

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §101.29, Emission Credit Banking and Trading. In addition, the commission proposes new §101.300, Definitions; §101.301, Purpose; §101.302, General Provisions; §101.303, Protocols; §101.304, Program Audits; §101.350, Definitions; §101.351, Applicability; §101.352, General Provisions; §101.353, Allocation of Allowances; §101.354, Allowance Deductions; §101.356, Allowance Banking and Trading; §101.358, Emission Monitoring and Compliance Demonstration; §101.359, Reporting; §101.360, Level of Activity Certification; §101.370, Definitions; §101.371, Purpose; §101.372, General Provisions; §101.373, Protocols; and §101.374, Program Audits. The repeal and new sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the Texas state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Houston/Galveston (HGA) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides (NO_x) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the NO_x waiver were based on early base-case episodes which marginally exhibited model performance in accordance with EPA modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national

ozone standard. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and NO_x reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to EPA in May 1998 became complete by operation of law. However, EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations

of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VI); identification of the level of reductions of VOC and NO_x necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or NO_x reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of NO_x reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of NO_x reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to

close the remaining gap in NO_x emissions. The modeling included in this proposal indicates that a gap of an additional 81 tons per day (tpd) of NO_x reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The Houston nonattainment area will need to ultimately reduce NO_x more than 750 tons per day to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved.

The proposed emissions banking and trading program has been designed to offer flexibility in generating and using emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credits (DERCs), and mobile discrete emission reduction credits (MDERCs). Flexibility has been built into the proposed rules to create incentives for the early or permanent retirement of volatile organic compounds (VOC) and nitrogen oxides (NO_x) emissions. The intent of the proposed rules is to also streamline the emissions banking and trading program by combining the stationary credits with mobile credits to achieve continuity within the banking programs. The proposed new §§101.300 - 101.304 are to be grouped into Subchapter H, Division 1, Emission Credit Banking and Trading. The proposed rules consolidate the requirements for generating, using, banking, and trading ERCs and MERCs. The proposed rules are intended to achieve consistency between the rules governing the use of ERCs/MERCs and DERCs and MDERCs. The proposed rules also address concerns raised by the EPA regarding current rules on how reductions are calculated as surplus and to ensure that emission reductions are not double-counted, that is, not banked as credits and relied upon as SIP reductions. These proposed sections would reduce the life of ERCs/MERCs generated after January 1, 2001 to five years to restrict the use of ERCs/MERCs to meet current environmental conditions. The rules would require the registration of emission reductions as ERCs/MERCs within 180 days of the actual reduction and add recordkeeping requirements to sources generating or using ERCs/MERCs.

The proposed new §§101.350 - 101.354, 101.356, 101.358 - 101.360 are to be grouped into Subchapter H, Division 3, Mass Emissions Cap and Trade Program. These proposed sections will implement a mandatory annual NO_x emission cap on all existing stationary sources located in the Houston/Galveston

(HGA) ozone nonattainment area that emit more than ten tons or more per year (tpy) of NO_x and that have SIP emission requirements in 30 TAC §117.106, Emission Specifications for Attainment Demonstrations, §117.206, Emission Specifications for Attainment Demonstrations, and §117.475, Emission Specifications. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of NO_x emissions. NO_x is a precursor gas that reacts with VOCs in the presence of sunlight to form ground-level ozone. This NO_x cap would be established at levels demonstrated as necessary to allow HGA to attain the national ambient air quality standard (NAAQS) for ozone. The proposed cap would initially be implemented on January 1, 2002 at historical emission levels, with three mandatory annual reductions until achieving the final cap by January 1, 2005. These proposed sections would also require all new or modified sources in HGA to obtain unused allowances from other sources already participating under the cap to offset any increased NO_x emissions.

At this time, the commission proposes to cap only those sources located in the eight-county HGA area. The commission will continue to evaluate ozone control strategies and may extend the cap and trade program to include other regions of the state in future rulemaking.

The proposed new sections §§101.370 - 101.374 are to be grouped into Subchapter H, Division 4, Discrete Emission Credit Banking and Trading. The proposed rules consolidate the requirements for generating, using, banking, and trading DERCs and MDERCs. The proposed rules are intended to achieve consistency between the rules governing the use of ERCs/MERCs and DERCs/MDERCs. The proposed rules also address concerns raised by the EPA regarding current rules on how reductions are

calculated as surplus and to ensure that emission reductions are not double-counted, that is, not banked as credits and relied upon as SIP reductions.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

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SECTION BY SECTION DISCUSSION

DIVISION 1

The proposed new §101.300 would contain the definitions to be used within Subchapter H, Emissions Credit Banking and Trading, Division 1, Emission Credit Banking and Trading. The definitions of “Activity,” “Actual emissions,” “Area Source,” “Certified,” “Emission Reduction Credit (ERC),”

“Emission Reduction Strategy,” “Generator,” “Permanent,” “Quantifiable,” and “Shutdown” were defined in §101.29 and are proposed to be transferred unchanged to §101.300.

The following definitions are proposed to be moved from §101.29 to §101.300 and amended.

“Applicable emission point” would be revised to refer to the emission point generating an emission reduction or using an emission credit. This revision will allow for consistency with the use of terms throughout the proposed rule language. The definition of “Baseline” would be amended to limit the emissions occurring prior to a reduction strategy to levels not to exceed the most recent level of emissions reported in the emission inventory used for SIP determinations. The definition of “Baseline activity” would be amended to describe a source’s actual level of activity based on actual data averaged over any consecutive two calendar year periods during the most recent year of emissions inventory used for SIP determinations or subsequent year(s). For sources in existence less than 24 months or not having two complete calendar years of data, a shorter time period, not less than 12 months, may be considered by the executive director. The definition of “Baseline emission rate” would be amended to refer to the source’s rate of emissions per unit of activity during the baseline activity period. The definition of “Curtailement” would be amended to mean a reduction in activity level at any stationary or mobile source. The definition of “Mobile emission reduction credit (MERC or mobile credit)” would be amended to be a credit representing the amount of emission reductions from a mobile source strategy. These emission reductions are voluntary and must be in addition to compliance with requirements of state and federal regulations. MERCs are any enforceable, permanent, and quantifiable emission reduction (exhaust and/or evaporative) generated by a mobile source, which has been banked in accordance with the rules of the commission. MERCs can be banked, purchased, traded, and sold to

meet clean air mandates for specified air programs, which can be applied to the emission reduction obligations of another air quality source or to air quality attainment goals. “Most stringent allowable emissions level” would be amended to include a reference to state emission limits. The definition of “Ozone season” would be revised to be the portion of the year when ozone monitoring is required to occur in a specific geographic area. This amendment removes specific references to dates for a given nonattainment area. “Protocol” would be amended to refer to replicable and workable methods for mobile, stationary, or area sources. “Real reduction” would mean a reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions. “Surplus” would be amended to refer to an emission reduction which is not otherwise required of a source by any state or federal law, regulation, or agreed order and is beyond the emissions level utilized for SIP determinations. “User” would be amended to refer to the owner or operator which acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

The following new definitions are proposed for addition to §101.300. “Baseline emissions” would be defined as the source’s total actual emissions based on the baseline activity and baseline emission rate. An “Emission credit” would be newly defined as a credible emission reduction such as an “Emission reduction credit” or “Mobile emission reduction credit.” A new definition of “Emission reduction” would be added as an actual reduction of emissions from a stationary or mobile source. “Mobile emission baseline” would be newly defined as a mobile source reduction that occurs prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline could be calculated by either use of measured emissions of an appropriately sized sample of the participating mobile sources using an approved EPA test

procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's mobile emissions factor model or other applicable model. The baseline cannot be higher than the emissions that are estimated in the SIP for that vehicle. "Mobile source" would be defined as on-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipments, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels). A "Mobile source baseline activity" would be newly defined as the mobile source's level of activity during the applicable mobile source baseline year. "Mobile source baseline emissions" would be newly defined as the mobile source's total emissions based on the product of mobile source baseline activity and mobile source baseline emission rate. "Source" would be a point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

The proposed new §101.301 states that the purpose of Division 1 is to allow an operator of a source to generate and use emission credits. The wording of this section would be revised from the previous language in §101.29 to refer to both ERCs and MERCs as emission credits, unless the rule language refers to specifically only one of these emission credits. This new section would also state that participation in the program is voluntary.

The proposed new §101.302 would contain the general provisions for the Emission Credit and Trading Program (Division 1). The wording of this section would be revised from the previous language in §101.29 to refer to both ERCs and MERCs as emission credits, unless the rule language refers to only one of these emission credits. The certification requirements of an emission credit would be revised to only allow credits which have occurred after the most recent year of emissions inventory used for SIP determinations and to require the source's annual emissions to have been represented in the emissions inventory of the most recent year of emissions inventory used for SIP determinations prior to the submittal of the emission credit application. Rule language would be added to this division which would not allow emission credits which are certified as ERCs or MERCs to be recertified as emission credits under any other division within Subchapter H. The rules associated with eligible sources would be changed to be consistent with the previous language of §101.29 for discrete emission credits. The changes would allow for stationary sources (including area sources), mobile sources and stationary sources (including area sources), and mobile sources associated with agencies under §101.30 to be eligible to generate emission credits. Effective January 2, 2001, the life of an emission credit would be revised to be available for use for 60 months from the date of the reduction except to the extent regulatory changes reduce or invalidate the reduction. Administratively complete applications for ERCs

which are received prior to January 2, 2001 would continue to be available for 120 months from the date of the reduction except to the extent regulatory changes reduce or invalidate the reduction. The geographic scope would remain the same as previously stated in §101.29 except the new rule language would allow for the trading of emission credits achieved in the county, state, or nation, provided the applicant can demonstrate an improvement to the air quality in the county of use and which is approved by the executive director. To be consistent with the previous language of §101.29, rule language would be added which allows for the possibility of the trading of emission credits to be discontinued by the executive director, with commission approval, as a remedy for problems caused by localized trading of emission credits. Recordkeeping requirements would be revised to require users to maintain a copy of all notices and information submitted to the registry for at least two years after the beginning of the use period along with the name, emission point number (EPN), and facility identification number (FIN) of each unit using emission credits, the amount of emission credits being used, and the specific identification number of the emission credits being used. The rule language concerning public information would be changed to be consistent with the discrete emission reduction requirements language previously located in §101.29(d)(1)(L). All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of an emission credit is public information and will not be considered confidential. All non-confidential notices and information regarding generation, use, and availability of emission credits may be obtained from the Office of Permitting, Remediation, and Registration (OPRR). In addition, rule language is proposed which allows the executive director to prohibit a company from participating in the program if the company has violated or abused the program.

The proposed new §101.303 would outline the required protocols of generating, calculating, certifying and registering, using, and transferring emission credits. This section would require emission credits to be determined based on established EPA protocols or when available, actual monitoring results are calculated using good engineering practices. The existing procedures in §101.29 regarding the various means for generating emission credits would be transferred unchanged to this section. The rule addresses procedures for calculating MERCs although most mobile source strategies will likely only qualify for MDERCs, MERCs would be available for mobile source strategies that are ongoing, creating the same amount of mobile reduction each year. Language would be added which does not allow the generation of credits if the emissions have been transferred to another unit. This additional language would eliminate the potential of a company shutting down a unit to generate emission credits, but altering the operation of another piece of equipment to take the place of the shut down unit and thereby increasing the emissions at the altered unit. The new rules would require companies to apply for emission credits within 180 days of generation, except that those sources that have implemented strategies prior to the effective date of this rule will be given until June 1, 2001 to apply. When applying for credits, new language would be added to the rules specifying the information which must be submitted. The information, which is to be submitted on the EC-1 Form, includes the information necessary for the executive director to review the application in accordance with the proposed rules and to properly administer the program. As is currently stated in §101.29, applicants will be notified in writing if the executive director denies the application. Although it has been the commission's accepted practice, the proposed new rule language specifically states that emissions credits will be determined and certified to the nearest tenth of a ton per year. As is currently stated in §101.29, the proposed section would state that emission credits are determined and certified by using EPA methodologies,

monitoring results, or otherwise good engineering practices, and all emission credits are deposited in the registry and reported as available credits until they are used, withdrawn, or expired. As is currently stated in §101.29, the proposed section would list the mechanisms which can be used to make emission credits enforceable. Rule language would be added which lists the OPCRE-1 form as an enforceable mechanism to establish new emission limits for grandfathered sources when applying for emission credits. Proposed rule language would also be added to make MERCs enforceable by registering them on a form approved by the executive director or by an agreed order that will set new maximum allowable mobile source emission limits which are not required to be implemented by a rule. The proposed language would limit the use of emission credits if there are permits under the same account number which contain a condition or conditions which preclude such use. As is currently stated in §101.29, the proposed section will allow ERCs to be used for offsets, mitigation offsets, and alternative compliance with reasonably available control technology (RACT) or SIP requirements. As has been the commission's practice, the proposed language would add the use of emission credits for netting only by the original applicant if the emission credits have not been previously sold or otherwise used and would also allow for emission credits to be used for other provisions as allowable within the guidelines of local, state, and federal laws. The proposed section would allow MERCs to be used as offsets, mitigation offsets, alternative compliance with RACT or SIP requirements, compliance with fleet requirements as allowed by the Texas Clean Fleet Program Requirements for Motor Vehicle Fleets, or other provisions as allowed within the guidelines of local, state, and federal laws. The requirements for compliance with §117.570, Trading, except for the equations for determining 30-day rolling average emission limits, would be changed to allow for emission reduction calculations in accordance with the methodology of this new division. These revisions would replace the former equations previously

located in §117.570. The equations for calculating 30-day rolling average emission limits would be relocated from §117.570 to this section. The procedure for notifying the commission of the intent to use emission credits in accordance with 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, §115.950, Emissions Trading, and §117.570 and any other commission rules would be revised to require the submittal of the EC-3 Form. The timelines for the review of this submittal would be removed from the rule language, revised, and included in the Emission Banking and Trading Program Technical Guidance Package. As previously required in §101.29, an additional 10% of emission credits would be retired as an environmental contribution. The proposed section would state that the user of credits shall submit an EC-3 Form along with the emission credit certificates when using the credits as offsets in accordance with 30 TAC Chapter 116, Division 7, Emission Reductions: Offsets, or for alternative compliance with 30 TAC Chapters 114, 115, or 117. The procedure for transfer would be revised to require emission credit certificate owners to submit an EC-4 Form, including the sale price, to the agency prior to the transfer. Transfers would only be considered final after the executive director has completed the transaction. This is a change to the existing language in §101.29, which requires notification within 30 days of the transfer. As currently stated in §101.29, the proposed section would state that the emission credits may be withdrawn from the registry at any time prior to the expiration date of the credit, and that emission reductions which have been certified as credits and have expired may still be used by the original owner for netting in accordance with §116.150. The proposed section would require applicants requiring offsets for a new source review permit to identify the credits at the time of permit issuance and to provide the original emission credit certificate prior to operation. It should be noted that emission credits will be evaluated to ensure that they are surplus at the time of use. The proposed section would require that any other uses of credits

be approved by the executive director prior to commencement of the intended use. Rule language is proposed which would allow an applicant to file a motion of reconsideration with the executive director within 60 days of denying a use of emission credits.

The proposed new §101.304 would require the executive director to perform an audit of the emission reduction program within three years of the effective date of the new division and every three years thereafter. The audit would evaluate the timing of credit generation and use, the impact of the program on the SIP, availability and cost of credits, compliance by participants, and any other elements chosen by the executive director.

DIVISION 3

The proposed new §101.350 would contain the definitions to be used with Subchapter H, Emissions Credit Banking and Trading, Division 3, Mass Emission Cap and Trade Program. The definition of "Allowance" would be the authorization to emit one ton of NO_x during a control period. The definition of "Authorized account representative" would be the responsible person who is authorized in writing, to transfer and otherwise manage allowances. The definition of "Banked allowance" would be an allowance which is not used to reconcile emissions in the designated year of allocation, but which is carried forward for up to one year and noted in the compliance or broker account as banked. The definition of "Broker" would be a person not required to participate in the requirements of this division who opens an account under this division for the purpose of banking and trading allowances. The definition of "Broker account" would be the account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this

division. The definition of "Compliance account" would be the account where allowances held by a source or multiple sources are recorded for the purposes of meeting the requirements of this division. Sources not under common ownership or control may have separate compliance accounts. The definition of "Control period" would be the 12-month period beginning January 1 and ending December 31 of each year. The initial control period would begin January 1, 2002. The definition of "Level of activity" would be the amount of activity at a source measured in terms of production, fuel use, raw materials input, 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). The definition of "Person" would be, for the purpose of issuance of allowances under this division, an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation.

The new section refers to the following predefined definitions: "Houston/Galveston (HGA) ozone nonattainment area" as defined in §101.1; and "Source" as defined in §101.1.

The proposed new §101.351 would state that the requirements of Division 3 apply to all stationary NO_x sources in the HGA nonattainment area subject to the emission specifications under §§117.106, 117.206, and 117.475 and that have a designed capacity to emit ten tons or more per year of NO_x.

The proposed new §101.352 would state that allowances may only be used to meet the requirements of Division 3 and cannot be used to meet or exceed the limitations of any annual emission limitation authorized under Chapter 116, Subchapter B, any applicable rule or law, or for netting purposes to avoid the applicability of federal and state new source review (NSR) requirements. The new section would require that each source subject to this division shall hold a quantity of allowances in its compliance account equal to or greater than its total emission of NO_x emitted during the control period just ending. The cap and trade program would begin January 1, 2002. Beginning February 1, 2003, each source would be required to hold the amount of allowance it used in the previous year's control period. The new section would allow unused allowances to be banked as ERCs provided that an enforceable and permanent reduction of annual allowances is approved by the executive director, and all applicable requirements of Divisions 1 or 4 of Chapter 101, Subchapter H are met. The new section states that allowances may be simultaneously used to satisfy offset requirements for new or modified sources subject to federal nonattainment NSR requirements as provided in Chapter 116, Division 7 but not for netting requirements. The new section states that all allowances would be allocated, transferred, or used as whole allowances and that one compliance account shall be used for multiple sources located at the same property and under common ownership or control. The new section states that an allowance would not constitute a security or a property right. The commission would maintain a registry of the allowances in each compliance account. The registry would not contain proprietary information. Requests for information identified as proprietary when submitted to the agency would be subject to the procedures set out in the Texas Public Information Act.

The proposed new §101.353 describes how allowances will be allocated to individual sources. Initially, for any source operating prior to January 1, 1997, allowances will be based on its actual level of activity averaged over 1997, 1998, and 1999 multiplied by the higher of the source's actual emission factor averaged over 1997, 1998, and 1999 (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117. For a source not operating prior to January 1, 1997, but operating prior to January 1, 2000, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) multiplied by the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117. For a source authorized under Chapter 106 or 116 but not operating prior to January 1, 2000, allowances will be equal to the source's authorized level of activity multiplied by the higher of source's authorized emission factor or the source's emission factor listed in Chapter 117. The purpose for using a two- or three-year average, when available, is to limit the effect of a year in which the activity level was uncharacteristically low or high. The purpose for using the higher of the source's actual or allowable emission factor or its emission factor as listed in Chapter 117 is to prevent penalizing those sources already emitting or authorized to emit at levels equal to or lower than the requirements in Chapter 117. For the 2003 and 2004 control periods, a source's allowances will be reduced each year by one-third of the difference between its initial allocation in 2002 and calculated final allocation for 2005. For the 2005 and subsequent control periods, allowances will be allocated based on historical activity levels and emission factors as listed in Chapter 117 that are demonstrated necessary to reach attainment. The section states that any new source which has submitted an administratively complete application by January 2, 2001 will not be allocated any

allowances. These new sources will be required to obtain allowances from other sources already participating in the cap and trade program or by obtaining DERC or MDERC. The section states that if a source emits more NO_x than what was held in the compliance account on January 31 following the control period, that allocation of allowances for the next control period will be reduced by the amount equal to the emission exceeding the compliance account plus an additional 10%. The section states that allowances would be allocated by January 1 of each control period, beginning in 2002, and that the annual allocation of allowances may be adjusted for any new SIP requirement and that allowances may be added or subtracted from compliance accounts after reviewing the trading reports required in §101.356 and the annual reporting requirements in §101.359. Proposed language would allow the executive director to deviate from the allocation methodology in extenuating circumstances.

The proposed new §101.354 describes how allowances will be subtracted out of compliance accounts. The section states that allowances are deducted in whole tons based on the source's level of activity during a control period and multiplied by the source's emission factor during the control period. The section states that a source shall hold a quantity of allowances equal to or greater than its actual NO_x emissions by February 1 for the preceding control period.

The proposed new §101.356 describes how allowances may be traded and banked. Allowances may generally be banked for future use or traded during the control period for which they are allocated or the following control period. Any allowance not used for compliance may be banked or traded for use in the following control period, with the exception of unused allowances allocated under proposed §101.353(a)(1)(C). The section states that allowances that aren't expired or used could be traded at any

time after they have been allocated. Only authorized account representatives may trade allowances. Trade requests would be made through the submittal of a completed form ECT-2. As part of the application, the account representative shall report the price paid per allowance. Trades would be completed through the executive director and would be considered complete when the executive director issues a letter finalizing the trade. This section would allow for the use of discrete emission credits in accordance with Chapter 101, Subchapter H, Division 4 in place of allowances for compliance with Division 3. Currently, the proposed §101.356(d) only allows NO_x credits to be used as an alternative to allowances under the mass cap and trade program. The commission is soliciting comments on how to address allowing certain VOC reductions which produce equal or better ozone results in lieu of NO_x reductions for compliance with the cap.

The proposed new §101.358 states that if monitoring is required of a source under a federal or state program, that monitoring or other data shall be used to determine actual NO_x emissions. Sources not required to monitor shall calculate actual NO_x emissions using good engineering practices, including calculation methodologies in general use and accepted in NSR permitting.

The proposed new §101.359 states that sources shall submit by March 31 a completed ECT-1 detailing the amount of actual NO_x emission for the preceding control period and shall include the methods used in determining the NO_x emissions and a summary of all final trades.

The proposed new §101.360 states that all sources required to participate in the cap and trade program would be required to submit a completed ECT-3 certifying their historical level of activity by June 30, 2001. This information will be used to calculate each source's allocations.

DIVISION 4

The proposed new §101.370 would contain the definitions to be used within Subchapter H, Emissions Credit Banking and Trading, Division 4, Discrete Emission Credit Banking and Trading. The definitions of “Activity,” “Actual emissions,” “Area Source,” “Certified,” “Emission Reduction Strategy,” “Generator,” “Permanent,” “Quantifiable,” “Shutdown,” and “Use period” were defined in §101.29 and are proposed to be transferred unchanged to §101.370.

The following definitions are proposed to be moved from §101.29 to this section and amended.

“Applicable emission point” will be revised to refer to the emission point generating an emission reduction or using an emission credit. This revision would allow for consistency with the use of terms throughout the proposed rule language. The definition of “Baseline” would be amended to limit the emissions occurring prior to a reduction strategy to levels not to exceed the most recent level of emissions reported in the emission inventory used for SIP determinations. The definition of “Baseline activity” would be amended to describe a source’s actual level of activity based on actual data averaged over any consecutive two calendar year period during the most recent year of emissions inventory used for SIP determinations or subsequent year(s). For sources in existence less than 24 months or not having two complete calendar years of data, a shorter time period, not less than 12 months, may be considered by the executive director. The definition of “Baseline emission rate” would be amended to refer to the source’s rate of emissions per unit of activity during the baseline activity period. The definition of “Curtailed” would be amended to mean a reduction in activity level at any stationary or mobile source. The definition of “Discrete emission reduction credit” would be revised to be a credible emission reduction that is created during a generation period, quantified after the period in which

emission reductions are made, and expressed in tons. This change provides consistency with the new terms and definitions of the proposed rules. The definition of “Ozone season” would be revised to the portion of the year when ozone monitoring is federally required to occur in a specific geographic area. “Protocol” would be amended to refer to replicable and workable methods for mobile and stationary sources. The definition of “Real reduction” would mean a reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions. “Surplus” would be amended to refer to an emission reduction which is not otherwise required of a source by any state or federal law, regulation, or agreed order and is beyond the emissions level utilized for SIP determinations. “User” would be amended to refer to the owner or operator which acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase. “Use strategy” would be revised to refer to the use of “emission credits” which is more consistent with the terms in the proposed new rules.

The following new definitions are proposed for addition to §101.370. “Baseline emissions” would be defined as the source’s total actual emissions based on the baseline activity and baseline emission rate. A “Discrete emission credit” would be newly defined as a credible emission reduction such as a “Discrete emission reduction credit” or Mobile discrete emission reduction credit.” A new definition of “Emission reduction” would be added as an actual reduction of emissions from a stationary or mobile area source. The “Generation period” would be defined as the discrete period of time, not exceeding 12 months, over which a discrete emission reduction credit is created. A “Mobile discrete emission reduction credit (MDERC or discrete mobile credit)” would be defined as a credit that is surplus, generated by a mobile source strategy. It is a creditable emission reduction that is created

during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons. "Mobile emissions baseline" is proposed to be mobile emissions which occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline could be calculated by either using measured emissions of an appropriately-sized sample of the participating mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's mobile emissions factor model or other applicable model. The baseline cannot be higher than the emissions which are estimated in the SIP for that vehicle. "Mobile source baseline activity" would be defined as the mobile source's level of activity during the applicable mobile source baseline year. A definition for "Mobile source baseline emissions" would be the source's total actual mobile source emissions based on the mobile source activity and the mobile source emissions rate. "Most stringent allowable emissions rate" would refer to the emission rate of a source, considering all limitations required by applicable local, state, and federal regulations. The term "Strategy activity" would be the source's level of activity during the discrete emission reduction generation period and "Strategy emission rate" would be the source's emission rate during the discrete emission reduction generation period. "Source" would be a point of origin of air contaminants, whether privately or publically owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or multiple sources.

The proposed new §101.371 states that the purpose of Division 4 is to allow an operator of a source to generate and use discrete emission credits. The wording of this section will be revised from the previous language in §101.29 to refer to both DERs and MDERs as discrete emission credits, unless the rule language refers to specifically only one of these discrete emission credits. This new section will also state that participation in the program is voluntary.

The proposed new §101.372 would contain the general provisions for the Discrete Emission Credit and Trading Program. The wording of this section will be revised from the previous language in §101.29 to refer to both DERs and MDERs as emission credits, unless the rule language refers to only one of these discrete emission credits. The section would specify to which pollutants the program will apply and is unchanged from those currently in §101.29. The section would state that DERs and MDERs must be real, quantifiable, and surplus. The certification requirements of a discrete emission credit would be revised to only allow credits which have occurred after the most recent year of emissions inventory used for SIP determinations and to require the source's annual emissions prior to the submittal of the emission credit application to have been represented in the emissions inventory of the most recent year of emissions inventory used for SIP determinations. Rule language would be added which prohibits emission credits certified as DERs or MDERs from being recertified as emission credits under any other division within Subchapter H. The proposed section would allow for stationary sources (including area sources), mobile sources, and stationary sources (including area sources) associated with agencies under §101.30 to be eligible to generate and use emission credits, if there are no permits under the same account number which contain a condition or conditions precluding the use of emission credits. The proposed rule language will allow DERs and MDERs to be available for

use after the executive director has received a notice of generation and the discrete emission credits have been reviewed and deemed creditable. This is a change from previous procedures where emission credits were placed in the registry upon receipt of the notice and generation and were not reviewed for credibility until a notice of intent to use was received by the executive director. This change will allow for the emission reduction program and the discrete emission reduction program to operate on a more consistent basis. The proposed section states that DERCs and MDERCs may be used anytime after certification and do not expire. The geographic scope will remain the same as currently stated in §101.29, except the new rule language will allow for the trading and use of emission credits generated in other counties, states, or nations provided that a demonstration has been made and approved by the executive director showing that the reduction in the area where the credit was generated causes an improvement in air quality in the county where the credit is used. As currently stated in §101.29, the trading of discrete emission credits may be discontinued by the executive director, in whole or in part, with commission approval. As currently stated in §101.29 for areas having an ozone season less than 12 months, discrete emission credits generated outside the ozone season may not be used during the ozone season. The commission will maintain a registry that lists all discrete emission credits available or used. The proposed section would require the generator and user of discrete emission credits to maintain a copy of records for a minimum of five years regarding the generation and use of credits. The records shall include at a minimum the name, emission point, and facility identification number of each source using discrete reduction credits, the amount of discrete reduction credits being used, and the specific identification number of the credit being used. As currently stated in §101.29, all information submitted with any application to generate or use discrete emission credits may not be submitted as confidential and discrete emission credits do not constitute a property right. The proposed

rules state that the executive director has the authority to prohibit either the generation or the use of discrete reduction credits if the executive director determines that the company has violated any of the requirements of the program or has abused the privileges provided by the program. Rule language concerning the start date for the discrete emission reduction program would be removed, since this program is currently ongoing.

The proposed new §101.373 outlines the required protocols of generating, calculating, certifying and registering, using, and transferring discrete emission credits. This section will require discrete emission credits, to be determined based on established EPA protocols or when available, actual monitoring results or calculated using good engineering practices. There are no changes from the existing §101.29 regarding the various means for generating discrete emission credits. The proposed section would revise the equation for calculating the amount of DERCs generated to use the lower of the baseline emission rate or the most stringent emission rate. This revision will allow for the correct calculation of DERCs if the baseline emission rate was exceeding the emission rate required by local, state, or federal requirements. As currently stated in §101.29, the proposed section would require DERCs to be rounded down to the nearest ton. The proposed section limits the generation period for DERCs to five years. The proposed section would not allow a source to generate discrete emission credits for any emissions exceeding its allowable emission limit. The proposed section deletes language from the existing §101.29 which restricted reductions used for netting from being generated as DERCs. The proposed section states what requirements and data must be documented to calculate MDERCs. The existing language located in §101.29 regarding registration and certification of emission credits would remain the same and would be relocated to this proposed section. The proposed section would

add language detailing what information, at a minimum, would be required to generate mobile discrete emission credits. The information, which is to be submitted on DEC-1 Form, includes the information necessary for the executive director to review the application in accordance with the proposed rules and to properly administer the program. It should be noted that, for continuing credits, each application will be reviewed for creditability at the time of submittal in addition to the time of strategy implementation. Although it has always been the accepted practice, the proposed new rule language specifically states that discrete emissions credits will be determined and certified to the nearest ton. The proposed section would include new language regarding the review of discrete emission reduction registrations for credibility upon receipt and that applicants being denied registration of discrete emission credits would be notified of such denial in writing. The proposed section states that discrete emission credits will be reviewed and certified based on actual monitoring data, EPA methodology, or other commission approved protocols. In addition, rule language is added which states that discrete emission credits will be deposited in the registry and will be available for use until they are used, withdrawn, or expire. The proposed compliance and burden language is essentially the same as currently stated in §101.29. The user would be responsible for ensuring that the discrete emission credits are certified and certification, by the executive director, does not relieve the user on any other responsibilities. There are no proposed changes to the existing §101.29 language regarding what discrete emissions can or cannot be used for; however, the language would be reorganized into subparagraphs which state what the discrete emission credits can be used for and a subparagraph which states what they cannot be used for. The proposed language would relocate the equations which provide flexibility to the 30-day rolling average emission limits, and the new maximum daily emission limit for source caps as defined in Chapter 117. The commission proposes to change the equation used

to calculate the amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement to be consistent with the terms proposed for this division, and to add language which would be consistent with the procedures and methodologies proposed within this division. The equations for calculating 30-day rolling average emission limits would be relocated to this section unmodified. There are no changes proposed to the existing requirements for additional credits needed as compliance margins or for environmental contributions. As previously stated in §101.29, the calculated discrete emission credits will be rounded up to the nearest ton and the user must retire 10% more than are needed. The amount of discrete emission credits needed for NSR offsets would remain equal to the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR program. As previously stated in §101.29, discrete emission credits which are not used during the use period would remain surplus and available for use or transfer by the holder. As previously stated in §101.29, a notice of intent to use the DEC-2 Form would be submitted to inform the executive director of the intent to use discrete emission credits. The information required to be submitted on the DEC-2 Form would remain the same as previously stated in §101.29. The proposed section would include a list of the required information to be submitted when a mobile source user intends to use discrete emission credits. The proposed language listing the requirements for a user to notify the executive director of actual discrete emission credit use would remain the same as previously stated in §101.29 with the exception of added language requiring the user to submit the information on a DEC-3 Form. The proposed language regarding compliance burden and enforcement for discrete emission credit users would remain the same as previously stated in §101.29.

The proposed new §101.374 is a relocation, and there will be no wording changes to previously existing language in §101.29, concerning auditing of the DERC program.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for each year of the first five-year period the proposed amendments are in effect, there will be fiscal implications which are not anticipated to be significant for any single unit of state or local government as a result of administration or enforcement of the proposed amendments.

The proposed amendments would consolidate existing requirements for generating, using, banking, and trading ERCs, MERCs, DERCs, and MDERCs into two separate programs. The section containing the original program would be repealed. The two programs would be grouped under two divisions.

Division 1, Credit Banking and Trading, would handle ERC and MERC issues. Division 4, Discrete Emission Credit Banking and Trading, would handle DERC and MDERC issues. The creation of two separate programs would facilitate improved management and control of the programs. The proposed amendments would update definitions, make administrative changes to Divisions 1 and 4, and should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the use of emission credits to meet emission reduction requirements.

In addition to creating Divisions 1 and 4, the proposed amendments would create Division 3, The Mass Emission Cap and Trade Program. This program would implement and manage a mandatory annual NO_x emission cap, phased-in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA ozone nonattainment area consisting of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The NO_x emission cap only affects sources in the HGA that have the capacity to emit ten tons of NO_x or more per year, and that have SIP emission requirements. Examples of equipment and processes at sources that would be affected by the proposed amendments include: electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and carbon monoxide (CO) boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units. The agency would allocate to a source a number of allowances (NO_x emissions in tons) which a source would be allowed to emit during the calendar year. The source is not allowed to exceed this number of allowances granted unless they obtain additional allowances from another facility's surplus allowances. Allowance trading should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

The commission is required to submit a new SIP revision by the end of 2000 which will bring the HGA into attainment by 2007. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

There will be fiscal impacts to state and local government facilities if they elect to participate in the voluntary programs under Division 1 and 4 programs; however, the total number of state or local government sites affected by these provisions is unknown. Division 1 covers facilities in nonattainment counties and Division 4 covers facilities statewide. The costs associated with participation in Division 1 and 4 programs would result from the purchase of emission credits and would be dependent on the market value of the emission credits. The current cost of credits in the HGA ranges from \$750 per ton for DERCS/MDERCS to \$3,600 per ton per year for ERCs/MERCs. Actual costs will be dependent on availability and demand. Total costs to state and local government sites that elect to participate in Division 1 and 4 programs will depend on the amount of emission credits purchased.

Although the total number is unknown, some of the approximately 6,000 pieces of equipment at sources in the HGA that are affected by Division 3 provisions will be owned and operated by state or local governments. The cost of allowances in similar programs nationwide has ranged from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. Actual costs for allowances will be dependent upon market demand and availability. The total cost to state and local government sites will depend on the total number of allowances purchased.

Most of the sources which will have to comply with the proposed rules are currently subject to air permits and are already being inspected for compliance. Consequently, only a limited number of additional facilities will need to be inspected for compliance with the proposed amendments; therefore, there are no significant fiscal implications for the agency as a result of implementation of the proposed amendments.

PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined for each of the first five years the proposed amendments to Chapter 101 are in effect, the public benefit anticipated as a result on implementing the amendments will be the reduction of emissions of NO_x in the HGA to a level that will allow the area to meet the NAAQS for ozone.

The proposed amendments would consolidate existing requirements for generating, using, banking, and trading ERCs, MERCs, DERCs, and MDERCs into two separate programs. The section containing the original program would be repealed. The two programs would be grouped under two divisions.

Division 1, Credit Banking and Trading, would handle ERC and MERC issues. Division 4, Discrete Emission Credit Banking and Trading, would handle DERC and MDERC issues. The creation of two separate programs would facilitate improved management and control of the programs. The proposed amendments would update definitions, make administrative changes to Divisions 1 and 4, and should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the use of emission credits to meet emission reduction requirements.

In addition to creating Divisions 1 and 4, the proposed amendments would create Division 3, The Mass Emission Cap and Trade Program. This program would implement and manage a mandatory annual NO_x emission cap, phased in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA ozone nonattainment area consisting of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The NO_x emission cap only affects sources in the HGA that have the capacity to emit ten tons of NO_x or more per year, and that have SIP emission requirements. Examples of equipment and processes at sources that would be affected by the proposed amendments include: electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units. The agency would allocate to a source a number of allowances (NO_x emissions in tons) which a source would be allowed to emit during the calendar year. The source is not allowed to exceed this number of allowances granted unless they obtain additional allowances from another facility's surplus allowances. Allowance trading should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

There will be fiscal impacts to persons and businesses if they elect to participate in the voluntary programs under Division 1 and 4 programs; however, the total number private entities affected by these provisions is unknown. Division 1 covers facilities in nonattainment counties and Division 4 covers facilities statewide. The costs associated with participation in Division 1 and 4 programs would result from the purchase of emission credits and would be dependent on the market value of the emission credits. The current cost of credits in the HGA area ranges from \$750 per ton for DERCS/MDERCS to \$3,600 per ton per year for ERCs/MERCs. Actual costs will be dependent on availability and demand. Total costs to persons and businesses that elect to participate in Division 1 and 4 programs will depend on the amount of emission credits purchased.

There are approximately 6,000 pieces of equipment at sources in the HGA that are affected by Division 3 provisions, some of which will be owned and operated by persons and businesses. The cost of allowances in similar programs nationwide has ranged from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. Actual costs for allowances will be dependent upon market demand and availability. The total cost to persons and businesses will depend on the total number of allowances purchased.

SMALL AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are not anticipated for small or micro-businesses as a result of administration or enforcement of the proposed amendments. Under the proposed amendments, small or micro-businesses electing to participate in the program established by Divisions 1 and 4 would pay the same unit cost for emission credits as other participants. There is no feasible way to reduce the unit

costs for small businesses. However, participation in this portion of the program is voluntary. Under the Mass Emissions Cap and Trade Program as established by Division 3, small or micro-businesses located in the HGA would pay the same unit costs for the purchase of allowances as other businesses. Of the 6,000 identified pieces of equipment at sources in the HGA, some will be owned and operated by small or micro-businesses. Examples of likely equipment at sources operated by small or micro-businesses include boilers, process heaters, and internal combustion engines. The rules exempt sources which emit less than ten tons per year. There is no feasible way to further reduce the impact of the proposed amendments for small businesses.

DRAFT REGULATORY IMPACT ASSESSMENT

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. Proposed Divisions 1 and 4 create a voluntary mechanism which provides regulatory flexibility for compliance with state and federal emission limitations and do not add mandatory regulatory requirements or required costs. The proposed Division 3 would affect owners and operators of new and existing stationary sources emitting NO_x subject to §§117.106, 117.206, and 117.475 requirements in the HGA nonattainment area. The commission has determined the proposed rulemaking in Division 3 of Chapter 101 meets the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225, but proposed rulemaking in Divisions 1 and 4 is not. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Existing sources would

be limited to NO_x emission levels under an emissions cap based on historical operating data and source specific emission rates determined by Chapter 117. New stationary sources would be required to identify a source(s) of allowances equal to allowable emissions prior to commencing operation. All sources subject to this division would be required to hold a quantity of allowances in their compliance account by January 31 following the end of a control period, which is equal to or greater than the total emissions from the preceding control period. The cost of allowances in similar programs nationwide has ranged from approximately \$500 to \$5,000 per allowance (ton), depending on availability and demand. Actual costs in the HGA nonattainment area will be dependent upon market demand and availability. The commission is proposing these sections as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for “implementation, maintenance, and enforcement” of the primary NAAQS in each

air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include “enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter,” (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are

adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded “based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.” The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such

as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017 as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. These sections are proposed as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the rules will not burden private real property. The proposed new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances created under these rules are not property rights. Consequently, these proposed sections do not meet the definition of a takings under Texas Government

Code, §2007.002(5). Although the proposed rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the FCAA, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the FCAA, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the FCAA, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a NO_x strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined 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 Resources 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 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP

goals and policies in accordance with the regulations of the Coastal Coordination Council and has determined that the proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. If adopted, the new sections will reduce and cap emissions of NO_x in the HGA nonattainment area to a level that would allow attainment of the NAAQS for ozone. No new contaminants will be authorized by these rules, and a reduction of NO_x emissions should occur. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

The proposed new sections under Divisions 1, 3, and 4, if adopted, would become part of the state's ozone attainment strategy; therefore, these amendments would be submitted as part of the SIP. As a result, the proposed sections and any allowances allocated under these sections would become applicable requirements under the federal operating permit program.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations:

September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer,

Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 1998-089-101-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

The repeal is proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed repeal implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

SUBCHAPTER A : GENERAL RULES

§101.29

§101.29. Emission Credit Banking and Trading.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT BANKING AND TRADING

§§101.300 - 101.304

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§101.300. Definitions.

The following words and terms, when used in this division, 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 source which is either generating an emission reduction or using an emission credit.

(4) **Area source** - Any source included 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 quantity of emissions reported in the most recent year of emissions inventory used for state implementation plan (SIP) determinations.

(6) **Baseline activity** - The source's level of activity based on the unit's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over any consecutive two calendar year period following or including the most recent year of emissions

inventory used for SIP determinations or subsequent year(s) which precede the emission reduction strategy or credit use period. For sources in existence less than 24 months or not having two complete calendar years of activity data, a shorter time period of not less than 12 months may be considered by the executive director.

(7) **Baseline emission rate (BER)** - The source's rate of emissions per unit of activity during the baseline activity period.

(8) **Baseline emissions** - The source's total actual emissions based on the product of baseline activity and BER.

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

(10) **Curtailement** - A reduction in activity level at any stationary or mobile source.

(11) **Emission Credit** - An emission reduction credit (ERC) or mobile emission reduction credit (MERC).

(12) **Emission Reduction** - An actual reduction of emissions from a stationary or mobile source.

(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 which are surplus.

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

(16) **Mobile emissions baseline** - Mobile emissions that occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline can be calculated by either using measured emissions of an appropriately sized sample of the participating mobile sources using an approved United States Environmental Protection Agency (EPA) test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's on-road or non-road mobile emissions factor models, or other model as applicable. To ensure that mobile credits are surplus, mobile source baseline emissions estimates for each year of the proposed mobile source control program must be the same as, or lower than, those used, or proposed to be used, in the SIP in which the control program is proposed.

(17) **Mobile emission reduction credit (MERC or mobile credit)** - A credit representing the amount of emission reductions from a mobile source strategy. These emission

reductions are voluntary and must be in addition to compliance with requirements of state and federal regulations. MERCs are any enforceable, permanent, and quantifiable emission reduction (exhaust and/or evaporative) generated by a mobile source, which has been banked in accordance with the rules of the commission. MERCs can be banked, purchased, traded, and sold to meet clean air mandates for specified air programs, which can be applied to the emission reduction obligations of another air quality source or to air quality attainment goals.

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

(19) **Mobile source baseline activity** - Will be based on an estimate for each year for which the credits are to be generated. After the initial year, the annual estimates should reflect:

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

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

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

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

(20) **Mobile source baseline emission** - The source's total actual mobile source emissions based on the product of mobile source action and the mobile source emissions rate.

(21) **Most stringent allowable emissions rate** - The emission rate of a source, considering all limitations required by applicable local, state, and federal regulations.

(22) **Ozone season** - The portion of the year when ozone monitoring is federally required to occur in a specific geographic area.

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

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

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

(26) **Real reduction** - A reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions.

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

(28) **Source** - As defined in §101.1(90) of this title (relating to Definitions).

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

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

§101.301. Purpose.

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

§101.302. General Provisions.

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs) and nitrogen oxides (NO_x) may qualify as emission credits. Reductions of other pollutants do not qualify as emission credits under this division. Reductions of one 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.

(1) emission reduction credits (ERCs) are generated from reductions beyond those required. To be certified as an emission credit, an emission reduction must be enforceable, permanent, quantifiable, real, and surplus. The emission credit must be surplus at the time it is created, as well as when it is used. The certified reduction must have occurred after the most recent year of emissions inventory used for state implementation plan (SIP) determinations for VOC and NO_x, and the source's annual emissions prior to the emission credit application must have been reported or represented in the emissions inventory used for SIP determinations.

(2) mobile emission reduction credits (MERCs) are generated from reductions beyond those required, and derived from a calculation of the annual difference between the mobile source emissions baseline and the projected emissions level after the MERC strategy has been put in place. To be certified as a MERC, an emission reduction must be enforceable, permanent, quantifiable, real, and

surplus. The emission credit must be surplus at the time it is created, as well as when it is used. The certified reduction must have occurred after the most recent year of emissions inventory used for SIP determinations for VOC and NO_x, the mobile source's emissions must have been represented in the emissions inventory used for SIP determinations, and the applicable mobile sources must have been included in the attainment demonstration baseline.

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

(c) Eligible sources. The following sources are eligible to generate emission credits:

(1) stationary sources (including area sources);

(2) any mobile source;

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

(d) Life of an emission credit.

(1) If an ERC is used prior to its expiration date, the ERC is effective for the life of the applicable user source.

(2) Effective January 2, 2001, an ERC is available for use for 60 months from the date of the emission reduction except to the extent regulatory changes occur after the date of reduction that reduce the certified amount or invalidate the entire reduction for affected emission points. ERCs certified or applied for prior to January 2, 2001 shall be available for use for 120 months from the date of the emission reduction except to the extent regulatory changes occur after the date of the emission reduction that reduce the certified amount or invalidate the entire reduction for affected emission points.

(e) Geographic scope. Only emission reductions generated in ozone nonattainment areas can be certified. The trading of emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern. An emission credit must be used in the nonattainment area in which it is generated unless:

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

(2) the emission credit was generated in an ozone nonattainment area which has an equal or higher nonattainment classification than the ozone nonattainment area of use, and a

demonstration has been made and approved by the executive director to show that the emissions from the ozone nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the ozone nonattainment area of use; or

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

(f) The registry. All emission credit generators and users must register with the executive director. A notice submitted by a generator or user will 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.

(g) Recordkeeping. The user must maintain a copy of all notices and backup information submitted to the registry during, and for at least two years after, the beginning of the use period. The user must also make such records available upon request to representatives of the executive director, United States Environmental Protection Agency (EPA), and any local enforcement agency. The records shall include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each unit using emission credits;

(2) the amount of emission credits being used by each unit;

(3) the specific number, name, or other identification of emission credits used for each unit.

(h) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of an emission credit is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information, may result in the rejection of the emission reduction. All non-confidential notices and information regarding the generation, use, and availability of emission credits may be obtained from the Office of Permitting, Remediation, and Registration.

(i) Authorization to emit. An emission credit created under this division is a limited authorization to emit VOC and/or NO_x, unless otherwise defined, in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. An emission credit does not constitute a property right. Nothing in this division may be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

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

§101.303. Protocols.

(a) All source categories must use a United States Environmental Protection Agency (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 EPA approved protocol does not exist, the following applies.

(1) Emission reduction credits (ERC) - The amount of emission credits in tons per year 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 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 emission credits are created or used.

(2) Mobile emission reduction credits (MERC) - The amount of emission credits in tons per year will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices. The generator must collect relevant data sufficient to characterize the process emissions of the affected pollutant, and the process activity level for all representative phases of mobile source operation during the period under which mobile credits are created.

(c) Emission credit generation.

(1) ERCs may be generated using one of the following methods or any other method that is approved by the executive director:

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

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

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

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

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

(2) MERCs may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this rule, and subject to the approval of the commission.

(d) Emission credit calculation.

(1) 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.

(2) The quantity of MERCs must be calculated from the annual difference between the mobile source emissions baseline and the projected emissions level after the MERC strategy has been put in place. The projected emissions must be based on the best estimate of the actual in-use emissions of the replacement or substitute on-road or non-road vehicles or transportation system. Any estimate of a projected annual mobile source emissions level based on an assumption of reduced consumer service or transportation service would not be allowed without the support of a convincing analytical justification of the assumption. Emission baselines for quantifying MERCs should include the following information and data as appropriate, but not be limited to:

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

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

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

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

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

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

(3) Emission credits cannot be generated from a source if the emissions have been transferred from that source to another source.

(e) Emission credit registration and certification.

(1) Stationary sources with potential ERCs must submit an ERC application (EC-1 Form), within 180 days of the implementation of the emission reduction strategy to the Office of Permitting, Remediation, and Registration (OPRR). Sources that have implemented a strategy prior to the effective date of this rule, must submit an application by June 1, 2001. Applications will be subjected to a review to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and an ERC certificate will be issued to the owner.

(2) Mobile sources with potential MERCs must submit an emission credit application (EC-1 Form), within 180 days of implementation of the strategy to the OPRR if an obligation is exceeded, or if it is clearly demonstrated that actual mobile emission reductions are generated. Sources that have implemented a strategy prior to the effective date of this rule, must submit an application by June 1, 2001. The commission will then issue a MERC certificate(s) to the person, company, business, organization, or public entity generating the mobile emission reduction, upon approval of the application. A MERC certificate will be issued by the executive director which indicates the total amount of certified emission credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires.

(3) The application for a stationary source generator must include the following information, where applicable for either an ERC or MERC, on the EC-1 Form for each pollutant reduced at each applicable emission point:

(A) the name, address, county, telephone number, contact person, permit or permit by rule numbers, account number of the generator, and the unique facility identification number and emission point number of the applicable emission points;

(B) the name of the owner and/or operator of the generator source;

(C) the date of the reduction;

(D) a complete description of the generation activity;

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

(F) the amount of emission credits generated;

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

(H) the baseline emission activity, baseline emission rate, baseline total emissions, emissions inventory data from the most recent year of emissions inventory used for state implementation plan determinations and emissions inventory data for the two consecutive years used to determine baseline activity for each applicable pollutant and emission point;

(I) the most stringent emission rate and the most stringent emission level for the applicable emission point, considering all the local, state, and federal applicable regulatory requirements,

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

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

(L) a statement that the emission reductions on which the emission credits are based are real, surplus, and are based on an eligible emission reduction strategy listed in subsection (c)(1) of this section.

(4) The application for a mobile source strategy must include the following information, where applicable for either an ERC or MERC, on the EC-1 Form for each pollutant reduced at each applicable mobile source strategy:

(A) the name, address, county, telephone number, and contact person;

(B) the name of the owner and/or operator of the generator source;

(C) the date of the reduction;

(D) a complete description of the generation activity;

(E) the amount of emission credits generated;

(F) the mobile source baseline emission activity, mobile source baseline emission rate, mobile source baseline total emissions, and the mobile source strategy;

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

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

(I) a statement that the emission reductions on which the emission credits are based are real, surplus, and based on an eligible emission reduction strategy that is prohibited.

(5) The applicant will be notified in writing if the executive director denies the emission credit application. The applicant may submit a revised application at any time.

(f) Emission credit practices.

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

(2) ERCs are based on EPA methodologies, when available, actual monitoring results, when available, or otherwise calculated using good engineering practices including calculation

methodologies in general use and accepted in NSR permitting. The executive director shall have the authority to inspect and request information to assure that the emissions reductions have actually been achieved.

(3) MERCs will be determined and certified using:

(A) EPA methodologies, when available;

(B) actual monitoring results, when available;

(C) otherwise calculated using the most current EPA MOBILE model or other model as applicable; or

(D) otherwise calculated using creditable emission reduction measurement or estimation methodologies which satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies.

(4) All emission credits are deposited in the registry and reported as available credits by the Emissions Banking and Trading Program until they are used, withdrawn, or expire.

(5) Compliance burden and enforcement.

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

(i) amending or altering 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 facility which is authorized by a standard exemption or permit by rule;

(iv) registering on an OPCRE-1 Form the emission reduction and the new maximum allowable emission limit for any facility which is not required to have a permit or qualifies for a permit by rule; or

(v) obtaining 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 permit by rule.

(B) MERCs will be made enforceable by one of the following methods:

(i) by registering, on a commission-provided form (MERC-1), that the MERCs are permanent, quantifiable, real, and surplus; or

(ii) by obtaining an agreed order which sets a new maximum allowable mobile source emission limits, which is not required to be implemented by a rule.

(6) Unless there are permits under the same commission account number which contain a condition or conditions precluding such use, ERCs may be used as the following:

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

(B) mitigation offsets for action by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans);

(C) 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 volatile organic compounds (VOCs)) and Chapter 117 of this title (relating to the Control of Air Pollution from Nitrogen Compounds);

(D) netting by the original applicant, if not used, sold, or otherwise relied upon; or

(E) other provisions as allowable within the guidelines of local, state, and federal laws.

(7) MERCs may only be used for the following purposes:

(A) an alternative means of compliance with VOC and NO_x reduction requirements as provided in Chapters 115 and 117 of this title;

(B) complying with fleet requirements to the extent allowed by the Texas Clean Fleet Program requirements for motor vehicle fleets;

(C) providing offsets for a new major source or major modifications;

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

or

(E) other provisions as allowable within the guidelines of local, state, and federal laws.

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

(A) for emission credits used as offsets, the method for determining the number of emission credits 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

(B) for emission credits used as compliance with Chapter 114, Chapter 115, or Chapter 117 of this title, the number of emission credits needed should be determined in accordance with the requirements of this section plus an additional 10% to be retired as an environmental contribution; or

(C) for emission credits used to comply with §117.210 of this title (relating to Source Cap) and §117.223 of this title (relating to Source Cap), sources may reduce the amount of emission reductions otherwise required by complying with the following equations instead of the equations in §117.210(c)(1) and (2) and §117.223(b)(1) and (2) of this title.

Figure: 30 TAC §101.303(f)(8)(C)

Figure: 30 TAC §101.303(f)(8)(C)

$$\text{New 30-day rolling average emission limit (lb/day)} = \sum_{i=1}^N \left[(H_i \times R_i) + \left(EC_i \times \frac{2000}{365} \right) \right]$$

Where:

R_i , in lb/MMBtu, is defined as in §117.223(b)(1) of this title

i = each emission unit in the source cap

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

H_i = actual daily heat input, in MMBtu per day, as calculated according to §117.223(b)(1) of this title

EC_i = emission credit used for each unit, in tons per year (for ERCs or MERCs), generated in accordance with subsection (b) of this section. If EC_i is from a unit not subject to the emission specifications of §117.105 or §117.205 of this title, this term becomes EC_i/F , where F is the offset ratio for the ozone nonattainment area where the unit is located (e.g. 1.2 for Beaumont/Port Arthur and 1.3 for Houston/Galveston).

d = the number of days in the use period

and :

$$\text{New maximum daily emission limit (lb/day)} = \sum_{i=1}^N \left[(H_{Mi} \times R_i) + \left(EC_i \times \frac{2000}{365} \right) \right]$$

Where:

i and N are defined as in the first equation in this paragraph

R_i , in lb/MMBtu, is defined as in §117.223(b)(1) of this title

H_{Mi} = the maximum daily heat input, in MMBtu/day, as defined in §117.223(b)(2) of this title.

d = the number of days in the use period

(D) emission reductions used as compliance with any other applicable program should be determined in accordance with the requirements of the appropriate chapter and section and must contain at least 10% extra to be retired as an environmental contribution.

(9) Review schedule.

(A) For emission credits which are to be used for compliance with the requirements of Chapter 114, Chapter 115, or Chapter 117 of this title, the user must submit a Notice of Intent to Use, (EC-3 Form) at least 90 days prior to the planned utilization of the emission credit. Emission credits may be utilized only after the executive director grants approval of the notice of intent to use.

(B) For emission credits which are to be used as offsets in accordance with Chapter 116 of this title, the user must submit a Notice of Intent To Use Form (EC-3 Form), along with the emission credit certificate when providing the emission credits as offsets.

(10) Emission credits are freely transferable in whole or in part, and may be traded or sold to a new owner any time before the expiration date of the emission credit. The Emissions Banking and Trading Program must be notified by means of an EC-4 Form prior to the transfer. The old certificate must be submitted to the registry. The executive director will issue a new certificate to the emission credit purchaser reflecting the emission credits purchased by the new owner, and a revised certificate to the emission credit seller showing any remaining emission credits available to the original owner. Emission credits may be transferrable only after the executive director grants approval of the transaction.

(11) Emission credits may be withdrawn from the registry by the owner at any time prior to the expiration date of the credit and may be held by the owner. Emission credits may still be used by the original owner as an emission reduction for netting purposes after the emission credits have expired, as provided in §116.150 of this title.

(12) Recording use of emission credits.

(A) Emission credits to be used as offsets in an NSR permit must be identified prior to permit issuance. The original certificate must be submitted prior to operation.

(B) Use of emission credits for purposes other than those specified in subparagraph (A) of this paragraph may not commence until the user has received approval from the executive director. The user must also keep a copy of the emission credit certificate, the notice, and all backup in accordance with §101.303(e) of this section.

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

§101.304. Program Audits.

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

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

(c) The executive director will recommend measures to remedy any problems identified in the audit. The trading of emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(d) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months of the date the audit begins.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

§§101.350 - 101.354, 101.356, 101.358 - 101.360

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§101.350. Definitions.

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Allowance** - The authorization to emit one ton of nitrogen oxides (NO_x) during a control period.

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

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

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

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

(6) **Compliance account** - The account where allowances held by a source or multiple sources are recorded for the purposes of meeting the requirements of this division. Sources not under common ownership or control may have separate compliance accounts.

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

(8) **Houston/Galveston (HGA) ozone nonattainment area** - As defined in §101.1 of this title (relating to Definitions).

(9) **Level of activity** - The amount of activity at a source measured in terms of production, fuel use, raw materials input, 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).

(10) **Person** - For the purpose of issuance of allowances under this division, a person includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation.

(11) **Source** - As defined in §101.1 of this title.

§101.351. Applicability.

This division applies to all stationary nitrogen oxides (NO_x) sources in the Houston/Galveston nonattainment area subject to the emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for

Attainment Demonstration; and Emission Specifications) and which have a design capacity to emit ten tons or more per year of NO_x.

§101.352. General Provisions.

(a) Allowances are valid only for the purposes described in this division and cannot be used to meet or exceed the limitations of any annual emission limitation authorized under Chapter 116, Subchapter B, of this title (relating to New Source Review Permits), or any other applicable rule or law.

(b) Beginning February 1, 2003, and no later than February 1 following the end of every control period, each account, as defined in §101.1(1) of this title (relating to Definitions), shall hold a quantity of allowances in its compliance account that is equal to or greater than the total emissions of nitrogen oxides emitted during the control period just ending. Compliance with the allowance system will begin with the initial control period beginning January 1, 2002.

(c) Unused allowances can be certified as emission reduction credits, provided that:

(1) an enforceable and permanent reduction of annual allowances is approved by the executive director; and

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

(d) Allowances cannot be used for netting requirements to avoid the applicability of federal and state new source review (NSR) requirements.

(e) Allowances may simultaneously be used to satisfy offset requirements for new or modified sources subject to federal nonattainment NSR requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions Offsets).

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

(g) All allowances will be allocated, transferred, or used as whole allowances. To determine the number of whole allowances, the number of allowances will be rounded down when determining excess allowances and rounded up when determining allowances used.

(h) One compliance account shall be used for multiple sources required to participate under this division and located at the same property and under common ownership or control.

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

§101.353. Allocation of Allowances.

(a) Allowances will be allocated according to the requirements of this section.

(1) For the 2002 control period in the Houston/Galveston (HGA) nonattainment area:

(A) for sources operating prior to January 1, 1997, allowances will be equal to the source's actual level of activity averaged over 1997, 1998, and 1999 multiplied by the higher of the source's actual emission factor averaged over 1997, 1998, and 1999 (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds);

(B) for sources not operating prior to January 1, 1997, but operating prior to January 1, 2000, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years multiplied by the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title.

(C) for sources that have submitted an administratively complete application under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and for sources that qualify for a permit by rule under Chapter 106 of this title (relating

to Permits by Rule), but not operating prior to January 1, 2000, allowances will be equal to the source's authorized level of activity multiplied by the source's authorized emission factor.

(2) For the 2003 control period:

(A) for sources with allowances allocated in accordance with paragraph (1)(A) and (B) of this subsection the number of allocations shall be two-thirds of the sum of the number of allocations derived in paragraphs (1) and (4) of this subsection;

(B) for sources with allowances allocated in accordance with paragraph (1)(C) of this subsection, the number of allocations shall be determined according to the following:

(i) for sources operating prior to January 1, 2001, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years multiplied by two-thirds of the sum of the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title and the source's emission factor listed in Chapter 117 of this title;

(ii) for sources not operating prior to January 1, 2001, allowances will be equal to the source's authorized level of activity multiplied by two-thirds of the sum of the higher of

the source's authorized emission factor or the source's emission factor listed in Chapter 117 and the source's authorized emission factor and the source's emission factor listed in Chapter 117.

(3) For the 2004 control period:

(A) for sources with allowances allocated in accordance with paragraph (1)(A) and (B) of this subsection, the number of allocations shall be one-third of the sum of the number of allocations derived in paragraphs (1) and (4) of this subsection.

(B) for sources with allowances allocated in accordance with paragraph (1)(C) of this subsection, the number of allocations shall be determined according to the following:

(i) for sources operating prior to January 1, 2002, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years multiplied by one-third of the sum of the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title and the source's emission factor listed in Chapter 117 of this title;

(ii) for sources not operating prior to January 1, 2002, allowances will be equal to the source's authorized level of activity multiplied by one-third of the sum of the higher of the source's authorized emission factor or the source's emission factor listed in Chapter 117 of this title

and the source's authorized emission factor and the source's emission factor listed in Chapter 117 of this title.

(4) For the 2005 and subsequent control periods allowances will be calculated for each source using the following equation.

Figure: 30 TAC §101.353(a)(4)

Figure: 30 TAC §101.353(a)(4)

$$A = \frac{LA * EF}{2000}$$

Where:

A = number of allowances

LA = level of activity, as defined below:

for sources in the HGA nonattainment area existing prior to 1997, the average level of activity, as certified by the executive director, for 1997, 1998, and 1999, or

for sources not existing prior to 1997 but existing prior to

January 1, 2003, the average level of activity, as certified by the executive director, for the most recent two consecutive calendar years, or

for sources that have submitted an administratively complete application under Chapter 116 of this title and for sources that qualify for a permit by rule under Chapter 106 of this title prior to January 1, 2001 but not operating prior to January 1, 2003, the authorized level of activity until such time two consecutive calendar years of actual level of activity data is available.

EF = emission factor, as listed in §117.106, Emission Specifications for Attainment Demonstration; §117.206, Emission Specifications for Attainment Demonstration; and §117.475, Emission Specifications

(5) For sources submitting applications for permits or qualifying for a permit by rule after January 2, 2001, allowances for each control period or the annual allocation rights shall be acquired from sources already participating under this division, or in accordance with §101.356(d) of this title (relating to Allowance Banking and Trading).

(6) If actual emissions of NO_x during a control period exceed the amount of allowances held in a compliance account no later than January 31 following the control period, allowances for the

next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus an additional 10%.

(b) Allowances will be allocated:

(1) initially, by January 1, 2002;

(2) subsequently, by January 1 of each following year by the executive director, who will deposit allowances into each compliance account.

(c) The annual deposit for any control period may be adjusted to reflect new state implementation plan requirements.

(d) Allowances may be added or deducted from compliance accounts following the review of trading reports required under §101.356 of this title.

(e) In extenuating circumstances, the executive director may deviate from the requirements of this section to determine the amount of allowances to be allocated to a source.

§101.354. Allowance Deductions.

(a) Allowances will be deducted in whole tons from a source's compliance account for a control period based upon the following equation.

Figure: 30 TAC §101.354(a)

Figure: 30 TAC §101.354(a)

$$A = \frac{LA_{CP} * EF_{CP}}{2000}$$

Where:

A = Allowances to be subtracted from the compliance account

LA_{CP} = the level of activity

EF_{CP} = the emission factor for the control period in lb of nitrogen oxides (NO_x)
per unit of activity

(b) On February 1 after every control period, a source shall hold a quantity of allowances in its compliance account that is equal to or greater than the total NO_x emissions emitted during the prior control period.

§101.356. Allowance Banking and Trading.

(a) Allowances not used for compliance during a control period may be banked for use in the following control period or traded except as provided in subsection (b) of this section.

(b) Allowances not used for compliance during a control period which were allocated in accordance with §101.353(a)(1)(C) of this title (relating to Allocation of Allowances) may not be banked for future use or traded.

(c) Allowances which have not expired may be traded at any time after they have been allocated.

(1) Only authorized account representatives may trade allowances.

(2) Trades shall be completed by the executive director following the submittal of a completed ECT-2 Form, Application for Transfer of Allowances. The completed ECT-2 shall include the price paid per allowance. The executive director will issue a letter to the purchaser and seller reflecting this trade. The trade will be considered finalized upon issuance of this letter.

(d) Sources may use nitrogen oxides discrete emission credits (DERCs or MDERCs) which have been generated, acquired, and used in accordance with Division 4 of this subchapter (relating to Discrete Emission Credit Banking and Trading) in place of allowances for compliance with this division.

§101.358. Emission Monitoring and Compliance Demonstration.

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

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

§101.359. Reporting.

Beginning March 31, 2003, for each control period, sources under each compliance account shall submit a completed ECT-1 Form, Annual Compliance Report, to the executive director by March 31 of each year detailing the following:

(1) the amount of actual nitrogen oxides (NO_x)emissions during the preceding control period;

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

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

§101.360. Level of Activity Certification.

No later than June 30, 2001, the owner or operator of any source subject to this division shall certify its historical level of activity by submitting to the executive director a completed ECT-3 Form, Level of Activity Certification, along with any supporting information such as usage records, testing or monitoring data, and production records.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING

§§101.370 - 101.374

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§101.370. Definitions.

The following words and terms, when used in this division, 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, 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** - Shall equal the total emissions during the selected time period, using the unit's actual daily operating hours, production rates, and 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 a discrete emission credit.

(4) **Area source** - Any source included 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 most recent level of emissions reported in the emissions inventory used for state implementation plan (SIP) determinations. 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 source's actual level of activity based on the unit's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over any consecutive two calendar year period including and following the most recent year of emissions inventory used for SIP determinations or subsequent year(s) which precede the emission reduction strategy or credit use period. For sources in existence less than two years, a shorter time period not less than 12 months may be considered by the executive director.

(7) **Baseline emission rate** - The source's rate of emissions per unit of activity during the baseline activity period.

(8) **Baseline emissions** - The source's total actual emissions based on the baseline activity and baseline emission rate.

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

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

(11) **Discrete emission credit** - An emission reduction generated over a discrete period of time, and measured in tons. A creditable emission credit such as a discrete emission reduction credit (DERC) or mobile discrete emission reduction credit (MDERC).

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

(13) **Emission reduction** - An actual reduction of emissions from a stationary or mobile source.

(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, not exceeding 12 months, 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 or discrete mobile credit)** - A credit that is surplus, generated by a mobile source strategy. It is a creditable emission reduction that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons.

(18) **Mobile emissions baseline** - Mobile emissions that occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal

regulations. A valid mobile emission baseline can be calculated by either using measured emissions of an appropriately sized sample of the participating mobile sources using an approved United States Environmental Protection Agency (EPA) test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's on-road or non-road mobile emissions factor models, or other model as applicable. To ensure that mobile credits are surplus, mobile source baseline emissions estimates for each year of the proposed mobile source control program must be the same as, or lower than, those used, or proposed to be used, in the SIP in which the control program is proposed.

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

(20) **Mobile source baseline activity** - The mobile source's level of activity during the applicable mobile source baseline year.

(21) **Mobile source baseline emissions** - The mobile source's total emissions based on the product of mobile source baseline activity and mobile source baseline emission rate.

(22) **Most stringent allowable emissions rate** - The emissions rate of a source, considering all limitations required by applicable local, state, and federal regulations.

(23) **Ozone season** - The portion of the year when ozone monitoring is federally required to occur in a specific geographic area.

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

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

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

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

(28) **Source** - As defined in §101.1 of this title (relating to Definitions).

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

(30) **Strategy activity** - The source's level of activity during the DERC generation period.

(31) Strategy emission rate - The source's level of activity during the DERC generation period.

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

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

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

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

§101.371. Purpose.

The purpose of this division is to allow the operator of a source to generate discrete emission credits by reducing emissions beyond the level required by any local, state, and federal regulation, and to allow the operator of another source to use these credits. Participation under this division is strictly voluntary.

§101.372. General Provisions

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs), nitrogen oxides (NO_x), carbon (CO), sulfur dioxide (SO₂), and particulates with an aerodynamic diameter of less than or equal to a nominal ten microns (PM₁₀) may qualify as discrete emission credits as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, except at such time as modeling demonstrates that one may be substituted for another or as approved by the executive director.

(b) Discrete emission credit requirements.

(1) Discrete emission reduction credit (DERC) - To be creditable as a DERC, an emission reduction must be real, quantifiable, and surplus at the time the discrete emission credit is generated. The creditable reduction must have occurred after the most recent year of emissions inventory used for state implementation plan (SIP) determinations for all applicable pollutants and the source's annual emissions prior to the discrete emission credit application must have been reported or represented in the emissions inventory used for SIP determinations.

(2) Mobile discrete emission reduction credit (MDERC) - To be creditable as an MDERC, an emission reduction must be quantifiable, real, and surplus. The discrete emission credit must be surplus at the time it is created, as well as when it is used. The creditable reduction must have occurred after the most recent year of emissions inventory used for SIP determinations for all applicable

pollutants, the mobile source's emissions must have been represented in the emissions inventory used for SIP determinations, and the mobile sources are in the attainment demonstration baseline. If a mobile reduction is implemented that is not in the baseline for emissions, this would not constitute an emission reduction.

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

(c) Eligible sources include the following:

(1) stationary sources (including area sources);

(2) mobile sources; or

(3) any stationary source (including area sources) 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 a discrete emission credit. A discrete emission credit is available for use after the notice of generation, DC-1 Form, has been received and deemed creditable by the commission registry in accordance with subsection (h) of this section, and may be used anytime thereafter.

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

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

(2) VOC and NO_x discrete emission credits generated in an ozone nonattainment area may be used either in the same ozone nonattainment area in which they were generated, or in any county or portion of a county designated as attainment or unclassified.

(3) VOC and NO_x discrete emission credits generated in an ozone nonattainment area may not be used in any other ozone nonattainment area, except as provided in this subsection.

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

(5) VOC and NO_x discrete emission credits generated in other counties, states, or nations can be used in any attainment or nonattainment county provided a demonstration has been made and approved by the executive director to show that the emission reductions achieved in the other county, state, or nation improves the air quality in the county where the credit is being used.

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

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

(h) The registry. All required notices of discrete emission credit generators and users must be submitted to the registry. A notice submitted by a generator or user will be reviewed for credibility and when deemed certified, 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.

(i) 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. The records shall include, but not necessarily be limited to:

(1) the name, emission point number (EPN), and facility identification number (FIN) of each unit using discrete emission credits;

(2) the amount of discrete emission credits being used by each unit;

(3) the specific number, name, or other identification of discrete emission credits used for each unit.

(j) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of discrete emission credits is public information and may not be submitted as confidential. Any claim of confidentiality for this type of material 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 discrete emission credits may be obtained from the registry.

(k) Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the United States Environmental Protection Agency to terminate or limit such authorization.

(l) Program participation. The executive director has the authority to prohibit a company from participating in discrete emission credit trading 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.

§101.373. Protocols.

(a) All discrete emission credit source categories must use a United States Environmental Protection Agency (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 EPA approved protocol does not exist, the amount of discrete emission credits 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 new source review (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 discrete emission credits are created or used.

(c) Discrete emission credit generation.

(1) Discrete emission reduction credits (DERCs) may be generated by any strategy that reduces a source's emission rate below its baseline and is approved by the executive director, except for the following:

(A) temporary curtailment of an activity at a source;

(B) modification or discontinuation of any activity that is otherwise in violation of a federal, state, or local law;

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

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

(E) emission reductions which have occurred as a result of transferring the emissions to another source;

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

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

(H) 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.

(2) A mobile discrete emission reduction credit (MDERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this rule, and is subject to the approval of the commission.

(d) Discrete emission credits generation calculation.

(1) DERCs, except for shutdowns, are calculated as follows.

Figure: 30 TAC §101.373(d)(1)

Figure: 30 TAC §101.373(d)(1)

If $SA > BA$, then

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

Else if $SA < BA$, then:

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

where:

BER = the lower of the baseline emission rate or the most stringent
emission rate

BA = baseline activity

SER = emission reduction strategy emission rate

SA = emission reduction strategy activity

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

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

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

(D) If a source's emissions exceed its allowable emission limit, the amount of emissions exceeding the limit may not be certified as DERCs.

(2) An MDERC may be calculated from the annual difference between the mobile source emissions baseline and the actual emissions level after the MDERC strategy has been put in place. The MDERC must be based on actual in-use emissions of the replacement or substitute mobile source. Emission baselines for quantifying MDERCs should include the following information and data as appropriate, but not be limited to:

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

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

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

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

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

(e) Registration and certification.

(1) A notice of generation and generator certification (DEC-1 Form), must be submitted to the Office of Permitting, Remediation, and Registration (OPRR) no later than 90 days after the discrete emission reduction strategy activity has been completed, or no later than 90 days after the completion of the first 12 months of generation, if the generation period exceeds 12 months, whichever is sooner. Submission of the DEC-1 Form should continue every 12 months thereafter for each subsequent year of generation.

(2) In the notice for a stationary source, including area source, the generator must include the following information for each pollutant reduced at each applicable emission point:

(A) 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;

(B) the name of the owner and/or operator of the generator source;

(C) the generation period;

(D) a complete description of the generation activity;

(E) 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;

(F) the amount of emission credits generated;

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

(H) the baseline emission activity, baseline emission rate, emission reduction strategy emission rate, emission reduction strategy activity, emissions inventory data from the most recent year of emissions inventory used for state implementation plan determinations and emissions inventory data for the two consecutive years used to determine the baseline activity for each applicable pollutant and emission point;

(I) the most stringent emission rate for the applicable emission point, considering all the local, state, and federal applicable regulatory requirements;

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

(K) the actual calculations performed by the generator to determine the amount of discrete emission credits generated; and

(L) a statement that the emission reductions on which the emission credits DERCs are based are real, surplus, and not based on an emission reduction strategy that is prohibited.

(3) The notice for a mobile source generator must include the following information to verify the credit calculation, but is not limited to:

(A) the name, address, county, telephone number, and contact person;

(B) the name of the owner and/or operator of the generator source;

(C) the date of the reduction;

(D) a complete description of the generation activity;

(E) the amount of discrete mobile source emission credits generated;

(F) the mobile source baseline emission activity, mobile source baseline emission rate, mobile source baseline total emissions, and the mobile source strategy;

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

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

(I) a statement that the discrete mobile source emission reductions on which the MDERCs are based are real, surplus, and not based on a mobile source emission reduction strategy that is prohibited.

(4) Registrations will be reviewed in order to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director.

(5) The applicant will be notified in writing if the executive director denies the notification. The applicant may submit a revised notification at any time.

(f) Discrete emission credit practices.

(1) 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.

(2) The amount of MDERCs will be quantified in tons. MDERCs will be determined and certified based on: EPA methodologies, when available; actual monitoring results, when available; otherwise calculated using the most current EPA MOBILE model; or otherwise calculated using creditable emission reduction measurement or estimation methodologies which satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies. The generator 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 the MDERCs are created or used.

(3) All discrete emission credits are deposited in the registry and reported as available credits until they are used, withdrawn, or expire.

(4) Compliance burden and enforcement.

(A) The generator is responsible for assuring that the discrete emission credits generated are certified.

(B) The user is responsible for ensuring that discrete emission credits which currently reside in the registry and are not certified are certified prior to use.

(5) Discrete emission credits may be used if the following requirements are met.

(A) The user must have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(B) The user must hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(C) The user shall acquire additional discrete emission credits during the use period if the user determines that he does not possess enough discrete emission credits 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.

(D) Source operators may acquire and use only discrete emission credits listed on the registry.

(6) With the exception of uses prohibited in paragraph (7) of this subsection or strictly prohibited in other rules or regulations, discrete emission credits may be used to meet or demonstrate compliance with any mobile or stationary regulatory requirement including the following:

(A) to exceed any allowable emission level, if the following conditions are met:

(i) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than 25 tons for nitrogen oxides (NO_x) or five 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; or

(ii) at permitted facilities in counties or portions of counties designated as attainment or unclassified, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations, §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 discrete emission credits at the levels requested;

(B) as NSR offsets if the following requirements are met:

(i) the user must obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified 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;

(C) compliance with NO_x cap and trade requirements as provided in §101.356(d) of this title (relating to Allowance Banking and Trading).

(D) compliance with §115.950 of this title (relating to Emissions Trading) and §117.570 of this title (relating to Use of Emission Credits for Compliance), as allowed.

(7) A discrete emission credit, under this division, may not be used:

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

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

(C) to meet FCAA requirements for:

(i) new source performance standards under FCAA, §111;

§173(a)(2);

(ii) lowest achievable emission rate standards under FCAA,

(iii) best available control technology standards under FCAA,

§165(a)(4);

(iv) hazardous air pollutants standards under FCAA, §112, including
the requirements for maximum achievable control technology;

(v) standards for solid waste combustion under FCAA, §129;

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

(vii) ozone control standards set under FCAA, §183(e) and (f);

(viii) clean-fueled vehicle requirements under FCAA, §246;

(ix) motor vehicle emissions standards under FCAA, §202;

(x) standards for nonroad vehicles under FCAA, §213;

(xi) requirements for reformulated gasoline under FCAA, §211(k); or

(xii) requirements for Reid vapor pressure standards under FCAA,
§211(h) and (i).

(D) 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;

(E) 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;

(F) 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.

(8) Calculation of discrete emission credits.

(A) A user may use the following equation to calculate the amount of discrete emission credits necessary to comply with §117.223 of this title (relating to Source Cap) instead of the equations in §117.223(b)(1) and (2) of this title.

Figure: 30 TAC §101.373(f)(8)(A)

Figure: 30 TAC §101.373(f)(8)(A)

$$\text{New 30-day rolling average emission limit (lb/day)} = \sum_{i=1}^N \left[(H_i \times R_i) + \left(\frac{DEC_i \times 2000}{d} \right) \right]$$

Where:

R_i , in lb/MMBtu, is defined as in §117.223(b)(1) of this title

i = each emission unit in the source cap

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

H_i = actual daily heat input, in MMBtu per day, as calculated according to §117.223(b)(1) of this title

DEC_i = DEC used for each unit, in tons per year (for ERCs or MERCs) or tons (for DERCs), generated in accordance with subsection (b) of this section. If DEC_i is from a unit not subject to the emission specifications of §117.105 or §117.205 of this title, this term becomes

DEC_i/F , where F is the offset ratio for the ozone nonattainment area where the unit is located (e.g. 1.2 for Beaumont/Port Arthur and 1.3 for Houston/Galveston).

d = the number of days in the use period

and

$$\text{New maximum daily emission limit (lb/day)} = \sum_{i=1}^N \left[(H_{Mi} \times R_i) + \left(\frac{DEC_i \times 2000}{d} \right) \right]$$

Where:

i and N are defined as in the first equation in this paragraph

R_i , in lb/MMBtu, is defined as in §117.223(b)(1) of this title

H_{Mi} = the maximum daily heat input, in MMBtu/day, as defined in §117.223(b)(2) of this title.

d = the number of days in the use period

(B) Otherwise, the amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement is calculated as follows.

Figure: 30 TAC §101.373(f)(8)(B)

Figure: 30 TAC §101.373(f)(8)(B)

$$(PLA * PER) - (ALA * AER) = \text{discrete emission credits needed}$$

where

PLA = proposed level of activity

PER = proposed emission rate

ALA = actual level of activity

AER = actual emission rate

(C) The amount of discrete emission credits needed must be rounded up to the nearest ton.

(D) The user must possess 10% more discrete emission credits than are needed, as calculated in subparagraph (B) of this paragraph, to ensure that the source's environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than ten tons, an additional 5.0% of the discrete emission credits needed, as calculated in subparagraph (B) of this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(F) The amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user must also purchase and retire enough discrete emission credits 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.

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

(g) Notice of intent to use. A notice of intent to use, DEC-2 Form, must be submitted to OPRR in accordance with the following requirements:

(1) discrete emission credits may be used only after the user has submitted the notice to the registry;

(2) 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;

(3) 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;

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

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

(B) the name of the owner and/or operator of the user source;

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

(D) the amount of discrete emission credits needed;

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

(F) the actual emission rate, activity level, and total emissions for the applicable emission points;

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

(H) a complete description of the protocol used to calculate the amount of discrete emission credits needed;

(I) the actual calculations performed by the user to determine the amount discrete emission credits needed;

(J) the date on which the discrete emission credits were acquired or will be acquired;

(K) the discrete emission credit generator and the serial numbers of the discrete emission credits acquired or to be acquired;

(L) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired; and

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

(5) the notice for a mobile source user must include the following information:

(A) the name, address, county, telephone number, and contact person;

(B) the name of the owner and/or operator of the user source;

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

(D) the amount of discrete emission credits needed;

(E) the mobile source baseline emission rate, mobile source activity level, and total mobile source emissions for the applicable mobile sources;

(F) the actual mobile source emission rate, activity level, and total emissions for the applicable mobile source;

(G) the most stringent mobile source emission rate and the most stringent mobile source emission level for the applicable emission points, considering all applicable regulatory requirements;

(H) a complete description of the protocol used to calculate the amount of MDERCs needed;

(I) the actual calculations performed by the user to determine the amount MDERCs needed;

(J) the date on which the MDERCs were acquired or will be acquired;

(K) the MDERC generator and the serial numbers of the MDERCs acquired or to be acquired;

(L) the price of the MDERCs acquired or the expected price of the MDERCs to be acquired;

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

(N) 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;

(6) a user may submit a notice late in the case of an emergency, but the notice must be submitted before the discrete emission credits 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;

(7) 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. If the generator's credits are rejected or the notice of generation is incomplete, the use of discrete emission credits by the user may be delayed by the executive director. The user cannot use any discrete emission credits that

have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a source if the credit and use cannot be demonstrated to meet the requirements of this section.

(A) Actual discrete emission credits use.

(i) The user shall calculate:

(I) the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution associated with actual use; and

(II) the amount of discrete emission credits not used, including the amount of excess discrete emission credits 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, DEC-3 Form, 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 discrete emission credits obtained prior to the current use period;

(-b) the actual amount of discrete emission credits possessed during the use period;

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

(-d) the actual amount of discrete emission credits used;

(-e) the actual environmental contribution; and

(-f-) the amount of discrete emission credits 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.

(B) Compliance burden and enforcement.

(i) The user is responsible for assuring that a sufficient quantity of discrete emission credits 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 discrete emission credits for purchase.

(ii) The user is in violation of this section if the user does not possess enough discrete emission credits to cover the credit need for the use period. If the user possesses an insufficient quantity of discrete emission credits to cover its compliance need, the user will be out of compliance for the entire use period, 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.

(C) Discrete emission credits 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 discrete emission credit. The Emissions Banking and Trading Program must be notified by means of an DC-4 Form prior to the transfer. The executive director will issue a letter to the discrete emission credit purchaser reflecting the discrete emission credits purchased by the new owner, and a letter to the discrete emission credit seller showing any remaining discrete emission credits available to the original owner. Discrete emission credits may be transferrable only after the executive director grants approval of the transaction.

§101.374. Program Audits.

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

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

(c) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(d) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.