

The commission adopts the repeal of existing §101.29, concerning Emissions Banking, new §101.29, concerning Emissions Banking and Trading, and revisions to the State Implementation Plan regarding these adoptions. New §101.29 is adopted with changes to the proposed text as published in the June 10, 1997 issue of the *Texas Register* (22 TexReg 5641).

EXPLANATION OF ADOPTED RULES

This rulemaking action expands the scope of the current banking program by allowing for the use of emission reduction credits (ERCs) to meet reasonably available control technology (RACT) requirements for the control of volatile organic compounds (VOCs) and nitrogen oxides (NO_x) under Chapter 115, concerning Control of Air Pollution From Volatile Organic Compounds, and Chapter 117, concerning Control of Air Pollution From Nitrogen Compounds respectively, and by creating a new type of credit known as the discrete emission reduction credit (DERC).

Since 1993, §101.29 has allowed limited banking and trading of ERCs and mobile emission reduction credits (MERCs) to meet nonattainment new source review offset requirements. Due partly to limitations on use, banking activity has been almost non-existent. The ability to use credits for purposes of RACT compliance is intended to stimulate credit trading activity and provide more flexible alternatives for compliance by creating economic incentives for early, surplus emission reductions.

Additionally, this rulemaking will allow for the trading of a new type of credit, the DERC. In August 1995, the United States Environmental Protection Agency (EPA) introduced the concept of a DERC through a voluntary trading rule referred to as the Open Market Trading Rule (OMTR). Instead of

promulgating the OMTR, EPA now intends to allow states to establish their own trading rules in accordance with EPA guidance. At this time the guidance has not been released, but agency staff has consulted with EPA in the development of this proposal to ensure consistency with the guidance once released.

ERCs and MERCs are generated by making enforceable, permanent emission reductions below the level required by state or federal regulations. The ERCs can then be banked and used later by the source which generated them, or they can be sold (traded) to another source and used to satisfy offset and other regulatory requirements. ERCs are created by eliminating future emissions, quantified during or before the period in which emission reductions are made, and are expressed in tons per year. By contrast, DERCs and mobile discrete emission reduction credits (MDERCs) are created during a discrete time period, quantified after the period in which emissions reductions are made, and expressed in tons. A MDERC is the counterpart of a MERC that has been quantified after the reduction has occurred.

Revisions are made to §101.29(c)(1)(E), regarding Geographic scope, to allow trading of ERCs or MERCs between ozone nonattainment areas for the purpose of nonattainment new source review (NNSR) offsets. Such trades will be allowed under the following conditions: 1) the ERC or MERC is used as an offset for a new or modified facility under Chapter 116, §116.150 (relating to New Major Source or Major Modification in Ozone Nonattainment Area); 2) the ERC or MERC was generated in an ozone nonattainment area which has an equal or higher nonattainment classification than the ozone nonattainment area of use; 3) a demonstration has been made showing that emissions from the ozone

nonattainment area where the ERC or MERC is generated contribute to a violation of the national ambient air quality standard in the ozone nonattainment area of use; and 4) the user has obtained prior written approval of the executive director. Using the Houston/Galveston (HGA) and Beaumont/Port Arthur (BPA) areas as an example, only reduction credits generated in HGA (classified severe) and used in BPA (classified moderate) would be allowed under the rule, assuming that all the above requirements are met. On the other hand, the reverse type of trading, with reduction credits generated in BPA and used in HGA, would not be allowed. This revision is being made because it provides additional flexibility in obtaining offsets, particularly in areas where reduction credits are in short supply. The revision requires a demonstration that emissions from the area of generation contribute to nonattainment of the ozone standard in the area of use, so reductions obtained in Houston may be beneficial to air quality in Beaumont, for example. The revision also ensures consistency with the Federal Clean Air Act (FCAA), §173(c)(1) which allows such offset trading between ozone nonattainment areas.

The availability of DERCs encourages early reductions of emissions, which may be used to meet RACT requirements. It is anticipated that with increased opportunities for credit use, there will be an economic incentive for sources at small businesses, not currently required by regulation to make reductions, to reduce emissions in order to create marketable credits.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, Section 2007.043. The following is a summary of that assessment. The

specific purpose of the adoption is to provide an alternative flexible, cost-effective method of complying with certain agency regulations. Promulgation and enforcement of the rules as adopted will not affect private real property.

COASTAL MANAGEMENT PLAN

The commission has determined that this rulemaking action is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and §505.22(a), and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with applicable CMP goals and policies. The commission has reviewed this rulemaking action for consistency, and has determined that it is consistent with the applicable CMP goals and policies because the action provides a flexible, cost-effective alternative approach to rule compliance by allowing emissions banking and trading. This rulemaking action will not authorize any new sources of air emissions.

PUBLIC HEARING AND COMMENTERS

A public hearing was held in Austin on July 8, 1997. Nine organizations and one individual submitted comments during the public comment period, which closed on July 10, 1997. Baker & Botts, Exxon Chemical Company (Exxon), Houston Lighting & Power (HL&P), and the Texas Chemical Council (TCC) supported the proposal. EPA generally supported the proposal, but submitted comments

recommending various changes. Environmental Defense Fund (EDF), Sierra Club Lone Star Chapter (Sierra Club), Texas Center for Policy Studies, and an individual generally opposed the proposal.

EDF commented that there should be restrictions on the use of DERCs. EDF questioned how proposed §101.29(d)(4)(B)(v) and (vi) affect the restriction in §101.29(d)(4)(B)(ii), which disallows the use of DERCs to net out of nonattainment new source review (NNSR). The EDF stated that §101.29(d)(4)(B)(vi) needs clarification regarding the allowable emissions level, how it relates to emission increases that are considered significant, and the effect on the source's ability to use DERCs to avoid triggering review as a major modification under the Prevention of Significant Deterioration (PSD) program.

DERCs cannot be used to net out of either PSD or NNSR. DERCs are discrete credits, representing mass reductions only without regard to time. Since a netting exercise is triggered by a modification which will authorize a permanent source of emissions, it would be inappropriate to allow a source to provide a discrete number of tons to compensate for a unit that will be emitting pollutants for years to come. The referenced provision at §101.29(d)(4)(B)(v) is not related to the netting process, but rather provides for some limited emission increases for permitted sources on a temporary basis.

The intent of this rule provision was to allow only permitted sources in attainment areas to use DERCs to increase emissions beyond their permitted levels, and then only up to the PSD significance levels. The allowable emissions level is the maximum allowable rate represented in

the permit. Since these increases may be authorized only on a temporary basis (for 12 months within any 24-month period), the source will not be avoiding PSD or NNSR requirements as a result of the rule. As suggested, the provision has been reworded for clarity.

EPA commented that the protocol section at §101.29(d)(2) should be completely reworked to include the language contained in EPA's draft Open Market Trading Guidance (OMTG) relating to EPA-approved protocols, and to specifically define all criteria.

Staff is agreeable to adding language requiring that EPA approval be sought if a source proposes to deviate from an existing EPA-approved protocol. However, staff does not agree that all criteria described in the OMTG are appropriate to include in the rule language. When the OMTG was written, there was a need to add safeguards, based on the expectation that a third party would be conducting the review. However, under the Texas program the New Source Review Permits Division (NSRPD) will be conducting these reviews. The NSRPD will use the same methodical approach for this program that is used in permit reviews. It is therefore inappropriate and unnecessary to include these criteria in the actual rule language. Since the criteria relate to how the commission will review the credits, and not to how the regulated community is affected by these rules, it is appropriate that the agreements between the state and the EPA should be developed through the State Implementation Plan (SIP) approval process. Any criteria listed in the OMTG that are not a part of the NSRPD's traditional procedures will be considered for inclusion in the narrative for the state's ozone SIP, and submitted to EPA at the next appropriate SIP submittal.

Exxon expressed concerns regarding the public disclosure requirements in the rule for DERCs and MDERCs, and commented that if additional requirements are imposed, the success of the program may be greatly compromised. The EPA, on the other hand, suggested that additional public information disclosure provisions be added stating that any credits created by relying on information marked “confidential” would subsequently be deemed ineligible as a credit. EPA also suggested that these requirements be extended to ERCs in addition to MDERCs and DERCs.

It is the agency's desire to share with the general public all information related to the amount of the emission credit, its intended use, and the types of pollutants involved. However, through years of permit reviews it has been recognized that certain proprietary business information is essential for the reviewing authority to assess the accuracy of the engineering calculations. Staff has revised §101.29(d)(1)(L) to allow for some confidential information to be submitted in support of DERC and MDERC claims, provided the essential elements of public concern, namely the nature and quantity of emissions, are disclosed. Staff also recognizes that program participation may be diminished by requiring public disclosure of all information submitted, and therefore is allowing the same types of information which could be submitted under the NSR Permitting Program to be submitted under the banking and trading program. A citizen may petition through the Public Information Act for information held confidential by the agency. The State Attorney General determines whether that information can be held confidential.

Unlike the new trading program for MDERCs and DERCs, the ERC trading program, used for offsetting emissions in nonattainment areas, is already well established. Since the ERC program began operation in March 1993, it has not encountered a problem with the handling of confidential documents. The ERC program is heavily intertwined with the NSR Permitting Program, which has accepted confidential information for a significant amount of time in its implementation of federal NSR. Therefore, staff believes that analysis of MDERCs and DERCs should be consistent with the approach used in evaluating engineering calculations in NSR permit applications. Staff does not concur that full public disclosure is appropriate for the analysis of ERCs.

EDF expressed concern over the lack of public participation in the process of creating and using DERCs, and the lack of accessibility to review documents.

As noted in §101.29(d)(1)(J), a Registry for all DERCs and MDERCs generated and traded will be maintained by the agency. This Registry will include all notices that are required to be submitted regarding generation, intent to use, and actual use. The Registry will be available for public review. Additionally, a listing of all credit transactions is currently available through the agency's Internet home page at <http://www.tnrcc.state.tx.us/air/erc/embank.htm>. Non-confidential information is available for public review at the agency's Austin office. Staff believes that sufficient public notice and document availability has been built into the DERC program.

EPA suggested that the state revise the proposed rule to include more explicit enforcement provisions.

The agency has statutory authority, pursuant to the Texas Water Code, Section 7.052, to assess administrative penalties of up to \$10,000 per day for each rule violation. Additionally, pursuant to Texas Water Code, Section 7.102, civil penalties up to \$25,000 per day for each violation are authorized if enforcement is made through district court. In many instances, a violation of the banking rule will also result in the violation of another rule. For example, if a user does not file a notice of intent to use prior to the use period and exceeds the permit allowable by the amount of the credit, there would be a permit violation in addition to the violation for failure to file notice. Depending upon the severity of each rule violation, the commission will use its enforcement discretion to assess appropriate penalties within that authority. It would be inappropriate to set the amount of the penalty by rule. Language has been added to clarify that every day of source non-compliance may be considered a violation and that failure to maintain sufficient records is a rule violation.

Sierra Club questioned whether the state has fully assessed the impact of the rule as it pertains to environmental justice. Further, the Sierra Club suggests that the rule may not comply with Title VI of the 1964 Civil Rights Act.

Staff believes that this rule complies with Title VI of the 1964 Civil Rights Act. The use of this trading rule is expected to lower emissions and to improve overall air quality. However, additional language has been added to §101.29(d)(1)(H)(v) allowing the executive director, with commission approval, to discontinue trading if a localized area of concern develops as a result of the trading program. Further, new §101.29(d)(4)(B)(v)(III) has been added to reiterate the Texas Clean Air

Act requirement that DERCs can not be used 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. Additionally, if the executive director finds problems during the audit required by §101.29(d)(1)(M), appropriate measures will be taken to correct the problem.

An individual suggested that the agency's failure to hold a public hearing in Houston for this rule proposal was designed to ensure that oral public comments and public input would not occur, since people would not be able to take off from work easily and drive to Austin to attend the hearing held there.

Since this rule would apply statewide, the public hearing notice announcing the Austin hearing was published in newspapers in four major metropolitan areas of the state, as well as in the *Texas Register*. Regardless of whether any commenter attends the public hearing, written comments received within the 30-day comment period are considered on the same basis as comments received orally at the hearing. The commission met all of the applicable rules in setting the location of this hearing, and believes that the interest of public participation was met.

EDF commented that the agency must evaluate the impact of trading on air quality. EDF expressed concerns that there is no air quality analysis conducted by either the generator or user in connection with the creation or use of a DERC.

Certain safeguards are already built into the rule to protect against adverse impacts from trading. For example, emission increases from DERC use for permitted sources cannot exceed specified PSD de minimis levels. Program audits are required on a periodic basis to evaluate impacts on the attainment of national standards. The agency may implement measures, including the suspension of DERC trading, to correct any problems identified by the audit. Further, increases in emissions must demonstrate protectiveness by meeting the requirements of §106.261(3) or (4) (relating to Facilities (Emission Limitations)) or §106.262(3) (relating to Facilities (Emission and Distance Limitations)). Finally, language was added at §101.29(d)(4)(F)(viii) to allow the executive director to reject the use of DERCs by a source if the credit and use cannot be demonstrated to meet the requirements of the rule. This language will allow staff to request additional information where needed to make the demonstration, one of which is that the use will not cause or contribute to a condition of air pollution. It is the user's responsibility to provide sufficient information to demonstrate compliance with the rule requirements, and staff may request additional information if it is deemed necessary.

EDF requested in the DERC certification process that the agency address the potential problem of emission reductions, which were once surplus, becoming necessary for compliance as air quality standards change.

Emission reductions must be surplus at the time DERCs are generated, but not at the time they are used. This feature helps ensure market stability and confidence in the system, thus encouraging more reductions and banking of emissions. The amount of DERCs generated is

limited to emissions during the period during which the reduction was created. The staff believes that early, voluntary reductions which are surplus at the time of creation provide a clear environmental benefit which outweighs effects from trading and subsequent tightening of emissions requirements.

EDF requested that the agency clarify whether and how it intends to use its general authority to terminate or limit DERC use as changes in air quality standards or conditions occur.

The rule gives the agency authority to limit, or even terminate, DERC trading if adverse air quality impacts are revealed. The executive director can also reject a use which would cause or contribute to a condition of air pollution. In the absence of such compelling reasons, however, DERCs are not affected by more stringent rule limitations as long as the DERCs are surplus at the time they were generated.

EDF stated that DERCs must be surplus at the time they are used, or attainment strategies may be jeopardized. EDF suggested that limits be placed on inter-temporal trading and the number of DERCs that can be used in a season. Sierra Club requested that the agency address polluters' ability to use emission reductions gained in previous years in order to allow emission increases now and in the future, especially in the ozone nonattainment and ozone near-nonattainment areas.

Although the timing of DERC use may add some uncertainty to the attainment planning process, there are many other factors such as growth and rule effectiveness which also contribute to

uncertainty. The ability to use prior decreases to balance present or future increases in emissions is consistent with NSR permitting determinations of applicability of federal NSR. In the determination of whether a major source triggers a federal NSR permit, the source must evaluate a contemporaneous period and determine the net change of that period of time. Additionally, it is expected that not all reductions will be subsequently sold for use as increases, thereby creating an overall decrease in emissions. The staff does not believe that the risks from the timing of DERC use outweigh the potential benefits from early and innovative reductions, or the 10% additional credit required beyond the source's compliance obligation.

The rule requires periodic program audits to evaluate such criteria as the timing of credit generation and use, and the impact on attainment of national standards. As the result of the audit, the agency may undertake measures, including the possible suspension of DERC trading, to correct any problems encountered. To address the potential for localized areas of concern prior to the audit, additional language has been added to §101.29(d)(1)(H)(v) allowing the executive director to discontinue trading, with commission approval, if a localized area of concern develops as a result of trading.

Restrictions on the lifetime of a DERC were considered in the development of the trading rule; however, staff believed that if DERCs had an expiration date, companies might attempt to find uses for their own credits prior to the expiration date. Given the infinite life of a DERC, there is no pressure on the company to capitalize on the DERC. Consequently, some DERCs may never be used, resulting in an overall improvement in air quality.

Comments from EDF and an individual questioned whether the public health will be protected by allowing increases in emissions under this rule.

DERC uses are restricted to meeting the emission limitations of §106.261(3) or (4) or §106.262(3), which are designed to prevent unlimited increases without consideration of impacts. Considering that the agency's standard exemption rules already allow comparable emission increases without requiring any corresponding decreases, the banking and trading rule is actually more restrictive than the current standard exemption process. Additionally, the amount of the increase may not exceed specified significance levels. For these reasons, the staff believes that the rule represents a benefit, not a detriment, to the environment.

Exxon recommended that a definition of “area source” be added at §101.29(a), in order to include all sources which are eligible to generate and use credits, but which may be disqualified under the rule because they are not required to submit an emissions inventory.

The rule is intended to allow banking and trading for all point sources, including those smaller than the 10 ton per year threshold for reporting to the agency emissions inventory. These types of sources are traditionally included in the area source category by reporting and representing their emissions in the aggregate, using population-based or other "surrogate" emission factors. The emissions inventory already includes these smaller point sources, although they are not reported as individual emission points. Therefore, the staff has added language to clarify that for the purpose

of this rule, "area source" refers to any source reported or represented in the agency emissions inventory under the area source category.

EPA commented that the rule fails to mention that the credits must be tied to an emissions inventory.

Section 101.29(c)(1)(B) states that “ ... the emission point's annual emissions prior to the ERC application must have been reported in the 1990 emissions inventory or a subsequent emissions inventory.” Furthermore, §101.29(d)(1)(B) states, “For a DERC to be creditable, the emission point's annual emissions prior to the emission reduction strategy must have been reported in the 1990 emissions inventory or a subsequent emissions inventory.” Staff believes that these statements link the emissions to an emissions inventory, thus addressing EPA's concern.

It should be noted that when credits are used to cover all or part of a source's compliance obligation, the source must report its total actual emissions to the agency emissions inventory, rather than a lesser quantity of emissions which takes the credits into account.

An individual questioned the use of DERCs to meet RACT, stating that RACT is a very weak method of control technology. The individual questioned allowing sources to avoid RACT, and stated that the agency is allowing negative impacts on people's welfare and environment.

The staff disagrees with the statement that RACT represents a very weak method of control technology. Although the control efficiencies required by rule vary, some RACT rules obtain well

above 95% reduction in emissions. RACT is defined as a level of control that is technically practicable and economically feasible. Therefore, RACT does not represent "maximum" emission reductions. A level of control more stringent than RACT is appropriate for new or modified sources, which are required to apply lowest achievable emission rate or best available control technology as part of the NSR process. The intent of this rule is to encourage early implementation of RACT and other control technology by providing incentives for early reduction.

Not only will the DERC program encourage the early implementation of control technology, but the use of DERCs requires an environmental contribution of 10%. Thus, overall emissions should be reduced by participation in this program. Emission increases under this program are allowed only to the extent that they are below de minimis values.

An individual questioned whether the reductions achieved through this program will be genuine, or whether the agency is creating paper reductions. The individual further questioned the method of calculation after the reduction has been made.

All requests for ERC or DERC evaluation receive thorough scrutiny by agency staff, which applies engineering expertise in reviewing all submitted documentation. This documentation may or may not include actual monitored data in all cases, although such data must be submitted in preference to other forms of documentation if it is available. All emissions estimation techniques must provide the basis for claimed emissions reductions, including records of activity levels, if

appropriate. No credits will be approved for use which do not represent actual, surplus emission reductions.

The method of DERC quantification (retrospective and for a discrete period of time) is a departure from the traditional method of ERC quantification, which assumes that the reduction is continuous or ongoing. The baseline level of actual emissions must be known so that the DERC can be determined as surplus, but there is no requirement to quantify the level of emissions after the DERC has been generated. Actual monitoring results will be used if available, but there may be some cases where this data is not available and alternate methods must be used to quantify emission reductions. This does not undermine the validity of DERCs or the concept of DERC trades.

Sierra Club requested that the agency address the failure to require a cap on emissions from facilities, especially major sources.

In cap and trade systems (so-called "closed market systems"), a cap is placed on aggregate emissions. Total emissions under the cap are divided among participants in the form of "allowances," where each allowance equals one ton of allowable emissions. As the number of allowances declines over the years, each source must reduce emissions by the required amount until the end target year is reached. Excess allowances are the commodity used for emissions trading.

There are several reasons why the DERC rule (an open market system) was chosen in preference to a cap and trade system. First, in order to ensure that the system is effective, participation in a cap and trade system is mandatory for all affected sources. Both the state and industry prefer the greater flexibility afforded by the DERC open market system, which is voluntary. Establishing the required NO_x and VOC reduction levels to attain the ozone standard is a long and complicated process, which would delay the implementation of a trading program for the state. In addition, uncertainties resulting from the new standards for ozone and particulates with an aerodynamic diameter of less than or equal to 10 microns (PM₁₀) would need to be factored into the trading program structure.

The Texas Center for Policy Studies expressed concern that DERCs have the potential to actually increase emissions from year to year, since they are temporary rather than permanent reductions.

Every DERC deposited in the bank represents emissions removed from the air. It is only when the DERC is used that these emissions are re-introduced to the air, with the stipulation that 10% over the amount used must be retired. Since deposited DERCs tend to accumulate over time, with only a percentage actually being used at any given time, the result would be a net decrease in emissions, not an increase. Additionally, while the decreases authorized under this program are temporary rather than permanent, authorized increases are temporary as well. Language has been added to §101.29(d)(4)(B)(v)(II) (formerly §101.29(d)(4)(B)(vi)), to assure that emissions increases are limited to one exceedance up to 12 months within any 24-month period. This language is consistent with that of §101.29(d)(4)(B)(v)(I), which pertains to VOC and NO_x.

EPA commented that the state should delete any statement in §§101.29, 117.540 and 117.570 which would allow the generation of MERCs using the Texas Accelerated Vehicle Retirement (AVR) and Texas Clean Fleet (TCF) programs, since credits cannot be generated using the methods referenced in these programs. EPA cannot approve the state AVR program because it uses a vehicle emission testing method that has changed. The AVR program planned to implement an inspection and maintenance (I/M) program utilizing the IM240 emission test which is no longer available. The Texas Clean Fuel Fleet program is not currently operational as a result of changes to the underlying legislation of the program which changed the criteria for vehicle accumulation.

Because the IM240 emission test is no longer available, it is correct that credits will not be available from the AVR program until the program is revised. Staff is in the process of revising the AVR and the TCF programs. When these revisions are complete, it will be possible for the state to generate and use credits under these programs. It is appropriate to allow those credits to be used once the programs are operational. In addition, although recent legislation requires revisions to the TCF program, current provisions will remain in place until the new provisions take effect. The state intends to rectify the problems EPA has identified with this program through revisions to Chapter 114 and the SIP.

An individual commented that it is inappropriate to allow MDERCs to be used at a stationary source, given the uncertainty and complexity associated with mobile emission calculations.

The agency is able to estimate the emissions from vehicles in a manner that is applicable for trades to stationary sources. Staff uses methodology provided by the EPA to calculate these reductions. The emission factors for use in the calculations are derived from EPA's Mobile Emission Factor Model (MOBILE5). Staff believes that since mobile sources also contribute to the nonattainment problems of an area, reductions from those sources should be encouraged as well.

Exxon recommended that the compliance margin requirement be removed from the rule, because the penalties associated with credit shortfalls provide adequate incentives for the users of DERCs or MERCs to acquire sufficient credits, thus ensuring that no shortfall occurs. Exxon commented that some activities for which excess credits would be used are so well understood or controllable that the excess is unnecessary. In those cases, this extra 5% margin would discourage some parties from participation in the program.

Staff does not believe that the additional 5% margin will result in a disincentive to participate in the program, since these credits may be resold after it is determined that they are not needed. In order to be consistent with the EPA's Draft OMTG, a compliance margin has been retained in the rule.

EPA suggested that the state may want to clarify whether allowable emissions or actual emission are used to calculate baseline emissions.

Staff has added the word "actual" to the definition of baseline emissions.

EDF and the Texas Center for Policy Studies expressed concerns about the implementation of the DERC system overlaid onto the existing ERC system. The EDF expressed concerns that the DERC program will result in an overall emission increase.

While some overlap between DERCs and ERCs exists, the creation of the DERC program should not result in an increase in overall emissions. Under existing permitting procedures, and under the §117.540 Phased RACT rule prior to this rule proposal, certain emissions increases could be allowed without the requirement for a comparable decrease. For example, under the current permitting program, a source may request an amendment to increase the emission rate from a facility. Presuming that the impacts and control technology are acceptable, the amendment would typically be granted. Under the DERC rule, the source will still be allowed to increase its emissions, but must retire an equivalent amount of reductions plus a 10% environmental contribution. It is anticipated that as DERCs are used, companies will contemplate further methods of creating DERCs, resulting in an overall decrease in emissions. The benefit to the source in participating in the banking/trading program is the short time frame required for authorization, compared to traditional permitting programs.

EDF expressed concerns that the certification process in the proposed rule does not enable the agency to determine if DERCs are in fact surplus.

The determination that credits are surplus will be made based on an assessment of the actual emissions, the applicable regulations, and the proposed reduction strategy. Because DERCs will

be certified only when the reduction goes beyond the requirements of the rules, the reduction is surplus.

EPA stated that the agency must include specific references to modeling provisions for carbon monoxide, sulfur dioxide, and PM₁₀ if reductions of emissions from those pollutants are to be considered in the generation of DERCs or MDERCs.

The rule limits the levels at which these trades may take place to below the threshold at which EPA would normally require additional modeling and impact analysis. The rule allows increases of these pollutants to occur only to the extent that those increases are below the PSD significance levels. If the rule was revised as requested, this rule would make the use of DERCs more cumbersome than obtaining a permit amendment under the existing permitting structure. As currently written, §101.29(d)(4)(B)(v)(II) states that the user must demonstrate that there will be no adverse impacts from the use of DERCs at the levels requested. Staff believes that this requirement, in combination with the limitation of emission increases to below the PSD significance level, assures that these increases will not cause an adverse impact.

EPA commented that the state may want to consider adding a sentence to §101.29(d)(1)(G) specifying that, although ERCs may be converted to DERCs, the newly created credit must continue to meet all of the requirements imposed on DERCs.

Staff believes this is implicit in the rule. Allowing conversions from ERCs to DERCs does not allow circumvention of other rule requirements pertaining to the creditability of DERCs.

EPA suggested adding the following language to §101.29(d)(4)(B)(v): .. “a synthetic minor may not exceed its permit allowable on a temporary basis if doing so would make it a major source,” in order to avoid any situation in which a synthetic minor would become a major source.

Language was added to §101.29(d)(4)(B)(vi), stating that DERCs may not be used to allow a source whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 (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.

EPA commented that the state should consider eliminating the executive director’s authority to allow a user to exceed an allowable emission level, because this allows the executive director too much discretion.

The intent of this provision at §101.29(d)(4)(B)(v) is to provide a mechanism for denial of the DERC in the event that an unforeseen use is proposed. Staff has revised the rule language to clarify that this discretion enables the executive director to deny inappropriate uses, rather than providing an opportunity for the executive director to authorize unspecified actions.

EPA requested that the state include the requirement that credits must be purchased and held by a prospective user source prior to the time when the credits will be used for compliance, in order to prevent the user from deferring purchase of the credit until after the source has violated its emission limits.

Current rule language at §101.29(d)(4)(A)(i) requires that the user have ownership of the DERCS prior to use. Staff believes that the rule language addresses EPA's comment.

An individual commented that the agency needs to define terms such as “good engineering practices,” and objected to the vagueness of phrases like “based on actual monitoring results, when available.”

The term “good engineering practices” is commonly used in the fields of engineering and air pollution control. Staff expects that when actual monitoring has been performed, these results are available and additional monitoring would not be required for the sole purpose of demonstrating the validity of a credit. If the monitoring has been conducted, it is required to be submitted.

Where monitoring has not been performed, standard methods of documentation and calculation will be used. At the executive director's discretion, sampling may be required as well.

Sierra Club and an individual expressed reservations about the ability to accomplish trading across areas.

The DERC portion of the rule allows VOC and NO_x increases in attainment areas to be countered by decreases in other areas. For nonattainment areas, the use of DERCs is restricted by requiring that emissions decreases must occur in the same nonattainment area as the increases. This restriction serves to protect nonattainment areas from being overwhelmed by increases without accompanying decreases within the same areas. The likely consequence of this restriction is that a greater amount of DERCs created in nonattainment areas will be used and removed from the system. The increases allowed by DERCs in attainment areas are restricted to values protective against adverse impacts. Those areas with the highest pollution levels will have the greatest amount of emissions available for reductions. Consequently, the greatest amount of reductions should be achieved where the reductions are most beneficial.

The use of DERCs is restricted to meeting the §106.261(3) or (4) or §106.262(3) emission and distance limitations, which limit increases allowed under §101.29(d)(4)(B)(iv). In fact, the banking and trading rule is actually more restrictive than the agency's existing standard exemption process, which allows such emission increases without requiring corresponding reductions.

An additional safeguard has been added to the rule at §101.29(d)(1)(H)(v), by providing that, with commission approval, the executive director may suspend trading in whole or in part where a localized area of concern has developed. If trading into an area begins to cause a problem, the executive director may suspend trading in that area. Additionally, the executive director may prohibit a use which would cause or contribute to a condition of air pollution.

Sierra Club commented that grandfathered sources should not be allowed to make use of the DERC rule, and questioned whether grandfathered sources could circumvent the permitting process through this rule.

This rule allows permitted facilities to exceed their allowable emission rates by strictly defined amounts, which must be offset by acquiring credits. Section 101.29(d)(4)(B)(v)(II) has been reworded to clarify that only permitted sources may exceed their allowables. Grandfathered sources could participate in creating DERCs by reducing emissions, but could not use DERCs to increase emissions. This rule encourages grandfathered and uncontrolled facilities to implement additional control technology early in order to create credits, and therefore does not promote circumvention of the permitting process.

South East Texas Regional Planning Commission requested that language be added to the rule to allow for trades of ERCs and MERCs from one ozone nonattainment area to another if it can be demonstrated that the emissions from the area of generation contribute to nonattainment of the ozone standard in the area of use and if the area of generation has an equal or higher nonattainment classification than the area of use. Such trades should be allowed pursuant to the Federal Clean Air Act Section 173(c)(1), 42 U.S.C. §7503(c)(1), subject to the approval of the executive director.

Section 101.29(c)(1)(E) has been revised to allow for the type of trade described in 42 U.S.C.

§7503(c)(1). Staff has revised the language submitted by the commenter to spell out the conditions under which a trade between nonattainment areas would be allowed.

STATUTORY AUTHORITY

The repeal is adopted under the Texas Health and Safety Code (Vernon 1992), the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and TCAA §382.012, which requires the commission to develop plans for protection of the state's air.

§101.29 Emissions Banking. (Repeal.)

This agency hereby certifies that the repeal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on November 19, 1997.

The new section is adopted under the Texas Health and Safety Code (Vernon 1992), the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and TCAA §382.012, which requires the commission to develop plans for protection of the state's air.

§101.29 Emission Credit Banking and Trading.

(a) Definitions. Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

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

(2) Actual emissions - Actual emissions as of a particular date shall equal the total emissions during the selected time period, using the unit's actual daily operating hours, production rates, types of materials processed, stored, or combusted during the selected time period.

(3) Applicable emission point - The emission point that is either generating an emission reduction or using an emission reduction credit (ERC) or discrete emission reduction credit (DERC).

(4) Area source - Any source reported in the agency emissions inventory under the area source category.

(5) Baseline - Emissions that occur prior to an emission reduction strategy, considering all limitations required by applicable state and federal regulations. The baseline may not exceed the level of emissions reported in the 1990 emission inventory or a subsequent emissions inventory. For reduction strategies that exceed 12 months, the baseline is established after the first year of generation and is fixed for the life of the strategy. A new baseline is established for each emission reduction strategy.

(6) Baseline activity - The stationary source's actual level of activity averaged over any 24 consecutive month period during the 120 consecutive months which precede the emission reduction strategy or credit use period, using the source's actual daily activity level.

(7) Baseline emission rate - The stationary source's average rate of emissions per unit of activity using the unit's actual daily operating hours, production rates, or types of materials processed, stored, or combusted for any 24 consecutive month period during the 120 consecutive months which precede the emission reduction strategy or credit use period.

(8) Baseline emissions - The stationary source's total actual emissions, averaged for a 12-month period for ERCs or averaged for the discrete time period for DERCs, using the unit's actual daily operating hours, production rates, or types of materials processed, stored, or combusted for any 24 consecutive month period during the 120 consecutive months which precede the emission reduction strategy or credit use period. The baseline emissions may not exceed the level of emissions reported in the 1990 emissions inventory or a subsequent emissions inventory. For sources in existence less than 24 months, a shorter time period not less than 12 months may be considered by the executive director.

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

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

(11) Discrete emission reduction credit (DERC) - A creditable emission reduction that is created during a discrete time period, quantified after the period in which emissions reductions are made, and expressed in tons.

(12) Discrete time period - The finite period of time in which a DERC is generated.

(13) Emission reduction credit (ERC) - A certified emission reduction that is created by eliminating future emissions, quantified during or before the period in which emission reductions are made, and expressed in tons per year.

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

(15) Generation period - The discrete period of time over which a DERC is created.

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

(17) Mobile discrete emission reduction credit (MDERC) - a credit that is surplus, generated by a mobile source as set forth in §114.200 of this title (relating to Accelerated Vehicle Retirement Program) or §114.201 of this title (relating to Mobile Emission Reduction Credit Program), and quantified after the period in which the reductions were made.

(18) Most stringent allowable emissions level - The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both), considering all limitations required by applicable state and federal regulations.

(19) Ozone season - The portion of the year when ozone monitoring is required to occur in a specific geographic area. The Houston/Galveston, Beaumont/Port Arthur, and El Paso nonattainment areas have a 12-month ozone season, whereas Dallas/Fort Worth's ozone season runs from March 1 to October 31.

(20) Permanent - An emission reduction that is long lasting and unchanging for the remaining life of the source.

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

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

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

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

(25) Surplus - An emission reduction that is not otherwise required of a source by a state or federal law, regulation, or agreed order.

(26) Use period - The period of time over which the user source applies DERCs to an applicable emission reduction requirement.

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

(28) Use strategy - The compliance requirement for which DERCs are being used.

(b) Purpose. The purpose of this section is to allow the operator of a source to generate ERCs or DERCs by reducing emissions beyond the level required by local, state, and federal regulation and to allow the operator of a source to use these credits as offsets or as an alternative means of compliance with state regulations.

(c) Emissions credit banking of ERCs and mobile emission reduction credits (MERCs).

(1) General provisions.

(A) Applicable criteria pollutants. Reductions of volatile organic compounds (VOCs) and nitrogen oxides (NO_x) may qualify as ERCs or MERCs. In addition, reductions of carbon monoxide (CO) may qualify as MERCs. Reductions of other criteria pollutants are not creditable. Reductions of one criteria pollutant may not be used to meet the requirements of another pollutant,

except at such time as urban airshed modeling demonstrates that one ozone precursor may be substituted for another.

(B) Emission reduction requirements. To be creditable as an ERC, an emission reduction must be enforceable, permanent, quantifiable through a replicable methodology, real, and surplus. The reduction must be surplus at the time it is created, as well as when it is used. The creditable reduction must have occurred after January 1, 1990 for VOC and NO_x, and the emission point's annual emissions prior to the ERC application must have been reported or represented in the 1990 emissions inventory or a subsequent emissions inventory. MERCs generated from reductions beyond those required by the Texas Clean Fleet Program must have occurred after January 1, 1992. MERCs generated from the accelerated retirement of high-emitting vehicles must have occurred after January 1, 1996. An emission reduction may be creditable as an ERC or DERC, but not both. A mobile source emission reduction may be creditable as a MERC or MDERC, but not both.

(C) Eligible sources. Participation in emissions credit banking is strictly voluntary. The following sources are eligible to generate ERCs:

(i) any stationary source;

(ii) any area source;

(iii) any mobile source registered in a designated ozone nonattainment area; and

(iv) any non-road mobile source or area source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(D) Life of an ERC or MERC. If an ERC is used prior to its expiration date, the ERC is effective for the life of the applicable user source except for an ERC which has been used for purposes of compliance with the provisions of §117.570 of this title (relating to Trading). An ERC is available for use for 120 months from the date of the emission reduction except to the extent that regulatory changes after the date of the reduction reduce the creditable amount or invalidate the entire reduction for affected emission points. Only a NO_x ERC that is used for compliance with Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) is subject to the applicable provisions of §117.570 of this title. The length of time a certified MERC is available for use is a function of the remaining vehicle miles of the mobile source, as determined in §114.200 of this title and §114.201 of this title. The Emissions Bank expiration date and useful life of the credit are calculated from the date the MERCs are certified.

(E) Geographic scope. Only emission reductions generated in ozone nonattainment areas are creditable. An ERC or MERC must be used in the nonattainment area in which it is generated unless:

(i) the ERC or MERC is used as an offset for a new or modified facility pursuant to §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Area);

(ii) the ERC or MERC was generated in an ozone nonattainment area which has an equal or higher nonattainment classification than the ozone nonattainment area of use;

(iii) a demonstration has been made to show that the emissions from the ozone nonattainment area where the ERC or MERC is generated contribute to a violation of the national ambient air quality standard in the ozone nonattainment area of use; and

(iv) the user has obtained prior written approval of the executive director.

(F) Public information. Information regarding the banking or sale of ERCs or MERCs may be obtained from the Texas Natural Resource Conservation Commission (commission) Emissions Bank, which is the registry of all ERCs and MERCs generated and used.

(G) Authorization to emit. An ERC created under this section is a limited authorization to emit VOC and/or NO_x in accordance with the provisions of this section, the Federal Clean Air Act (FCAA), and the Texas Clean Air Act (TCAA), as well as regulations promulgated thereunder. An ERC does not constitute a property right. Nothing in this section may be construed to

limit the authority of the commission or the United States Environmental Protection Agency (EPA) to terminate or limit such authorization.

(H) Chapter 117 compliance. Any ERC or MERC for NO_x which is used to comply with the provisions of Chapter 117 of this title must meet all applicable provisions of §117.570 of this title and shall then be subject to all applicable provisions of §117.570 of this title in addition to the requirements of this section. The value of any NO_x ERC or MERC which is used to comply with Chapter 117 of this title may be reduced in accordance with §117.570(d) of this title.

(2) ERC and MERC generation.

(A) Methods of generation. ERC and MERCs may be generated using one of the following methods or any other method that meets the requirements of subsection (c)(1) of this section and is approved by the executive director:

(i) the permanent shutdown of a facility which causes a loss of capability to produce emissions;

(ii) the installation and operation of pollution control equipment which reduces emissions below the level required of the emission source;

(iii) a change in a manufacturing process which reduces emissions below the level required of the emission source;

(iv) the permanent curtailment in production, which reduces the source's capability to produce emissions;

(v) pollution prevention projects that produce surplus emission reductions;

(vi) an actual emission reduction resulting from the utilization of vehicles below the established emissions standard and/or the fleet percentages as required by the Texas Clean Fleet Program.

(vii) an actual emissions reduction resulting from the accelerated retirement of high-emitting vehicles.

(B) Calculation. The quantity of ERCs is determined by subtracting the source's new allowable emission limit (tons per year) from the emission source's baseline emissions. The source's new allowable emission limit equals the enforceable emission limit for the applicable emission point after the emission reduction strategy has been implemented. The quantity of MERCs must be calculated in accordance with §114.200 and §114.201 of this title.

(C) Certification and registration. Stationary sources with potential ERCs may submit an ERC application to the Emissions Bank. Applications for total emission reductions, VOC and NO_x combined, of less than 10 tons per year (TPY) will be registered in the Emissions Bank and subjected to a review upon use. Applications for 10 TPY or greater will be subjected to a review in accordance with paragraph (3)(D) of this subsection to determine the creditability 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. MERCs will be certified by the Emissions Bank for any emission reduction which has been registered in accordance with the specific requirements of §114.200 and §114.201 of this title. A MERC certificate will be issued by the executive director which indicates the total amount of certified emission reduction credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires. The applicant will be notified in writing if the executive director denies the ERC application. The applicant may submit a revised application at any time.

(D) Protocols. The amount of ERCs in TPY will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices including calculation methodologies in general use in new source review (NSR) permitting. The executive director shall have the authority to inspect and request information to assure that the emissions reductions have actually been achieved. MERCs will be determined and certified using the methodologies provided in §114.200 and §114.201 of this title.

(E) ERC bank deposits. All ERCs are deposited in the Emissions Bank and reported as available credits by the Emissions Bank until they are withdrawn or expire.

(F) Enforcement. ERCs generated by a stationary emission source will be made enforceable by:

(i) amending an NSR permit to reflect the emission reduction and set a new maximum allowable emission limit;

(ii) voiding an NSR permit when an emission source has been shut down;

(iii) registering on a PI-8 form the emission reduction and the new maximum allowable emission limit for any standard exemption facility; or

(iv) an agreed order which sets a new maximum allowable emission limit for a facility which is not required to have a permit or qualify for a standard exemption.

(3) ERC and MERC use.

(A) Use of ERCs. ERCs may be used as:

(i) offsets for a new source or major modification to an existing source;

(ii) mitigation offsets for action by federal agencies under §101.30 of this title;

(iii) netting by the original applicant, if not used as an offset to meet a regulatory requirement or relied upon in the issuance of an NSR permit; or

(iv) an alternative means of compliance with VOC and NO_x reduction requirements as provided in Chapter 115 of this title (relating to the Control of Air Pollution from VOCs) and Chapter 117 of this title.

(B) Use of MERCs. MERCs can only be used for the following purposes:

(i) extending a compliance deadline for up to the life of the credit to the extent allowed in any provision of Chapter 115 of this title and §117.540 of this title (relating to Phased Reasonably Available Control Technology (RACT));

(ii) complying with fleet requirements to the extent allowed by the Texas Clean Fleet Program Requirements for Motor Vehicle Fleets;

(iii) providing offsets for a new major source or major modifications.

When MERCs are used for purposes of this clause, offsets will be required, upon the expiration of the MERCs, through internal emission reductions (netting) or the purchase of additional credits as allowed under this section, or the facility will be required to shut down the emission source.

(C) Calculation. The calculation of the number of ERCs needed by the user for offsets or for compliance with Chapter 115 or Chapter 117 of this title are as follows:

(i) for ERC usage as offsets, the method for determining the number of ERCs needed by the user for offsets is provided in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Area); or

(ii) for ERC usage for compliance with Chapter 115 or Chapter 117 of this title, the number of ERCs needed equals the emission reduction that would have been generated if the affected emission point had implemented the respective requirements of Chapter 115 or Chapter 117 of this title, plus an additional 10% to be retired as an environmental contribution.

(D) Review schedule. The following applies to ERCs which are to be used for compliance with the requirements of Chapter 115 or Chapter 117 of this title. The user must submit a notice of intent to use, at least 90 days prior to the planned utilization of the ERC. ERCs may be utilized only after the executive director grants approval of the notice of intent to use. The executive director shall have 30 days from date of receipt to determine if the registration application is complete.

The executive director shall have 90 days from date of receipt to approve, modify, or deny the registration or 60 days after determination of completeness, whichever is later.

(E) Transfer. ERCs and MERCs are freely transferable in whole or in part, and may be traded or sold to a new owner anytime before the expiration date of the ERC. The Emissions Bank must be notified no later than 30 days after the transfer of any credits to another party. The old certificate must be submitted to the Emissions Bank. The executive director will issue a new certificate to the ERC purchaser reflecting the ERCs purchased by the new owner, and a revised certificate to the ERC seller showing any remaining ERCs available to the original owner.

(F) Withdrawal. ERCs may be withdrawn from the Emissions Bank by the owner at any time prior to the expiration date of the credit and may be held by the owner. ERCs may still be used by the original owner for netting purposes after the ERCs have expired, as provided in §116.150 of this title.

(G) Recording of ERC use.

(i) ERCs and MERCs used as offsets must be included in the user's new source review permit application. The original ERC or MERC certificate must be submitted by the permit applicant to the executive director before the permit is issued.

(ii) Use of ERCs or MERCs for purposes other than those specified in clause (i) of this subparagraph may not commence until the user has received approval from the executive director. The user must also keep a copy of the ERC certificate, the notice, and all backup data on site for a minimum of five years.

(iii) If the executive director denies the stationary source's use of ERCs or MERCs, any person affected by the executive director's decision may file a motion for reconsideration. 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) may apply. However, only a person affected may file a motion for reconsideration.

(d) Emission credit trading of DERCs and MDERCs.

(1) General provisions.

(A) Applicable pollutants. Reductions of VOCs, NO_x, CO, sulfur dioxide (SO₂), and particulates with an aerodynamic diameter of less than or equal to a nominal 10 microns (PM₁₀) may qualify as DERCs or MDERCs as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, except at such time as urban airshed modeling demonstrates that one ozone precursor may be substituted for another.

(B) Discrete emission reduction requirements. To be creditable as a DERC or MDERC, an emission reduction must be real, properly quantified, and surplus at the time the emission reduction is generated. For a DERC to be creditable, the emission point's annual emissions prior to the emission reduction strategy must have been reported or represented in the 1990 emissions inventory or a subsequent emissions inventory. An emission reduction may be credited as either an ERC or DERC, or as a MERC or MDERC.

(C) Credit measurement. A DERC or MDERC is equivalent to one ton of emissions of one pollutant. DERCs and MDERCs may not be broken down into units smaller than one ton.

(D) Start date for discrete emission reductions. An emission reduction must be generated after the effective date of this section. However, reductions made after November 15, 1992 (January 1, 1992 if credits are generated from reductions beyond those required by the Texas Clean Fleet Program or January 1, 1996 if credits are generated from the accelerated retirement of high-emitting vehicles and before the effective date of this section) may be creditable if the reduction is surplus on the effective date of this section. Sources that generated emission reductions prior to the effective date of this section must submit a notice of generation within six months of the effective date of this section or the reductions will not be creditable.

(E) Eligible sources. Participation in emission credit trading is strictly voluntary. Stationary sources and any non-road mobile source or area source associated with actions by

federal agencies under §101.30 of this title are eligible to generate and use DERCs, if there are no permits under the same commission account number that contain a condition or conditions precluding the use of DERCs. Mobile sources are eligible to generate MDERCs. Stationary and area sources may use MDERCs if there are no permits under the same commission account number that contain a condition or conditions precluding the use of DERCs or MDERCs.

(F) Life of a DERC or MDERC. A DERC or MDERC is available for use after the notice of generation has been received by the commission Registry in accordance with subparagraph (J) of this paragraph, and may be used anytime thereafter.

(G) Converting ERCs to DERCs. Certified ERCs and MERCs banked in the Emissions Bank prior to the effective date of this section may be converted to DERCs or MDERCs, respectively, if the emission reduction is surplus on the date the ERCs or MERCs are to be converted, the ERCs or MERCs have not expired, and the reduction meets the requirements of subsection (c)(3)(A) of this section. The conversion of ERCs to DERCs or MERCs to MDERCs, must occur within six months of the effective date of this section. A whole ERC, not a portion, must be converted to a DERC and may not be converted back to an ERC.

(H) Geographic scope. Emission reductions generated in the state of Texas may be creditable and used in the state with the following limitations:

(i) VOC and NO_x reductions generated in an ozone attainment area may be used in any county or portion of a county designated as attainment or unclassified, but may not be used in an ozone nonattainment area.

(ii) VOC and NO_x reductions 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.

(iii) VOC and NO_x reductions generated in an ozone nonattainment area may not be used in any other ozone nonattainment area.

(iv) CO, SO₂, and PM₁₀ must be used in the same metropolitan statistical area in which the reduction was generated.

(v) The trading of DERCs or MDERCs 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.

(I) Ozone season. In areas having an ozone season of less than 12 months, VOC and NO_x credits generated outside the ozone season may not be used during the ozone season.

(J) The commission Registry. All required notices of DERC and MDERC generators and users must be submitted to the Registry. A notice submitted by a generator or user will automatically be posted to the Registry. The Registry will assign a unique number to each ton of emission reductions generated. The Registry will maintain current listings of all credits available or used for each ozone nonattainment area. One combined listing for all the counties or portions of counties designated as attainment or unclassified will be provided by the Registry.

(K) Recordkeeping. The generator must maintain a copy of all notices and backup information submitted to the Registry for a minimum of five years following the completion of the generation period. The user must maintain a copy of all notices and backup information submitted to the 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 sources. The user must also maintain a copy of the generator's notice and backup information for a minimum of five years after the use is completed. Failure to keep sufficient records is a violation of this rule.

(L) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of DERCs or MDERCs is public information and will not be considered confidential. Any claim of confidentiality not meeting this requirement, or failure to submit all information, may result in the rejection of the emission reduction. All non-confidential notices and information regarding the generation, use, and availability of DERCs or MDERCs may be obtained from the Registry.

(M) Program audits.

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

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

(iii) The executive director will recommend measures to remedy any problems identified in the audit. The trading of DERCs or MDERCs 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.

(iv) The audit data and results will be completed and submitted to EPA and made available for public inspection within six months after the audit begins.

(N) Authorization to emit. A DERC or MDERC created under this section is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the FCAA and the TCAA as well as regulations promulgated thereunder. A DERC or MDERC does

not constitute a property right. Nothing in this section should be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

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

(P) Chapter 117 compliance. Any DERC or MDERC for NO_x which is used to comply with the provisions of Chapter 117 of this title must meet all applicable provisions of §117.570 of this title and shall then be subject to all applicable provisions of §117.570 of this title in addition to the requirements of this section. The value of any NO_x ERC which is used to comply with Chapter 117 of this title may be reduced in accordance with §117.570(d) of this title.

(2) Protocols.

(A) All source categories must use an EPA approved protocol if one exists for the applicable source. If the source wants to deviate from an EPA approved protocol, EPA approval is required before the protocol can be used.

(B) If an approved protocol does not exist the following applies:

(i) The amount of DERCs in tons will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices including calculation methodologies in general use in NSR permitting. The source must 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 DERCs are created or used.

(ii) The amount of MDERCs will be quantified in accordance with §114.200 or §114.201 of this title as appropriate. For the purposes of quantifying MDERCs, the term "VMT" represents the actual vehicle miles traveled over the time period for which credit is desired, and the term "n" represents the time period over which the credit is generated.

(3) DERC generation.

(A) Generation limitations. A DERC or MDERC may be generated by any strategy that reduces a source's emission rate below its baseline, except for the following:

- (i) curtailing an activity at a source;
- (ii) modification or discontinuation of any activity that is otherwise in violation of a federal, state, or local law;

(iii) emissions reductions required to comply with any provision under Title I of the FCAA regarding tropospheric ozone, or Title IV of the FCAA regarding acid rain;

(iv) emission reductions of hazardous air pollutants, as defined in the FCAA §112, from application of a standard promulgated under the FCAA §112;

(v) emission reductions credited or used under any other emissions trading program;

(vi) emission reductions occurring at a source which received an alternative emission limitation to meet a state RACT 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; and

(vii) emission reductions at a facility with a flexible permit, unless the reductions are made permanent and enforceable or the generator can demonstrate that the emission reductions were not used to satisfy the conditions for the facilities under the flexible permit.

(B) Calculation of emission reduction generated.

(i) An emission reduction is generated when the operator of an emission source undertakes a strategy to reduce the source's emission rate per unit of activity below its baseline.

(ii) For all emission reduction strategies, except shutdowns and mobile source emission reduction strategies, the emission reduction is calculated as follows:

$$(\text{BER} * \text{BA}) - (\text{SER} * \text{SA}) = \text{reduction generated}$$

If $\text{SA} < \text{BA}$, then:

$$(\text{BER} * \text{BA}) - (\text{SER} * \text{BA}) = \text{reduction generated}$$

where:

BER = baseline emission rate

BA = baseline activity

SER = emission reduction strategy emission rate

SA = emission reduction strategy activity

(iii) The amount of DERCs or MDERCs generated must be rounded down to the nearest ton.

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

(v) The generation period for a shutdown is ten years. Shutdown DERCs must be generated and noticed to the Registry on an annual basis.

(vi) If the generator exceeds the allowable emission limit for the applicable facility, no DERC will be generated.

(vii) If the generator uses the emission reduction to net out of nonattainment new source review or increases emissions at another emission point within the property by an amount equal to or greater than the emission reduction generated, no DERC will be generated.

(C) Notice of generation. A notice of generation and generator certification must be submitted to the Registry in accordance with the following requirements if the reduction is to be creditable and marketable:

(i) the notice must be submitted no later than 90 days after the generation activity has been completed, or no later than 90 days after the completion of the first 12 months of generation, if the generation period exceeds 12 months, and every 12 months thereafter for each subsequent year of generation, whichever is sooner.

(ii) The notice for a stationary or area source generator must include the following information for each pollutant reduced at each applicable emission point:

(I) the name, address, county, telephone number, contact person, permit or standard exemption numbers, account number of the generator, and the unique facility identification number (FIN) and emission point number (EPN) of the applicable emission points,

(II) the name of the owner and/or operator of the generator source,

(III) the generation period,

(IV) a complete description of the generation activity,

(V) for shutdown emission reduction strategies, an explanation as to whether production shifted from the shut down facility to another facility in the same nonattainment area,

(VI) the amount of DERs generated,

(VII) for VOC reductions, a list of the specific compounds reduced,

(VIII) the baseline emission rate and baseline total emissions for each applicable pollutant and emission point,

(IX) the most stringent emission rate and the most stringent emission level for the applicable emission point, considering all the applicable regulatory requirements,

(X) a complete description of the protocol used to calculate the emission reduction generated,

(XI) the actual calculations performed by the generator to determine the amount of DERCs generated, and

(XII) a statement that the emission reductions on which the DERCs are based are real, surplus, and not based on an emission reduction strategy prohibited in subsection (c)(3)(A) of this section.

(iii) The notice for a mobile source generator must include information as required to verify the credit calculation. A mobile source generator shall also indicate in his notification whether credits have been banked under §114.201 of this title.

(iv) The notice must include a certification of generation, which shall contain certification under penalty of law by a responsible official of the generator source of truth, accuracy, and completeness. This certification shall state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete.

(v) If a generator submits a notice late, the creditable portion of the reduction will be reduced at the discretion of the executive director.

(vi) The generator must provide a complete copy of the Notice of Generation, Certification, and backup information to the user.

(vii) The generator is responsible for maintaining current information in the notice of generation after it is submitted to the Registry, such as address changes, or a change of ownership when the credits are sold or transferred.

(D) Compliance burden and enforcement.

(i) The generator is responsible for assuring that the DERCs or MDERCs generated are real, surplus, and quantified accurately.

(ii) The notice of generation will be reviewed and the credits certified by the executive director at the time the credits are used. Certification by the executive director does not relieve the generator of any responsibilities.

(4) DERC and MDERC use.

(A) Use requirements.

(i) The user must have ownership of a sufficient amount of DERCs or MDERCs before the use period for which the specific DERCs or MDERCs are to be used.

(ii) The user must hold sufficient DERCs or MDERCs to cover the user's compliance obligation at all times.

(iii) The user shall acquire additional DERCs or MDERCs during the use period if the user determines that he does not possess enough DERCs or MDERCs to cover the entire use period. The user must acquire additional credits as allowed under this section prior to the shortfall, or the user will be in violation of this section.

(iv) Source operators may acquire and use only DERCs or MDERCs listed on the Registry.

(B) Use limitations. A DERC or MDERC may be used to meet a regulatory requirement or demonstrate compliance, except as prohibited by this paragraph. A DERC or MDERC may not be used:

(i) before it has been acquired by the user;

(ii) for netting to avoid the applicability of federal and state NSR requirements;

(iii) to meet FCAA requirements for:

(I) new source performance standards under §111;

(II) lowest achievable emission rate standards under
§173(a)(2);

(III) best available control technology standards under
§165(a)(4);

(IV) HAP standards under §112, including the requirements
for maximum achievable control technology;

(V) standards for solid waste combustion under §129;

(VI) requirements for a vehicle inspection and maintenance
program under §182(b)(4) or (c)(3);

(VII) ozone control standards set under §183(e) and (f);

(VIII) clean fueled vehicle requirements under §246;

(IX) motor vehicle emissions standards under §202;

(X) standards for nonroad vehicles under §213;

(XI) requirements for reformulated gasoline under §211(k);

(XII) requirements for Reid vapor pressure standards under §211(h) and (i);

(iv) to allow an emissions increase of an air contaminant that exceeds the limitations of §106.261(3) or (4) or §106.262(3) of this title (relating to Facilities (Emission Limitations), and Facilities (Emission and Distance Limitations)) except as approved by the executive director;

(v) to exceed any allowable emission level, except as follows:

(I) In ozone nonattainment areas, permitted facilities may use DERCs and MDERCs to exceed permit allowables by no more than 25 tons for NO_x or 5 tons for VOC 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 use must extend beyond a 24-hour period;

(II) At permitted facilities in counties or portions of counties designated as attainment or unclassified, DERCs and MDERCs 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 §52.21(b)(23), as approved by the executive director prior to use. This use is limited to one exceedance up to 12 months, within any 24-month period per use strategy. The user must demonstrate that there will be no adverse impacts from the use of DERCs or MDERCs at the levels requested.

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

(vii) 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.

(C) Use of DERCs or MDERCs for NSR offsets.

(i) The user must obtain the executive director's approval prior to the use of specific DERCs or MDERCs to cover, at a minimum, one year of operation of the new or modified source in the NSR permit.

(ii) The NSR permit must contain an enforceable requirement that the source obtain at least one additional year of offsets before continuing operation in each subsequent year.

(D) Chapter 117 compliance. Any DERC or MDERC for NO_x which is used to comply with the provisions of Chapter 117 of this title must meet all applicable provisions of §117.570 of this title and shall then be subject to all applicable provisions of §117.570 of this title in addition to the requirements of this section.

(E) Calculation of DERCs or MDERCs needed.

(i) The amount of DERCs or MDERCs needed to demonstrate compliance or meet a regulatory requirement is calculated as follows:

$$AE - MSAE = \text{DERCs or MDERCs needed}$$

where:

AE = estimated actual emissions for the use period

MSAE = the most stringent allowable emission level

for the use period

(ii) The amount of DERCs or MDERCs needed must be rounded up to the nearest ton.

(iii) The user must possess 10% more DERCs or MDERCs than are needed, as calculated in clause (i) of this subparagraph, to ensure that the source's environmental contribution retirement obligation will be met in accordance with subparagraph (G)(i) of this paragraph.

(iv) If the amount of DERCs or MDERCs needed to meet a regulatory requirement or to demonstrate compliance is greater than 10 tons, an additional 5% of the DERCs or MDERCs needed, as calculated in clause (i) of this subparagraph, must be acquired to ensure that sufficient DERCs are available to the user with an adequate compliance margin.

(v) The amount of DERCs or MDERCs 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 must also purchase and retire enough DERCs or MDERCs to meet the offset ratio requirement in the user's ozone nonattainment area. The user must purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher.

(vi) DERCs or MDERCs that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion of the calculated environmental contribution not attributed to actual use is also available.

(F) Notice of intent to use. A notice of intent to use must be submitted to the Registry in accordance with the following requirements:

(i) DERCs or MDERCs may be used only after the user has submitted the notice to the Registry;

(ii) the notice must be submitted at least 45 days prior to the first day of the use period if the generator is a stationary source, and 90 days if the generator is a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months;

(iii) a copy of the notice 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.

(iv) the notice for a stationary or area source user must include the following information for each use:

(I) the name, address, county, telephone number, contact person, permit or standard exemption numbers, and account number of the user, the unique FIN and EPN identification numbers for each emission point,

(II) the name of the owner and/or operator of the user source,

(III) the applicable state and federal requirements that the DERCs will be used to comply with and the intended use period,

(IV) the amount of DERCs needed,

(V) the baseline emission rate, activity level, and total emissions for the applicable emission points,

(VI) the expected emission rate, activity level, and total emissions for the applicable emission points,

(VII) the most stringent emission rate and the most stringent emission level for the applicable emission points, considering all applicable regulatory requirements,

(VIII) a complete description of the protocol used to calculate the amount of DERCs needed,

(IX) the actual calculations performed by the user to determine the amount of DERCs needed,

(X) the date on which the DERCs were acquired or will be acquired,

(XI) the DERC generator and the serial numbers of the DERCs acquired or to be acquired,

(XII) the price of the DERCs acquired or the expected price of the DERCs to be acquired, and

(XIII) a statement that due diligence was taken to verify that the DERCs were not previously used, that the DERCs were not generated as a result of actions prohibited under this regulation, and that the DERCs will not be used in a manner prohibited under this regulation.

(v) the notice for a mobile source user must include information as required in §114.200 and §114.201 of this title.

(vi) the notice must include a certification of use, which must contain certification under penalty of law by a responsible official of the user source 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.

(vii) a user may submit a notice late in the case of an emergency, but the notice must be submitted before the DERCs can be used. The user must include a complete description of the emergency situation in the notice of intent to use. All other notices submitted less than 45 days prior, or 90 days prior for a mobile source, to use will be considered late and in violation.

(viii) the user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating source in the notice of intent to use. The executive director will certify or reject the generating source's emission reduction within 14 days of receiving the notice of intent to use from the user if the generator is a stationary source and 30 days if the generator is a mobile source. If the generator's credits are rejected or the notice of generation is incomplete, the use of DERCs by the user may be delayed by the executive director. The user cannot use any DERCs that have not been certified by the executive director. The executive director may reject the use of DERCs by a source if the credit and use cannot be demonstrated to meet the requirements of this section.

(G) Actual DERC or MDERC use.

(i) The user shall calculate:

(I) the amount of DERCs or MDERCs used, including the amount of DERCs or MDERCs retired to cover the environmental contribution associated with actual use; and

(II) the amount of DERCs or MDERCs not used, including the amount of excess DERCs or MDERCs that were purchased to cover the environmental contribution but not associated with the actual use, and available for future use.

(ii) A report of use must be submitted to the Registry in accordance with the following requirements:

(I) a report of use must be submitted within 90 days after the end of the use period;

(II) the report must be submitted within 90 days of the conclusion of each 12-month use period, if applicable;

(III) the report 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:

(-a-) purchase price of the DERCs or MDERCs obtained prior to the current use period,

(-b-) the actual amount of DERCs or MDERCs possessed during the use period,

(-c-) the actual emissions during the use period for VOC and NO_x;

(-d-) the actual amount of DERC or MDERCs used;

(-e-) the actual environmental contribution; and

(-f-) the amount of DERC's or MDERCs available for
future use.

(iii) 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.

(iv) The Registry shall not contain proprietary information.

(H) Compliance burden and enforcement.

(i) The user is responsible for assuring that a sufficient quantity of
DERCs or MDERCs is acquired to cover the applicable source's emissions for the entire use period.
The user should ensure that the credits are real, surplus, and properly quantified DERCs or MDERCs
for purchase.

(ii) The user is in violation of this section if the user does not possess
enough DERCs or MDERCs to cover the credit need for the use period. If the user possesses an
insufficient quantity of DERCs or MDERCs to cover its compliance need, the user will be out of
compliance for the entire use period, unless the user can demonstrate otherwise. Each day the user is
out of compliance may be considered a violation.

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

This agency hereby certifies that the repeal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on November 19, 1997.