

The commission proposes 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 the proposal. Since the proposed changes to §101.29 are extensive, the commission has determined that it is administratively more efficient to repeal §101.29 and replace it with a new §101.29.

EXPLANATION OF PROPOSED RULES

This rule proposal will expand 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). Commission staff has prepared an issues paper that describes in more detail the background and provisions of the proposed rule. Copies of this issues paper may be obtained by contacting Susan Blevins at (512) 239-1296, or by mail at the commission, Office of Air Quality, MC 161, P.O. Box 13087, Austin, Texas 78711-3087.

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. Additionally, this proposal 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.

The commission has proposed new definitions in paragraph (a) to establish the terms used in this section. The requirements for banking and trading ERCs and MERCs remain unchanged except to add the ability to use credits as an alternative means of compliance with Chapter 115 and 117 control requirements. The proposal requires that any source opting to use credits to comply with RACT requirements must retire, as an environmental contribution, an additional 10% of the amount of credits

needed to cover the source's compliance obligation. The proposal also establishes a timeline for review of applications associated with use of credits for Chapter 115 and Chapter 117 compliance.

The proposal includes provisions for the generation and use of DERCs and MDERCs in §101.29(d). A DERC or MDERC is traded in units of one ton of the following pollutants: VOC, NO_x, carbon monoxide, sulfur dioxide, and particulates with an aerodynamic diameter of less than or equal to a nominal 10 microns (as appropriate for MDERCs). The start date for the generation of DERCs and MDERCs is the effective date of this proposed section. Reductions that occurred prior to the effective date of the section, and that are still surplus on that date, may be registered as a credit if a notice of generation is submitted within six months after the effective date of the section. The proposed section requires that three notifications be made to the commission: notification of generation, notice of intent to use, and notice of use. The proposed section establishes the information to be submitted in these notices.

The proposed rule provides a six-month window after the effective date of the rule for sources to convert any applicable ERCs to DERCs, if desired. During this time, a source may request to convert ERCs to DERCs, provided the reduction meets the requirements of the DERC portion of the rule. The procedure for converting ERCs to DERCs involves multiplying the amount of given ERCs (expressed in tons per year) by the number of years and/or fraction of a year since the ERC was generated. The number of DERCs thus derived must be rounded down to the nearest ton, and the resulting DERC value is expressed in tons. The entire ERC will be converted to DERCs, and may not be converted back. Once the six-month window has passed, a credit will be certified as either an ERC or DERC and may

not be converted. After that time, future generation of credits will be locked in as either ERCs or DERCs.

The provisions of the proposed section do not relieve a non-permitted source from obtaining necessary state authorization for construction and modifications. However, it is intended that such a source could eliminate short term increases from its nonattainment or prevention of significant deterioration netting calculations by acquisition of credits. Under the proposed section, a permitted facility would be allowed, on a limited basis, to exceed its permitted allowable by using DERCs and MDERCs. The agency staff believes that such an exceedance would not make a significant contribution of air contaminants to the atmosphere and therefore may be exempt from permitting requirements under Health and Safety Code, §382.057.

Participation in the program is voluntary; however, all DERCs and MDERCs traded must be listed on the commission Registry and the selling price of the credits is required to be disclosed. DERCs and MDERCs will be certified by the commission upon receipt of a notice of intent to use. Sources are required to own the credits prior to use, and to acquire an additional 5% credit above the amount needed in order to cover the compliance margin. At the time a credit is used, the source must retire, as an environmental contribution, an amount equal to 10% of the credit used.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be no significant fiscal implications

anticipated for state and local governments as a result of administration or enforcement of the proposed sections. The proposal expands trading options as an alternative means of complying with nonattainment new source review offset provisions of Chapter 116, as well as with the emission control provisions of Chapters 115 and 117. The proposed rules would provide more flexibility, enabling sources to comply with rule requirements in a more cost-effective manner.

PUBLIC BENEFIT

Mr. Minick has also determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of implementing the sections will be the ability to satisfy Federal Clean Air Act amendments and the United States Environmental Protection Agency requirements, and potential early VOC and NO_x emission reductions in ozone nonattainment areas. Also, the proposed section requires that 10% additional credits beyond the source's rule compliance obligation be retired as an environmental benefit. As the program is voluntary, there are no economic costs anticipated for any individual required to comply with these sections as proposed.

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

COASTAL MANAGEMENT PLAN

The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et. seq.), 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 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 the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. This proposal provides a flexible, cost-effective alternative approach to rule compliance by allowing emissions banking and trading. If adopted, it will not authorize any new sources of air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

PUBLIC HEARING

A public hearing on this proposal will be held in Austin on July 8, 1997, at 10:00 a.m. in Building F, Room 2210 at the Texas Natural Resource Conservation Commission complex, located at 12100 North IH-35, Park 35 Technology Center, Austin. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments may be mailed to Heather Evans, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 96158-101-AI. Comments must be received by 5:00 p.m., July 10, 1997. For further information, please contact Susan Blevins, Office of Air Quality, at (512) 239-1296.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The repeal is proposed under the Texas Health and Safety Code, 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.

The proposed repeal implements Health and Safety Code, §382.017.

§101.29 Emission Banking. (Repeal.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on May 28, 1997.

The new section is proposed under the Texas Health and Safety Code, 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.

The proposed new section implements Health and Safety Code, §382.017.

§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) 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.

(5) 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.

(6) 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.

(7) Baseline emissions - The stationary source's total 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. For sources in existence less than 24 months, a shorter time period not less than 12 months may be considered by the executive director.

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

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

(10) 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.

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

(12) 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.

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

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

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

(16) Mobile discrete emission reduction credit (MDERC) - a credit that is surplus, generated by a mobile source as set forth in §114.29 of this title (relating to Accelerated Vehicle Retirement Program) or §114.39 of this title (relating to Mobile Emission Reduction Credit Program), and quantified after the period the reductions were made.

(17) 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.

(18) 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.

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

(20) 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.

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

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

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

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

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

(26) 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.

(27) 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 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 the 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 and State 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 §114.29(f) of this title and §114.39(d) and (e) 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.

(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 (b)(1) and is approved by the executive director:

(i) the permanent shutdown of equipment 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 §114.29(f) and 114.39(d) and (e) 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 §114.29 and §114.39 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 ERC 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. MERC's will be determined and certified using the methodologies provided in §114.29 and §114.39 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 and MERCs. ERCs and MERCs 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) MERC use limitations. 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. For ERCs which are to be used for compliance with the requirements of Chapter 115 or 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. For all other ERC applications not qualified for registration by the executive director, the applicant shall be notified in writing, within 60 calendar days of receipt of the application, of the reasons for denying the application.

(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 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 being in attainment, 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 ozone attainment area in the state of Texas.

(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.

(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 being in attainment in the state 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.

(L) Public information. All information submitted with a notice or report is public information and will not be considered confidential. Any information marked as confidential will not be accepted as part of the submittal and will be returned to the source. All 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 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. The amount of DERC 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. The amount of MDERCs will be quantified in accordance with §114.29(f), §114.39(d) or (e) of this title as appropriate. For the purposes of quantifying MDERCs, the terms "VMT" represents the actual vehicle miles traveled over the time period for which credit is desired, and the term "n" represents 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 DERCs 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 and data used 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 §114.39 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 its 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 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)) or §106.262(3) except as approved by the executive director;

(iv) 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);

(v) to exceed any allowable emission level, except for permitted facilities, which 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. 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; or

(vi) to exceed the user's allowable emission level up to the prevention of significant deterioration levels as provided in 40 Code of Federal Regulations §52.21(b)(23), unless approved by the executive director prior to use in attainment areas only. The user must demonstrate that there will be no adverse impacts from the use of DERCs or MDERCs at the levels requested.

(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, when the generator is a stationary source and 90 days when 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 and data used 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 §114.29 and §114.39 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 requirements of this section are not met.

(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.

(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.

The agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on May 28, 1997.