The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes 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 §§101.304, 101.358, and 101.374.

If adopted, the amended and repealed sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).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 Proposed 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 reduction credit (ERC) 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 reduction credit (DERC) 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 existing EBT rules that have historically not been used. Specifically, there has been interest in generating credits by reducing emissions from area and mobile sources. However, the research into the feasibility of generating area and mobile source credits has uncovered significant implementation issues associated with ensuring that these source credits would meet the EPA and Federal Clean Air Act (FCAA) requirements. In addition, there has been considerable interest from the regulated community for flexibility in existing rules for the use of allowances to

satisfy NNSR offset requirements. The proposed rulemaking would revise the EBT Program rules in Chapter 101 to respond to these 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 DERCs in the DFW 1997 eight-hour ozone nonattainment area 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 current 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 the DFW area 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* proposed 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 proposed rulemaking would 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 *Notice of Intent to Use DERCs* and *Notice of Use of DERCs* 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 *Notice of Intent to Use DERCs* applications submitted by regulated entities from 2009 - 2014 requested the potential use of 3.2 to 11.4 tpd NO_X DERCs. However, the *Notice of Use of DERCs* applications submitted for this same time indicate that the actual NO_X DERC use ranged from 0.1 to 1.5 tpd.

The proposed rulemaking would replace the existing annually-calculated NO_X DERC limit in §101.379(c) with a fixed limit of 17.0 tpd of NO_X DERC use in the DFW area. This limit would apply only to NO_X DERCs generated and used in the nine-county DFW 1997 eight-hour ozone nonattainment area. The proposed 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. The proposed 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 during this same time. The proposed use of a fixed limit would provide certainty to the affected regulated community and facilitate planning for the future use of NO_X DERCs. The proposed limit also provides the affected regulated community with flexibility because it exceeds the amount of DERCs historically requested for use. The proposed 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 proposed 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* proposed concurrently with this rulemaking provides details regarding the modeled ozone impacts of the proposed new NO_X DERC limit in Section 3.7.4.3: *DERC Sensitivity*.

Generating Credits from Area Sources

The existing rules allow an area source to generate 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 would meet the EPA and FCAA requirements.

Under the existing 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 would be 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 would be required to submit detailed emissions inventories annually and this facility-specific information would be included in subsequent SIPs. To generate an ERC, an area source would also be required to make the emission reductions 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 would create 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.

Therefore, the commission is proposing to remove the rules that allow an area source to generate credits due to the significant regulatory and financial responsibility for industry and the agency associated with implementing an area source program consistent with federal requirements. The commission requests comment on the proposed removal and the associated impacts of removing the potential for generation of area source credits. Additionally, the commission requests comment from individuals who support retaining an area source credit program specifically regarding suggestions for how an area source ERC or DERC program could be implemented in a manner

consistent with EPA and FCAA requirements and minimize the burden to applicants. Comments focusing on how an area source program might be implemented for specific industry types or sectors are also requested. The commission also notes that if the proposed removal of the rules for area sources is not adopted or is modified then all of the proposed changes to the ERC and DERC Program rules in Chapter 101, Subchapter H, Divisions 1 and 4 would also apply to area sources.

Generating Credits from Mobile Sources

The existing rules allow a mobile source to generate 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 mobile source credits has uncovered significant implementation issues associated with ensuring that mobile source credits would meet the EPA and 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 ERCs and DERCs 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 is required in some areas.

Given these legal and technical issues with generating credits from mobile sources, the commission is proposing to remove the rules that allow a mobile source to generate credits due to the difficulties associated with demonstrating these reductions are surplus to the federal requirements already accounted for in the SIP. The proposed removal would not affect the use of the existing mobile DERCs that were previously generated.

Using Allowances to Satisfy NNSR Offset Requirements

The proposed rulemaking would revise the MECT and HECT rules to provide clarity and additional flexibility for the use of allowances for NNSR offsets. The existing MECT rules limit 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 proposed rulemaking would expand 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 proposed rulemaking would also continue 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 existing MECT and HECT rules only address the use of allowances for the one-to-one portion of the offset requirement. The proposed rulemaking would expand the rules to provide for the use of allowances to satisfy any portion of the NNSR offset requirement. The proposed revisions would provide additional flexibility and would not adversely affect air quality because the amount of allowances in the MECT and HECT caps would not increase. The proposed expansion of the rules to provide for the use of allowances to satisfy the environmental contribution portion of the NNSR offset requirement would 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 would be permanently retired, would not be used to simultaneously comply with the MECT or HECT Programs, and would 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 proposed amendments would not negatively affect the status of the state's progress towards attainment with the ozone NAAQS, would not interfere with control measures, and would not prevent reasonable further progress toward attainment of the ozone NAAQS.

General Revisions

The proposed rulemaking includes various administrative changes, removal of the option for area and mobile sources to generate credits, and includes other changes that are intended to provide flexibility in a manner consistent with the requirements in the

SIP. The commission has determined that these proposed rule changes would not increase emissions (and therefore, will not negatively affect the status of the state's progress towards attainment with the ozone NAAQS), would not interfere with control measures, and would not prevent reasonable further progress toward attainment of the ozone NAAQS.

DERC Use in the DFW Area

The proposed rulemaking would replace the existing annually calculated NO_X DERC limit with a fixed limit of 17.0 tpd of NO_X DERC use in the DFW area. The current methodology used to calculate the NO_X DERC limit incorporates 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 and indicated the proposed 17.0 tpd limit would 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. Details regarding the modeled ozone impacts of the proposed new NO_X DERC limit are provided in Section 3.7.4.3: *DERC Sensitivity* of the Attainment Demonstration SIP Revision for the DFW 2008 Eight-Hour Ozone Nonattainment Area proposed concurrently with this rulemaking. Since

this current modeling shows attainment with the 1997 eight-hour ozone NAAQS and that this limit would not substantively affect future design values in the DFW area for the 2008 eight-hour ozone NAAQS, the commission considers the proposed 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 current DERC limit and the results of the modeling sensitivity, the commission has determined that the proposed rule change would not negatively affect the status of the state's progress towards attainment with the 1997 and 2008 ozone NAAQS, would not interfere with control measures, and would not prevent reasonable further progress toward attainment of the 1997 and 2008 ozone NAAQS.

Allowances Used for NNSR Offset Requirements

The proposed rulemaking would revise the MECT and HECT rules to provide clarity and additional flexibility for the use of allowances for NNSR offsets. The proposed rulemaking would expand 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 proposed rulemaking for the MECT and HECT Programs would expand the rules to provide for the use of allowances to satisfy any portion of the NNSR offset requirement. The additional flexibility provided by the proposed revisions would not adversely affect air quality because the amount of allowances in the MECT and HECT caps would not increase. Additionally, the use of allowances to satisfy the environmental contribution portion of the NNSR offset requirement would ultimately cause a permanent reduction in the overall MECT and HECT caps because these

allowances would be permanently retired and would not be returned when the facility shuts down. Therefore, the commission has determined that these proposed rule changes would not negatively affect the status of the state's progress towards attainment with the 1997 and 2008 ozone NAAQS, would not interfere with control measures, and would not prevent reasonable further progress toward attainment of the 1997 and 2008 ozone NAAQS.

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

Section by Section Discussion

General Revisions

The commission proposes 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 proposed 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," "time period" to "period," and "Web site" to "website."

In the current and proposed 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 proposed rules, this use would mean the staff in the EBT Program. For consistency, references to "owner" or "operator" are proposed to be changed to "owner or operator" to indicate that these entities share the responsibility for certain actions in the rules. Throughout the rules, the phrase "law, rule, regulation, or agreed order" in its entirety or in part is proposed to be 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, 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 proposed 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. Throughout the proposed rules, the term

"transfer" is changed to "trade" for consistency with the section titles; the use of "trade" is intended to include all types of transfers as well.

In the introductory paragraph of the definition section for each division, a sentence is proposed to be 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 current sentence in the introductory paragraph of each definition section would be revised to be more concise. The proposed revisions are consistent with the definition sections in other subchapters in Chapter 101.

The proposed revisions would replace the phrase "emission credit" with "emission reduction credit" or "ERC" and "discrete emission credit" with "discrete emission reduction credit" or "DERC" for consistency with common usage and the proposed removal of the mobile credit programs. Additionally, the proposed revisions update form names and form designations to include the program acronym and reflect other changes proposed in the rules. The proposed revisions would also use the form title followed by its designation the first time the form is mentioned in a section. Subsequent references to the same form in the section are proposed to be the form designation (e.g., Form ERC-1, Form MECT-2, etc.).

These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble. The commission is requesting comment on any instance where these proposed technical corrections would inadvertently change the requirements in the commission's existing rules.

Division 1: Emission Credit Banking and Trading

The title of this division is proposed to be changed from "Emission Credit Banking and Trading" to "Emission Reduction Credit Program." As discussed in the background section of this preamble, the commission is proposing removal of the option to generate ERCs by reducing emissions from area and mobile sources, and all corresponding references to area and mobile sources are proposed for removal or revision in this division. Throughout the division, the commission proposes to remove requirements to submit ERC certificates and revise the term "certificate" to "identification number" for consistency with current practice. This proposed revision will not affect the way ERCs are generated, used, or traded. Throughout the division, the commission proposes to remove references to 30 TAC Chapter 114 because there are no longer any provisions therein for which ERCs can be used for compliance.

Section 101.300, Definitions

Wording changes are proposed in the definition of "activity" at §101.300(1) to add "fuel usage," and "power output" because these measurements are commonly used for reporting emissions; to remove "vehicle miles traveled" and "or mobile source" because these terms are for mobile sources; and to change "economic output" to "usage" because some types of facilities (like flares) do not have an economic output. As part of the proposed removal of provisions related to area sources, the definition of "area source" at §101.300(3) is proposed to be deleted. The definitions of "baseline activity" at §101.300(4) and "baseline emission rate" at §101.300(5) are also proposed to be deleted because they are redundant due to the proposed new definition of "historical adjusted

emissions." The subsequent definitions would be renumbered.

The commission proposes to amend the definition of "baseline emissions" currently at §101.300(6), which would be renumbered as §101.300(3), 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) add "the lowest of the facility's historical adjusted emissions or state implementation plan emissions" to describe the values that limit baseline emissions.

A definition of "compliance account" is proposed to be added as §101.300(5) to specify where ERCs are held for use, and the subsequent definitions would be renumbered. At §101.300(7), the definition of "emission rate" is proposed to be added to specify the rate of emissions per unit of activity that does not exceed any regulatory limit. The proposed definition is the same as the existing 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. Subsequent definitions would be renumbered.

Because the provisions for mobile ERCs are proposed to be deleted from the division, the commission proposes removal of the obsolete definition of "emission credit" at current §101.300(9) and to renumber subsequent definitions. In current §101.300(11), which would be renumbered as §101.300(9), a change is proposed 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.

The existing definition of "emission reduction strategy" in current §101.300(12) is proposed to be renumbered as §101.300(10) and to have the phrase "beyond that required by state or federal law, regulation, or agreed order" changed to "below the baseline emissions" to clarify that the baseline emissions rather than only regulatory limits restrict the certification of ERCs. Because of the proposed removal of provisions for area sources to generate ERCs, the definition of "facility" at current §101.300(13) is proposed to be renumbered as §101.300(11) and amended to clarify that this term includes only a facility included in the agency EI under the point source category.

A definition of "historical adjusted emissions" is proposed to be added as §101.300(13), and the subsequent definitions would be renumbered. The definition would specify 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 proposed definition contains the applicable portions of the existing definition of "baseline emissions" and the existing equation for calculating baseline emission in existing §101.303(c). Throughout the division, the commission proposes to use this new 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.

As part of the removal of provisions related to mobile sources, the commission proposes to delete the definitions of mobile emission reduction credit, mobile source, mobile source baseline activity, mobile source baseline emissions, and mobile source baseline emission rate in existing §101.300(15) - (19), respectively. The definition of "most stringent allowable emissions rate" at current §101.300(20) is also proposed for deletion because the term is not used in Division 1. Subsequent definitions would be renumbered.

The definition of "protocol" at current §101.300(22) is proposed to be renumbered as §101.300(15) and amended to change "estimating" to "determining" to better describe how protocols work. The definition of "quantifiable" at current §101.300(23) is proposed to be renumbered as §101.300(16) and amended to clarify that an approved protocol must be used to calculate an emission reduction. Because the term "real reduction" is not used in Division 1, current §101.300(24) is proposed to be renumbered as §101.300(17) and amended to define the word "real" as reductions in actual, not allowable, emissions. In the definition of "shutdown" at current §101.300(25), which is proposed to be renumbered as §101.300(18), the word "permanent" is proposed to be 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" at §101.300(27) would be deleted because it is not needed if the provisions for mobile sources generating or using ERCs are removed.

For conciseness throughout Division 1, the term "state implementation plan emissions" is proposed to be added as §101.300(21), and subsequent definitions would be

renumbered. The term would be defined as a facility's annual emissions as reported in the state's point source EI for the year in which that facility's emissions are specifically identified in the SIP revision submitted to the EPA for the area where the facility is located. The SIP emissions may not exceed any (i.e., the most stringent overall) applicable local, state, or federal requirement. The SIP emissions are determined for the calendar year used to represent the facility's emissions in the projection-base year inventory used in the modeling included in the most recent AD SIP revision or maintenance plan SIP revision for the most current NAAQS for the pollutant that was submitted to the EPA for the area where the facility is located. If no AD SIP revision or maintenance plan SIP revision for the most current NAAQS has been submitted to the EPA for the area where the facility is located, the SIP emissions are determined for the calendar year used to represent the facility's emissions in the most recent AD SIP revision or attainment inventory used in the most recent maintenance plan SIP revision submitted to the EPA for the area where the facility is located for an earlier NAAQS. If no AD or maintenance plan SIP revisions have been submitted to the EPA for the area where the facility is located, the SIP emissions are determined for the calendar year used to represent the facility's emissions in the point source inventory used in the most recent EI SIP revision submitted to the EPA for the area where the facility is located. Throughout the division, the commission proposes to use this new term to replace other references to the EI used in the SIP.

The definition of "strategic emissions" at current §101.300(29) is proposed to be renumbered as §101.300(22), and the word "allowable" is proposed to be changed to "enforceable" because the reduced emission limit must be federally enforceable for the

reduction to be eligible to be certified as an ERC.

Section 101.301, Purpose

The commission proposes to revise §101.301 to clarify that the division would apply to a person buying and selling credits, including a broker. The word "another" would be 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.

Section 101.302, General Provisions

Amendments to §101.302(a) are proposed to move the provisions for the inter-pollutant use of ERCs to §101.306 where the other provisions for ERC use are already covered. Language is proposed to be added to §101.302(b) to specify that the owner or operator of a facility in a nonattainment area may generate ERCs from emission reductions that meet the criteria in this division. In §101.302(b)(1), eligible facilities would be specified as those with SIP emissions reported in the point source category of the EI. The commission proposes to delete §101.302(b)(2) because the paragraph would be obsolete due to removing the option to generate ERCs from mobile sources. Because referenced §101.30 no longer exists, the citation to this section in §101.302(b)(3) is proposed to be changed to the federal conformity rules, 40 Code of Federal Regulations (CFR) Part 93. Therefore, subsection (b) is proposed to be rewritten to clarify that the owner or operator of a facility located in a nonattainment area may generate an ERC if the emission reduction meets the criteria in this division.

The proposed revisions in §101.302(c)(1) would remove redundant language for conciseness and update the language to reflect the proposed definition of "SIP emissions." Given the proposed definition of "SIP emissions" the commission is also requesting comments on whether it is necessary to retain the language in §101.302(c)(1)(D). The deletion of §101.302(c)(2) is proposed as part of the removal of provisions for mobile sources, and the subsequent paragraph would be renumbered. In current §101.302(c)(3), which would be renumbered as §101.302(c)(2), the phrase "another division within this subchapter" is proposed to be changed to "Division 4 of this subchapter" to clarify that the limitation on recertification only applies to DERCs rather than allowances under the other divisions.

Changes are proposed throughout §101.302(d) to indicate that this subsection applies to both generators and users, including changing "baseline emissions" to "emissions" because users do not calculate baseline emissions. Non-substantive changes are also proposed throughout subsection (d) to remove redundant and obsolete language. In §101.302(d)(1), the phrase "if existing for the applicable facility or mobile source" is proposed to be deleted because all protocols must be submitted to the EPA by the executive director prior to use, as specified in §101.302(d)(1)(C). Additionally, the phrase "executive director and" is proposed to be added before "EPA approval" to clarify that the executive director has discretion on whether a protocol that was not previously approved can be used. The decision by the executive director on use of such a protocol can be made at any time in the process of certifying an ERC. In §101.302(d)(1)(A), (B), and (C)(iii), addition of "the owner or operator of" is proposed to clarify that this person (rather than the facility) must quantify reductions. In §101.302(d)(1)(A), two rule

citations are proposed to be deleted because these sections are in the process of being repealed from 30 TAC Chapter 117. In §101.302(d)(1)(B), a citation of 30 TAC Chapter 115 as a whole would replace the citations of specific sections to ensure that all monitoring and testing requirements are reflected. The provision in §101.302(d)(1)(C) is proposed to be expanded to apply to users of ERCs as well as generators. Protocols must be used to calculate emissions for both the generation and use of ERCs, so the current omission of users here could be interpreted as prohibiting use of an ERC if the protocol used to determine the credits needed had not already been submitted to the EPA. This limitation was not the commission's intent, so this change is proposed to clarify this issue.

In §101.302(d)(2), the phrase "required under" is proposed to be changed to "specified in" because the referenced paragraph (1) does not itself require monitoring and testing data. For clarity, the provision in current §101.302(d)(3) requiring the use of the most conservative method is proposed to be moved to paragraph (2). The word "conservative" is intended to mean the method that would result 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, either in the existing rule language or in the proposed revision, 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" would be 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 would be used to determine the excess emissions to be covered.

The provisions in §101.302(e)(2) are proposed to be rewritten for clarity to specify that the executive director (i.e., program staff) must review an application. The proposed changes would also indicate that an identification number will be assigned to each ERC certified. Although not explicitly stated in the proposed rule, the commission plans to continue the current practice of assigning one identification number for multiple ERCs that are generated from the same site and expire on the same date. The proposed changes would also indicate that a new number will be assigned when an ERC is partly used or traded. Although not explicitly stated in the proposed rule, this provision would include separate identification 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" would be added after the word "creditable" in the last sentence.

In §101.302(e)(3), the phrase "emission credit application" is proposed to be changed to "ERC generation" to clarify that, if appropriate, the executive director would deny the generation of an ERC rather than the Form ERC-1 that was submitted. For consistency, in §101.302(e)(4) the phrase "its allowable emission limit" is proposed to be replaced with "any applicable local, state, or federal requirement." The generation of ERCs is not being prohibited entirely if a requirement is exceeded, but the amount certified would

be adjusted downward to account for the amount that the emissions exceeded the requirement. The phrase "upon completion of the public comment period" in §101.302(e)(5) is proposed to be changed to "after the EPA's 45-day adequacy review of the protocol" because the current language is not consistent with the requirements of §101.302(d)(1)(C)(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 would review the ERCs and make appropriate adjustments to the amount certified.

The commission proposes to revise §101.302(g) to make non-substantive wording changes. In §101.302(h) the word "immediately" is proposed to be 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 proposed revisions would 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 proposed in §101.302(j) to clearly provide the executive director authority

to prohibit, with cause as currently delineated, a person from participating in the ERC Program in any way. The term "person," as defined in §3.2(25), includes organizations, individuals, and other legal entities and is used in the proposed language to better describe all that can participate in the ERC Program. Similarly, the phrase "the ERC Program" is broader than "emission credit trading," and this change shows that the executive director's authority includes all aspects of the program rather than only trading. Non-substantive wording changes are proposed in §101.302(k).

Current §101.302(l) is proposed to be deleted. The provision is not needed because of the removal of the provisions for generating ERCs from area and 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 101.302(b) already indicates it is the owner or operator of the facility that may generate an ERC if the emission reduction meets the criteria in this division. The commission is requesting comment on whether it is necessary to retain this provision.

Section 101.303, Emission Reduction Credit Generation and Certification

In §101.303(a), the catch line "methods of generation" is proposed to be changed to "emission reduction strategy" to have consistent use of the latter term throughout the division. In §101.303(a)(1)(B) and (C), a wording change is proposed to clarify that the emissions "level required of the facility" is any (i.e., the most stringent overall) applicable local, state, or federal requirement. In §101.303(a)(2)(C), the phrase "the shutdown of" is proposed to be deleted and wording would be clarified to say that reductions from a facility that does not qualify as having SIP emissions are not eligible

because all emission reductions that generate ERCs (not just those from shutdowns) must be from facilities that have SIP emissions.

In §101.303(b)(1), language changes are proposed to specify that the SIP emissions set one possible upper limit for the baseline emissions used in certifying an ERC. Language pertaining to §116.170(b) would be removed from §101.303(b)(1) because the applicable deadlines specified in 30 TAC §116.170(b) have passed and the language is no longer relevant. The commission proposes to revise §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 proposes to limit 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 is proposed to ensure 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 proposed to be deleted because it is not needed and only recapitulates how the term "strategic emissions" is defined. The equation for calculating ERCs generated in §101.303(c) is proposed to be changed. The current equation has been incorporated into the definition of historical adjusted emissions. The proposed changes are intended to reflect the existing 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 proposed 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 proposes to extend the deadline to submit an Application to Generate ERCs (Form ERC-1) in §101.303(d)(1) from 180 days to two years after the implementation of the emission reduction strategy. This proposed change would not alter the lifespan of an ERC, which would continue to be five years after the implementation of the emission reduction strategy, but would allow 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 Form ERC-1. The current 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 proposed two-year period would 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 proposed in §101.303(d)(1) would 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 would 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. The commission is requesting comments on the proposed extension of the deadline to submit an ERC generation application and any potential issues associated with applications submitted after the commission proposes a SIP revision that affects the amount of ERCs that could be certified.

Non-substantive changes are proposed 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 proposed to be specifically added to the list of required documentation. However, this proposed change does not require the applicant to submit any information that is not currently required. Amendments are proposed for §101.303(d)(3)(F) to 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, current §101.303(d)(4)(C) is proposed to be revised to cover the provisions currently in §101.303(d)(4)(D) and (E). The references to the Special Certification Form for Exemptions and Standard Permits (Form PI-8) would be updated to the current Certification of Emission Limits (Form APD-CERT). Proposed revisions

to subparagraph (C) would 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) would 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. Current §101.303(d)(4)(D) and (E) are proposed to be deleted because they would no longer be needed.

Section 101.304, Mobile Emission Reduction Credit Generation and Certification

As part of the removal of the provisions for generating ERCs from mobile sources, §101.304 is proposed to be repealed in its entirety.

Section 101.306, Emission Credit Use

In the title of §101.306, "Emission Credit Use" is proposed to be changed to "Emission Reduction Credit Use." Non-substantive changes are proposed in current §101.306(a)(1) to specify ERCs can be used as an offset in an NNSR permit and to reference Chapter 116, Subchapter B that regulates this use. Current §101.306(a)(2), which allows ERCs to be used for mitigation offsets in certain circumstances, is proposed to be changed because the rule section referenced was previously repealed. The provision would cite the federal conformity rule instead of §101.30. The reference to Chapter 114 in §101.306(a)(3) is proposed to be deleted because there are no longer any provisions in Chapter 114 for which ERCs can be used for compliance. In §101.306(a)(4), the reference to §116.150 is proposed to be changed to Chapter 116, Subchapter B. Current §101.306(a)(5) is proposed to be deleted because the provisions for converting ERCs to

allowances under the MECT Program have expired and the provisions for converting ERCs to allowances under the HECT Program are proposed to be removed. Current §101.306(a)(6) is proposed to be deleted because the motor fleet requirements in §114.201 have been repealed. Because of the proposed deletions, current §101.306(a)(7) would be renumbered as §101.306(a)(5), and rewording is proposed for conciseness.

For consistency, "ERC" is proposed to be substituted for "credit" in the catch line for §101.306(b). In §101.306(b)(1), the citation of §116.150 is proposed to be changed to Chapter 116, Subchapter B. In §101.306(b)(2), rewording is proposed for readability and to remove references to Chapter 114 because it no longer has any provisions for which ERCs can be used for compliance. The equation in §101.306(b)(2) is proposed to be updated to current figure format requirements and update terminology. The current language in §101.306(b)(3) is proposed to be modified for readability and to remove references to §117.223 and §117.1120 because these sections are being proposed for repeal concurrent with this rulemaking. The equation in §101.306(b)(3) is proposed to be updated to current figure format requirements. In §101.306(b)(4), the phrase "emission credits used" is proposed to be changed to "the number of ERCs needed" for consistency with how the other paragraphs are proposed to be reworded. Additionally, the word "extra" would be replaced by "an additional" for clarity.

The catch line of §101.306(c) is proposed to be changed for consistency with the proposed revisions to EBT forms. The provision in §101.306(c)(1) is proposed to be deleted, and the part of the provision would be moved with changes (as described below) to proposed §101.306(c)(2)(A). The requirement to identify the ERCs to be used

as offsets before permit issuance would be 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 new paragraph (1) is proposed to clarify that the executive director would not accept an Application to Use ERCs (Form ERC-3) until an ERC is available in the compliance account for the site where the ERC will be used. Proposed §101.306(c)(1) would also specify that, if the ERC would be used for NNSR offsets, the executive director would not accept the Form ERC-3 before the applicable NNSR permit application is administratively complete. EPA approval, where required, is not necessary when the Form ERC-3 is submitted but is required prior to the use of any ERCs included on the Form ERC-3.

Proposed §101.306(c)(2)(A) would require the user to submit a completed Form ERC-3 at least 90 days before the start of operation for an ERC used to satisfy NNSR offsets requirements. Proposed subparagraph (A) revises the existing requirement in §101.306(c)(1) to change the deadline for submitting the Form ERC-3 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, proposed subparagraph (A) also removes the existing requirement 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.

Proposed §101.306(c)(2)(B) would require the user to submit a completed Form ERC-3

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. Proposed subparagraph (B) would revise the existing requirement in current §101.306(c)(2) to remove the obsolete references to mobile sources, Chapter 114, and the original ERC certificate. Proposed subparagraph (B) would also remove the redundant provision that users must keep records since this requirement is proposed to be in §101.302(g). The provision that ERCs can only be used after executive director approval is proposed to be deleted for consistency with the amendments proposed for §101.306(c)(1). In §101.306(c)(3), the redundant phrase "by the executive director's decision" after "any affected person" is proposed to be deleted because affected persons in this instance are those impacted by the executive director's decision to deny use of the ERC. Proposed §101.306(c)(4) would specify that if the executive director approves the ERC use, the date the Form ERC-3 is submitted will be considered the date the ERC is used.

The commission proposes to move 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 proposed §101.306(d) because this is the section pertaining to ERC use. Proposed subsection (d) would revise the language moved from §101.302(a) to limit inter-pollutant use to NO_X and VOC ERCs used as NNSR offsets. The proposed changes are consistent with EBT guidance on inter-pollutant use of ERCs as offsets for NNSR permits. Proposed subsection (d) would also revise the language moved from §101.302(a) to require the user to provide a photochemical modeling demonstration to show that the substitution of one ozone precursor for the other will not adversely affect the overall air quality or regulatory

design value in the ozone nonattainment area of use. The term "photochemical modeling" would be used in place of the current term "urban airshed modeling" because 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 §101.306(d) would continue 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

In the title of §101.309, "Emission Credit Banking and Trading" is proposed to be changed to "Emission Reduction Credit Banking and Trading." Non-substantive changes are proposed in paragraphs (1) - (3) for clarity and to update the language to use "identification number" instead of the term "certificate."

An amendment is proposed to §101.309(b)(1) for clarity. The phrase "for which the ERC was used" would replace the phrase "applicable user." All ERCs with a ten-year lifespan have been used or have expired so the obsolete language in §101.309(b)(2) is proposed to be deleted, and the subsequent paragraphs renumbered. The current language in §101.309(b)(3) is proposed to be renumbered as §101.309(b)(2) and simplified because the five-year lifespan applies to all ERCs currently available or that will be generated in the future. Current §101.309(b)(4) is proposed to be renumbered as §101.309(b)(3) and amended to remove the obsolete reference to paragraph (3).

The proposed language in §101.309(c) would correct grammatical errors and update

terminology. Revisions to §101.309(d) are proposed for conciseness and to update EBT form names and other terminology. In §101.309(d)(3), the phrase "in whole or in part" would be deleted because it is included in the wording "in any manner."

Proposed amendments in §101.309(e) update the reference to Chapter 116, Subchapter B, to clarify that an owner cannot void an ERC from the credit registry to keep it from being public information, and remove language that is obsolete now that all ERCs have the same five-year lifespan as the reductions that can be used for netting. Owners can void an ERC at any point during its lifetime and hold the emission reductions for the purpose of netting as provided by Chapter 116, Subchapter B, but the reductions are not ERCs after this occurs.

Division 3: Mass Emissions Cap and Trade Program

Section 101.350, Definitions

In §101.350(2), the commission proposes to define 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 would be renumbered. The definition of "banked allowance" at §101.350(4) is proposed to be renamed as "vintage allowance" in proposed new 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 proposed to be 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 proposed to be 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.

A change is proposed to the definition of "existing facility" at §101.350(9). The first letter of "facility" would not be 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 proposed to be changed from a citation of the definition in §101.1 to a list of the counties in that area. This change is proposed to allow for flexibility if it is needed by the commission.

The definition of "person" at §101.350(12) is proposed to be deleted and the subsequent definitions would be renumbered. The term "person" is defined somewhat more broadly in §3.2, and that definition would not cause any issue with the single use of this term in current Division 3. The proposed definition of "vintage allowance" is proposed 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 proposed to be 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 proposed for conciseness, and the phrase "one or more" is proposed to be 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 proposed to be added. In §101.351(a)(2), the word "ten" is proposed to be 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 proposed to improve the readability of §101.351(b) and (c). Additionally, an error in the current §101.351(b) is proposed to be 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, proposed subsection (d) would clarify that the requirements of this division also apply to brokers and broker accounts.

Section 101.352, General Provisions

Proposed revisions in §101.352(a) would 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 proposed to be 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) are proposed to incorporate the newly defined term "affected facility" and to clarify that this provision only applies to generating NO_X ERCs. Proposed revisions to §101.352(c)(1) would 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 would be updated to reflect the change proposed for the title.

The provisions for using allowances for offsets in §101.352(e) are proposed to be substantially rewritten for clarity and completeness. The current provision only addresses 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 would be replaced with new provisions that are more complete and specify the requirements for using MECT allowances for offset purposes in NNSR permits. Proposed subsection (e) would specify 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.

Proposed §101.352(e)(1) would require the owner or operator to use a permanent allowance allocation stream 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. Proposed §101.352(e)(1) would clarify 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 NOx emission increase from the affected facilities must be offset at all times. The use of vintage allowances would result 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. Proposed §101.352(e)(1) would clarify that an allowance used for offsets may not be banked, traded, or used for any other purpose other than simultaneous use for MECT compliance. Proposed §101.352(e)(1)

would also indicate 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 existing requirements in this subsection.

Proposed §101.352(e)(2) would require the owner or operator to permanently set aside allowances for offsets by submitting an Application to Use Allowances for Offsets (Form MECT-O) at least 30 days before the start of operation of the affected facility. Proposed §101.352(e)(2)(A) would specify that the executive director will permanently set aside in the site's compliance account an allowance used for the one-to-one portion of the offset ratio. Proposed subparagraph (A) would specify that if the allowances set aside for offsets devalues in accordance with §101.353(d), the owner or operator would be required to submit a Form MECT-O at least 30 days before the shortfall to revise the amount of allowances set aside for offsets. The owner or operator can either set aside additional allowances equal to the amount of the devaluation or, if the NNSR permit authorizes the use of ERCs or DERCs for offsets, the owner or operator can revise the amount of allowances set aside for offsets. The owner or operator would also need 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. Proposed subparagraph (A) would also clarify 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. Proposed §101.352(e)(2)(B) would specify that the executive director will permanently retain an allowance used for the environmental contribution portion of the offset ratio. Proposed subparagraph (B) would prohibit an allowance used for the environmental contribution portion of the offset ratio from being used for compliance with this division. Proposed subparagraph (B) would also specify that allowances set aside for this purpose would not devalue due to regulatory changes because this portion of the offset requirement would be 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 proposed §101.352(e)(3)(A), the allowance could then be used for compliance with this division and would again be subject to devaluation due to regulatory changes.

Proposed §101.352(e)(3)(A) would allow 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., ERCs or DERCs) for the NO_X offset requirement. Proposed §101.352(e)(3)(B) would allow 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. If a request submitted under §101.352(e)(3)(A) or (B) is approved, the release would become effective in the control period following the date that the alternative means of offsetting takes effect, and allowances would not be released retroactively for any previous control periods.

For consistency, non-substantive amendments are proposed 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" would be 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 proposed to be shorted to "the number of allowances will be rounded up to the nearest tenth of a ton when determining allowances used." An amendment is proposed 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 is proposed to specify that the executive director (rather than the commission) will maintain a registry of the allowances in both compliance and broker accounts.

Proposed §101.352(j) would be 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 would hold accountable for MECT compliance and would not preclude the two parties from arranging for compliance as part of the sale of the site. Proposed subsection (j) would require the new owner to contact the EBT Program to request a compliance account for the site. The proposed provision would ensure that the executive director has accurate information about the owner or operator that is responsible for demonstrating compliance with the MECT Program. Proposed subsection (j) would also clarify 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 are proposed in §101.353(a) to clarify that the executive director deposits allowances. The current equation for allocating MECT allowances in §101.353(a) is proposed to be replaced with a simpler equation and updated to current formatting standards. The obsolete factors B (baseline emission rate) and X (reduction factor) in the current equation are proposed to be removed because the deadlines have passed where these would affect the calculation. In the current 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 proposed 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 are proposed in §101.353(b)(1) - (4) to 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 existing provisions in §101.353(b)(5) are combined into §101.353(b)(4) by using the defined term "existing facility."

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

The obsolete provision in current §101.353(d)(1) that the executive director will allocate allowances initially by January 1, 2002, is proposed for removal. The provision for subsequent allocations in current §101.353(d)(2) would be re-lettered as proposed §101.353(c) and would specify that the executive director will allocate and deposit allowances into each compliance account by January 1 of each year. Current §101.353(e) and (f) would be re-lettered as proposed §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" would be 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 in current §101.353(g)(1) has passed, so this obsolete provision is proposed for deletion with §101.353(g)(2) and (3) and renumbered as proposed §101.353(f)(1) and (2), respectively.

Proposed revisions to renumbered §101.353(f)(1) include updating the citation for the variable related to allowances allocated based on permit allowable emissions. In current §101.353(h), which would be re-lettered as proposed §101.353(g), the phrase "activity levels" would be changed twice to "level of activity" for consistency with the defined term.

Section 101.354, Allowance Deductions

In §101.354(a), amendments are proposed to 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" would be changed to "quantified using" for clarity.

Amendments are proposed in §101.354(b) to clarify that the substitute data would be used to quantify (rather than report) emissions. The provision to use the equation currently provided in §101.354(b) instead of the listed substitute data sources is proposed to be 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 proposed 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 in current §101.354(b) is proposed to be moved with non-substantive changes to §101.354(b)(1) and would require 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 proposes to specify 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 is proposed to ensure 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 would 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) would 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 proposed to be changed to "vintage" for consistency with the proposed revisions to these terms in §101.350. Proposed 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 would be updated to reflect the proposed changes to the equation in §101.353(a), and the phrase "other facilities at the same site during the same control period" would be 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 removal of the redundant provision in §101.354(g) is proposed 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. Proposed replacement of §101.354(g) would specify 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) would be reduced by the amount of allowances deducted for the one-to-one portion of the NNSR offset requirement in accordance with proposed §101.352(e)(2)(A). Consistent with the existing provisions in §101.352(e), proposed subsection (g) would provide 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 proposed §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 proposed §101.352(e)(2)(A). If the amount of allowances deducted under proposed §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 existing §101.353(c) is proposed to be moved to proposed §101.354(h) and (h)(2)

because §101.354 contains provisions related to allowance deductions. Consistent with existing §101.353(c), proposed §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%. Proposed §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 existing §101.353(c), proposed §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 are proposed in §101.356(a) - (c) to update the formatting. Proposed changes in §101.356(a) also include the use of the proposed new term vintage allowance. The provisions in current §101.356(d) - (f) are proposed to be consolidated to minimize repetition and shorten the rules. The provisions in current §101.356(d)(2), (e)(2), and (f)(2) are proposed to be combined in proposed §101.356(d). Proposed subsection (d) would require 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 in current §101.356(d)(1) and (3), (e)(1), and (f)(1) are proposed to be combined into subsection (d)(1) - (3), respectively. Proposed subsection (d)(1) would require the seller to submit an Application to Trade Allowances (Form MECT-2) 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. Proposed subsection (d)(2) would require the seller to submit an Application for Stream Trade (Form MECT-4) to permanently trade ownership of any portion of the allowances allocated annually to an individual facility. Proposed subsection (d)(3) would require the seller to submit an Application for Future Trade (Form MECT-5) to trade any portion of the individual future year allowances to be allocated annually to an individual facility.

The provisions in current §101.356(d)(4), (e)(3), and (f)(3) are proposed to be combined in proposed §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 proposed revisions would 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 in current §101.356(d)(5), (e)(4), and (f)(4) would be combined in proposed §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 existing provisions limiting trading are still needed until those allowances are recertified or voided. Therefore, the existing provision that allowable allowances cannot be banked or traded in current §101.356(g)(1) is proposed to be re-lettered as §101.356(g). The provision in current §101.356(g)(2) for allowances allocated before January 1, 2005 is no longer needed because these allowances have expired, so this provision is proposed for deletion.

Non-substantive changes are proposed to the provisions for using DERCs for MECT compliance in §101.356(h) to update terminology and references. The provisions in §101.356(h)(2) - (4) are proposed to be deleted because they are obsolete and subsequent paragraphs would be renumbered. Current §101.356(h)(5) and (6) are proposed to be renumbered as §101.356(h)(2) and (3) with non-substantive changes to be clear that a ton-for-ton substitution is intended. In current §101.356(h)(9), which would be renumbered as proposed §101.356(h)(5) with amendments to improve the grammar, changes are proposed to specify that the owner or operator of the site must submit the required forms and to remove the requirement to submit the DERC certificate(s). Current §101.356(h)(7) and (10) are proposed to be 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 proposed to be 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 are proposed to clarify the meaning. The obsolete provisions in §101.356(i) are proposed for removal 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 proposed to be 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 are proposed to 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. Proposed revisions would clarify that the owner or operator, rather than a facility, is required to file the Form MECT-1. The phrase "by March 31 of each year" would be deleted because it is not needed with the initial change proposed for the subsection. The word "detailing" would be changed to the phrase "which must include" because the listed information is all required for a Form MECT-1. In §101.359(a)(1) the phrase "from applicable facilities at the site" would be added to clarify that only NO_X emissions subject to Division 3 are to be reported. The proposed 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" would be 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" would be 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 Form MECT-1 submitted.

The commission is proposing §101.359(a)(5) requiring 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 is proposed to clarify that the owner or operator of a site, rather than the site itself, is responsible for submitting a Form MECT-1. Proposed subsection (c) would provide a mechanism to allow the owner or operator of a site that has been subject to Division 3 to stop filing a Form MECT-1 annually if the site no longer has any affected facilities. To do so, the owner or operator would 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 Form MECT-1. 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.

Proposed §101.359(c) would allow the owner or operator of a site subject to this division that no longer has authorization to operate any affected facilities to request a waiver from the reporting requirements in this section. If approved, the Form MECT-1 will not be required until a new affected facility is authorized at the site.

Section 101.360, Level of Activity Certification

The deadline of June 30, 2001, for certifying historical level of activity in §101.360(a) would be deleted because it is obsolete; although the deadline for filing a Level of Activity Certification (Form MECT-3) 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 proposed to put "as follows" near "historical level of activity" rather than after the list of supporting documentation. For consistency, the proposed revisions in §101.360(a)(2) would use the term "existing facility" instead of including a description of this already defined term.

In §101.360(b)(1), the word "certify" is proposed to be moved and the word "from" changed to "after" to improve the readability. In §101.360(c) "such" is proposed to be changed to "the" because a specific certification is referenced. In the last sentence of proposed §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 Banking and Trading

The title of this division is proposed to be changed from "Discrete Emission Credit Banking and Trading" to "Discrete Emission Reduction Credit Program." As discussed in the background section of this preamble, the commission proposes to remove the option to generate DERCs by reducing emissions from area and mobile sources and all corresponding references to area and mobile sources. Throughout the division, the commission proposes to remove requirements to submit DERC certificates and revise the term certificate to identification number for consistency with current practice. This proposed revision would not affect the way DERCs are generated, used, or traded. Throughout the division, the commission proposes to remove references to Chapter 114 because there are no longer any provisions therein for which DERCs can be used for compliance.

Section 101.370, Definitions

Wording changes are proposed in the definition of "activity" at §101.370(1) to add "fuel use," "power output," and "operating hours" because these measurements are commonly used for reporting emissions and to change the term "economic output" to "use" because some types of facilities that could generate DERCs (like flares) do not have any economic output. As part of the proposed removal of provisions related to area sources, the definition of "area source" at §101.370(3) is proposed to be deleted. The definitions of "baseline activity" at §101.370(4) and "baseline emission rate" at §101.370(5) are proposed to be deleted because these terms are redundant due to the proposed removal of the provisions related to mobile sources. The subsequent definitions would be renumbered.

The definition of "baseline emissions" at §101.370(6) is proposed to be renumbered as §101.370(3) and 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 emissions" to describe the values that limit baseline emissions. The use of "any applicable local, state, or federal requirement" in this context and elsewhere in the rules means 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., and 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.

The definition of "compliance account" is proposed as §101.370(5), and the subsequent definitions would be renumbered. The definition would clarify that a compliance account is for all facilities at a single site, except for a compliance account used for compliance with an area-wide emission limitation. Proposed §101.370(7) would define the "Dallas-Fort Worth area" as the counties that have been designated by EPA as nonattainment for the 1997 eight-hour ozone NAAQS 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.

As part of the proposed removal of provisions related to mobile sources, the definition of "discrete emission credit" at §101.370(9) is proposed to be deleted, and the subsequent definitions would be renumbered. The definition of "discrete emission reduction credit"

at §101.370(10) is proposed to be renumbered as §101.370(8) and amended to indicate that DERCs are measured in tenths of a ton and that, with respect to the use and trading, this term includes DERC generated from mobile sources certified before June 1, 2015.

The definition of "emission rate" is proposed as §101.370(9), defining the term as the rate per unit of activity, not to exceed regulatory limits. The proposed definition is the same as the existing 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 subsequent definitions would be renumbered. In the definition of "emission reduction strategy" currently at §101.370(12), which would be renumbered as §101.370(11), the phrase "below the baseline emissions" is proposed to be substituted for "beyond that required by state or federal law, regulation, or agreed order" for conciseness and consistency with the definition of "baseline emissions." As part of the removal of provisions for area sources, in the definition of "facility" at current §101.370(13), which would be renumbered as proposed §101.370(12), a sentence would be added to specify that area sources are not included since this term only applies to a facility included in the agency's point source EI.

The definition of "historical adjusted emissions" is proposed to be added as §101.370(15), and the subsequent definitions would be renumbered. The definition would specify 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 §101.373(b)(2), not to exceed any applicable local, state, or federal requirement. Throughout the division, the commission proposes to use this new 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.

As part of the removal of provisions related to mobile sources, the commission proposes to delete the definitions of "mobile discrete emission reduction credit or discrete mobile credit," "mobile source," "mobile source baseline activity," "mobile source baseline emissions," and "mobile source baseline emissions rate" in existing §101.370(16) - (20) respectively. The definition of "most stringent allowable emissions rate" currently at §101.370(21) is also proposed to be deleted because the term is not used in Division 4. The definition of "permanent" at current §101.370(23) is proposed to be deleted because this term is not relevant to DERCs, which are normally certified from temporary emission reductions. Subsequent definitions would be renumbered.

The definition of "protocol" at current §101.370(24) is proposed to be renumbered as §101.370(17) and amended to change "estimating" to "determining" to better describe how protocols work. The definition of "quantifiable" at §101.370(25) is proposed to be renumbered as §101.370(18) and amended to clarify that an approved protocol must be used to calculate an emission reduction.

Because the term "real reduction" is not used in Division 4, current §101.370(26) is proposed to be renumbered as §101.370(19) and amended to define the word "real" as

reductions in actual, not allowable, emissions. In the definition of "shutdown" at current §101.370(27), which is proposed to be renumbered as §101.370(20), the word "permanent" is proposed to be 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" at §101.370(29) is proposed to be deleted because it is not needed if the provisions for mobile sources are removed.

For conciseness throughout Division 4, the term "state implementation plan emissions" is proposed to be added as §101.370(23), and subsequent definitions would be renumbered. The term would be defined as a facility's annual emissions as reported in the state's point source EI for the year in which that facility's emissions are specifically identified in the SIP revision submitted to the EPA for the area where the facility is located. The SIP emissions may not exceed any applicable local, state, or federal requirement. The SIP emissions are determined for the calendar year used to represent the facility's emissions in the projection-base year inventory used in the modeling included in the most recent AD SIP revision or in the attainment inventory used in the most recent maintenance plan SIP revision, whichever is most recent, for the most current NAAQS for the pollutant that was submitted to the EPA for the area where the facility is located. If no AD or maintenance plan SIP revision for the most current NAAQS has been submitted to the EPA for the area where the facility is located, the SIP emissions are determined for the calendar year used to represent the facility's emissions in the projection-base year inventory used in the modeling included in the most recent AD SIP revision or in the attainment inventory used in the most recent maintenance

plan SIP revision, whichever is most recent, that was submitted to the EPA for the area where the facility is located. If no AD or maintenance plan SIP revisions have been submitted to the EPA for the area where the facility is located, the SIP emissions are determined for the calendar year used to represent the facility's emissions in the point source inventory used in the most recent EI SIP revision submitted to the EPA for the area where the facility is located. Throughout the division, the commission proposes to use this new term to replace other references to the EI used in the SIP.

The definitions of "strategy activity" and "strategy emission rate" currently at §101.370(31) and (32) are proposed to be renumbered as §101.370(24) and (25) and amended to replace the word "strategy" with "strategic" for consistency with the same terms in Division 1. The definition of "surplus" at current §101.370(33) would be renumbered as §101.370(26) and revised to reference local requirements for consistency. The definition of "use period" at current §101.370(34) is proposed to be renumbered as §101.370(27) and amended to specify the 12-month maximum time for a use period.

Section 101.371, Purpose

Amendments are proposed to §101.371. In addition to wording changes described for all rules, the phrase "another source" would be replaced with "a facility" to clarify DERCs can be used by the owner or operator of the source that generated the credits, rather than only by the owner or operator of another source. Language is proposed to be added specifying that the division allows a person to buy and sell credits to clarify that brokers who may only engage in trading are covered by the trading provisions.

Section 101.372, General Provisions

For consistency with the corresponding provision in Division 1, proposed revisions to §101.372(a) would 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. The provisions for the inter-pollutant use of DERCs is proposed to be moved to §101.376 where the other provisions for use are already covered.

The commission proposes to delete §101.372(b)(2) and (3) because the paragraphs would be obsolete due to the proposed removal of the option to generate DERCs from mobile sources and because referenced §101.30 no longer exists because it was made obsolete by 40 CFR Part 93. Therefore, subsection (b) is proposed to be rewritten to clarify that the owner or operator of a facility may generate a DERC if the emission reduction meets the criteria in this division. The proposed revisions to subsection (b) would also clarify that DERCs can be generated from any facility associated with federal actions under 40 CFR Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans.

The proposed revisions in §101.372(c)(1) would remove unnecessary language for conciseness, update the language to reflect the proposed 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. Given the proposed definition of "SIP emissions" the commission is also requesting comments on whether it is necessary to

retain the language in §101.372(c)(1)(C). The deletion of §101.372(c)(2) is proposed as part of removal of provisions for mobile sources, and the subsequent paragraph would be renumbered. The phrase "another division within this subchapter" is proposed to be changed to "Division 1 of this subchapter" to clarify that the limitation on recertification only applies to ERCs rather than allowances under the other divisions.

Changes are proposed throughout §101.372(d) to indicate that this subsection applies to both generators and users, including changing baseline emissions to emissions because users do not calculate baseline emissions. Non-substantive changes are also proposed throughout subsection (d) to remove redundant and obsolete language. In §101.372(d)(1), the phrase "if existing for the applicable facility or mobile source" is proposed to be deleted because all protocols must be submitted to the EPA by the executive director prior to use. Additionally, the phrase "executive director and" is proposed to be added before "EPA approval" to clarify that the executive director has discretion on whether a protocol that was not previously approved can be used. The decision by the executive director on use of such a protocol can be made at any time in the process of certifying a DERC. The provisions in §101.372(d)(1) are proposed to be expanded to apply to users of DERCs as well as generators. Protocols must be used to calculate emissions for both the generation and use of DERCs, so the current omission of users here could be interpreted as prohibiting use of an ERC if the protocol used to determine the credits needed had not already been submitted to the EPA. This limitation was not the commission's intent, so this change is proposed to clarify this issue. In §101.372(d)(1)(A) and (B), the addition of "the owner or operator of" is proposed to clarify that the person (rather than the facility) must quantify reductions

and the addition of the pollutants covered in Chapters 115 and 117 is added for clarity. In §101.372(d)(1)(A), two rule citations are proposed to be deleted because these sections are in the process of being repealed from Chapter 117. A similar provision for other criteria pollutants is added as proposed §101.372(d)(1)(C) to clarify that monitoring and testing required by commission rules must be used to quantify reductions, and the subsequent subparagraph is re-lettered. In current §101.372(d)(1)(C)(vi), which would be re-lettered as proposed §101.372(d)(1)(D)(vi), the word "proposes" is proposed to be changed to "adopts" because denial of the use of a protocol should only result from a final action by the EPA.

In §101.372(d)(2), the phrase "required under" is proposed to be changed to "specified in" because the referenced paragraph (1) does not itself require monitoring and testing data. For clarity, the provision in current §101.372(d)(3) requiring the use of the most conservative method is proposed to be moved to paragraph (2). In the last sentence of proposed §101.372(d)(2), the phrase "the data is missing or unavailable" would be inserted after the phrase "that 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 would be used to determine the excess emissions to be covered.

The provisions in §101.372(e)(2) are proposed to be rewritten for clarity to specify that the executive director must review an application but has discretion on whether to certify a DERC. The proposed changes would also indicate that an identification number will be assigned to each DERC certified. Although not explicitly stated in the proposed rule, the commission plans to continue the current practice of assigning one identification number for several DERCs that are generated from the same site and expire on the same date. The proposed changes would also indicate that a new number will be assigned when a DERC is partly used or traded. Although not explicitly stated in the proposed rule, this provision would include separate identification numbers for the traded and retained credits if only part of a DERC is traded.

In §101.372(e)(3), the word "notification" is proposed to be changed to "certification" to clarify that, if appropriate, the executive director would deny the generation of a DERC rather than the Form DERC-1 that was submitted. For consistency, in proposed §101.372(e)(4) the phrase "its allowable emission limit" is proposed to be replaced with "any applicable local, state, or federal requirement." The generation of DERCs is not prohibited entirely if a requirement is exceeded, but the amount certified would be adjusted downward to account for the amount that the emissions exceeded the requirement. Section 101.372(e)(5) is proposed to clarify that a DERC cannot be certified until after the EPA's 45-day adequacy review period of the protocol if the protocol used had not previously been submitted to and approved by the EPA.

The commission proposes to revise §101.372(h) to make non-substantive wording changes and to clarify that the provisions apply to forms and backup materials

submitted to the executive director. A provision would be added that indicates the records must be available to the commission, the EPA, and any local enforcement agency. In §101.372(h)(3), language is proposed to be changed to specify that the identification number be included in records because this number by itself is sufficient to identify a DERC.

In §101.372(i), the wording "may be obtained from the registry" is proposed to be changed to "will be made available to the public 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, although the information is available to the public upon request. The proposed revisions would 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. Non-substantive wording changes are proposed in §101.372(j).

Changes are proposed in §101.372(k) to clearly provide the executive director authority to prohibit, with cause as currently delineated, a person from participating in the DERC Program in any way. The term "person," as defined in §3.2(25), includes organizations, individuals, and other legal entities and is proposed to better describe all that can participate in the DERC Program. Similarly, the phrase "the DERC Program" is broader than "discrete emission credit trading," and this change shows that the executive director's authority includes all aspects of the program rather than only trading. Non-substantive wording changes are proposed in §101.372(l).

The provision in current §101.372(m) is not needed because of the removal of the provisions for generating DERCs from area and mobile sources. The determination of ownership of DERCs has always been based on ownership of the facility that generates the emission reductions at the time the emission reductions occur, which does not need to be stated in the rule. Subsection (b) already indicates it is the owner or operator of a facility that may generate a DERC if the emission reduction meets the criteria in this division. The commission is requesting comment on whether it is necessary to retain this provision.

Section 101.373, Discrete Emission Reduction Credit Generation and Certification

In §101.373(a), the catch line "methods of generation" is proposed to be 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 is proposed to clarify that the emissions "level required of a facility" is any applicable local, state, or federal requirement. In §101.373(a)(1)(B), the phrase "other than a shutdown or curtailment" is proposed to be 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 proposed throughout §101.373(a)(2) for clarity and to update terms. In §101.373(a)(2)(A), wording changes are proposed to clarify that DERCs cannot be generated from temporary or permanent curtailments consistent with the EPA's *Improving Air Quality with Economic Incentive Programs* (EIP), January 2001. In §101.373(a)(2)(E), the term "emissions" is proposed to be changed to "activity" because 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 are proposed in §101.373(a)(2)(H) to 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 proposed. The proposed revision is consistent with current practice and the EPA's 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 proposed to be deleted because the prohibition on shutdowns is already in subparagraph (A) and the phrase "located in a nonattainment area" would be added to clarify that the requirement for the facility to have SIP emissions only applies in nonattainment areas.

The catch line of §101.373(b) is proposed to have "emissions" added for clarity and consistency with the ERC rules. In §101.373(b)(1), language changes are proposed to specify that the SIP emissions set one possible upper limit for the baseline emissions used in certifying a DERC. Language pertaining to §116.170(b) would be 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 proposes to revise §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 proposes to limit the period available for selecting the historical baseline years to the ten years before the emission reduction occurred. The change is proposed to ensure 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.

Non-substantive changes are proposed in §101.373(b)(3) to clarify that it is the historical adjusted emissions that are being determined. The commission proposes to revise §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 proposed sentence would clarify that ongoing emission reduction strategies can only be used to generate DERCs until they are incorporated into a SIP.

Changes are proposed for §101.373(c) to reformat the equation and to update language. Because DERCs can no longer be generated from emission reductions from shutdowns, reference to shutdowns in current §101.373(c)(1) would be deleted, and current §101.373(c)(3) and (4) would be deleted. The existing 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 existing 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 in existing §101.373(c)(2) to determine the actual quantity of DERCs certified.

In §101.373(d)(1), the proposed changes include updating the form name and designation and changing "or" to "and" to simplify the requirement to submit a Form DERC-1 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.

The provision at §101.373(d)(3)(C) is proposed to be deleted because generation from shutdowns has been prohibited for several years, and subsequent subparagraphs would be re-lettered. Current §101.373(d)(3)(D) is proposed to be re-lettered as §101.373(d)(3)(C). Current §101.373(d)(3)(F) and (G) are proposed to be re-lettered as §101.373(d)(3)(E) and (F) and amended to specifically add the newly defined terms "historical adjusted emissions" and "SIP emissions" to the list of required documentation. This proposed change however does not require the applicant to submit any information that is not currently required. Proposed revisions to re-lettered §101.373(d)(3)(E) also change the term "strategy emission rate" to "strategic emission rate." Amendments are proposed for §101.373(d)(3)(H), relettered as §101.373(d)(3)(G), to remove the redundant phrase "for the applicable facility" because §101.373(d)(3) already requires this information to be submitted for all facilities and pollutants or

precursors. Current §101.373(d)(3)(I) and (J) are proposed to be re-lettered as §101.373(d)(3)(H) and (I) respectively with non-substantive updates to terminology.

Section 101.374, Mobile Discrete Emission Reduction Credit Generation and Certification

As part of the removal of provisions for generating DERCs from mobile sources, §101.374 is proposed to be repealed in its entirety.

Section 101.376, Discrete Emission Credit Use

The title of §101.376 is proposed to be changed to "Discrete Emission Reduction Credit Use." The catch line in §101.376(a) is proposed to be changed to "General requirements" to better describe the contents of this subsection and the word "only" would be added to clarify that all the listed requirements must be met. Non-substantive changes are proposed in §101.376(a)(1) - (4) to update terms. The commission proposes to revise §101.376(a)(1) - (3) to clarify that DERCs must be in the compliance account where the DERC will be used before the use period begins. For conciseness, §101.376(a)(5) is proposed to be rewritten and rule references would be updated. Current §101.376(a)(6) and (7) are proposed to be deleted because these requirements are already included in §101.376(f).

The catch line in §101.376(b) is proposed to be changed to "Uses for DERCs" for consistency with the corresponding provisions in the ERC Program and to better describe the contents of this subsection. In §101.376(b)(1), amendments are proposed for conciseness and clarity but would not alter the meaning of the provisions. In

§101.376(b)(1)(B), the word "unclassified" is proposed to be changed to "unclassifiable" because the latter is the word used by EPA for designating these counties and "attainment/unclassifiable" would be added because EPA may use this designation also. Because the last two sentences are the same in current §101.376(b)(1)(A) and (B), these provisions are proposed to be moved from these subparagraphs into new subparagraphs (C) and (D).

Non-substantive changes are proposed in current §101.376(b)(2) to specify DERCs can be used to satisfy any part of the offset requirement in an NNSR permit and to reference Chapter 116, Subchapter B that regulates this use. In current §101.376(b)(2)(B), wording is proposed for the first sentence to clarify that it is the user's responsibility to obtain the amount of DERCs specified as offsets in the NNSR permit. The rest of current §101.376(b)(2)(B) is proposed to be deleted and moved to a new subparagraph (C), with wording changes for conciseness. For consistency with NNSR requirements, the requirement in §101.376(b)(2)(C)(ii) for users to identify DERCs prior to NNSR permit issuance is proposed for removal because this is not a requirement in the commission's NNSR permit program in Chapter 116, Subchapter B. However, any facility using the DERCs as offsets could not start operation until the use of the DERC as an offset is approved by the executive director. The provisions in §101.376(b)(2)(C)(i) is proposed to be re-lettered as §101.376(b)(2)(D). Proposed revisions to re-lettered §101.376(b)(2)(D) include changing the word "facility" to "user" because a person (rather than a facility) must be responsible for obtaining DERCs as specified. Proposed §101.376(b)(2)(E) would replace §101.376(b)(2)(C)(iii) and require the user to submit an Application to Use DERCs as Offsets (Form DERC-O) at least 90 days before the start of operation and

before continuing operation for any subsequent use period for which the offset requirement was not covered under the initial Form DERC-O. The commission is proposing to allow the user to submit one Form DERC-O to reduce the regulatory burden associated with the existing requirement to submit an application annually. The proposed submission deadline is consistent with corresponding provisions in the ERC Program. In §101.376(b)(3), the current 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 proposed to be deleted.

Non-substantive changes are proposed in current §101.376(c) to update acronyms and references. For consistency with other provisions, proposed new language would be added to §101.376(c)(1) specifying that DERCs cannot be used before being acquired by the user in the compliance account for the site where the DERCs will be used. Proposed revisions to §101.376(c)(7) would update the reference to the DFW area for consistency with the new definition of this term and update the citation for the limit on NO_X DERC use in the DFW area.

An amendment is proposed in §101.376(d)(1)(A) to clarify that the required approval is for the use of DERCs to comply with the specified requirement during that use period. The submittal deadline for the Form DERC-2 in §101.376(d)(1)(B)(i) for NO_X DERC use in the DFW area is 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). The later date is proposed as part of the changes proposed to establish a fixed limit on NO_X DERC use in the DFW area because additional time is no longer needed to prepare the report. A

deadline of three months before the start of the calendar year should provide sufficient time for the executive director to review the number of DERCs requested and notify companies by November 1 if the amount of DERCs requested is approved. However, because this reduced period would leave users less time to find an alternate means of compliance if the requested amount of DERCs is not approved, the commission specifically requests comment on whether the current August 1 deadline should be retained to allow more time for companies to arrange an alternative for compliance if the limit is ever exceeded.

In §101.376(d)(1)(B)(ii), the commission proposes to provide the later submission date for using DERCs for MECT compliance that is currently in §101.356(h). The provisions currently in clause (ii) would be moved to proposed clause (iii) with non-substantive changes. Changes proposed in §101.376(d)(1)(C) would clarify that it is the responsibility of the user to send the Form DERC-2 to the federal land manager for DERC use at a facility located within 100 kilometers of a Class 1 area.

A change is proposed in §101.376(d)(1)(D)(iii) to change the word "baseline" to "expected." In submitting a Form DERC-2, the baseline emission rate and activity are not appropriate for determining the amount to set aside, but the expected activity and emission rate are appropriate. Similarly, in §101.376(d)(1)(D)(iv) the actual emission rate and activity level would not be known before the use period has occurred so this provision is proposed to be deleted, and the subsequent clauses renumbered. Current §101.376(d)(1)(D)(vi) is proposed to be renumbered as §101.376(d)(1)(D)(v) and revised to remove the unnecessary parenthetical clause because it does not account for the use

of alternate protocols with executive director and EPA approval. Current §101.376(d)(1)(D)(ix), which would be renumbered as §101.376(d)(1)(D)(viii), is proposed to be changed to just require records of the DERC identification number because this is sufficient to inform the executive director of the identity of the generator. Current §101.376(d)(1)(D)(x) would be deleted and the subsequent clauses renumbered. The requirement to provide on the Form DERC-2 the price for each DERC that has been or will be acquired is not needed because this information is provided on the Form DERC-4 when a DERC is traded and could be several years old before a Form DERC-2 is submitted.

The current language in §101.376(d)(2)(A) is proposed to be modified to remove references to §117.223 and §117.1120 because these sections are being proposed for repeal concurrent with this rulemaking. These citations are also proposed to be deleted where they appear in the definitions of variables in the equations in this subparagraph. Proposed revisions to the equations in clauses (i) and (ii) would update the figures to current formatting standards and define variables in the order that they appear in the equation.

In §101.376(d)(2)(B) and (C), the words "is" are proposed to be changed to "must be." Proposed revisions to the equations in paragraphs (B) and (C) update the figures to current formatting standards and define variables in the order that they appear in the equation. An amendment is proposed for §101.376(d)(2)(E) to clarify that it is the responsibility of the user to acquire the additional DERCs to be set aside as the 5% compliance margin if the use would exceed 10.0 tons.

For clarity, in §101.376(d)(3), the word "situation" is proposed to be changed to "emergency or exigent circumstances" to better describe what must be provided with a late Form DERC-2. If documentation of the emergency or exigent circumstances is not provided, the use period would not start until 45 days after the Form DERC-2 is submitted, which may result in a user being in violation of the requirement for which DERCs are requested to be used. The phrase "prior to use" is proposed to be changed to "before the start of the use period" because the start date may be adjusted by the executive director if the form is filed late.

In §101.376(d)(4), non-substantive amendments are proposed to update the formatting. The commission proposes to add §101.376(d)(6) to specify that the user is not required to submit a Form DERC-2 to use DERCs to satisfy an NNSR offset requirement if they submit a Form DERC-O as required by §101.376(b)(2)(E) at least 90 days before the affected facility starts operation.

The commission proposes §101.376(e)(1)(A) to require the user to submit a Form DERC-3 to the executive director no later than March 31 after the control period for which a DERC was used for a facility subject to the MECT Program as provided by §101.356(i)(5). The provisions currently at §101.376(e)(3)(A) are proposed to be moved to §101.376(e)(1)(B) and to require that for any other DERC use the user submit a Form DERC-3 to the executive director no later than 90 days after the end of each use period, which may not exceed 12 months. The proposed revisions would specify that the Form DERC-3 must be submitted to the executive director rather than the commission for

consistency. The commission proposes §101.376(e)(2) to specify that the user is not required to submit a Form DERC-3 to use DERCs to satisfy an NNSR offset requirement if the user submits a Form DERC-O as required by §101.376(b)(2)(E) at least 90 days before the start of operation of the affected facility.

The provisions in current §101.376(e)(3)(B) are proposed to be moved to §101.376(e)(3) with changes. In addition to changes described throughout the rules and Subchapter H, Division 4, in current §101.376(e)(3)(B)(ii), which would be renumbered as §101.376(e)(3)(B), the phrase "in the compliance account" would replace the word "possessed" for consistency with the changes proposed in §101.376(a). Additionally, the phrase "for volatile organic compounds and nitrogen oxides" is proposed to be deleted from current §101.376(e)(3)(B)(iii) when the provision is moved to §101.376(e)(1)(C) because the actual emissions of another criteria pollutant is also needed for DERCs used to comply with requirements for that pollutant.

Current §101.376(e)(1)(A) is proposed to be renumbered as §101.376(e)(4)(A) and revised to correct a citation referring to the environmental contribution to "subsection (d)(2)(D)." Current §101.376(e)(2)(A) and (B) are proposed to be renumbered as §101.376(e)(5)(A) and (B), and non-substantive revisions would be made to update the format of the figures for current formatting standards. Current §101.376(e)(4) is proposed to be renumbered as §101.376(e)(6) with non-substantive amendments to combine the sentences and to indicate that the retained portion of the environmental contribution that was set aside is the part attributed to the unused DERCs. For completeness, language is proposed to be added to specify that any unused part of the

5% compliance margin would also be retained.

Current §101.376(f) would be revised to "Dallas-Fort Worth area DERC use" for consistency. The NO_X DERC limits for the DFW area currently in §101.376(f) and §101.379(c) are proposed to be combined in §101.376(f), with significant changes as discussed in the Background and Summary of the Factual Basis for the Proposed Rules section of this preamble. Because the proposed rules would establish a fixed 17.0 tpd limit on NO_X DERC use in the DFW area, the report provisions in §101.379(c) related to the current calculation methodology are proposed to be deleted. Proposed §101.376(f)(1) would provide the limit of 42.8 tpd on NO_X DERC use in the DFW area for the 2015 calendar year, which was calculated using the exiting methodology. Proposed §101.376(f)(2) would provide the 17.0 tpd limit proposed for Calendar Year 2016 and beyond. The current §101.376(f)(1) would be renumbered as §101.376(f)(3) and revised to remove the phrase "determined by the annual review specified in §101.379(c) of this title, applicable to the control period specified in the DEC-2 Form." Additionally, the phrase "control period" would be changed to "calendar year" for clarity because the limit applies to annual DERC use. The current requirement in subparagraph (B) is proposed to be removed as part of the proposed fixed limit on DERC use in the DFW area. The current subparagraph (A) that the executive director consider the appropriate amount of DERCs allocated for each Form DERC-2 submitted on a case-by-case basis would be moved to subparagraph (B). In current §101.376(f)(2), which would be renumbered as §101.376(f)(4), wording would be 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 a Form DERC-2 and add subparagraphs (A) and (B). Proposed subparagraph (A)

would contain the existing 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. Proposed subparagraph (B) would contain the existing portion of §101.379(c)(2)(C)(ii) that indicates the executive may consider any late DERC-2 Forms 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 would exceed the limit. Proposed paragraph (5) would include the existing requirement in §101.379(c)(2)(D) that specifies that, if the DERC-2 Forms 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 proposes to move 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. Proposed subsection (g) would revise the language moved from §101.372(a) to limit inter-pollutant use to NO_X and VOC DERCs used as NNSR offsets. The proposed changes are consistent with EBT guidance on inter-pollutant use of DERCs as offsets for NNSR permits. Proposed subsection (g) would also revise the language moved from §101.372(a) to require the user to provide a photochemical modeling demonstration to show that the substitution of one ozone precursor for the other will not adversely affect the overall air quality or regulatory design value in the nonattainment area of use. The term "photochemical modeling" is used in place of the current 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) would continue 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

The title of §101.378, "Discrete Emission Credit Banking and Trading" is proposed to be changed to "Discrete Emission Reduction Credit Banking and Trading." Non-substantive changes are proposed in §101.378(a)(1) - (3) for clarity and to use the term " identification number" instead of "certificate." In §101.378(a)(1), the redundant statement regarding information posted to the credit registry would be removed because this requirement is already included in §101.372(i). Because DERCs can be generated statewide for any criteria pollutant or precursor, except lead, changes are proposed in §101.378(a)(3) to remove the reference to "ozone" and to add "and all counties designated as attainment, attainment/unclassifiable, or unclassifiable" to show that the credit registry reflects the history and availability of all DERCs. Because the registry is searchable in multiple ways, the last sentence regarding a combined listing for all attainment and nonattainment counties is proposed to be deleted.

In §101.378(b), non-substantive changes are proposed for clarity and conciseness. As discussed elsewhere in this preamble, some information on DERCs is entered into the registry prior to certification, but a DERC is not available for use until certified. In the last sentence, the phrase "intended for use" would replace "withdrawn" because this term is commonly used to show that a DERC has been set aside for future use after a Form DERC-2 has been processed. Because the provisions are obsolete, paragraphs (1)

and (2) are proposed to be deleted, and the prohibition on using a DERC from a shutdown is proposed to be moved to the end of §101.378(b).

An amendment is proposed in §101.378(c)(1) to clarify that it is the responsibility of the seller to submit an Application to Trade DERCs (Form DERC-4). In §101.378(c)(2), amendments are proposed to specify the information that will be provided by the executive director to the buyer and seller regarding a trade. The provision in §101.378(c)(3) is proposed to be rewritten to clarify that any discontinuation of trading would be taken to the commission before being implemented. The phrase "in whole or in part" would be deleted because it is included in the wording "in any manner."

Section 101.379, Program Audits and Reports

In §101.379, amendments are proposed for conciseness and conformity with other changes in Division 4. For §101.379(a), removal of "after the effective date of this section" is proposed to clarify that the current audit schedule would not be delayed by the new effective date for §101.379 for the amendments. In §101.379(a)(2), the same changes as in §101.378(c)(2) are proposed for the same reasons as discussed for §101.378(c)(2). Because the limit on the use of NO_X DERCs in the DFW area are proposed to be moved to §101.376(f), the reference in §101.379(b)(4) is proposed to be updated and all provisions in current §101.379(c) are proposed to be deleted.

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

In the title and throughout the division, the hyphen is proposed to be 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(18), 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

Proposed §101.390(1) would define the term "affected facility" as a facility subject to §115.720 or §115.760 that is located at a site subject to this division, and the subsequent definitions would be renumbered. The definition of "banked allowance" at §101.390(3) is proposed to be renamed as "vintage allowance" in proposed paragraph (15) because this is the term commonly used. In §101.390(4), changes are proposed to the definition of "baseline emission period" to delete the words "calendar year" because they are unneeded with the proposed definition of "control period" and to update citations to be consistent with reformatting proposed for that section.

The definition of "broker" at §101.390(5) would be 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 proposed to be 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 proposed to be 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 proposed to be 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 proposed as §101.390(9), which would reference 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 proposed to be added as §101.390(10), which would list the counties as Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the subsequent definitions would be renumbered. A typographic error is proposed to be revised in the definition of "industry sector" at current §101.390(8), which would be renumbered as §101.390(11) by changing "carbon" to "compound."

In the definition of "level of activity" at current §101.390(9), which would be renumbered as §101.390(12), the reference to §115.10 is proposed to be deleted because of the proposed addition of a definition of the term "highly reactive volatile organic compound" that would include this citation. The definition of "site" is proposed as §101.390(13), which would reference the definition in 30 TAC §122.10 and be the same as the current definition in the MECT Program, and the subsequent definitions would be renumbered. The definition of "vintage allowance" is proposed as §101.390(15), which would replace the definition of "banked allowance" with wording changes for clarity and conciseness.

Section 101.391, Applicability

In §101.391, the current provisions are proposed to be designated as subsection (a) and two additional subsections are proposed. In proposed §101.391(a), the citations for the terms "site" and "highly reactive volatile organic compound" would be removed because they are no longer needed due to the proposed new definitions of these terms. The phrase "with one or more affected facilities" is proposed to be added after "site" 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 proposed definition of "affected facility" references the HRVOC provisions in Chapter 115, the references to Chapter 115 in this section are proposed to be deleted. For consistency with the proposed definition, the phrase "applicable facility" in the second sentence would be 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) is proposed to explain that the banking and trading provisions apply to brokers and broker accounts.

Section 101.392, Exemptions

Non-substantive changes are proposed in §101.392(a) to update terms and correct rule references. The word "ten" is proposed to be 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 proposed in §101.392(b) to clarify the counties that qualify for the exemption, to specify the owner or operator (rather than the site itself) is responsible for compliance, and to remove the obsolete January 1, 2007 deadline.

Section 101.393, General Provisions

Proposed revisions in §101.393(a) would clarify that an allowance can only be used by an affected facility and can only be used for a purpose described in Division 6. Proposed amendments in §101.393(b) would remove language made obsolete by the proposed 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 proposed to be substantially rewritten for clarity and completeness. The current provision only addresses using allowances for the one-to-one portion of the offset requirement. This language would be 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 would 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.

Proposed §101.393(d)(1) would require the owner or operator to use a permanent allowance allocation stream 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. Proposed §101.393(d)(1) would clarify that a vintage allowance or an allowance allocated based on permit allowable emissions, as described under §101.394, cannot be used as an offset. 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. Proposed paragraph (1) would clarify that an allowance used for offsets may not be banked or traded. Proposed paragraph (1) would also indicate 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 existing requirements in this subsection. Proposed §101.393(d)(1) would require the user to permanently set aside allowances for offsets by submitting an Application to Use Allowances for Offsets (Form HECT-O) at least 30 days before the start of operation of the affected facility. Proposed paragraph (1) would also specify 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 VOC emissions from the affected facility are less than this amount. Proposed §101.393(d)(2) would allow HECT allowances to be used simultaneously to comply with the one-to-one portion of an offset requirement and the requirements of Division 6. If the actual VOC emission from the affected facility is less than the one-to-one portion of the offset requirement, the user would not be allowed to bank or transfer the difference or to use the allowances for any other purpose.

Proposed §101.393(d)(3) would require the user to have sufficient allowances set aside in the site's compliance account to cover the one-to-one offset requirement for the affected facility at all times. If allowances set aside for the one-to-one portion of the offset requirement devalue for any reason, submit a Form HECT-O at least 30 days before the shortfall to revise the amount of allowances set aside for offsets. The owner or operator can either set aside additional allowances equal to the amount of the

devaluation or, if the NNSR permit authorizes the use of ERCs or DERCs for offsets, the owner or operator can revise the amount of allowances set aside for offsets. The owner or operator would also need to submit the appropriate form for the credit use in accordance with the requirements in §101.306 or §101.376. Proposed §101.393(d)(4) would require an allowance set aside to comply with any portion of a VOC offset requirement other than the one-to-one portion to be permanently transferred to the executive director and would prohibit that allowance from being used to comply with the requirements of Division 6. Allowances set aside for this purpose would not devalue because this portion of the offset requirement is met when the allowances are permanently retired prior to the start of operation.

Proposed §101.393(e)(5)(A) would allow the user to submit a request to the executive director to release allowances set aside for offsets if the user receives authorization in the NNSR permit for the affected facility to use an alternative means of compliance for the VOC offset requirement. Proposed subparagraph (B) would allow the user to submit a request to the executive director to release allowances set aside for offsets if the user permanently shuts down the affected facility. If a request submitted under subparagraph (A) or (B) is approved, the release would become effective in the control period following the date that the alternative means takes effect, and allowances would not be released retroactively for any previous control periods. Under proposed subparagraph (A), the future allocations set aside for the entire portion of the offset requirement could be released but under proposed subparagraph (B) only the future allocations set aside for the one-to-one portion of the offset requirement could be released.

Proposed §101.393(i) 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 tpy of HECT allowances is surrendered for each tpy of ERCs generated from HRVOC emissions. The proposal is intended to provide greater flexibility to owners and operators in the generation of ERCs. An owner or operator would 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 would be transferred to the commission retirement account so that 1.0 tpy of HECT allowances would be 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.

An amendment is proposed in current §101.393(f) the phrase "allocated, transferred, deducted, or used" is proposed to be 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. Current §101.393(g) is proposed to be 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 proposed 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.

Proposed §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. Proposed 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), obsolete language for the allocation of allowances for the 2007 - 2010 control periods is proposed to be deleted. The obsolete equation in §101.394(a)(1)(A) and the introductory sentences for paragraph (1)(A) and (B) are proposed to be deleted. In §101.394(a)(1), the citation to §115.10 for HRVOCs, which is proposed in the definition for HRVOCs in §101.390(9), would be removed, and the reference to two equations would be changed to a reference to the one equation proposed to be retained. In the equation in §101.394(a)(1)(A), which would be redesignated as §101.394(a)(1), the format is proposed to be made consistent with other figures in the rules: the equation would be put in a more accessible format; the spelled-out factors would be changed to acronyms; and the factors would be defined in the order that they appear in the equation. In the definition of factor AC^1, a citation would be changed for a proposed re-lettering of a subsection, and the tons of HRVOC allowances for 2011 - 2013 would be deleted because this information is obsolete (the value for 2014 would be retained in case it is needed after the effective date of this rule for processing annual compliance reports for the 2014 control period).

Because of the proposed restructuring of the rule, current §101.394(a)(1)(C) is proposed

to be redesignated as §101.394(a)(2) and clauses (i) - (iii) as subparagraphs (A) - (C). The subsequent paragraphs would be renumbered. The provision is proposed to be 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 in current §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.

In current §101.394(a)(2), which is proposed to be renumbered as §101.394(a)(3), the equation is proposed in a more accessible format. Factor AC, which is currently shown as "AC^2" in the definitions under the current equation, is proposed to be 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 proposed 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)(2) would use "AC^1" as the factor, this change is not expected to cause any confusion.

For consistency with the proposed definition of "affected facility" in current §101.394(a)(3) and (3)(D), which would be renumbered as §101.394(a)(4) and (4)(D), respectively, "applicable facility" is proposed to be changed to "affected facility." In §101.394(a)(3)(E), the reference to §101.394(a)(1), which is proposed to be deleted, is proposed to be changed to "the previous allocation methodology." Additionally, the owner or operator is proposed to be made responsible for the addition covered, rather

than leaving the person doing the addition unspecified.

Because the allocation methodology in current §101.394(a)(1)(A) is obsolete, the provision at current §101.394(c) for augmenting allocations under that allocation methodology is also obsolete. Therefore, §101.394(c) is proposed to be deleted, and the subsequent subsections re-lettered. The proposed deletion of §101.394(a)(1)(A) would leave current §101.394(a)(1)(B) as the only allocation methodology. Therefore, the two references to §101.394(a)(1)(B) in current §101.394(d), which would be re-lettered as §101.394(c), are no longer needed and are proposed to be deleted. For clarity, a sentence is proposed to be 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 five tons could be raised to five tons.

Deletion of §101.394(e) is proposed with moving the current provisions with changes to §101.394(e) and (f) because these provisions are more appropriate in the rule section covering allowance deductions. Subsequent subsections would be re-lettered.

The provision in current §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 proposed to be moved to current §101.394(f), which would be re-lettered as §101.394(d), and paragraphs (1) and (2) deleted. For conciseness the clause "who will deposit allowances" is proposed to be changed to "and deposited."

Section 101.396, Allowance Deductions

In §101.396(a), amendments are proposed for clarity, grammar, and consistency. The deductions of allowances would be specified as the responsibility of the executive director, and, consistent with current §101.393(f), which would be re-lettered as §101.393(h), the amount would be specified as being deducted in tenths of a ton. The first sentence would be reformatted to improve the grammar and readability. In the second sentence, the HRVOC emissions would be required to be based on monitoring and testing protocols in §115.725 and §115.764, but an introductory clause would provide 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) (35 TexReg 2537). The proposed revision would replace the existing language in §101.396(b) with the version of the rule that existed before the revision.

In §101.396(c), amendments are proposed for clarity and consistency. In the first sentence "referenced in subsection (a)" would be changed to "required under subsection (a)" because the proposed subsection would require certain monitoring; "does not exist" is proposed to be changed to "is missing" and "is not required for a period of time" would be added; the proposal would make the owner or operator of the site responsible for using the first available specified method in the order listed to determine emissions; and in the listed methods, "data from manufacturers" is proposed to be 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 current subsection (c) is proposed to be deleted and moved to §101.396(c)(1) with changes to make the provision more similar to the comparable provision §101.354(b) in the MECT rules, as well as the following changes: "determining" is proposed to be changed to "reporting" because the submission would be made with the Form HECT-1; the owner or operator is proposed to be specified as responsible for providing the justifications; and a requirement to provide justification of the method used is proposed to be added for consistency with §101.354(b) and because explanation of why the method used is appropriate would allow better evaluation of the emissions reported.

Proposed §101.396(c)(2) would specify that the executive director would 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 is proposed to ensure 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 would not apply, and any applicable Chapter 115 data substitution provisions would be 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) would be used to quantify the HRVOC emissions for the period of time the required data is missing.

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

The existing provisions in §101.394(e) are proposed to be moved to §101.396(f) because this section contains provisions related to allowance deductions. As in the current rule, proposed 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%. Proposed 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. Proposed 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 proposed in §101.399(a) and (b) to update the formatting. Proposed changes in §101.399(a) also include the use of the proposed new term vintage allowance. The provisions in current §101.399(b) - (d) are proposed to be consolidated to minimize repetition and shorten the rules. The provisions in current §101.399(b)(2), (c)(2), and (d)(2) are proposed to be combined in §101.399(c). Proposed subsection (c) would require 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 in current §101.399(b)(1), (c)(1), and (d)(1) are proposed to be combined into §101.399(c)(1) - (3) respectively. Proposed paragraph (1) would require the seller to submit an Application to Trade Allowances (Form HECT-2) 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 current rule does not specify a deadline for submitting the Form HECT-2, 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. Proposed paragraph (2) would require the seller to submit an Application for Stream Trade (Form HECT-4) to permanently trade ownership of any portion of the allowances allocated annually to an individual facility. Proposed paragraph (3) would require the seller to submit an Application for Future Trade (Form HECT-5) to trade any portion of the individual future year allowances to be allocated to an individual facility.

The provisions in current §101.399(b)(3), (c)(3), and (d)(3) would be 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 proposed revisions would 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 in current §101.399(b)(4), (c)(4), and (d)(4) would be 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 would be 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 in current §101.399(e) are proposed to be re-lettered as §101.399(f). Non-substantive changes are proposed to the provisions in §101.399(f), (g), and (h) which would re-lettered as in §101.399(g), (h), and (i) respectively.

Deletion of current §101.399(i) is proposed 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 is requesting public comment on whether this provision is needed for future flexibility in providing additional HECT allowances. The deletion would also address 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 would 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). If the provision for converting ERCs to HECT allowances is retained because the regulated community sees a need to retain this flexibility, the limit of 5% of the initial allocation for allowances at a site would also need to be retained because the additional HECT allowances could impact the program if the provision is ever used extensively.

Section 101.400, Reporting

In §101.400(a), amendments are proposed for clarity. The responsibility of filing a Form HECT-1 annually would be made the responsibility of the owner or operator of a site, rather than the site itself. The Form HECT-1 would also be required to have the listed information to be complete. Current §101.400(a)(4) is proposed to be deleted. It requires 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 is proposed to clarify that the executive director may suspend the trading by an owner or operator of a site (rather than the site itself) if the Form HECT-1 is not filed. Proposed §101.400(c) would allow the owner or operator of a site that is no longer subject to the HECT Program to send the executive director a letter detailing why the site is no longer subject and would specify that, after the executive director acknowledges that the site is no longer subject, a Form HECT-1 would no longer be required until a new facility subject to the HECT rules is brought to the site.

Proposed §101.400(c) would allow 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 Form HECT-1 will not be required until a new affected facility is authorized at the site.

Fiscal Note: Costs to State and Local Government

Jeff Horvath, Analyst in the Chief Financial Officer's Division, has determined that for

the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rulemaking would update the EBT rules in Chapter 101, Subchapter H, Divisions 1, 3, 4, and 6. The EBT provides flexibility for complying with certain federal and state air quality requirements, while creating a net reduction in total air emissions. The current rules provide a market-based framework for trading reductions in VOC, NO_X, and certain other criteria pollutant emissions from stationary, area, and mobile sources. The rules are an integral part of the SIP under the FCAA.

Division 1, ERC Program

ERCs are generated from voluntary, enforceable, and permanent reductions of a criteria pollutant (other than lead) or its precursors in an area designated nonattainment for that pollutant. To certify an ERC, the reductions must be real, permanent, surplus, quantifiable, and federally enforceable. ERCs can be used as offsets for NNSR permits or for compliance with other certain air quality rules as a tpy amount. ERCs can be traded freely and have values that vary greatly over time, among areas, and by pollutant.

Over the last five years, the average prices in the HGB area were $131,151 per tpy for NO_X ERCs and $163,220 per tpy for VOC ERCs. In the DFW area, the average prices were $907 per tpy for VOC, while no NO_X ERCs were traded. There are currently 168.6 tpy of NO_X and 937.6 tpy of VOC available in the HGB area, and 66.4 tpy of NO_X ERCs and 200.9 tpy of VOC ERCs available in the DFW area.

There are four changes in the ERC Program rules that may have fiscal implications for entities that choose to participate in this voluntary program. To date, 237 entities have participated in the program. Because this is a free-market program and market conditions vary so widely, fiscal implications are extremely difficult to predict and would be different for various entities. The four proposed changes to the ERC Program include the following revisions.

The proposed rules would remove the option to generate ERCs by reducing emissions from area and mobile sources. No ERCs have ever been generated from a mobile source and no ERCs have been generated from an area source since 2005. It is no longer possible for an area or mobile source to generate ERCs because these sources cannot demonstrate that the emission reduction is a surplus to the area's most recent AD SIP. Therefore, removing these options is not expected to have a fiscal impact.

The proposed rules would revise the modeling requirement for the inter-pollutant use of ERCs from the urban airshed model to photochemical model. The proposed change is necessary as urban airshed modeling uses outdated software (developed in the 1970s) that is no longer available. There are newer software programs available that are more effective and economical. The proposed rules provide flexibility to use the newer modeling that is currently available. Some of the newer software can be downloaded at no cost, but the required computer hardware to use the software may have a significant cost. The TCEQ uses six servers to provide the needed data storage and processing for its modeling, so the cost would be significant for a company to set up such a system on its own. However, there are consulting companies that do this work, so they may

provide a more cost-effective option. Costs would vary by the consultant and the specific modeling required. However, since urban airshed modeling requires considerably more time for input and processing and provides less data, in most cases it would cost more to have the modeling done under the software specified in the current rules than with the options that are proposed. Therefore, it is anticipated that this proposed change would provide additional flexibility and not result in additional costs overall but could result in cost savings.

The proposed rules would revise the deadline to submit the application to use ERCs as NNSR offsets to ensure consistency with the commission's NNSR permitting program requirements. Extending the application deadline allows more time to purchase or generate ERCs, which may help reduce costs for buyers.

The proposed rule extends the application deadline to certify ERCs from 180 days to two years after achieving the emission reduction. In the past, applications submitted after the 180-day deadline have been denied even though the emission reduction may have been fully creditable if the deadline was met, so this revision may increase the number of ERCs generated.

Division 4, DERC Program

DERCs are generated by reducing emissions of a criteria pollutant (other than lead) or its precursors. DERCs are similar to ERCs except that DERCs can be generated for temporary reductions, do not need to be enforceable, and can be generated in attainment, attainment/unclassifiable, unclassifiable, and nonattainment areas. DERCs

can be used to comply with NNSR offset requirements or other requirements.

Over the last five years, the average prices in the HGB area were $8,104 per ton for NO_X DERCs, $8,497 per ton for VOC DERCs, and $15,000 per ton for hazardous air pollutant DERCs; in the DFW area, VOC DERCs were $1,250 per ton and NO_X DERCs were $21,023 per ton. There are currently 168.6 tons of NO_X DERCs and 937.6 tons of VOC DERCs available in the HGB area, and 66.4 tons of NO_X DERCs and 200.9 tons of VOC DERCs available in the DFW area.

There are three changes in the DERC Program that may have fiscal implications, but these will only arise for entities that choose to participate in this voluntary program. To date, there have been a total of 266 participants in this program. Because this is a free-market program and market conditions vary so widely, fiscal implications are extremely difficult to predict and would be different for various entities.

The proposed rules would revise the limit on DERC use in the DFW area from an annually calculated value to a fixed value of 17.0 tpd. The proposed revisions will allow greater certainty in planning for the use of NO_X DERCs in the DFW area. However, the limit has not been exceeded in the last five years, so the impact from the change should not be significant. Because additional time is no longer needed to perform the calculation, the proposed rulemaking would extend the deadline for submitting the application to use NO_X DERCs in the DFW area. Companies will still receive approval in time to find an alternate method of compliance if the total amount of NO_X DERCs requested for use exceeds 17.0 tpd.

The proposed rulemaking would remove the option to generate DERCs by reducing emissions from area and mobile sources. No DERCs have ever been generated from an area source and no DERCs have been generated from a mobile source since 2010. It is extremely challenging for an area or mobile source to generate DERCs because these sources cannot demonstrate that the emission reduction is surplus to the SIP. Therefore, removing these options is not expected to have fiscal implications.

The proposed rulemaking would revise the modeling requirement for the inter-pollutant use of DERCs from urban airshed to photochemical modeling. The proposed change is necessary as urban airshed modeling uses outdated software (developed in the 1970s) that is no longer available. There are newer software programs available that are more effective and economical. The proposed rules provide flexibility to use the newer modeling that is currently available. Some of the newer software can be downloaded at no cost, but the required computer hardware to use the software may have a significant cost. The TCEQ uses six servers to provide the needed data storage and processing for its modeling, so the cost would be significant for a company to set up such a system on its own. However, there are consulting companies that do this work, so they may provide a more cost-effective option. Costs would vary by the consultant and the specific modeling required. However, since urban airshed modeling requires considerably more time for input and processing and provides less data, in most cases it would cost more to have the modeling done under the software specified in the current rule than with the options that are proposed. Therefore, it is anticipated that this proposed change would provide additional flexibility and not result in additional costs overall, but could result

in cost savings.

Division 3, MECT Program

The MECT Program provides for the use of NO_X allowances certified from emissions based on historical operations in the HGB area. The annually allocated allowances can be used for compliance for two years (called "vintage allowances" in the second year). Allowances can be traded freely, and the average price over the last five years was $514 per allowance, $219 per vintage allowance, and $77,225 per tpy for a permanent allocation of allowances. Unlike ERCs and DERCs, participation in the MECT Program is mandatory for a site in the HGB area with facilities subject to an emission standard in Chapter 117 that is a major source of NO_X, an electric generating site, or a minor source of NO_X with a collective uncontrolled design capacity to emit 10.0 tpy or more of NO_X.

There are three rule changes proposed that may have fiscal implications for entities in the MECT Program. A total of 414 entities have participated in this program to date. Because of volatility in the market for allowances, the impact can only be estimated from average prices and may be different for specific entities. Specifying that brokers are covered by the rules may be initially perceived as having an impact, but brokers must already follow the trading provisions (i.e., the only part of the rules that applies to them) to conduct their business.

The proposed rulemaking would expand the use of MECT allowances for NNSR offset requirements to allow greater flexibility for entities. In the current rules, allowances can be used for the one-to-one portion of the NNSR offset requirement, and the amendment

would expand this to the environmental contribution portion (currently 0.3-to-one in the HGB area).

The existing MECT rules require emissions to be quantified using the monitoring and testing required under Chapter 117. The MECT rules provide alternatives if the required data is missing or not available. However, use of the required Chapter 117 data results in a more accurate accounting of emissions from sites subject to the MECT Program. The proposed rules imposes a 10% additional deduction on sources using the alternative emission quantification protocols due to non-compliance with the monitoring and testing required in Chapter 117. The proposed rulemaking would require non-compliant sources to surrender allowances equivalent to the emissions quantified using the alternative protocols plus an additional 10%. The additional deduction would not apply to a facility that is in compliance with Chapter 117. The proposed rulemaking helps ensure that the number of MECT allowances surrendered at the end of each control period is sufficient to cover the actual NO_X emissions from affected sources. Based on data for the last three years, 8% of 414 sites that have reported to the MECT Program may be subject to this penalty if they do not achieve compliance with Chapter 117 by the time these rules are effective.

The proposed rulemaking would require the owner or operator of a site that does not have enough allowances in the next year to cover a deficit and the associated 10% penalty, to transfer in the deficit amount within 30 days if the EBT Program sends a notice of deficiency. There would be minimal impact from this proposed change because the owner or operator is already required to transfer sufficient allowances by the

following January 30. Moving up the deadline if a notice of deficiency is issued may result in the owner or operator paying a higher cost for allowances than they would otherwise because they would not have as much time to find a better price. However, the potential cost difference from having to purchase allowances more quickly cannot be estimated because of the variability in prices in the market.

Division 6, HECT Program

The HECT Program is similar to MECT, but currently only applies in Harris County (in the HGB area) to sites with 10.0 tpy or more of HRVOC emissions from applicable facilities. Additionally, the HECT Program is based on a fixed cap of emissions, unlike the MECT Program. Like MECT, the annually allocated allowances can be used for compliance for two years. Allowances can be traded freely, and the average price over the last five years was $1,879 per ton for current, $2,725 per ton for vintage, and $130,207 per tpy for a permanent allocation.

There are two rule changes proposed that may have a fiscal impact for entities in the HECT Program. A total of 55 entities have participated in this program to date. Because of volatility in the market for allowances, the impact can only be estimated from average prices and may be different for specific entities. Specifying that brokers are covered by the trading provisions in the rules may be initially perceived as having an impact, but brokers must already follow the trading provisions (i.e., the only part of the rules that applies to them) to conduct their business.

The proposed rulemaking would expand the use of HECT allowances for NNSR offset

requirements to allow greater flexibility for entities. In the current rule, allowances can be used for the one-to-one portion of the NNSR offset requirement, and the amendment would expand this to the environmental contribution portion (currently 0.3-to-one in Harris County).

The existing HECT rules require emissions to be quantified using the monitoring and testing required under Chapter 115. The HECT rules provide alternatives if the required data is missing or not available. However, use of the required Chapter 115 data results in a more accurate accounting of emissions from sites subject to the HECT Program. The proposed rule imposes a 10% additional deduction on sources using the alternative emission quantification protocols due to non-compliance with the monitoring and testing required in Chapter 115. The proposed rulemaking would require non-compliant sources to surrender allowances equivalent to the emissions quantified using the alternative protocols plus an additional 10%. The additional deduction would not apply to a facility that is in compliance with Chapter 115. The proposed rulemaking helps ensure that the number of HECT allowances surrendered at the end of each control period is sufficient to cover the actual HRVOC emissions from affected sources. Based on data for the last three years, few of 49 sites that have reported to the HECT Program may be subject to this penalty if they do not achieve compliance with Chapter 115 by the time these rules are effective.

These proposed changes are not expected to have a significant effect on agency operations or workload. The proposed rulemaking would reduce the time available for processing requests for some specific actions, but the EBT staff routinely process the

forms within the times proposed in the rules. One goal of the proposed rulemaking is to provide additional flexibility for sources to generate ERCs and DERCs. As a result, there is a chance that the generation of ERCs and DERCs may increase, but this possibility is not expected to significantly increase workloads.

A few agencies in the state, such as the Lower Colorado River Authority, MD Anderson Cancer Center, and the University of Houston, operate facilities that are subject to the MECT Program or have participated in the ERC or DERC Programs. A few local government entities operate facilities that are subject to MECT (three City of Houston airports and Harris County Central Plant) or have participated in the ERC Program (Cleburne Resource Recovery Center and Houston Almeda Sims Wastewater Treatment Plant) or DERC Program (Harris County Municipal Utility District 16). No sites are affected by the proposed revisions to the HECT Program.

The proposed rules may have fiscal implications for these agencies or institutions owned or operated by the state or units of local government, but they are not anticipated to be significant. The proposed rulemaking is expected to provide additional flexibility under the EBT Program and some of the proposed revisions to the ERC and DERC rules could make it easier for government-owned facilities to generate credits, which could be used for NNSR offset requirements or sold on the open market.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed

rules would be more participation in the ERC and DERC Programs as a result of the increased flexibility from the proposed rule revisions. The proposed changes are also anticipated to provide emission sources more flexibility for compliance and allow for expansion of the EBT in nonattainment areas by increasing the credits available. Because of the environmental benefits associated with credit use, any increased generation and use of credits will reduce emissions in the airshed, thereby improving air quality.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

Participation in the ERC and DERC Programs is voluntary for companies that choose to generate or use credits for compliance. Participation in the MECT Program is mandatory for sites with an uncontrolled capacity to emit at least 10.0 tpy of NO_X. Companies with certified historical emissions receive an annual allocation of NO_X allowances. Similarly, the HECT Program is mandatory for certain sites in Harris County, and HRVOC allowances are allocated from a capped amount of HRVOC emissions.

The proposed rulemaking is not expected to expand agency authority over any additional emission sources. Because the ERC and DERC Programs are voluntary, it is impossible to predict how many sites may choose to participate as generators or users. Historically, 237 entities have participated in the ERC Program and 266 in the DERC Program. There is no limit on program participation, but the number of participants

over the next five years is not expected to exceed the historical participation. Approximately 200 companies or sources are currently subject to the MECT Program, and approximately 40 companies or sources are currently subject to the HECT Program. The proposed rulemaking is not expected to increase or decrease the number of sources subject to the MECT or HECT programs.

Any fiscal implications for businesses affected by the proposed rules are dependent upon discretionary actions taken by the program participants, and therefore would be difficult to predict.

In the voluntary ERC Program, cost savings may result from updating the photochemical modeling requirement. The elimination of area and mobile sources from generating ERCs would not incur any costs, but may prevent someone from generating an ERC (although this has not occurred for emission reductions made in the last five years). The extensions of the deadlines for submitting a certification or an offset use would not have costs but may allow the generation of an ERC that would not have been eligible or provide more time to find lower-cost ERCs. If the amount of emissions an ERC generates increases or decreases as a result of the rule changes, the market price might be affected, but this would be from the mechanisms of the marketplace, rather than the rules themselves.

In the DERC Program, similar savings or costs are expected for inter-pollutant use, elimination of area and mobile source generation, and later submission of offsets. Later submission of forms for NO_X DERCs in the DFW area may also allow less expensive

DERCs to be identified and acquired.

In the MECT and HECT Programs, there is the potential of an increase in the use of allowances as offsets, which may affect the price of allowances in the area. Because there is a fixed cap in the HECT Program, this factor may be of more consequence. The costs associated with site ownership changes will be dependent on how many sites are sold during a year, but it is expected that the costs will be minimal for most companies. The additional penalties for noncompliance with Chapter 115 or 117 would require the use of more of an account's existing allowance allocation or the acquisition of more allowances, which may incur costs, but the amounts would vary with the cost of allowances and could be avoided by achieving compliance.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the implementation or administration of the proposed rules. The ERC and DERC Programs are completely voluntary, so any fiscal implications to small or micro-businesses that participate in these programs would result from their decisions and not from this rulemaking. At this time, there are approximately 85 small businesses and 34 micro-businesses participating in the ERC Program, and five small businesses and five in micro-businesses in the DERC Program. Any fiscal implications due to change in ownership of MECT and HECT sites for small or micro-businesses are not expected to be significant. Historically there have been 164 small businesses and 70 micro-businesses in MECT, and six small businesses and two micro-businesses in HECT. Because there is some change in ownership of MECT and HECT sites over time, the number of micro-businesses subject to those programs each year may vary.

Since the ERC and DERC Programs are completely voluntary, the number of micro-businesses affected by those rules is expected to vary even more annually.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking 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 proposed 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 ERC 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 DERC 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 in 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 proposing 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 NOx 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 flow control 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

proposed rules make changes to the DERC flow control provisions to replace the current equation for setting the flow control limit with a hard cap of 17 tpd.

The proposed 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 proposed rulemaking will revise the EBT rules in Chapter 101 to respond to issues with flexibility and use of the rules, and to improve the workability and functionality of the rules. Additionally, the proposed 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 proposed rulemaking is to revise the EBT rules in Chapter 101 to respond to issues with flexibility and use of the rules and to improve the workability and functionality of the rules. Additionally, the proposed 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 proposed 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 proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the proposed 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 invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

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 emissions banking and trading rules in Chapter 101 to respond to issues with flexibility and use of the rules, and to improve the workability and functionality of the rules. Additionally, the proposed rulemaking includes changes to the technical basis of DERC flow control 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 proposed by these rules were developed to ensure that the use of DERCs would not interfere with attainment and maintenance of NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the proposed amendments are consistent with CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

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 proposed rules.

Announcement of Hearing

The commission will hold public hearings on this proposal in Arlington on January 15, 2015, at 6:30 p.m. in the City of Arlington Council Chamber, at 101 West Abram Street, Arlington, Texas 76010, and in Houston on January 20, 2015, at 2:00 p.m. in the auditorium, at the Texas Department of Transportation, 7600 Washington Avenue, Houston, Texas 77007. The hearings are structured for the receipt of oral or written

comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2014-007-101-AI. The comment period closes January 30, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Joseph Thomas, Air Quality Planning Section, at (512) 239-0012.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION REDUCTION CREDIT PROGRAM [BANKING AND TRADING]

§§101.300 - 101.303, 101.306, 101.309

Statutory Authority

The amended sections are proposed 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 proposed 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 proposed 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 proposed

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 [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 fuel usage, power output, production, use, raw materials input, [vehicle miles traveled,] or other similar units that have a direct correlation with the usage [economic output] and emission rate of the facility [or mobile source].

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

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

[(4) Baseline activity--The facility's level of activity based on the facility's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over two consecutive calendar years.]

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

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

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

(5) Compliance account--The account where emission reduction credits held for a facility or multiple facilities at a single site are recorded. The executive director may create one compliance account for multiple sites when a company is using

credits to comply with an area-wide emission limit instead of a facility-specific or site-specific emission limit.

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

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

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

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

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

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

(11) [(13)] Facility--As defined in §116.10 of this title (relating to General Definitions). In this division, this term only applies to a facility included in the agency's point source emissions inventory.

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

(13) 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(13)

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

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

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

(15) [(22)] Protocol--A replicable and workable method of determining the [estimating] emission rate [rates] or activity level [levels] used to calculate the amount

of emission reduction generated or credits required for a facility [facilities or mobile sources].

(16) [(23)] Quantifiable--An emission reduction that can be measured or estimated with confidence using the replicable methodology in an approved protocol.

(17) [(24)] Real [reduction]--A reduction in [which] actual emissions. An emission reduction based solely on reducing a facility's allowable emissions is not considered real [are reduced].

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

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

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

(20) [(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.

(21) State implementation plan emissions--A facility's annual emissions as reported in the state's point source emissions inventory (EI) for the year in which that

facility's emissions are specifically identified in the state implementation plan (SIP) revision submitted to the United States Environmental Protection Agency (EPA) for the area where the facility is located. The SIP emissions may not exceed any applicable local, state, or federal requirement. The SIP emissions are determined for the calendar year used to represent the facility's emissions in:

(A) the projection-base year inventory used in the modeling included in the most recent attainment demonstration (AD) SIP revision or attainment inventory used in the maintenance plan SIP revision that was most recently submitted to the EPA for the current national ambient air quality standard (NAAQS) for the area where the facility is located;

(B) if a SIP revision for the current NAAQS has not been submitted to EPA for the area in which the facility is located, the projection-base year inventory used in the modeling included in the AD SIP revision or the attainment inventory used in the most recent maintenance plan SIP revision submitted to the EPA for an earlier NAAQS for the same pollutant; or

(C) the point source inventory used in the most recent EI SIP revision submitted to the EPA for the area where the facility is located if no AD or maintenance plan SIP revisions have been submitted to the EPA for the area where the facility is located.

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

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

(24) [(31)] User--The owner or operator of a facility [or mobile source] that acquires and uses an emission reduction credit [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[, as defined in §116.10 of this title (relating to Definitions), or mobile source] to generate an emission reduction credit (ERC) [credits] by reducing emissions beyond [the level required by] any applicable local, state, or [and] federal requirement; to allow a person to buy and sell an ERC; [regulation] and to allow the owner or operator of a [another] facility [or mobile source] to use an ERC [these credits]. Participation under this division is strictly voluntary.

§101.302. General Provisions.

(a) Applicable pollutants. An emission reduction credit (ERC) may be generated from a reduction [Reductions] of a criteria pollutant [pollutants], excluding lead, or a precursor [precursors] of a criteria pollutant [pollutants] for which an area is designated nonattainment[, may qualify as emission credits]. An ERC generated from the reduction [Reductions] 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 Reduction Credit Use) [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 generators. The owner or operator of a facility located in a nonattainment area may generate an ERC if the emission reduction meets the criteria in this division. This includes any facility associated with federal actions under 40 Code of Federal Regulations Part 93, Subpart B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans.

[(b) Eligible generator categories. The following categories are eligible to generate emission credits:]

[(1) facilities, including area sources;]

[(2) mobile sources; and]

[(3) any facility, including area sources, or mobile source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).]

(c) ERC [Emission credit] requirements.

(1) An ERC is a [Emission reduction credits are] certified emission reduction [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 occur [have occurred] after the [most recent] year [of emissions inventory] used to determine [in] the state implementation plan (SIP) emissions for the facility; and

(D) must occur at a facility with SIP [the facility's annual] emissions reported prior to implementation of the emission reduction strategy [must have been reported or represented in the emissions inventory used in the SIP].

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

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

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

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

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

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

(2) [(3)] An emission reduction [Emission reductions] from a facility [or mobile source] that is [are] certified as an ERC [emission credits] under this division cannot be recertified [in whole or in part] as credits under Division 4 of [another division within] this subchapter (relating to Discrete Emission Reduction Credit Program).

(d) Protocol.

(1) An ERC generator or user [All generators or users of emission credits] shall use a protocol that has been submitted by the executive director to the United States Environmental Protection Agency (EPA) [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, executive director and EPA approval is required before the protocol can be used. The generator or user shall use a protocol [Protocols must be used] as follows.

(A) The owner or operator of a facility [Facilities] subject to the emission specifications under §§117.110, [117.210,] 117.310, 117.410, 117.1010, [117.1110,] 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 [quantify reductions in nitrogen oxide emissions using] the testing and monitoring methodologies identified to show compliance with the emission specification.

(B) The owner or operator of a facility [Facilities] subject to the requirements under Chapter 115 [§§115.112, 115.121, 115.122, 115.162, 115.211, 115.212, 115.352, 115.421, 115.541, or 115.542] of this title (relating to Control of Air Pollution from Volatile Organic Compounds [Requirements; and Emission Specifications]) shall use [quantify volatile organic compound reductions using] the testing and monitoring

methodologies identified to show compliance with the applicable [emission specifications or] requirements.

(C) If the executive director has not submitted a protocol for the applicable facility [or mobile source] to the EPA for approval, the following requirements apply:

(i) the amount of ERCs generated or used [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 or user 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 [facilities] with a continuous emissions monitoring system [systems] or predictive emissions monitoring system [systems] in place shall use this data in quantifying [actual] emissions;

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

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

(vi) quantification protocols may [shall] 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 [In the event that] the monitoring and testing data specified in [required under] paragraph (1) of this subsection is missing or unavailable, the generator or user shall determine [facility may report actual] emissions for the [that] 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 [of preference to determine actual emissions]:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

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

(F) material balance.

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

(e) ERC [Credit] certification.

(1) The amount of an ERC [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 [Applications] for certification [will be reviewed in order] to determine the credibility of the reductions. Each ERC certified will be assigned an identification 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 ERC generation [emission credit application]. The applicant may submit a revised application in accordance with the requirements of this division.

(4) If a facility's [or mobile source's actual] emissions exceed any applicable local, state, or federal requirement [its allowable emission limit], reductions of emissions exceeding the requirement [limit] may not be certified as an ERC [emission credits].

(5) An application [Applications] for certification of ERCs [emission credit] from reductions quantified under subsection (d)(1)(C) of this section may only be approved after the EPA's 45-day adequacy review of the protocol [upon completion of the public comment period].

(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 ERC forms [notices] and backup information submitted to the executive director [registry] for a minimum of five years after the date the ERC is generated. The user shall maintain a copy of all ERC forms [notices] and backup information submitted to the executive director [credit registry] from the beginning of the use period and for at least five years after. The user shall [also] make the [such] records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records must include, but not necessarily be limited to:

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

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

(3) the identification [specific] number[, name, or other identification] of each ERC [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 ERC [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 ERC [emission credit] application. All nonconfidential [notices and] information will [regarding the generation, availability, use, and transfer of emission credits shall] be [immediately] made available to the public as soon as practicable.

(i) Authorization to emit. An ERC [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 ERC [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 [an organization] from participating in the ERC Program [emission credit trading either as a generator or user,] if the executive director determines that the person [organization] has violated the requirements of the program[,] or abused the privileges provided by the program.

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

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

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

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

§101.303. Emission Reduction Credit Generation and Certification.

(a) Emission reduction strategy. [Methods of generation.]

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

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

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

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

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

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

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

(A) reductions from the shifting of activity from one facility to another facility at the same site[, as defined in §122.10 of this title (relating to General Definitions)];

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

(C) reductions [in emissions] from [the shutdown of] a facility without state implementation plan (SIP) emissions [that was not reported or represented in the most recent emissions inventory used in the state implementation plan (SIP)].

(b) ERC baseline emissions.

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

(2) The [two consecutive calendar years for the baseline] activity and emission [emissions] rate used to calculate the facility's historical adjusted emissions must be determined from the same two consecutive calendar years selected from [either

a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years,] the ten consecutive years immediately before [preceding] the emission reduction is achieved.

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

(c) ERC calculation. The quantity of ERCs is determined by subtracting the facility's strategic emissions from the facility's baseline emissions, as calculated in the following equation. [The facility's strategic emissions equal the enforceable emission limit for the applicable facilities after the emission reduction strategy has been implemented.]

Figure: 30 TAC §101.303(c)

[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 [Facilities] with potential ERCs shall [must] submit[,] to the executive director[,] an Application to Generate ERCs (Form ERC-1) no more than two years after [EC-1 Form, Application for Certification of Emission Credits, within 180 days of] the implementation of the emission reduction strategy. Applications will be reviewed to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and an ERC [certificate] will be issued to the owner.

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

(3) An application for ERCs must include, but is not limited to, a completed Form ERC-1 [EC-1 Form] signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

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

(B) the amount of ERCs [emission credits] generated;

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

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

(E) emissions inventory data for each of the years [from the most recent year of emissions inventory] used to determine [in] the SIP emissions and historical adjusted emissions [inventory data for the two consecutive years used to determine baseline activity for each applicable pollutant and facility];

(F) the most stringent emission rate and the most stringent emission level [for the applicable facility], considering all applicable [the] local, state, and federal [applicable regulatory and statutory] requirements;

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

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

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

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

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

(C) for any facility without a new source review permit that is otherwise authorized by commission [standard permit, standard exemption, or permit by] rule, certifying the emission reduction and the new maximum emission limit [emissions] on a Certification of Emission Limits (Form APD-CERT) [PI-8 Form, Special Certification Form for Exemptions and Standard Permits,] or other form considered equivalent by the executive director or an agreed order. [, the emission reduction and the new maximum allowable emission limit;]

[(D) for any facility that is not required to have authorization by permit, standard permit, standard exemption, or permit by rule, certifying emissions on an OPC-RE1 Form, Certified Registration of Emissions Form for Potential to Emit, or other form considered equivalent by the executive director, the emission reduction and the new maximum allowable emission limit; or]

[(E) for any facility that is not required to have authorization by permit, standard permit, standard exemption, or permit by rule, obtaining an agreed order that sets a new maximum allowable emission limit.]

§101.306. Emission Reduction Credit Use.

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

(1) an offset in a nonattainment new source review (NNSR) permit in accordance with Chapter 116, Subchapter B of this title (relating to New Source Review Permits);

[(1) offsets for a new source, as defined in §101.1 of this title (related 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 [§101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans)];

(3) an alternative means of compliance with volatile organic compound and nitrogen oxides reduction requirements to the extent allowed in Chapters [114,] 115[,] and 117 of this title (relating to [Control of Air Pollution from Motor Vehicles;] Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds);

(4) [reductions certified as emission credits may be used] in netting by the original applicant, if the reduction certified as an ERC is not used, sold, reserved for use,

or otherwise relied upon, as provided by Chapter 116, Subchapter B [in §116.150] of this title [(relating to New Major Source or Major Modification in Ozone Nonattainment Areas)]; or

[(5) an annual allocation of allowances as provided in §101.356 and §101.399 of this title (relating to Allowance Banking and Trading);]

[(6) compliance with motor vehicle fleet requirements to the extent allowed by §114.201 of this title (relating to Mobile Emission Reduction Credit Program); or]

(5) [(7)] an alternative means of compliance with other requirements as allowed in any applicable [allowable within the guidelines of] local, state, and federal requirement [laws].

(b) ERC [Credit] use calculation.

(1) The number of ERCs [emission credits] needed by the user for NNSR offsets should [shall] be determined as provided by Chapter 116, Subchapter B [in §116.150] of this title.

(2) The number of ERCs needed for [For emission credits used in] compliance with Chapter [Chapters 114,] 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)

[Figure: 30 TAC §101.306(b)(2)]

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

Where:

ERC = The amount of emission reduction credits needed rounded to the nearest tenth of a ton per year.
A = The maximum projected annual activity level.
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) The number of ERCs needed to increase the 30-day rolling average emission cap or maximum daily cap for compliance [For emission credits used to comply] with §§117.123, [117.223,] 117.320, 117.323, 117.423, 117.1020, [117.1120,] 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)

[Figure: 30 TAC §101.306(b)(3)]

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

Where:

ERCs = The amount of emission reduction credits needed in tenths of a ton per year.

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) The number of ERCs needed [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 an additional 10% [extra] to be retired as an environmental contribution, unless otherwise specified by that program.

(c) Applying [Notice of intent] to use ERCs [emission credits].

(1) The executive director will not accept an Application to Use ERCs (Form ERC-3) before the ERC is available in the compliance account for the site where it will be used. If the ERC will be used for NNSR offsets, the executive director will not accept the Form ERC-3 before the applicable NNSR permit application is administratively complete.

(2) The user shall submit a completed Form ERC-3 at least 90 days before:

(A) the start of operation for an ERC used as offsets in an NNSR permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

[(1) For emission credits which are to be used as offsets in a New Source Review permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), the emission credits must be identified prior to permit issuance. Prior to construction, the offsets must be provided through submittal of a completed EC-3 Form, Notice of Intent to Use Emission Credits, along with the original emission credit certificate.]

(B) [(2)] the planned use of an ERC [For emission credits that are to be used] for compliance with the requirements of Chapter 115 [Chapters 114, 115,] or 117 of this title or other programs[, the user must submit a completed EC-3 Form along with the original emission credit certificate, at least 90 days prior to the planned use of the emission credit. Emission credits 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 emission credit certificate, 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 ERC [facility or mobile source's] use [of emission credits], any affected person [by the executive director's decision] 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.

(4) If the executive director approves the ERC use, the date the Form ERC-3 is submitted will be considered the date the ERC is used.

(d) Inter-pollutant use. 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 NNSR offset requirements for the other ozone precursor if photochemical modeling demonstrates that the substitution will not adversely affect the overall air quality or regulatory design value in the nonattainment area of use.

§101.309. Emission Reduction Credit Banking and Trading.

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

(1) The credit registry will contain all applications for ERC [All notices of] generation, use, and trade [transfer will be posted to the credit registry].

(2) The credit registry will assign an identification [a unique] number to each ERC and [certificate which] will include the amount of emission reductions generated.

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

(b) Life of an ERC [emission credit].

(1) If an ERC [emission credit] is used before [prior to] its expiration date, the ERC [emission credit] is effective for the life of the [applicable user] facility for which the ERC was used [or mobile source].

[(2) Emission credits certified as part of an administratively complete application received prior to January 2, 2001 shall be available for use for 120 months from the date of the emission reduction.]

(2) [(3)] An ERC expires if not used within [Emission credits certified as part of an administratively complete EC-1 Form, Application for Certification of Emission Credits, received after January 2, 2001 shall be available for use for] 60 months from the date [of] the emission reduction is achieved.

(3) [(4)] Notwithstanding paragraph (2) [paragraphs (2) and (3)] of this subsection, the executive director may invalidate an ERC [a certificate] or portion of an

ERC [a certificate] if local, state, or federal regulatory changes occur after the certification of the ERC that [emission credit which would or] would have affected the generating facility [or mobile source].

(c) Creditability review of ERCs. The value of an ERC [emission credits. Emission credits] may be reviewed [for creditability] at any time during its [their] banked life to ensure [insure] the emission reductions used to generate the ERC [generating the emission credit] are surplus to all current local, state, and federal requirements that [state and/or federal rules, regulations, or requirements which] would have affected [been applicable to] the generating facility [or mobile source].

(1) A request for a creditability review may be made by any interested person by submitting [party through the submittal of] a completed ERC Creditability Review Request (Form ERC-2) [EC-2 Form, Re-review of Emission Credits].

(2) If [In the event] a creditability review identifies a regulatory change invalidating an ERC [a certificate] or portion of an ERC [a certificate], the executive director shall void the ERC [emission credit certificate] and, if any credit remains, issue to the owner a new ERC identification [certificate with a unique] number [to the certificate owner] in the amount of remaining surplus credit.

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

(1) Before [Prior to] the transfer, the seller shall submit [executive director must be notified by means of] a completed Application to Trade ERCs (Form ERC-4) [EC-4 Form, Application for Transfer of Emission Credits, accompanied by the original certificate to be transferred].

(2) The executive director will issue a new ERC identification [certificate with a unique certificate] number to the [emission credit] purchaser reflecting the ERCs [emission credits] purchased [by the new owner], and a new ERC identification number [revised certificate] to the [emission credit] seller reflecting [showing] any remaining ERCs [emission credits] available [to the original owner]. An ERC trade is [Emission credits will be] considered final [transferred] only after the executive director grants [final] approval of the transaction.

(3) The trading of ERCs [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) ERC [Emission credit] voidance. An ERC [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]. A reduction [Reductions] certified as an ERC [emission credits] may still be used by the original owner as an emission reduction for netting purposes after the ERC has been voided [emission credits have expired], as

provided by Chapter 116, Subchapter B [in §116.150]of this title (relating to New [Major] Source Review Permits [or Major Modification in Ozone Nonattainment Areas]).

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT BANKING AND TRADING

[§101.304]

Statutory Authority

The repealed section is proposed 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 proposed 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 proposed 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 proposed 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*.

[§101.304. Mobile Emission Reduction Credit Generation and Certification.]

[(a) Methods of generation.]

[(1) Mobile emission reduction credits (MERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under these rules and subject to the approval of the commission.]

[(2) MERCs may not be generated from the following strategies:]

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

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

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

[(b) MERC baseline emissions.]

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

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

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

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

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

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

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

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

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

[(c) MERC calculation. The quantity of MERCs must be calculated from the annual difference between the mobile source baseline emissions and the projected emissions level after the MERC strategy has been put in place. The projected emissions must be based on the best estimate of the actual in-use emissions of the modified or substitute on-road or non-road vehicles or transportation system. Any estimate of a projected annual mobile source emissions level based on an assumption of reduced consumer service or transportation service would not be allowed without the support of a convincing analytical justification of the assumption.]

[(d) Emission offsets. Mobile source reduction strategies that reduce emissions in one criteria pollutant or precursor for which an area is designated nonattainment, yet

result in an emissions increase of another criteria pollutant or precursor for which that same area is nonattainment and from the same mobile source, must be required to offset the resulting increase at a 1:1 ratio with ERCs or MERCs.]

[(e) MERC certification.]

[(1) Mobile sources with potential MERCs shall submit to the executive director an MEC-1 Form, Application for Mobile Emission Credits, within 180 days of implementation of the strategy. Upon approval of the application, the executive director shall issue a MERC certificate(s) to the person, company, business, organization, or public entity generating the mobile emission reduction. A MERC certificate will indicate the total amount of certified emission credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires.]

[(2) MERCs will be determined and certified in accordance with §101.302(d) of this title (relating to General Provisions) using:]

[(A) EPA methodologies, when available;]

[(B) actual monitoring results, when available;]

[(C) calculations using the most current EPA mobile emissions factor model or other model as applicable; or]

[(D) calculations using creditable emission reduction measurement or estimation methodologies that satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies.]

[(3) An application for MERCs must include, but is not limited to, a completed MEC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced by each applicable mobile source:]

[(A) the date of the reduction;]

[(B) a complete description of the generation strategy;]

[(C) the amount of emission credits generated;]

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

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

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

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

[(4) MERCs will be made enforceable by obtaining an agreed order that sets a new maximum allowable mobile source emission limit.]

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

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

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

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

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

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

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

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

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

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

(10) Houston-Galveston-Brazoria (HGB) ozone nonattainment area--An area consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. [As defined in §101.1 of this title (relating to Definitions).]

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

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

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

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

(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, [sites] in the Houston-Galveston-Brazoria ozone nonattainment area that:

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

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

(c) Once a site becomes subject to [the requirements of] this division, the site will remain subject to this division until the site is [has been] 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 [Allowances are valid] only for the purposes described in this division and only for an affected facility. An allowance may not [cannot] be used for any purpose that is not described in this division or to meet or exceed the emission limitations [of any annual emission limitation] authorized under Chapter 116, Subchapter B[,] of this title (relating to New Source Review Permits)[,] or any other applicable requirement [rule or law].

(b) No [Beginning March 1, 2003, and no] later than March 1 after each [following the end of every] control period, the [each site shall hold a] quantity of allowances in a site's [its] compliance account must be [that is] equal to or greater than the total tons [emissions] of nitrogen oxides (NO_X) emitted from all affected facilities at the site during the control period [just ending. Compliance with this division will begin with the initial control period beginning January 1, 2002].

(c) The [An] owner or operator of an affected facility [a facility subject to this division] 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 Reduction Credit Program [Banking and Trading]) are met.

(d) An allowance [Allowances] 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 stream 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 to Use Allowances for Offsets (Form MECT-O).

(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 a Form MECT-O 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.

[(e) Allowances may be used simultaneously to satisfy the correlating one to one portion of offset requirements for new or modified facilities which do not meet the definition of an existing facility, as defined in §101.350 of this title (relating to Definitions), subject to federal nonattainment new source review requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions: Offsets).]

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

(g) An allowance [All allowances] will be allocated, traded, and [transferred, or] used in tenths of a ton [tons]. The [To determine the number of allowances, the] number of allowances will be rounded [down to the nearest tenth when determining excess allowances and rounded] up to the nearest tenth of a ton when determining allowances used.

(h) The owner or operator shall use one [One] compliance account [shall be used] for all affected [multiple] facilities [required to participate under this division and] located at the same site and under common ownership or control.

(i) The executive director [commission] 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 [Allowances will be deposited] into a compliance account [accounts] according to the following equation except as provided by [in] subsection (b) or (g) [(h)] of this section.

Figure: 30 TAC §101.353(a)

[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 [rights] from a facility [facilities] already participating under this division in accordance with §101.356 of this title (relating to Allowance Banking and Trading):

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

(2) a new or [new and/or] modified facility [facilities] 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 [and have] not commence [commenced] construction before January 2, 2001;

(3) a facility [facilities] in operation before [prior to] January 1, 1997[,] located at a site defined on or before December 31, 2000[,] as a major source [of nitrogen oxides (NO_X)], as defined in §117.10 of this title (relating to Definitions), for which the owner or operator did not submit a MECT [that have not submitted an ECT-3 Form,] Level of Activity Certification (Form MECT-3)[,] 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 [new and/or modified facilities] located at a site defined [on or] before January 1, 2001 [December 31, 2000], as a major source [of NO_X], as defined in §117.10 of this title, for which the owner or operator did not submit a Form MECT-3 [that submitted a permit application that was determined administratively complete before January 2, 2001, but have not submitted an ECT-3 Form] in accordance with §101.360(a)(2) of this title by March 30, 2010. [; and]

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

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

(c) [(d)] The [Allowances will be allocated by the] executive director will allocate and[, who will] deposit allowances into each compliance account by January 1 of each year. [:]

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

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

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

(e) [(f)] The executive director [Allowances] may add [be added] or deduct allowances [deducted by the executive director] from compliance accounts based on [following] the review of reports required under §101.359 of this title (relating to Reporting).

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

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

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

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

(g) [(h)] An allowance [Allowances] calculated under subsection (a) of this section will continue to be based on historical level of activity [levels], despite subsequent reductions in the level of activity [levels]. If an allowance is [allowances are] being allocated based on allowables and the facility does not achieve two complete consecutive calendar years of actual level of activity data, then the allowance [allowances] 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 [Allowances will be deducted] 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 [for a] control period. The amount of NO_X emissions must be quantified using [based upon] 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 [In the event that] 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 [report actual emissions] for that period of time using the following [equation or other listed] methods in the following order [to determine actual emissions]: 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 [When reporting actual emissions as required] under this subsection, the owner or operator of the affected facility shall [the facility must also] submit the justification for not using the methods in subsection (a) of this section and the justification for the method used.

[Figure: 30 TAC §101.354(b)]

(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 [commission] 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 [banked] allowances.

(e) The executive director shall deduct allowances [Allowances shall be deducted] from a site's compliance account in an amount equal to the NO_X [nitrogen oxides (NO_X)] emissions increases from a facility [facilities] 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 [which] result from changes made after December 31, 2000, to a facility [facilities] 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 [Documentation detailing] these increases in NO_X emissions

[shall be included] with the [submittal of the ECT-1 Form,] Annual Compliance Report (Form MECT-1).

(f) An allowance allocated based on allowable emissions [Allowances allocated] in accordance with variable (B)(i) [the variables in (a)(2)(B) listed] in the figure [contained] in §101.353(a) of this title may only be used by the facility for which it was [they were] allocated and may not be used by any other facility [facilities at the same site during the same control period].

(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.

[(g) On March 1 after every control period, a site shall hold a quantity of allowances in its compliance account that is equal to or greater than the total NOx emissions emitted during the prior control period.]

§101.356. Allowance Banking and Trading.

(a) An allowance [Allowances] not used for compliance in the [at the end of a] 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 [in] subsection (g) of this section.

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

(c) Only an authorized account representative [representatives] may trade an allowance [allowances].

(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 an Application to Trade Allowances (Form MECT-2). 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 for Stream Trade (Form MECT-4).

(3) To trade any portion of the individual future year allowances to be allocated annually to an individual facility, the seller shall submit an Application for Future Trade (Form MECT-5).

(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.

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

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

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

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

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

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

[(e) The owner or operator of a site receiving allowances on an annual basis may permanently transfer ownership of the allowances allocated to individual facilities at that site to any person in accordance with the following requirements.]

[(1) A request for transfer of ownership shall be reviewed for approval by the executive director following the submission of a completed ECT-4 Form, Application for Permanent Transfer of Allowance Ownership.]

[(2) The ECT-4 Form must include the price paid per allowance, except for transfers between sites under common ownership or control, and shall be submitted to executive director at least 30 days prior to the allowances being deposited into the transferee's broker or compliance account.]

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

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

[(f) Trades involving the transfer of individual future year allowances to be allocated to individual facilities at a site must be made in accordance with the following.]

[(1) The application for trade shall be reviewed for approval by the executive director following the submission of a completed ECT-5 Form, Application for Transfer of Individual Future Year Allowances.]

[(2) The completed ECT-5 Form must include the price paid per allowance, except for transfers between sites under common ownership or control.]

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

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

[(g) The banking for future use or trading of allowances not used for compliance during a control period shall be restricted in accordance with the following.]

<u>(g)</u> [(1)] Allowances that were allocated <u>based on allowable emissions</u> in accordance with the <u>variable (B)(i)</u> [variables in (2)(B) listed] in the figure [contained] in §101.353(a) of this title (relating to Allocation of Allowances) may not be banked for future use or traded.

[(2) Allowances that were allocated prior to January 1, 2005 in accordance with the variables in (3)(D) listed in the figure contained in §101.353(a) of this title may not be banked for future use or traded.]

(h) Nitrogen [Sites may use nitrogen] oxides (NO_X) discrete emission reduction credits (DERCs) [(DERC) or mobile discrete emission reduction credits (MDERC) that have been] generated and acquired in accordance with Division 4 of this subchapter (relating to Discrete Emission Reduction Credit Program [Credit Banding and Trading]) may be used in place of allowances for compliance with this division in accordance with [paragraphs (1) - (9) of] this subsection. Volatile [Sites may use volatile] organic compound (VOC) DERCs [or MDERCs that have been] 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 [paragraphs (1) - (9) of] this subsection if the user satisfies the inter-pollutant requirements in §101.376(g) of this title (relating to Discrete Emission Reduction Credit Use). [provided that demonstration has been made and approved by the executive director and the United States Environmental Protection Agency to show that the use of VOC DERCs or MDERCs is equivalent, on a one to one basis or other ratio, to the use of NOx allowances in reducing ozone.]

(1) DERCs generated by a mobile source [MDERCs] may be used in lieu of allowances at a ratio of one ton of DERCs [MDERC] for one ton of allowances [allowance].

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

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

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

(2) [(5)] DERCs generated by a stationary source before [prior to] January 1, 2005 may be used in lieu of allowances [for compliance with this division for the control period beginning January 1, 2007 and all subsequent control periods] at a ratio of ten tons of DERCs for one ton of allowances [allowance].

(3) [(6)] DERCs generated by a stationary source after December 31, 2004 [on or after January 1, 2005] may be used in lieu of allowances at a ratio of one ton of DERCs [DERC] for one ton of allowances [allowance].

[(7) Beginning January 1, 2005, no more than 10,000 DERCs may be used in any combination totaled over all sites in the Houston/Galveston ozone nonattainment area during a single calendar year in accordance with paragraph (10) of this subsection. This restriction does not apply to MDERCs.]

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

(5) [(9)] To use DERCs for [DERCs or MDERCs submitted with a DEC-2 Form, Notice of Intent to Use Discrete Emission Credits, for the purpose of] compliance with this division, the Notice of Intent to Use DERCs (Form DERC-2) must [section, shall] be submitted to the executive director on or before October 1 of the control period for which the DERCs [or MDERCs] will be used [and must be accompanied by an original DERC or MDERC certificate]. In addition, the Application to Use DERCs (Form DERC-3) [a DEC-3 Form, Notice of Use of Discrete Emission Credits,] must be submitted by March 31 [along] with the site's [ECT-1 Form,] Annual Compliance Report (Form MECT-1).

(6) [(10)] 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. [Beginning January 1, 2005,] DERCs may [shall] 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 [Approval will be given to use 250 or less] 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 [in excess of] 250 tons, the excess DERCs up to the 10,000 DERC limit may be apportioned based on the percentage of DERCs greater than [in excess of] 250 tons requested for use by those sites relative to the total amount of DERCs available up to the 10,000 ton DERC limit.

[(i) Emission reduction credits (ERC) may be converted into a yearly allocation of allowances at the rate of one ERC to one allowance per year only if they were generated prior to December 1, 2000 and provided that:]

[(1) the ERC is quantifiable, real, surplus, enforceable, and permanent as required in §101.302 of this title (relating to General Provisions) at the time the ERC is converted;]

[(2) the ERC was generated in the Houston/Galveston area;]

[(3) the ERC was generated from a reduction in NOx;]

[(4) the ERC has not expired; and]

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

§101.359. Reporting.

(a) No later than March 31 after [Beginning March 31, 2003, for] each control period, the owner or operator of a site subject to this division [facilities under each compliance account] shall submit a completed [ECT-1 Form,] Annual Compliance Report (Form MECT-1)[,] to the executive director, which must include [by March 31 of each year detailing] 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; [and]

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

(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 [sites] failing to submit a [an ECT-1] Form MECT-1 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 Form MECT-1 [ECT-1 Form] 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 Form MECT-1 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 [facility] subject to this division shall certify the[, no later than June 30, 2001, its] historical level of activity for each affected facility by submitting to the executive director a completed [ECT-3 Form,] Level of Activity Certification (Form MECT-3)[,] 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 [facilities in operation prior to] January 1, 1997, the level of activity averaged over 1997, 1998, and 1999;

(2) for an existing facility [new and modified facilities not in operation prior to January 1, 1997 and either have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application which the executive director has determined to be administratively complete before January 2, 2001, or have qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have commenced construction before January 2, 2001,] the level of activity authorized by the executive director; and

(3) for a new or modified facility [new and modified facilities] not in operation before [prior to] January 1, 1997, that is [are] subject to an emission specification [emission specifications] under §§117.310, 117.1210, or 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration; and Emission Specifications) [that were] first adopted after April 1, 2001, and either has [have] submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) an application [which the executive director has] determined by the executive director to be administratively complete within 90 days of the effective date of this emission specification, or has [have] qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and [have] 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 [of any facility subject to this division who has] certified a facility's allowable level of activity under subsection (a)(2) of this section shall:

(1) [certify] no later than 90 days after [from] 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 Form MECT-3 [ECT-3 Form, Level of Activity Certification], 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 [Owners or operators] of a site or facility that becomes subject to this division [on or] after March 31, 2001 [April 1, 2001] shall certify the level of activity, as determined by the executive director, in accordance with subsections (a) and (b) of this section. The [Such] certification must [shall] be submitted no later than 90 days after [from] the date the site or facility becomes subject to this division [or no later than 90 days from the effective date of this rule, whichever is later].

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM
[§101.358]

Statutory Authority

The repealed section is proposed 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 proposed 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 proposed 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 proposed 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.]

[(a) Monitoring data or other emission quantifications for facilities required to monitor or quantify emissions under any other federal or state program shall be used to show compliance with this division.]

[(b) Facilities not required to monitor or quantify nitrogen oxides emissions shall calculate emissions using good engineering practices, including calculation methodologies in general use and accepted in new source review permitting.]

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
DIVISION 4: DISCRETE EMISSION REDUCTION CREDIT PROGRAM
[BANKING AND TRADING]
§§101.370 - 101.373, 101.376, 101.378, 101.379

Statutory Authority

The amended sections are proposed 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 proposed 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 proposed 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 proposed 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 [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, fuel use, raw materials input, power output, operating hours [vehicle miles traveled,] or other similar units that have a direct correlation with the use [economic output] and emission rate of the facility [or mobile source].

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

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

[(4) Baseline activity--The facility's actual level of activity based on the facility's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over two consecutive calendar years.]

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

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

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

(5) Compliance account--The account where discrete emission reduction credits held for a facility or multiple facilities at a single site are recorded for the purposes of meeting the requirements of this division. The executive director may create one compliance account for multiple sites when a company is using credits to comply

with an area-wide emission limitation instead of a facility or site specific emission limitation.

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

(7) Dallas-Fort Worth area--The 1997 eight-hour ozone nonattainment area consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

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

(8) [(10)] 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 [in which emissions reductions are made], and expressed in tenths of a ton. With respect to the use and trading of credits, this term includes a discrete emission reduction credit generated from mobile sources certified before June 1, 2015 [tons].

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

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

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

(12) [(13)] Facility--As defined in §116.10 of this title (relating to General Definitions). In this division, this term only applies to a facility included in the agency's point source emissions inventory.

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

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

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

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

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

emission rate not to exceed all limitations required by applicable local, state, and federal rules and regulations.]

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

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

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

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

(17) [(24)] Protocol--A replicable and workable method of determining the [estimating] emission rate [rates] or activity level [levels] used to calculate the amount of emission reduction generated or credits required for a facility [facilities or mobile sources].

(18) [(25)] Quantifiable--An emission reduction that can be measured or estimated with confidence using the replicable methodology in an approved protocol.

(19) [(26)] Real [reduction]--A reduction in [which] actual emissions. An emission reduction based solely on reducing a facility's allowable emissions is not considered real [are reduced].

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

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

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

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

(23) State implementation plan emissions--A facility's annual emissions as reported in the state's point source emissions inventory (EI) for the year in which that facility's emissions are specifically identified in the state implementation plan (SIP) revision submitted to the United States Environmental Protection Agency (EPA) for the area where the facility is located. The SIP emissions may not exceed any applicable local,

state, or federal requirement. The SIP emissions are determined for the calendar year used to represent the facility's emissions in:

(A) the projection-base year inventory used in the modeling included in the attainment demonstration (AD) SIP revision or attainment inventory used in the maintenance plan SIP revision that was most recently submitted to the EPA for the current national ambient air quality standard (NAAQS) for the area where the facility is located;

(B) if a SIP revision for the current NAAQS has not been submitted to EPA for the area in which the facility is located, the projection-base year inventory used in the modeling included in the AD SIP revision or the attainment inventory used in the maintenance plan SIP revision that was most recently submitted to the EPA for an earlier NAAQS for the same pollutant; or

(C) the point source inventory used in the most recent EI SIP revision submitted to the EPA for the area where the facility is located if no AD or maintenance plan SIP revisions have been submitted to the EPA for the area where the facility is located.

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

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

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

(27) [(34)] Use period--The period of time, not exceeding 12 months, over which the user applies discrete emission reduction credits to an applicable emission reduction requirement.

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

(29) [(36)] Use strategy--The compliance requirement for which discrete emission reduction 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 a discrete emission reduction credit (DERC) [credits] by reducing emissions beyond [the level required by] any applicable local, state, or [and]

federal requirement; to allow a person to buy or sell a DERC; [regulation,] and to allow the owner or operator of a facility [another source] to use a DERC [these credits]. Participation under this division is strictly voluntary.

§101.372. General Provisions.

(a) Applicable pollutants. 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). [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 discrete emission credits 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 generators. The owner or operator of a facility may generate a DERC if the emission reduction meets the criteria in this division. This includes any facility associated with federal actions under 40 Code of Federal Regulations Part 93, Subpart

B, Determining Conformity of General Federal Actions to State or Federal Implementation Plans. [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 §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).]

(c) DERC [Discrete emission credit] requirements.

(1) A DERC is a certified emission reduction that [To be creditable as a discrete emission reduction credit (DERC), an emission reduction must meet the following]:

(A) must [the reduction] be real, quantifiable, and surplus at the time the DERC [discrete emission credit] is generated;

(B) [the reduction] must occur after the year [have occurred after the most recent year of emissions inventory] used to determine [in] the state implementation plan (SIP) emissions for a facility in a nonattainment area [for all applicable pollutants]; and

(C) must occur at a facility with SIP emissions reported before implementation of [the facility's annual emissions prior to] the emission reduction strategy for a facility in a nonattainment area [must have been reported or represented in the emissions inventory used for the SIP].

[(2) To be creditable as a mobile discrete emission reduction credit (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.]

(2) [(3)] An emission reduction from a facility that is [Emission reductions from a facility or mobile source which are] certified as a DERC [discrete emission credits] under this division cannot be recertified as an emission reduction credit under Division 1 of this subchapter (relating to Emission Reduction Credit Program). [in whole or in part as emission credits under another division within this subchapter.]

(d) Protocol.

(1) A DERC generator or user shall [All generators or users of discrete emission credits must] use a protocol that [which] has been submitted by the executive director to the United States Environmental Protection Agency (EPA) [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, executive director and EPA approval is required before the protocol can be used. The generator or user shall use a protocol [Protocols shall be used] as follows.

(A) The owner or operator of a facility [Facilities] subject to the emission specifications for nitrogen oxides (NO_X) or a criteria pollutant under §§117.110, [117.210,] 117.310, 117.410, 117.1010, [117.1110,] 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 [quantify reductions in NO_X using] the testing and monitoring methodologies identified to show compliance with the emission specification.

(B) The owner or operator of a facility [Facilities] subject to the volatile organic compounds (VOC) control requirements or emission specifications under Chapter 115 [§§115.112, 115.121, 115.122, 115.162, 115.211, 115.212, 115.352, 115.421, 115.541, or 115.542] of this title (relating to Control of Air Pollution from Volatile Organic Compounds [Requirements; and Emission Specifications]) shall use [quantify VOC reductions using] the testing and monitoring methodologies identified to show compliance with the applicable [emission specifications or the] requirements.

(C) The owner or operator of a facility subject to an emission specification or control requirement for carbon monoxide (CO), sulfur dioxide (SO_2), particulate matter with an aerodynamic diameter of less than or equal to a nominal ten micrometers (PM_{10}) or 2.5 micrometers ($PM_{2.5}$) shall use the testing and monitoring methodologies in commission rules, if available, to show compliance with the applicable requirements.

(D) [(C)] 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 DERCs generated or used [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 or user shall [must] 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 [facilities with] continuous emissions monitoring system [systems] or predictive emissions monitoring system [systems] in place shall use this data in quantifying [actual] emissions;

(iv) if approved by the executive director, the chosen quantification protocol must [shall] be made available for public comment for a period of 30 days and must [shall] be viewable on the commission's website [Web site];

(v) the chosen quantification protocol and any comments received during the public comment period must [shall], upon approval by the executive director, be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols may [shall] not be accepted for use with this division [(relating to Discrete Emission Credit Banking and Trading)] 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 [proposes] disapproval of the protocol in the *Federal Register*.

(2) If [In the event that] the monitoring and testing data specified in [required under] paragraph (1) of this subsection is missing or unavailable, the generator or user shall determine [facility may report actual] emissions for that period of time the data is missing or unavailable using the most conservative method for replacing the data and [using] these listed methods in the following order [of preference to determine actual emissions]:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

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

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator or user shall [use the most conservative method for

replacing the missing data,] submit the justification for not using the methods in paragraph (1) of this subsection, and submit the justification for the method used.

(e) DERC [Credit] certification.

(1) The amount of a DERC must [discrete emission credits shall] be rounded down to the nearest tenth of a ton when certified [generated] and must [shall] be rounded up to the nearest tenth of a ton when used.

(2) The executive director shall review an application for certification [Applications for certification will be reviewed in order] to determine the credibility of the reductions and may certify reductions. Each DERC certified will be assigned an identification 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 DERC certification [discrete emission credit notification]. The applicant may submit a revised Application to Generate DERCs (Form DERC-1) [discrete emission credit notification] 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 [its allowable emission limit, the amount] of emissions exceeding the requirement [limit] may not be certified as a DERC [discrete emission credits].

(5) Certification of DERCs 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 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 and NO_X 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), a VOC or NO_X DERC [VOC and NO_X discrete emission credits] generated outside the ozone season may not be used during the ozone season.

(h) Recordkeeping. The generator shall [must] maintain a copy of all forms [notices] and backup information submitted to the executive director [registry] for a minimum of five years after the date of the DERC is generated[, following the completion of the generation period]. The user shall [must] maintain a copy of all forms [notices] and backup information submitted to the executive director [registry] 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 generator or user shall make the records available upon request to representatives of the executive director, EPA, and any local enforcement agency. 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 [shall] 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 DERCs [discrete emission credits];

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

(3) the identification number of each DERC used by each facility [specific number, name, or other identification of discrete emission credits used for 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, or trade of a DERC [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 DERC [discrete emission reduction] application. All nonconfidential [notices and] information will be made available to the public as soon as practicable [regarding the generation, use, and availability of discrete emission credits may be obtained from the registry].

(j) Authorization to emit. A DERC [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 DERC [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 [company] from participating in the DERC Program [discrete emission credit

trading either as a generator or user,] if the executive director determines that the person [company] 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 DERCs [discrete emission credits] are acquired to cover the applicable facility's [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 DERCs [discrete emission credits] to cover the compliance need for the use period. If the user possesses an insufficient quantity of DERCs [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 [Users] may not transfer its [their] compliance burden and legal responsibilities to a third-party participant. A third-party participant [Third-party participants] 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 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 one tenth of a ton of credit.]

§101.373. Discrete Emission Reduction Credit Generation and Certification.

(a) Emission reduction strategy. [Methods of generation.]

(1) A discrete [Discrete] emission reduction credit [credits] (DERC) may be generated using one of the following strategies [methods] or any other method that is approved by the executive director:

(A) the installation and operation of pollution control equipment that reduces emissions below any applicable local, state, or federal requirement for [the level required of] the facility; or

(B) a change in the manufacturing process, other than a shutdown or curtailment, that reduces emissions below any applicable local, state, or federal requirement for [the level required of] the facility.

(2) A DERC [DERCs] may not be generated using [by] the following strategies:

(A) a shutdown [permanent or temporary shutdowns] or [permanent] 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 [federal, state, or local law];

(C) an emission reduction [emission reductions] required to comply with any provision under 42 United States Code (USC), Subchapter I regarding tropospheric ozone, or 42 USC, Subchapter IV-A regarding acid deposition control;

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

(E) an emission reduction [emission reductions] that occurred as a result of transferring activity [the emissions] to another facility at the same site;

(F) an emission reduction [emission reductions] credited or used under any other emissions trading program;

(G) an emission reduction [emission reductions] occurring at a facility that received an alternative emission limitation to meet a state reasonably available control technology requirement, except to the extent that the emissions are reduced below the level that would have been required had the alternative emission limitation not been issued;

(H) an emission reduction from a facility authorized in [emission reductions at a site facility with] a flexible permit, unless the reduction is [reductions are made] permanent and enforceable or the generator can demonstrate that the emission reduction was [reductions were] not used to satisfy the conditions for the facilities under the flexible permit;

(I) that portion of an emission reduction [emission reductions] funded through a state or federal program, unless specifically allowed under that program;

(J) an emission reduction [emission reductions] from a facility subject to Division 2, 3, or 6 [3] 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 [emission reductions from the shutdown of a facility that was not included in the] 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 in which a SIP is required for a criteria pollutant, the [The] baseline emissions may not exceed the facility's SIP [quantity of] emissions [reported in the most recent year of emissions inventory used in the SIP. For reductions being certified in accordance with §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets), the baseline emissions may not exceed the quantity of emissions reported in the emissions inventory used in the SIP in place at the time the reduction strategy was implemented].

(2) The [two consecutive calendar years for the baseline] activity and emissions rate used to calculate the facility's historical adjusted emissions must be determined from the same two consecutive calendar years, selected from [either a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years,] the ten consecutive years immediately before [preceding] the emission reduction is achieved.

(3) For a facility located [facilities] in an area in which a SIP [demonstration] is not required for a criteria pollutant, the historical adjusted emissions must be determined from two consecutive calendar years that [must] include or follow the 1990 emission inventory.

(4) For emission reduction strategies that exceed 12 months, the baseline emissions [and SIP emissions inventory] are established after the first year of generation and are fixed for the life of [the strategy. A new baseline is established for] each unique emission reduction strategy. 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 [facilities] in existence less than 24 months or not having two complete calendar years of activity data, a shorter [time] period of not less than 12 months may be considered by the executive director.

(c) DERC calculation.

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

Figure: 30 TAC §101.373(c)(1)

[Figure: 30 TAC §101.373(c)(1)]

$$DERC = [SA \times (BER - SER)]$$

Where:

DERC = The number of DERCs generated.
SA = Strategic activity
BER = The lower of the emission rate used in reporting or representing emissions in the emissions inventory used for the state implementation plan or the average of the actual emission rates during the two-year baseline period.
SER = Strategic emission rate

(2) 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 [quantity of emissions reported or represented in the emissions inventory used for SIP determination or the two-year average baseline emissions,] whichever is less.

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

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

(d) DERC certification.

(1) An Application to Generate DERCs (Form DERC-1) must [A DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, shall] be submitted to the executive director no later than 90 days after the end of the generation period and[, or] no later than 90 days after completing each [the completion of the first] 12 months of generation. [Submission of the DEC-1 Form should continue every 12 months thereafter for each subsequent year of generation.]

(2) A DERC [DERCs] must be quantified in accordance with §101.372(d) of this title (relating to General Provisions). The executive director shall have the authority

to inspect and request information to assure that the emission reductions have actually been achieved.

(3) An application for DERCs must include, but is not limited to, a completed Form DERC-1 [DEC-1 Form] signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

(A) the generation period;

(B) a complete description of the generation activity;

[(C) for shutdown emission reduction strategies, an explanation as to whether production shifted from the shutdown facility to another facility at the same site;]

(C) [(D)] the amount of DERCs [discrete emission credits] generated;

(D) [(E)] for volatile organic compound reductions, a list of the specific compounds reduced;

(E) [(F)] documentation supporting the baseline activity, baseline emission rate, historical adjusted emissions, SIP emissions, strategic [strategy] emission rate, and strategic [strategy] activity;

(F) [(G)] emissions inventory data for each of the years [from the most recent year of emissions inventory] used to determine the SIP emissions and historical adjusted emissions [in the SIP and emissions inventory data for the two consecutive years used to determine the baseline activity for each applicable pollutant and emission point];

(G) [(H)] the most stringent emission rate for the [applicable] facility, considering all applicable [the] local, state, and federal [applicable regulatory and statutory] requirements;

(H) [(I)] a complete description of the protocol used to calculate the DERC [emission reduction] generated; and

(I) [(J)] the actual calculations performed by the generator to determine the amount of DERCs [discrete emission credits] generated.

§101.376. Discrete Emission Reduction Credit Use.

(a) General requirements. A discrete emission reduction credit (DERC) [Requirements to use discrete emission credits. Discrete emission credits] may be used only if the following requirements are met.

(1) The user shall have [ownership of] a sufficient amount of DERCs in the site's compliance account [discrete emission credits] before the use period for which the specific DERCs [discrete emission credits] are to be used.

(2) The user shall have a sufficient amount of DERCs in the site's compliance account [hold sufficient discrete emission credits] to cover the user's compliance obligation at all times.

(3) The user shall acquire additional DERCs [discrete emission credits] during the use period if it is determined the site's compliance account does not have [user does not possess] enough DERCs [discrete emission credits] to cover the entire use period. The user shall acquire additional DERCs [credits] as allowed under this section prior to the shortfall, or be in violation of this section.

(4) The user [Facility or mobile source operators] may acquire and use only DERCs [discrete emission credits] listed in [on] the registry.

(5) The user shall obtain executive director approval to use nitrogen oxides (NO_X) DERCs in the Dallas-Fort Worth area as provided by subsection (f) of this section.

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

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

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

(b) Uses for DERCs [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, a DERC [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 permit allowable emission level, if the following conditions are met:

(A) in an ozone nonattainment area, the use is limited to [areas, permitted facilities may use discrete emission credits to exceed permit allowables by] no more than 10 tons for NO_x [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) in a county or portion of a county [at permitted facilities in counties or portions of counties] designated as attainment or, attainment/unclassifiable, or unclassifiable [unclassified], the use is limited to no more than [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 [prior to] use; [.]

(C) the [This] use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy; and [.]

(D) the user demonstrates [The user shall demonstrate] that there will be no adverse impacts from the use of DERCs [discrete emission credits] at the level [levels] requested;

(2) to satisfy any part of the offset requirement in a nonattainment [as] new source review (NNSR) [(NSR)] permit in accordance with Chapter 116, Subchapter B of this title (relating to New Source Review Permits) [offsets], if the following requirements are met:

(A) the user shall obtain the executive director's approval before [prior to] the use of specific DERCs [discrete emission credits] to cover, at a minimum, one year of operation of the new or modified facility in the NNSR [NSR] permit;

(B) the user shall obtain the amount of DERCs specified for NNSR offsets in the user's NNSR permit;

(C) the user shall obtain enough DERCs to meet the offset ratio requirement in the user's ozone nonattainment area or an environmental contribution of 10%, whichever is higher;

[(B) the amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user shall also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user shall purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher; and]

[(C) the NSR permit must meet the following requirements:]

(D) [(i)] the NNSR permit must contain an enforceable requirement that the user [facility] obtain at least one additional year of offsets before continuing operation in each subsequent year; and

(E) at least 90 days before the start of operation and before continuing operation for any subsequent use period, the user shall submit a completed Application to Use DERCs for Offsets (Form DERC-O);

[(ii) prior to issuance of the permit, the user shall identify the discrete emission credits; and]

[(iii) prior to start of operation, the user shall submit a completed DEC-2 Form;]

(3) to comply with the Mass Emissions Cap and Trade Program requirements as provided by §101.356(h) [in §101.356(g)] of this title (relating to Allowance Banking and Trading); or

(4) to comply with Chapter 115 or [Chapters 114, 115 , and] 117 of this title (relating to [Control of Air Pollution from Motor Vehicles;] Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds), as allowed.

(c) DERC [Discrete emission credit] use prohibitions. A DERC [discrete emission credit] may not be used under this division:

(1) before it has been acquired by the user in the compliance account for the site where the credits will be used;

(2) for netting to avoid the applicability of federal and state NNSR [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 DERCs [DERC or mobile DERC] in lieu of allowances under §101.356 [§101.356(h)] of this title;

(5) to authorize a facility whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by [such] major source status;

(6) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director; or

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

(d) Notice of intent to use.

(1) A completed Notice of Intent to Use DERCs (Form DERC-2) [DEC-2 Form], signed by an authorized representative of the user [applicant], must be submitted to the executive director in accordance with the following requirements.

(A) A DERC [Discrete emission credits] may be used only after the applicant has submitted the Form DERC-2 [notice] and received executive director approval to use DERCs to comply with the specified requirement during that use period.

(B) The Form DERC-2 [application] must be submitted:

(i) except as provided in subsection (f)(4) of this section, for NO_X DERC use in the Dallas-Fort Worth [DFW eight-hour ozone nonattainment] area, by October 1 before [no later than August 1 prior to] the beginning of the calendar year in which [that] the DERCs are intended for use; [and]

(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) [(ii)] for all other DERC [discrete emission credit] use, at least 45 days before [prior to] the first day of the use period [if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were

generated from a mobile source,] and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

(C) The user shall send a copy of the application to the federal land manager 30 days before use of a DERC if the facility for which the DERC will be used [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 Form DERC-2 [application] must include, but is not limited to, the following information for each use:

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

(ii) the amount of DERCs [discrete emission credits] needed;

(iii) the expected [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;]

(iv) [(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 [regulatory] requirements;

(v) [(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 DERCs [discrete emission credits] needed;

(vi) [(vii)] the actual calculations performed by the user to determine the amount of DERCs [discrete emission credits] needed;

(vii) [(viii)] the date that each DERC was [the discrete emission credits were] acquired or will be acquired;

(viii) [(ix)] the identification number of each DERC [discrete emission credit generator and the original certificate of the discrete emission credits] acquired or to be acquired;

[(x) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired, except for transfers between sites under common ownership or control;]

(ix) [(xi)] a statement that due diligence was taken to verify that each DERC was [the discrete emission credits were] not previously used, the DERCs [discrete emission credits] were not generated as a result of actions prohibited under this regulation, and the DERCs [discrete emission credits] will not be used in a manner prohibited under this regulation; and

(x) [(xii)] a certification of use[,] that must contain certification under penalty of law by a responsible official of the user of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) DERC use calculation.

(A) To calculate the amount of DERCs [discrete emission credits] necessary to comply with §§117.123, [117.223,] 117.320, 117.323, 117.423, 117.1020, [117.1120,] 117.1220, or 117.3020 of this title (relating to Source Cap; and System Cap), a user may use the equations listed in those sections[,] or the following equations.

(i) For the rolling average cap:

Figure: 30 TAC §101.376(d)(2)(A)(i)

[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)

[Figure: 30 TAC §101.376(d)(2)(A)(ii)]

$$DERCs = \sum_{i=1}^{N} \left[\left(EH_{Mi} \times ER_i \right) - \left(H_{Mi} \times R_i \right) \right] \times \frac{d}{2000}$$

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_{Mi} = 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 DERCs [discrete emission credits] needed to demonstrate compliance or meet a regulatory requirement must be [is] calculated as follows.

Figure: 30 TAC §101.376(d)(2)(B)

[Figure: 30 TAC §101.376(d)(2)(B)]

$$DERCs\ needed = (ELA) \times (EER - RER)$$

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 DERCs [discrete emission credits] needed to exceed an allowable emissions level must be [is] calculated as follows.

Figure: 30 TAC §101.376(d)(2)(C)

[Figure: 30 TAC 101.376(d)(2)(C)]

$$DERCs = (ELA - PLA) \times (PER)$$

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 DERCs [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 DERCs [discrete emission credits] needed to meet a regulatory requirement or to demonstrate compliance is greater than 10 tons, the user shall acquire 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 Form DERC-2 [DEC-2 Form] in the case of an emergency, or other exigent circumstances, but the form [notice] must be submitted before the DERCs [discrete emission credits] can be used. When using this provision, the [The] user shall include a complete description of the emergency or exigent circumstances with the Form DERC-2 [situation in the notice of intent to use]. All other forms [notices] submitted less than 45 days before the start of the use period [prior to use, or 90 days prior to use for a mobile source,] will be considered late and in violation.

(4) The user shall determine the credits to purchase and shall notify [is responsible for determining the credits it will purchase and notifying] the executive director of the selected generating facility [or mobile source] in the Form DERC-2 [notice of intent to use]. If the generator's credits are rejected or the Application to Generated DERCs (Form DERC-1) [notice of generation] is incomplete, the use of DERCs [discrete emission credits] by the user may be delayed by the executive director.

The user may not use any DERCs [cannot use any discrete emission credits] that have not been certified by the executive director. The executive director may reject the use of a DERC by a facility [discrete emission credits by a facility or mobile source] if the credit and use are not demonstrated by the user [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 DERCs [discrete emission credits] needed for the ozone season separately from the non-ozone season.

(6) The user is not required to submit a Form DERC-2 to use DERCs to satisfy a NNSR offset requirement if the user submits a Form DERC-O as required by subsection (b)(2)(E) of this section at least 90 days before the start of operation of the affected facility.

(e) Notice of use.

(1) The user shall submit an Application to Use DERCs (Form DERC-3) to the executive director no later than:

(A) March 31 after the control period for which a DERC was used for a facility subject to the Mass Emissions Cap and Trade Program as provided by §101.356(h)(5) of this title; and

(B) within 90 days after the end of each use period, which each may not exceed 12 months in length, for any other DERC use.

(2) The user is not required to submit a Form DERC-3 to use DERCs to satisfy a NNSR offset requirement if the user submits a Form DERC-O as required by subsection (b)(2)(E) of this section at least 90 days before the start of operation of the affected facility.

(3) The Form DERC-3 is to be used as the mechanism to update or amend the Form DERC-2 and must include any information different from that reported in the corresponding Form DERC-2, including, but not limited to, the following items:

(A) purchase price of the DERCs obtained, except for transfers between sites under common ownership or control;

(B) the actual amount of DERCs in the compliance account during the use period;

(C) the actual emissions during the use period;

(D) the actual amount of DERCs used;

(E) the actual environmental contribution; and

(F) the amount of DERCs available for future use.

(4) [(1)] The user shall calculate:

(A) the amount of DERCs [discrete emission credits] used, including the amount of [discrete emission] credits retired to cover the environmental contribution, as described in subsection (d)(2)(D) [(d)(2)(C)] of this section, associated with actual use; and

(B) the amount of DERCs [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) [(d)(2)(C)] of this section, but not associated with the actual use, and available for future use.

(5) [(2)] DERC use is calculated by the following equations.

(A) The amount of DERCs [discrete emission credits] used to demonstrate compliance or meet a regulatory requirement is calculated as follows.

Figure: 30 TAC §101.376(e)(5)(A)

[Figure: 30 TAC §101.376(e)(2)(A)]

$$DERCs = (ALA) \times (AER - RER)$$

Where:

ALA = actual level of activity

AER = actual emission rate per unit activity

RER = regulatory emission rate per unit activity

(B) The amount of DERCs [discrete emission credits] used to comply with permit allowables is calculated as follows.

Figure: 30 TAC §101.376(e)(5)(B)

[Figure: 30 TAC §101.376(e)(2)(B)]

$$Credits\ used = (ALA - PLA) \times (AER)$$

Where:

ALA = actual level of activity
PLA = permitted level of activity
AER = permitted emission rate per unit activity

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

[(A) The notice must be submitted within 90 days after the end of the use period. Each use period must not exceed 12 months.]

[(B) The notice is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that reported in the notice of intent to use, including, but not limited to, the following items:]

[(i) purchase price of the discrete emission credits obtained prior to the current use period, except for transfers between sites under common ownership or control;]

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

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

[(iv) the actual amount of discrete emission credits used;]

[(v) the actual environmental contribution; and]

[(vi) the amount of discrete emission credits available for future use.]

(6) [(4)] DERCs [Discrete emission credits] that are not used during the use period are surplus and remain available for trade [transfer] or use by the holder, as well as[. In addition,] any portion of the calculated environmental contribution [not] attributed to those credits and any portion of the 5% compliance margin, if required, that is not used [actual use is also available].

(7) [(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) Dallas-Fort Worth [DFW eight-hour ozone nonattainment] area DERC use [usage].

(1) For the 2015 calendar year, the use of NO_X DERCs in the Dallas-Fort Worth area may not exceed 42.8 tons per day.

(2) Beginning in the 2016 calendar year, the use of NO_X DERCs in the Dallas-Fort Worth area may not exceed 17.0 tons per day.

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

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

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

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

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

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

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

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

(B) The executive director shall consider the appropriate amount of DERCs allocated for each Form DERC-2 submitted on a case-by-case basis.

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

(4) [(2)] If the total number of DERCs submitted for use during the upcoming calendar year in all Forms DERC-2 received by the deadline in subsection

(d)(1)(B)(i) of this section is less than the limit [is less than the flow control limit for that particular year determined according to the annual review specified in §101.379(c) of this title], the executive director may:

(A) approve all requests for DERC usage provided that all other requirements of this section are met; and [.]

(B) consider any late DERC-2 Forms 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 DERC-2 Forms 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. 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 the substitution will not adversely affect the overall air quality or regulatory design value in the nonattainment area of use.

§101.378. Discrete Emission Reduction Credit Banking and Trading.

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

(1) The credit registry will contain all notices of generation, use, and transfer. [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 an identification number to each DERC and [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 and all counties designated as attainment, attainment/unclassifiable, or unclassifiable. [One combined listing for all the counties or portions of counties designated as attainment or unclassified will be provided by the credit registry.]

(4) The credit registry will [registry shall] not contain proprietary information.

(b) Life of a DERC [discrete emission credit]. A DERC [discrete emission credit] is available for use after it is certified [the DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, 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 intended for use or used [or withdrawn]. A DERC generated from a shutdown may not be used.

[(1) Discrete emission credits generated from shutdown strategies prior to September 30, 2002, will be available for use until September 8, 2010.]

[(2) Discrete emission credits certified from facility shutdowns after September 30, 2002, may not be used.]

(c) Trading. A DERC is [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 in accordance with the following.

(1) Before the transfer, the seller shall submit to [Prior to the transfer,] the executive director [must be notified by means of] a completed Application to Trade DERCs (Form DERC-4) [DEC-4 Form, Application for Transfer of Discrete Emission Credits].

(2) The executive director will issue a new DERC identification number [letter] to the [discrete emission credit] purchaser reflecting the DERCs [discrete emission credits] purchased [by the new owner], and a new DERC identification number [letter] to the [discrete emission credit] seller reflecting [showing] any remaining DERCs [discrete emission credits] available [to the original owner]. A DERC trade is [Discrete emission credits are] considered final [transferred] only after the executive director grants approval of the transaction.

(3) The trading of DERCs [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. [No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.]

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of DERCs [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 [United States Environmental Protection Agency] a report that includes the following information for the previous calendar year:

(1) the amount of DERCs for each pollutant [emission credits] generated under this division;

(2) the amount of DERCs for each pollutant [emission credits] used under this division;

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

(4) the amount of DERCs [discrete emission reduction credits (DERC)] approved for use under §101.376(f) of this title (relating to Discrete Emission Reduction Credit Use) [subsection (c) of this section].

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

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

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

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

[Figure: 30 TAC §101.379(c)(2)(A)]

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

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

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

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

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

[(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an 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.]

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING
[§101.374]

Statutory Authority

The repealed section is proposed 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 proposed 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 proposed 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 proposed 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*.

[§101.374. Mobile Discrete Emission Reduction Credit Generation and Certification.]

[(a) Method of generation.]

[(1) Mobile discrete emission reduction credits (MDERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this division (relating to Discrete Emission Credit Banking and Trading), and is subject to the approval of the commission.]

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

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

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

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

[(b) MDERC baseline emissions.]

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

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

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

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

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

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

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

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

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

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

[(e) MDERC certification.]

[(1) An MDEC-1 Form, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits, shall be submitted to the executive director no later than 90 days after the discrete emission reduction strategy activity has been completed,

or no later than 90 days after the completion of the first 12 months of generation. Submission of the MDEC-1 Form shall continue every 12 months thereafter for each subsequent year of generation.]

[(2) MDERCs will be determined and certified in accordance with §101.372(d) of this title (relating to General Provisions) using:]

[(A) EPA methodologies, when available;]

[(B) actual monitoring results, when available;]

[(C) calculations using the most current EPA mobile emissions factor model or other model as applicable; or]

[(D) calculations using creditable emission reduction measurement or estimation methodologies that satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies. The generator shall collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which the MDERCs are created or used.]

[(3) An application for MDERCs must include, but is not limited to, a completed MDEC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced for each mobile source:]

[(A) the date of the reduction;]

[(B) a complete description of the generation activity;]

[(C) the amount of discrete mobile source emission credits generated;]

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

[(E) a complete description of the protocol used to calculate the discrete mobile source emission reduction generated;]

[(F) the actual calculations performed by the generator to determine the amount of discrete mobile source emission credits generated; and]

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

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
DIVISION 6: HIGHLY REACTIVE [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 proposed 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 proposed 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 proposed 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 proposed 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 [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) [(1)] Allowance--The authorization to emit one ton of highly reactive [highly-reactive] volatile organic compounds, expressed in tenths of a ton, during a control period.

(3) [(2)] Authorized account representative--The responsible person who is authorized in writing to transfer and otherwise manage allowances for the site.

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

(4) Baseline emissions period--The two consecutive [calendar-year] control periods from 2006 - 2009 with the highest monitored average actual highly reactive volatile organic compound [HRVOC] emissions for the purpose of establishing baseline emissions used for the allocation of allowances, except as allowed under §101.394(a)(2) and (3) [§101.394(a)(1)(C) and (D)] of this title (relating to Allocation of Allowances).

(5) Broker--A person [that is] not required to participate in the requirements of this division who[, but that] 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 [held in a broker account] 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) [(8)] Industry sector--One of the following sectors of industry in which participants of the Highly Reactive Volatile Organic Compounds [Carbons] (HRVOC) Emissions Cap and Trade program are [to be] 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) [§101.394(a)(1)(B)] of this title (relating to Allocation of Allowances): petroleum refining, non-polymer chemical producers, polymer producers, and storage/loading/other.

(12) [(9)] Level of activity--The amount of highly reactive [highly-reactive] volatile organic compounds (HRVOCs) [, as defined in §115.10 of this title (relating to Definitions),] 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 [highly-reactive volatile organic compounds] internal to the process unit.

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

(14) [(10)] Uncontrolled emissions--The total emissions during routine normal operations from each affected [applicable] facility calculated as pre-control using the applicable control efficiency for the purpose of determining site allocations under §101.394(a)(1) [§101.394(a)(1)(B)] 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[, as defined in §122.10 of this title (relating to General Definitions),] in the Houston-Galveston-Brazoria ozone nonattainment area with one or more affected facilities[, as defined in §115.10 of this title (relating to

Definitions), that is subject to Chapter 115, Subchapter H, Division 1 of this title (relating to Vent Gas Control) or Division 2 of this title (relating to Cooling Tower Heat Exchange Systems)]. Affected [Applicable] facilities include vent gas streams, flares, and cooling tower heat exchange systems that emit or have the potential to emit highly reactive [highly-reactive] volatile organic compounds[, as defined in §115.10 of this title, and that are located at a site subject to Chapter 115, Subchapter H of this title (relating to Highly-Reactive Volatile Organic Compounds)].

(b) For the purpose of compliance with Chapter 115, Subchapter H, Division 1 or [Division] 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 [Sites] in the Houston-Galveston-Brazoria ozone nonattainment area that has [have] the potential to emit, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), 10 [ten] tons per year or less of highly reactive [highly-reactive] volatile organic

compounds from all affected [applicable] facilities at the site is [are] exempt from the requirements of this division.

(b) A site in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, or Waller County is [All sites in the Houston-Galveston-Brazoria ozone nonattainment area, excluding Harris County, are] 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 [sites] subject to this division located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, or Waller County shall [the Houston-Galveston-Brazoria ozone nonattainment area, excluding Harris County, will] comply [by January 1, 2007, or] within 180 days of public notice[, whichever is later].

§101.393. General Provisions.

(a) An allowance [Allowances] 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 local, state, or federal requirement [rule or law].

(b) [The initial control period is January 1, 2007, through December 31, 2007. Each control period after December 31, 2007, shall begin January 1 and end December 31 of each year.] No later than March 1 after each control period, the [a site subject to this division must hold a] quantity of allowances in a site's [its] compliance account must be [that is] equal to or greater than the total highly reactive [highly-reactive] volatile organic compound (HRVOC) emissions from each affected facility [the applicable facilities located] at the site during the control period.

(c) An allowance [Allowances] 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 or an allowance allocated based on permit allowable emissions, as described under §101.394 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 §101.396(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 to Use Allowances for Offsets (Form HECT-O).

(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, the owner or operator shall submit a Form HECT-O 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.

[(d) Allowances may be used simultaneously to satisfy the requirements of this division and the one-to-one portion of the offset requirements for new or modified covered facilities, subject to federal nonattainment new source review requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions: Offsets).]

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

(f) An allowance will be allocated, traded, and [All allowances will be allocated, transferred, deducted, or] used in tenths of tons. The number of allowances will be rounded [down to the nearest tenth of a ton when determining excess allowances and rounded] up to the nearest tenth of a ton when determining allowances used.

(g) The owner or operator shall use [Each site shall have only] one compliance account for all affected facilities located at the same site and are under common ownership or control.

(h) The executive director shall [commission will] maintain a registry of the allowances in each compliance account [compliance accounts] and broker account [accounts]. 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; and

(2) all applicable requirements of Division 1 of this subchapter (relating to Emission Reduction 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 [will] deposit allowances into a compliance account [accounts] as follows.

(1) For a site [sites] located in Harris County, allowances [for the emissions of one or more of the highly-reactive volatile organic compounds (HRVOC) as defined in §115.10 of this title (relating to Definitions),] will be determined using the following equation: [equations in subparagraphs (A) and (B) of this paragraph.]

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.

[(A) For calendar-year control periods 2007 - 2010, the following equation will be used to determine the allocation for each site:]

[Figure: 30 TAC §101.394(a)(1)(A)]

[(B) For calendar-year control periods 2011 and later the following allocation methodology will apply:]

[Figure: 30 TAC §101.394(a)(1)(B)]

(2) [(C)] For a site in Harris County [Qualifying sites] 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) [(i)] this allowance stream is less than the HRVOC permit allowable limit in effect at the time the facility commences operation;

(B) [(ii)] the baseline emissions period for any site under this paragraph [subparagraph] will be any consecutive 24 months from 2010 - 2012; and

(C) [(iii)] beginning with the 2014 [calendar-year] control period, all sites will receive an allocation in accordance with the methodology under paragraph (1) of this subsection [subparagraph (B) of this paragraph].

(3) [(D)] 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) [(i)] the site used continuous flow rate monitoring and speciation of HRVOC to determine HRVOC emissions during the alternative baseline period;

(B) [(ii)] 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) [(iii)] 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) [(iv)] a request for an alternative baseline period must be received by the executive director no later than July 1, 2010.

(4) [(2)] For a site [sites] located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances [for emissions of ethylene and propylene for each site] will be determined using the following equation [in the following figure].

Figure: 30 TAC §101.394(a)(4)

[Figure: 30 TAC §101.394(a)(2)]

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

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) [(3)] Uncontrolled emissions for affected [applicable] facility types for use in determining site allocations under paragraph (1) [(1)(B)] of this subsection must [shall] 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 [shall] 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 [all other facilities] 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 [sites that employ] flare or vent gas recovery or flare minimization control strategy that is [strategies that are] not requesting the use of an alternative baseline emissions period under paragraph (3) [(1)(D)] 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 [prior to] 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 [applicable facilities] 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 [sites that have] purchased HRVOC allowance streams, uncontrolled emissions must [shall] be the greater of the [their] uncontrolled emissions calculated under subparagraphs (A) - (C) of this paragraph, or the sum of the [their] original existing HRVOC allowance allocated according to the previous allocation methodology [paragraph (1) of this subsection] and the amount of the allowance stream in tons. If [In the event that] 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 [shall be added] 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) Sites subject to the requirements of this division or electing to opt-in to the requirements of this division that receive an HRVOC allocation of less than 5.0 tons based on the allocation methodologies under subsection (a)(1)(A) of this section will be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year.]

(c) [(d)] A site in Harris County [Sites] subject to the requirements of this division that receives [receive] an HRVOC allocation of less than 5.0 tons [based on the allocation methodology under subsection (a)(1)(B) of this section] will be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year. A site [Sites] subject to the requirements of this division that receives [receive] an HRVOC allocation of greater than or equal to 5.0 tons but less than 10.0 tons [based on the allocation methodology under subsection (a)(1)(B) of this section] 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.

[(e) If the total actual HRVOC emissions from the covered 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 10% of the exceedance. This allocation reduction does not preclude the executive director from initiating an enforcement action. If a compliance account does not hold sufficient allowances to accommodate the reduction, the executive director may issue a notice of deficiency to the owner or operator. The owner or operator will purchase or transfer allowances sufficient to accommodate the reduction within 30 days of issuance of the notice of deficiency from the executive director.]

(d) [(f)] The [Allowances will be allocated by the] executive director[, who] will deposit allowances into each compliance account by January 1 of each year. [:]

[(1) initially, by January 1, 2007; and]

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

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

(f) [(h)] 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 [On March 31 of each year after a control period,] allowances equal to [representing] the total highly reactive [highly-reactive] volatile organic compounds (HRVOC) emissions from each affected facility [the applicable facilities] at the [a] site during the previous control period [will be deducted from the compliance account for the site]. The amount of HRVOC emissions must [will] be quantified using [based upon] 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 [applicable facilities will] 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 [shall] not

exceed the short-term limit of §115.722(c) or [and] §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 [referenced in] subsection (a) of this section does not exist or is unavailable, the owner or operator of the site shall [may] determine the [its] HRVOC emissions for that period of time using the following methods [and] in the following order: continuous monitoring data; periodic monitoring data; testing data; manufacturer's data [from manufacturers]; and engineering calculations. [When determining the amount of HRVOC emissions under this subsection, the site will include a justification for using the substitute method or methods in lieu of the methods referenced in subsection (a) of this section.]

(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 [banked] 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 [Allowances] allocated for a control period that is [are] not used for compliance for [in] 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 [transferred].

(b) An allowance [Allowances] that has [have] not expired or been used may be traded [transferred] at any time during a control period[,] except as provided by [in] 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 to Trade Allowances (Form HECT-2). 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 for Stream Trade (Form HECT-4).

(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 for Future Trade (Form HECT-5).

(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.

[(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-2, Application for Transfer of Allowances.]

[(2) The ECT-2 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.]

[(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.]

[(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.]

[(c) A person receiving allowances on an annual basis may permanently transfer ownership of current and future allowances to any person in accordance with the following requirements.]

[(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership.]

[(2) The ECT-4 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.]

[(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.]

[(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.]

[(d) A person may transfer allowances that are scheduled to be allocated in a future control period but have not yet been deposited into an account.]

[(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances.]

[(2) The ECT-5 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.]

[(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.]

[(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.]

(f) [(e)] Allowances that were provided under §101.394(a)(2) [§101.394(a)(1)(C)] of this title (relating to Allocation of Allowances) are not eligible for trade [transfer under subsections (b), (c), or (d) of this section].

(g) [(f)] Allowances generated from a site [sites] located in counties other than Harris County may not be used at a site [sites] located in Harris County. Allowances

generated from a site [sites] located in Harris County may not be used at a site [sites] located in counties other than Harris County.

(h) [(g)] Only an authorized account representative [representatives] may trade [transfer] allowances.

(i) [(h)] Allowances subject to an approved transaction will be deposited into the buyer's [purchaser's broker or compliance] account within 30 days of receipt of a completed trade [transfer] application.

[(i) Volatile organic compound emission reduction credits (ERC) certified in accordance with Division 1 of this subchapter (relating to Emission Credit Banking and Trading) may be converted to a yearly highly-reactive volatile organic compound (HRVOC) allocation.]

[(1) Qualified volatile organic compound (VOC) ERCs must be generated:]

[(A) from a reduction at a site located in the Houston/Galveston/Brazoria nonattainment area;]

[(B) from a reduction strategy implemented after December 31, 2004; and]

[(C) from a reduction in VOC species other than those defined as HRVOCs under §115.10 of this title (relating to Definitions).]

[(2) VOC reductions due to the installation of best available control technology do not qualify for conversion under this subsection.]

[(3) In addition to the requirements of Division 1 of this subchapter, a qualified VOC ERC must meet the following requirements:]

[(A) the ERC must be quantifiable, real, surplus, enforceable, and permanent as required in §101.302 of this title (relating to General Provisions) at the time the ERC is converted;]

[(B) the baseline emissions to which the VOC reduction is compared must consist of the average actual emissions for any two consecutive calendar years preceding the emission reduction strategy and that include or follow the most recent year of emission inventory used in the state implementation plan;]

[(C) the quantification of VOC reductions must be performed using the monitoring and testing methods required under §115.725 or §115.764 of this title (relating to Monitoring and Testing Requirements) and subject to the recordkeeping and reporting requirements under §115.726 and §115.766 of this title (relating to Recordkeeping and Reporting Requirements);]

[(D) the ERC must not have expired; and]

[(E) the owner of the ERC shall have prior approval from the executive director to convert the ERC to an HRVOC allocation.]

[(4) VOC ERCs must be converted to HRVOC allowances at a ratio calculated using the equation in the following figure.]

[Figure: 30 TAC §101.399(i)(4)]

[(5) For each site eligible to receive allowances under §101.394(a) of this title, additional HRVOC allowances received from the conversion of VOC ERCs under this subsection must be limited to a quantity not to exceed more than 5% of the site's initial HRVOC allocation.]

[(6) In addition to paragraph (5) of this subsection, sites subject to this division may receive an HRVOC allocation from the conversion of VOC ERCs under this subsection equivalent to any HRVOC emissions increases from new or modified covered facilities not in operation prior to January 2, 2004, and that were included in 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 was deemed administratively complete by the executive director within one year of the effective date of this rule.]

§101.400. Reporting.

(a) No later than March 31 after each control period, the owner or operator of each site shall [will] submit a completed [Form ECT-1H, Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade] Annual Compliance Report (Form HECT-1)[,] to the executive director, which must [will] include the following:

(1) the total amount of actual HRVOC emissions from each affected facility [applicable facilities] 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. [; and]

[(4) the total amount and respective dates of HRVOC emissions from emissions events subject to the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements).]

(b) For the owner or operator of a site [sites] failing to submit a Form HECT-1 [an ECT-1H form] by the required deadline in subsection (a) of this section, the

executive director may withhold approval of any proposed trades from that site involving allowances allocated for the control period for which the Form HECT-1 [ECT-1H form] 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 Form HECT-1 will not be required until a new affected facility is authorized at the site.