of a facility or mobile source by any applicable local, state, or federal requirement and has not been otherwise relied upon in the state implementation plan.

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

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

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

§101.371. Purpose.

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

§101.372. General Provisions.

(a) Applicable pollutants.

(1) A discrete emission reduction credit (DERC) may be generated from a reduction of a criteria pollutant, excluding lead, or a precursor of a criteria pollutant. A DERC generated from the reduction of one pollutant or precursor may not be used to meet the requirements for another pollutant or precursor, except as provided in §101.376 of this title (relating to Discrete Emission Reduction Credit Use).

(2) Reductions of volatile organic compounds (VOC), nitrogen oxides (NO_X), carbon monoxide (CO), sulfur dioxide (SO_2) and particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns (PM_{10}) may qualify as mobile discrete emission reduction credits (MDERCs) as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, unless urban airshed modeling demonstrates that one may be substituted for another subject to approval by the executive director and the United States Environmental Protection Agency (EPA).

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

(1) facilities (including area sources);

(2) mobile sources; or

(3) any facility, including area sources, or mobile source associated with actions by federal agencies under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans.

(c) Discrete emission credit requirements.

(1) A DERC is a certified emission reduction that:(A) must be real, quantifiable, and surplus at the time the DERC is generated;(B) must occur after the year used to determine the state implementation plan (SIP) emissions for a facility in a nonattainment area; and (C) must occur at a facility with SIP emissions reported before implementation of the emission reduction strategy for a facility in a nonattainment area.

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

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

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

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

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

(3)Emission reductions from a facility or mobile source which are certified as discrete emission credits under this division cannot be recertified in whole or in part as emission credits under another division within this subchapter.

(d) Protocol.

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

If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols shall be used as follows.

(A) The owner or operator of a facility subject to the emission specifications under §§117.110, 117.310, 117.410, 117.1010, 117.1210, 117.1310, 117.2010, 117.2110, or 117.3310 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Eight-Hour Attainment Demonstration; and Emission Specifications) shall use the testing and monitoring methodologies required under Chapter 117 of this title (relating to Control of Air Pollution for Nitrogen Compounds) to show compliance with the emission specification for that pollutant.

(B) The owner or operator of a facility subject to the control requirements or emission specifications under Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) shall use the testing and monitoring methodologies required under Chapter 115 of this title to show compliance with the applicable requirements.

(C) The executive director may approve the use of a methodology approved by the EPA to quantify emissions from the same type of facility.

(D) Except as specified in subparagraph (C) of this paragraph, if the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following applies:

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

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

(iii) the owner or operator of a facility with a continuous emissions monitoring system or predictive emissions monitoring system in place shall use this data in quantifying emissions;

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

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

(vi) quantification protocols may not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPAproposes disapproval of the protocol in the *Federal Register*.

(2) If the monitoring and testing data specified in paragraph (1) of this subsection is missing or unavailable, the generator or user shall determine the facility's emissions for the period of time the data is missing or unavailable using the most conservative method for replacing the data and these listed methods in the following order:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

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

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator or user shall submit the justification for not using the methods in paragraph (1) of this subsection and submit the justification for the method used.

(e) Credit certification.

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

(2) The executive director shall review an application for certification to determine the credibility of the reductions and may certify reductions. Each DERC

certified will be assigned a certificate number.Reductions determined to be creditable will be certified by the executive director.

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

(4) If a facility's or mobile source's emissions exceed any applicable local, state, or federal requirement, reductions of emissions exceeding the requirement may not be certified as discrete emission credits.

(f) Geographic scope. Except as provided in paragraph (7) of this subsection and §101.375 of this title (relating to Emission Reductions Achieved Outside the United States), only emission reductions generated in the State of Texas may be creditable and used in the state with the following limitations.

(1) VOC and NO_X discrete emission credits generated in an ozone attainment area may be used in any county or portion of a county designated as attainment or unclassified, except as specified in paragraphs (4) and (5) of this subsection and may not be used in an ozone nonattainment area.

(2) VOC and NO_X discrete emission credits generated in an ozone nonattainment area may be used either in the same ozone nonattainment area in which they were generated, or in any county or portion of a county designated as attainment or unclassified.

(3) VOC and NO_X discrete emission credits generated in an ozone nonattainment area may not be used in any other ozone nonattainment area, except as provided in this subsection.

(4) VOC discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), if generated outside of the covered attainment counties. VOC discrete emission credits generated in a nonattainment area may be used in the covered attainment counties, except those generated in El Paso.

(5) NO_X discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title, if generated outside of the covered attainment counties. NO_X discrete emission credits generated in a nonattainment area, except those generated in El Paso, may be used in the covered attainment counties.

(6) CO, SO_2, and PM_{10} discrete emission credits must be used in the same metropolitan statistical area (as defined in Office of Management and Budget Bulletin Number 93-17 entitled "Revised Statistical Definitions for Metropolitan Areas" dated June 30, 1993) in which the reduction was generated.

(7) VOC and NO_X discrete emission credits generated in other counties, states, or emission reductions in other nations may be used in any attainment or nonattainment county provided a demonstration has been made and approved by the executive director and the EPA, to show that the emission reductions achieved in the other county, state, or nation improve the air quality in the county where the credit is being used.

(g) Ozone season. In areas having an ozone season of less than 12 months (as defined in 40 Code of Federal Regulations Part 58, Appendix D)VOC and NO_X discrete emission credits generated outside the ozone season may not be used during the ozone season.

(h) Recordkeeping. The generator must maintain a copy of all forms and backup information submitted to the executive director for a minimum of five years , following the completion of the generation period. The user shall maintain a copy of all forms and backup information submitted to the executive director for a minimum of five years,

following the completion of the use period. Other relevant reference material or raw data must also be maintained on-site by the participating facilities or mobile sources. The user must also maintain a copy of the generator's notice and backup information for a minimum of five years after the use is completed. The records must include, but not necessarily be limited to:

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

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

(3) the certificate number of each discrete emission credit used by each facility or mobile source.

(i) Public information. All information submitted with notices, reports, and trades regarding the nature, quantity of emissions, and sales price associated with the use, or generation of discrete emission credits is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information , or failure to submit all information may result in the rejection of the discrete emission

reduction application. All nonconfidential notices and information regarding the generation, use, and availability of discrete emission credits may be obtained from the registry.

(j) Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(k) Program participation. The executive director has the authority to prohibit a person from participating in discrete emission credit trading either as a generator or user, if the executive director determines that the person has violated the requirements of the program or abused the privileges provided by the program.

(l) Compliance burden and enforcement.

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

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

(3) A user may not transfer its compliance burden and legal responsibilities to a third-party participant. A third-party participant may only act in an advisory capacity to the user.

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

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

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

§101.373. Discrete Emission Reduction Credit Generation and Certification.

(a) Emission reduction strategy.

(1) A discrete emission reduction credit (DERC) may be generated using one of the following strategies or any other method that is approved by the executive director:

(A) the installation and operation of pollution control equipment that reduces emissions below the baseline emissions for the facility; or

(B) a change in the manufacturing process, other than a shutdown or curtailment, that reduces emissions below the baseline emissions for the facility.

(2) A DERC may not be generated using the following strategies:

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

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

(C) an emission reduction required to comply with any provision under 42 United States Code (USC), Subchapter I regarding tropospheric ozone, or 42 USC, Subchapter IV-A regarding acid deposition control;

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

(E) an emission reduction from the shifting of activity from one facility to another facility at the same site;

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

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

(H) an emission reduction from a facility authorized in a flexible permit, unless the reduction is permanent and enforceable or the generator can

demonstrate that the emission reduction was not used to satisfy the conditions for the facilities under the flexible permit;

(I) that portion of an emission reduction funded through a state or federal program, unless specifically allowed under that program;

(J) an emission reduction from a facility subject to Division 2, 3, or 6 of this subchapter (relating to Emissions Banking and Trading Allowances; Mass Emissions Cap and Trade Program; and Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program); or

(K) an emission reduction from a facility without state implementation plan (SIP) emissions if the facility is located in a nonattainment area.

(b) DERC baseline emissions.

(1) For a facility located in an area designated as nonattainment for a criteria pollutant, and the pollutant being reduced is either the same criteria pollutant or a precursor of that criteria pollutant, the baseline emissions may not exceed the facility's SIP emissions. If the pollutant being reduced is not the same criteria pollutant for which

the area is designated nonattainment or a precursor of that criteria pollutant, then baseline emissions are limited as specified in paragraph (3) of this subsection.

(2) The activity and emission rate used to calculate the facility's historical adjusted emissions must be determined from the same two consecutive calendar years, selected from the ten consecutive years immediately before the emission reduction is achieved.

(3) For a facility located in an area that is not designated nonattainment for the criteria pollutant being reduced, or the pollutant being reduced is not a precursor of that criteria pollutant, the historical adjusted emissions must be determined from two consecutive calendar years that include or follow the 1990 emission inventory.

(4) For emission reduction strategies that exceed 12 months, the baseline emissions are established after the first year of generation and are fixed for the life of each unique emission reduction strategy. A new baseline must be established if the commission adopts a SIP revision for the area where the facility is located.

(5) For a facility in existence less than 24 months or not having two complete calendar years of activity data, a shorter period of not less than 12 months may be considered by the executive director.

(c) DERC calculation.

(1) DERCs are calculated according to the following equation.

Figure: 30 TAC §101.373(c)(1)

$$DERC = \left[SA \times \left(BER - SER\right)\right]$$

Where:

DERC = The number of discrete emission reduction credits generated in tenths of a ton.
SA = Strategy activity, which is the facility's level of activity during the discrete emission reduction credit generation period.
BER = The facility's baseline emission rate, which is the lowest of the emission rate used in the historical adjusted emissions or the state implementation plan emissions.
SER = The facility's emission rate during the discrete emission reduction credit generation period.

(2) For a facility located in an area designated nonattainment for a criteria pollutant, and the pollutant being reduced is either the same criteria pollutant or a precursor of that criteria pollutant, the sum of the reduction generated under paragraph (1) of this subsection and the total strategy emissions must not be greater than the facility's historical adjusted emissions or SIP emissions, whichever is less.

(3) For a facility located in an area that is not designated nonattainment for the criteria pollutant being reduced, or the pollutant being reduced is not a precursor of that criteria pollutant, the sum of the reduction generated under paragraph (1) of this subsection and the total strategy emissions must not be greater than the facility's historical adjusted emissions.

(d) DERC certification.

(1) The application form designated by the executive director must be submitted to the executive director no later than 90 days after the end of the generation period and no later than 90 days after completing each 12 months of generation.

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

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

(A) the generation period;

(B) a complete description of the generation activity;

(C) the amount of DERCs generated;

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

(E) documentation supporting the activity, emission rate, historical adjusted emissions, SIP emissions, strategy emission rate, and strategy activity;

(F) emissions inventory data for each of the years used to determine the SIP emissions and historical adjusted emissions;

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

(H) a complete description of the protocol used to calculate the DERC generated; and

(I) the actual calculations performed by the generator to determine the amount of DERCs generated.

§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 creditsduring 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) The user may acquire and use only discrete emission credits listed in the registry.

(5) The user shall obtain executive director approval to use nitrogen oxides (NO_X) discrete emission reduction credits (DERCs) in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties as provided by subsection (f) of this section.

(6) A DERC may not be used unless it is available in the account for the site where it will be used.

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

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

(A) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than 10 tons for nitrogen oxides or 5 tons for volatile organic compounds in a 12-month period as approved by the executive director. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested; or

(B) at permitted facilities in counties or portions of counties designated as attainment or, attainment/unclassifiable, or unclassifiable, 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 before 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) for the use of mobile discrete emission reduction credits, 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 application form specified by the executive director ;

(D) for the use of DERCs, the user shall submit a completed application form specified by the executive director at least 90 days before the start of operation and at least 90 days before continuing operation for any period in which DERCs not included in a prior application will be used as offsets;

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

(4) to comply with Chapter 115 or 117 of this title (relating to 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 (EPA). This paragraph does not apply to limit the use of DERC or mobile DERC in lieu of allowances under §101.356 of this title;

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

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

(7) in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, if the NO_X DERC usage requested exceeds the limit specified in subsection (f) of this section.

(d) Notice of intent to use.

(1) A completed application form specified by the executive director, signed by an authorized representative of the applicant, must be submitted to the executive director in accordance with the following requirements.

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

(B) The application must be submitted:

(i) except as provided in subsection (f)(4) of this section, for NO_X DERC use in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, by August 1 before the beginning of the calendar year in which the DERCs are intended for use;

(ii) for DERC use for the Mass Emissions Cap and Trade Program in accordance with §101.356 of this title, by October 1 of the control period in which the DERC are intended for use; or

(iii) for DERC use for NSR offsets, as required by subsection (b)(2)(D) of this section; or

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

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

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

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

(ii) the amount of discrete emission credits needed;

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

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

(v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable local, state, and federal 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 number 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) Discrete emission credit use calculation.

(A) To calculate the amount of discrete emission credits necessary to comply with §§117.123, 117.320, 117.323, 117.423, 117.1020, 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)

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

Where:

N = The total number of emission units in the source or system cap.
i = Each emission unit in the source or system cap.
EH_i = The expected new daily heat input, in MMBtu per day.
ERi = The expected new emission rate, in lb/MMBtu.
H_i = The actual daily heat input, in million British thermal units (MMBtu) per day, as calculated according to §§117.123(b)(1), 117.320(c)(1) and (2), 117.323(b)(1), 117.423(b)(1), 117.1020(c)(1), 117.1220(c)(1), or 117.3020(c) of this title as applicable.
R_i = The actual emission rate, in pounds (lb)/MMBtu, as defined in §§117.123(b)(1), 117.320(c)(1) and (2), 117.323(b)(1), 117.423(b)(1), 117.1020(c)(1), 117.1220(c)(1), or 117.3020(c) of this title as applicable.
d = The number of days that emissions are expected to exceed the source or system cap.

(ii) For maximum daily cap:

Figure: 30 TAC §101.376(d)(2)(A)(ii)

$$DECs = \sum_{i=1}^{N} \left[\left(EH_{Mi} \times ER_i \right) - \left(H_{Mi} \times R_i \right) \right] \times \frac{d}{2000}$$

Where:

N = The total number of emission units in the source or system cap.
i = Each emission unit in the source or system cap.
EH_{Mi} = The expected new maximum daily heat input, in MMBtu per day.
ER_i =The expected new emission rate, in lb/MMBtu.
$H_{M\text{i}}$ = The maximum daily heat input, in MMBtu/day, as defined in §§117.123(b)(2), 117.320(c)(3), 117.323(b)(2), 117.423(b)(2), 117.1020(c)(2), or 117.1220(c)(2) of this title as applicable.
Ri = In lb/MMBtu, is defined as in §§117.123(b)(2), 117.320(c)(3), 117.323(b)(2), 117.423(b)(2), 117.1020(c)(2), or 117.1220(c)(2) of this title as applicable.
d = The number of days in the use period.

(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)

$$DECs = \left(ELA \right) \times \left(EER - RER \right)$$

Where:
ELA = The expected level of activity.
EER = The expected emission rate per unit activity.

RER = The 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)

$$DECs = \left(ELA - PLA\right) \times \left(PER\right)$$

Where:
ELA = The expected level of activity.
PLA = The permitted level of activity.
PER = The 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 application in the case of an emergency, or other exigent circumstances, but the notice must be submitted before the discrete emission credits can be used. The user shall include a complete description of the situation in the notice of intent to use. All other notices submitted less than 45 days prior to use, or 90 days prior to use for a mobile source, will be considered late and in violation.

(4) The user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating facility or mobile source in the application. If the generator's credits are rejected or the application 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)(D) 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)(D) of this section, but not associated with the actual use, and available for future use.

(2) Discrete emission credit 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)

$$DECs = (ALA) \times (AER - RER)$$

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)

$$DECs = (ALA - PLA) \times (AER)$$

Where:

ALA = actual level of activity
PLA = permitted level of activity
AER = permitted emission rate per unit activity

(3) A form specified by the executive director for using credits must be submitted to the commission in accordance with the following requirements.

(A) The notice must be submitted within 90 days after the end of the use period. Each use period must not exceed 12 months.

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

(i) purchase price of the discrete emission credits obtained prior to the current use period, except for transfers between sites under common ownership or control;

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

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

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

(v) the actual environmental contribution; and

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

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

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

(f) DERC use in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(1) For the 2015 calendar year, the use of NO_X DERCs in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties may not exceed 42.8 tons per day.

(2) Beginning in the 2016 calendar year, the use of NO_X DERCs in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties may not exceed 17.0 tons per day.

(3) If the total number of DERCs submitted for the upcoming calendar year in all applications received by the August 1 deadline in subsection (d)(1)(B)(i) of this section is greater than the applicable limit in paragraph (1) or (2) of this subsection, the executive director shall apportion the number of DERCs for use.

(A) In determining the amount of DERC use to approve for each application, the executive director may take into consideration:

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

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

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

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

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

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

(B) The executive director shall consider the appropriate amount of DERCs allocated for each application submitted on a case-by-case basis.

(4) If the total number of DERCs submitted for use during the upcoming calendar year in all applications received by the August 1 deadline in subsection (d)(1)(B)(i) of this section is less than the limit, the executive director may:

(A) approve all requests for DERC usage provided that all other requirements of this section are met; and

(B) consider any late application submitted as provided under subsection (d)(3) of this section that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in paragraph (5) of this subsection, but will not otherwise approve a late submittal that would exceed the limit established in this subsection.

(5) If the applications are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the limit established in this subsection and may be approved provided all other requirements are met. For the purposes of this paragraph, an ERCOT-declared emergency situation is defined as the period of time that an ERCOT-issued emergency notice or energy emergency alert (EEA) (as defined in ERCOT Nodal Protocols, Section 2: Definitions and Acronyms (June 1, 2012) and issued as specified in ERCOT Nodal Protocols, Section 6: Adjustment Period and Real-Time Operations (June 1, 2012)) is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice or EEA issued by ERCOT.

(g) Inter-pollutant use of DERCs. With prior approval from the executive director and the EPA, a NO_X or VOC DERC may be used to meet the NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that overall air quality and the regulatory design value in the nonattainment area of use will not be adversely affected by the substitution .

§101.378. Discrete Emission Credit Banking and Trading.

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

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

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

(3) The credit registry will maintain a listing of all credits available or used for each ozone nonattainment area . One combined listing for all the counties or portions of counties designated as attainment or unclassifiable will be provided by the credit registry.

(4) The registry shall not contain proprietary information.

(b) Life of a discrete emission credit. A discrete emission credit is available for use after the application form specified by the executive director has been received, deemed creditable by the executive director, and deposited in the commission credit registry in accordance with subsection (a) of this section, and may be used anytime thereafter except as stated in this subsection. All credits are deposited in the credit

registry and reported as available credits until they are used or withdrawn. A DERC generated from a shutdown may not be used.

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

(1) Before the transfer, the seller shall submit to the executive director a completed application form specified by the executive director.

(2) The executive director will issue a new certificate number to the purchaser reflecting the discrete emission credits purchased, and a new certificate number to the seller reflecting any remaining discrete emission credits available. A trade is considered final only after the executive director grants approval of the transaction.

(3) The trading of discrete emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern.

§101.379. Program Audits and Reports.

(a) The executive director will audit this program every three years.

(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 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;

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

(4) the amount of discrete emission reduction credits approved for use under §101.376(f) of this title (relating to Discrete Emission Credit Use).

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 6: HIGHLY REACTIVE VOLATILE ORGANIC COMPOUND EMISSIONS CAP AND TRADE PROGRAM

§§101.390 - 101.394, 101.396, 101.399, 101.400

Statutory Authority

The amended sections 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 amended sections 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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 amended sections 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 amended sections 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 in which the National Ambient Air Quality Standards 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*.

§101.390. Definitions.

Unless specifically defined in the Texas Clean Air Act or in §3.2 or §101.1 of this title (relating to Definitions), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition, the following words and terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise.

(1) Affected facility--A facility subject to §115.720 or §115.760 of this title (relating to Applicability and Definitions; and Applicability and Cooling Tower Heat Exchange System Definitions) that is located at a site that is subject to this division.

(2) Allowance--The authorization to emit one ton of highly reactive volatile organic compounds, 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 for the site.

(4) Baseline emissions period--The two consecutive control periods from 2006 - 2009 with the highest monitored average actual highly reactive volatile organic compound emissions for the purpose of establishing baseline emissions used for the allocation of allowances, except as allowed under §101.394(a)(2) and (3) of this title (relating to Allocation of Allowances).

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

(6) Broker account--The account where allowances held by a broker are recorded. Allowances may not be used to satisfy compliance requirements for this division while held in a broker account.

(7) Compliance account--The account in which allowances held by the owner or operator of a site are recorded for the purposes of meeting the requirements of this division for each affected facility at that site.

(8) Control period--The 12-month period beginning January 1 and ending December 31 of each year. The initial control period began January 1, 2007.

(9) Highly reactive volatile organic compounds--As defined in §115.10 of this title (relating to Definitions).

(10) Houston-Galveston-Brazoria (HGB) ozone nonattainment area--An area consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(11) Industry sector--One of the following sectors of industry in which participants of the Highly Reactive Volatile Organic Compounds (HRVOC) Emissions Cap and Trade program are assigned, according to the process type and products from which the largest share of HRVOC emissions is associated, for the purpose of assigning an industry sector share under the allocation equation located in §101.394(a)(1) of this title (relating to Allocation of Allowances): petroleum refining, non-polymer chemical producers, polymer producers, and storage/loading/other.

(12) Level of activity--The amount of highly reactive volatile organic compounds (HRVOCs) in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled HRVOCs internal to the process unit.

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

(14) Uncontrolled emissions--The total emissions during routine normal operations from each affected facility calculated as pre-control using the applicable control efficiency for the purpose of determining site allocations under §101.394(a)(1) of this title (relating to Allocation of Allowances).

(15) Vintage allowance--An allowance that is not used for compliance during the control period in which it is allocated and remains available for use only in the following control period.

§101.391. Applicability.

(a) This division applies to each site in the Houston-Galveston-Brazoria ozone nonattainment area with one or more affected facilities. Affected facilities include vent gas streams, flares, and cooling tower heat exchange systems that emit or have the potential to emit highly reactive volatile organic compounds.

(b) For the purpose of compliance with Chapter 115, Subchapter H, Division 1 or 2 of this title (relating to Vent Gas Control; and Cooling Tower Heat Exchange Systems), each site that meets the applicability requirements of this section will always be subject to this division unless exempted under §101.392 of this title (relating to Exemptions).

(c) The banking and trading requirements of this division apply to a broker and a broker account.

§101.392. Exemptions.

(a) A site in the Houston-Galveston-Brazoria ozone nonattainment area that has the potential to emit, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), 10 tons per year or less of highly reactive volatile organic compounds from all affected facilities at the site is exempt from the requirements of this division.

(b) A site in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, or Waller County is exempt from the requirements of this division except for §101.401(a) - (e) of this title (relating to Level of Activity Certification). The commission may revoke this exemption upon public notice of this revocation. If the exemption is revoked, the owner or operator of a site subject to this division located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, or Waller County shall comply within 180 days of public notice.

§101.393. General Provisions.

(a) An allowance may be used only for the purposes described in this division and only for an affected facility. An allowance may not be used for any purpose that is not described in this division or to meet or exceed the limitations authorized under Chapter 116, Subchapter B of this title (relating to New Source Review Permits), or any other applicable local, state, or federal requirement.

(b) No later than March 1 after each control period, the quantity of allowances in a site's compliance account must be equal to or greater than the total highly reactive volatile organic compound (HRVOC) emissions from each affected facility at the site during the control period.

(c) An allowance may not be used to satisfy netting requirements under Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review).

(d) An allowance may be used to offset volatile organic compound (VOC) emissions from an affected facility if such use is authorized in a nonattainment new source review (NNSR) permit issued under Chapter 116, Subchapter B of this title with the following conditions.

(1) The owner or operator shall use a permanent allowance allocation stream equal to the amount specified in the NNSR permit to offset VOC emissions from an affected facility. A vintage allowance cannot be used as an offset. An allowance used for offsets may not be banked, traded, or used for any other purpose except as allowed in §101.396(e) of this title (relating to Allowance Deductions).

(2) At least 30 days before the start of operation of an affected facility using allowances as offsets, the owner or operator shall submit an application form specified by the executive director .

(A) Except as provided in paragraph (3) of this subsection, the executive director shall permanently set aside in the site's compliance account an

allowance used for the one-to-one portion of the offset ratio. If an allowance set aside for offsets devalues in accordance with §101.394(a)(1) or (f) of this title (relating to Allocation of Allowances), the owner or operator shall submit the application at least 30 days before the shortfall to revise the amount of allowances set aside for offsets. At the end of each control period, the executive director shall deduct from the site's compliance account all allowances set aside as offsets.

(B) The executive director shall permanently retain an allowance used for the environmental contribution portion of the offset ratio. An allowance used for this purpose cannot be used for compliance with this division or devalued due to future regulatory changes except as required in §101.394(a)(1) of this title.

(3) The owner or operator may submit a request to the executive director to release an allowance used for offsets. If approved, the executive director will release the allowances for use in the control period following the date that the request is submitted. Allowances will not be released retroactively for any previous control periods. A request may be submitted if the owner or operator:

(A) receives authorization in the NNSR permit for the affected facility to use an alternative means of compliance for any portion of the VOC offset

requirement equivalent to the amount of allowances the owner or operator requests to have released for the affected facility; or

(B) permanently shuts down the affected facility, except that an allowance used for the environmental contribution portion of the offset ratio does not qualify for release under this paragraph.

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

(f) An allowance will be allocated, traded, and used in tenths of tons. The number of allowances will be rounded up to the nearest tenth of a ton when determining allowances used.

(g) The owner or operator shall use one compliance account for all affected facilities located at the same site and are under common ownership or control.

(h) The executive director shall maintain a registry of the allowances in each compliance account and broker account. The registry will not contain proprietary information.

(i) The owner or operator of an affected facility may certify reductions from an affected facility as VOC emission reduction credits (ERCs), provided that:

(1) an enforceable and permanent reduction of annual allowances is approved by the executive director at a ratio of 1.0 ton of allowances per year for each 1.0 ton per year of ERCs generated from HRVOC reductions; and

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

(j) If there is a change in ownership of a site subject to this division, the new owner of the site is responsible for complying with the requirements of this division beginning with the control period during which the site was purchased. The new owner shall contact the executive director to request a compliance account for the site. The new owner must acquire allowances in accordance with §101.399 of this title (relating to Allowance Banking and Trading).

§101.394. Allocation of Allowances.

(a) The executive director shall deposit allowances into a compliance account as follows.

(1) For a site located in Harris County, allowances will be determined using the following equation:

Figure: 30 TAC §101.394(a)(1)

$S = AC^1 \times ISS \times SS$

Where:

S = the allocation for the site.

AC[1] = the amount of highly reactive volatile organic compound (HRVOC) tons defined in (1) - (4) of this figure less the total amount allocated to those sites receiving a minimum allocation under subsection (c) of this section.

(1) For 2014, AC^1 = 3,105.9 tons;

(2) For 2015, AC^1 = 2,932.9 tons;

(3) For 2016, AC^1 = 2,761.2 tons; and

(4) For 2017 and all subsequent control periods, AC^1 = 2,588.6 tons.

ISS = Industry Sector Share: Total actual average emissions for the industry sector during the baseline emissions period divided by the total actual average emissions for all participating sites during the baseline emissions period.

SS = Site share: The sum of the total average actual emissions for vents, cooling towers, and other facilities and uncontrolled emissions for flares, heaters, boilers, furnaces, thermal and catalytic oxidizers, and other combustion control devices combusting HRVOC streams, during the baseline emissions period divided by the total uncontrolled actual average emissions for the industry sector during the baseline emission period.

(2) For a site in Harris County not in operation or with HRVOC emissions that are not representative of permitted normal routine operation due to an authorized modification that resulted in an HRVOC emission reduction during the baseline emissions period, the owner or operator may request from the executive director the use of any allowance stream acquired from facilities previously participating in the HRVOC

Emissions Cap and Trade program in lieu of reallocation until the alternate baseline emissions are established for the site, according to the following:

(A) this allowance stream is less than the HRVOC permit allowable limit in effect at the time the facility commences operation;

(B) the baseline emissions period for any site under this paragraph will be any consecutive 24 months from 2010 - 2012; and

(C) beginning with the 2014 control period, all sites will receive an allocation in accordance with the methodology under paragraph (1) of this subsection.

(3) A site meeting the following conditions may request to use an alternative baseline emissions period consisting of the two consecutive calendar-year control periods immediately preceding the baseline emissions period defined under §101.390 of this title (relating to Definitions):

(A) the site used continuous flow rate monitoring and speciation of HRVOC to determine HRVOC emissions during the alternative baseline period;

(B) the site had permanent, voluntary, and quantifiable HRVOC emission reductions in an amount equal to or greater than 25 tons resulting in a site-wide reduction in HRVOC emissions of at least 25% as calculated by comparing the average HRVOC emissions from the alternate baseline period to the baseline emissions period defined under §101.390 of this title;

(C) qualifying HRVOC emission reductions must have been made enforceable by a permit application submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or other submittal to the executive director no later than April 1, 2010; and

(D) a request for an alternative baseline period must be received by the executive director no later than July 1, 2010.

(4) For a site located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances will be determined using the following equation.

Figure: 30 TAC §101.394(a)(4)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

Where:

S = the greater of 5.0 tons or the allocation for the site.
i = each site located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties and subject to this division.
n = the total number of sites subject to this division.
LA = the level of activity baseline for a site, calculated as the annual level of activity for any 12 consecutive months during the period of 2000-2004 for the site, as certified by the executive director.
AC = 4,390.8 tons per year of highly reactive volatile organic compounds less the total amount allocated to those sites receiving a minimum of 5.0 tons.

(5) Uncontrolled emissions for affected facility types for use in determining site allocations under paragraph (1) of this subsection must be calculated as follows.

(A) For flares, the uncontrolled emissions are equal to actual average HRVOC emissions from routine normal operation during the baseline emissions period for that facility divided by one minus the average percent control efficiency specifications for flares in §115.725(d) of this title (relating to Monitoring and Testing Requirements).

(B) For heaters, boilers, furnaces, thermal and catalytic oxidizers, and other combustion control devices combusting HRVOC streams, the uncontrolled

emissions must be calculated by dividing actual average emissions from routine normal operation during the baseline emissions period for each facility by one minus 99%, or by one minus the actual monitored HRVOC control efficiency for the facility, not to exceed 99.9%, if that facility has demonstrated the actual monitored HRVOC control efficiency through stack performance testing.

(C) For any other facility without a demonstrated combustion control efficiency, the control efficiency is equal to zero; therefore, the uncontrolled emissions will be equal to the actual HRVOC emissions from routine normal operation.

(D) For a site that employs a flare or vent gas recovery or flare minimization control strategy that is not requesting the use of an alternative baseline emissions period under paragraph (3) of this subsection, the owner or operator may request to include the amount of any quantifiable reduction in actual HRVOC emissions attributable to the use of flare or vent gas recovery as uncontrolled emissions, subject to approval by the executive director. The amount of quantified reductions is equal to the difference of the average actual HRVOC emissions from routine normal operation during a consecutive 12-month period before the 2006 - 2009 baseline emissions period and the implementation of the HRVOC gas recovery or flare minimization control strategy and the enforceable allowable HRVOC permit limit for the affected facility after the recovery-based emissions reduction strategy implementation. The average actual

HRVOC emissions used for quantifying the reductions under this subparagraph must be determined through continuous flow rate monitoring and HRVOC speciation testing. This allowable emissions limit must be made enforceable through a permit application submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) to the executive director no later than April 1, 2010. Credit allocated for reductions due to flare or vent gas recovery cannot also be creditable if the HRVOC stream is sent to another control device. The creditable emissions from flare gas recovery calculated in this subparagraph are then converted to uncontrolled emissions through the use of the average control efficiency specifications under §115.725(d) of this title.

(E) For a site that has purchased HRVOC allowance streams, uncontrolled emissions must be the greater of the uncontrolled emissions calculated under subparagraphs (A) - (C) of this paragraph, or the sum of the original existing HRVOC allowance allocated according to the previous allocation methodology and the amount of the allowance stream in tons. If a site's actual two-high year emissions is less than the sum of its original existing HRVOC allowance and the amount of the allowance stream in tons, the owner or operator shall add the difference to the uncontrolled emissions as actual emissions.

(b) The level of activity of a site will be determined by summing the levels of activity from the chosen 12 consecutive month period for each process unit, as defined in §115.10 of this title (relating to Definitions), located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product.

(c) A site in Harris County subject to the requirements of this division that receives an HRVOC allocation of less than 5.0 tons will be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year. A site subject to the requirements of this division that receives an HRVOC allocation of greater than or equal to 5.0 tons but less than 10.0 tons will be eligible to receive a minimum allocation of 10.0 tons of HRVOC allowances per year. This provision does not apply if the site's allocation falls below a minimum allocation only because of a transfer of part or all of the site's allocation.

(d) The executive director will deposit allowances into each compliance account by January 1 of each year.

(e) The executive director may adjust the deposits for any control period to reflect new or existing state implementation plan requirements.

(f) The executive director may add or deduct allowances from compliance accounts based on the review of reports required under §101.400 of this title (relating to Reporting).

§101.396. Allowance Deductions.

(a) The executive director shall deduct from a site's compliance account an amount of allowances equal to the total highly reactive volatile organic compounds (HRVOC) emissions from each affected facility at the site during the previous control period. The amount of HRVOC emissions must be quantified using the monitoring and testing protocols established in §115.725 and §115.764 of this title (relating to Monitoring and Testing Requirements), as appropriate.

(b) The amount of HRVOC emissions from an affected facility must be calculated for each hour of the year and summed to determine the annual emissions for compliance. For emissions from emissions events subject to the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) or emissions from scheduled maintenance, startup, or shutdown activities subject to the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), the hourly emissions to be included in the summation may not exceed the short-term limit

of §115.722(c) or §115.761(c) of this title (relating to Site-wide Cap and Control Requirements; and Site-wide Cap).

(c) If the monitoring and testing data required under subsection (a) of this section does not exist or is unavailable, the owner or operator of the site shall determine the HRVOC emissions for that period of time using the following methods in the following order: continuous monitoring data; periodic monitoring data; testing data; manufacturer's data; and engineering calculations.

(1) When reporting the amount of HRVOC emissions under this subsection, the owner or operator of the site shall also submit the justification for not using the methods in subsection (a) of this section and the justification for the method used.

(2) If emissions are quantified under this subsection due to non-compliance with the monitoring and testing required under subsection (a) of this section, the executive director shall deduct allowances from a site's compliance account in an amount equivalent to the HRVOC emissions quantified under this subsection plus an additional 10%.

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

(e) The amount of allowances deducted from a site's compliance account under subsection (a) of this section will be reduced by the amount of allowances deducted in accordance with §101.393(d)(2)(A) of this title (relating to General Provisions).

(f) If the total actual HRVOC emissions from the affected facilities during a control period exceed the amount of allowances in the site's compliance account on March 1 following that control period, the executive director will reduce allowances for the next control period by an amount equal to the emissions exceeding the allowances in the site's compliance account plus an additional 10%.

(1) If the site's compliance account does not hold sufficient allowances to accommodate this reduction, the executive director shall issue a Notice of Deficiency requiring the owner or operator to obtain sufficient allowances within 30 days of the notice.

(2) These actions do not preclude additional enforcement action by the executive director.

§101.399. Allowance Banking and Trading.

(a) An allowance allocated for a control period that is not used for compliance for that control period may be banked as a vintage allowance for use in demonstrating compliance for the next control period under §101.396 of this title (relating to Allowance Deductions) or traded.

(b) An allowance that has not expired or been used may be traded at any time during a control period except as provided by this section.

(c) At least 30 days before the allowances are deposited into the buyer's account, the seller shall submit the appropriate trade application to the executive director. The completed application must include the amount of allowances to be traded and, except for transactions between sites under common ownership or control, the purchase price per ton of allowances traded.

(1) To trade a current allowance or vintage allowance for a single year, the seller shall submit an application form specified by the executive director . Trades involving allowances needed for compliance with a control period must be submitted on or before January 30 of the following control period.

(2) To permanently trade ownership of any portion of the allowances allocated annually to an individual facility, the seller shall submit an application form specified by the executive director .

(3) To trade any portion of the allowances that are scheduled to be allocated to an individual facility in a future control period, the seller shall submit an application form specified by the executive director .

(d) All information regarding the quantity and sales price of allowances will be made available to the public as soon as practicable.

(e) The executive director will send letters to the seller and buyer if the trade is approved or denied. If approved, the trade is final upon the date of the letter from the executive director.

(f) Allowances that were provided under §101.394(a)(2) of this title (relating to Allocation of Allowances) are not eligible for trade.

(g) Allowances generated from a site located in counties other than Harris County may not be used at a site located in Harris County. Allowances generated from a site

located in Harris County may not be used at a site located in counties other than Harris County.

(h) Only an authorized account representative may trade allowances.

(i) Allowances subject to an approved transaction will be deposited into the buyer's account within 30 days of receipt of a completed trade application.

§101.400. Reporting.

(a) No later than March 31 after each control period, the owner or operator of each site shall submit a completed annual compliance report specified by the executive director to the executive director, which must include the following:

(1) the total amount of actual HRVOC emissions from each affected facility at the site during the preceding control period;

(2) the method or methods used to determine the actual HRVOC emissions for each affected facility, including, but not limited to, monitoring protocol and results, calculation methodologies, and emission factors; and

(3) a summary of all final transactions for the preceding control period.

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

(c) The owner or operator of a site subject to this division that no longer has authorization to operate any affected facilities may request a waiver from the reporting requirements in this section. If approved, the annual compliance report will not be required until a new affected facility is authorized at the site.