

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF AIR QUALITY

Statutory Authority: 7 Delaware Code, Section 6010 and 29 Delaware Code, Section 10113(b)(4); (7 Del.C. §6010, 29 Del.C. §10113(b)(4))
7 DE Admin. Code 1134

FINAL

Secretary's Order No.: 2018-A-0053

Date of Issuance: October 3, 2018

Effective Date of the Amendment: November 11, 2018

1134 Emission Banking and Trading Program

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 Del.C. §6010 and 29 Del.C. §10113(b)(4), DNREC hereby revises Section 1134 of Title 7 of the Delaware Administrative Code to correct existing referencing error contained therein by replacing "Economic Development Office" with "Department of State, Division of Small Business." This correction is necessitated as a result of recent changes made to Delaware law, specifically, the codification of House Bill 432, effective July 1, 2018, which transferred State of Delaware economic development functions formerly located within the Delaware Department of Economic Development to the Department of State.

Findings of Fact

Based on Delaware law and the record as referenced above, I make the following findings of fact:

1. The proposed regulation is not in conflict with Delaware law; and
2. The proposed regulation is an appropriate exercise of the Department's responsibilities and authority.

Decision and Order Concerning the Regulation

NOW THEREFORE, under the above-described statutory authority, and for the reasons set forth above, I hereby ORDER that the revision to 7 DE Admin. Code 1134: ***Emission Banking and Trading Program***, be adopted and promulgated as follows, to wit:

Section 8.5.2 shall be corrected by replacing "Economic Development Office" with "Department of State, Division of Small Business."

The effective date of this Order is ten (10) days from the date of its publication in the Delaware *Register of Regulations*, in accordance with 29 Del.C. §10118(g).

Shawn M. Garvin,
Secretary

1134 Emission Banking and Trading Program

10/06/1997

1.0 Program Overview

The purpose of this regulation is to establish a voluntary emission banking and trading program. Participation in this program shall not relieve a person of the responsibility to comply with any applicable local, State, or Federal law or regulation. This program does not limit the use of emission reduction credits (ERCs) established pursuant to this regulation. It is the responsibility of the user to ensure that the use of any ERC is consistent with the requirements of all underlying applicable requirements (i.e., the particular ERC meets all restrictions on geographic location, attainment classification, pollutant type, etc. that are imposed by an underlying applicable requirement). The goals of the program are to:

- 1.1 Create market-based incentives for emission reductions of volatile organic compounds (VOCs) and nitrogen oxides (NO_x);
- 1.2 Encourage early emission reductions and technological innovations to reduce emissions;
- 1.3 Encourage the creation of surplus emission reductions as emission reduction credits (ERCs);

- 1.4 Provide for the trading and the use of ERCs for offsets and cost-effective compliance with emission standards and limitations established by applicable requirements, where such use is specifically allowed by such applicable requirements;
- 1.5 Produce a net air quality benefit through the permanent retirement of a percentage of all emission reductions submitted to the Department for certification as ERCs;
- 1.6 Assure that ERCs are real, surplus, enforceable, permanent, and quantifiable;
- 1.7 Require that the use of ERCs is consistent with the Act, regulations promulgated under the Act, the State Implementation Plan (SIP), and the federal Clean Air Act;
- 1.8 Establish a mechanism to ensure the state and federal enforceability of ERCs; and
- 1.9 Not interfere with any applicable requirements concerning maintenance, attainment, or reasonable further progress toward the attainment of any NAAQS, or any other applicable air pollution control requirement.

10/06/1997

2.0 Definitions

The following definitions apply to this regulation. Except as specifically provided in 2.0 of this regulation, terms used in this regulation retain the meaning accorded them under the Act, the federal Clean Air Act, or 7 **DE Admin. Code** 1101.

“Act” means Title 7, **Delaware Code**, Chapter 60.

“Actual emissions” mean the actual rate of emissions of a pollutant from an emission unit. Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which immediately precedes the particular date and which is representative of normal source operation. The Department may allow the use of a different time period upon a satisfactory showing that it is more representative of normal source operation, provided that the Department agrees with such showing and provided that the emissions for that time period are, in the judgment of the Department, consistent with the SIP. The actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials used or processed, stored, or combusted during the selected time period, as applicable, and, in descending order and as required by applicable requirements:

- (1) Continuous emission monitoring (CEM) data, parametric monitoring data, or the monitoring of other surrogates, as approved by both the Department and the Administrator of the EPA; or
- (2) Direct measurement of emissions conducted in accordance with test methods approved by both the Department and the Administrator of the EPA, which include, but are not limited to those methods referenced in 40 CFR Parts 60, 61, and 63, or in applicable State regulations, provided that a representative of the Department was afforded the opportunity to witness the measurement; or
- (3) Any other quantification method that is approved for use by the Department and the Administrator of the EPA.

“Allowable emissions” mean the emissions rate of an emission unit, in tons per year, calculated using the maximum rated capacity of the unit (unless the unit is subject to enforceable limits which restrict the operating rate, or hours of operation, or both, in which case the restricted operating rate or hours of operation shall be used) and the most stringent of the following:

- (1) The applicable standards as set forth in 7 **DE Admin. Codes** 1120 and 1121;
- (2) Other applicable Delaware SIP emissions limitations, including those with a future compliance date; or
- (3) The emissions rate specified as an enforceable permit condition, including those with a future compliance date.

“Area source” means a stationary source that is not individually included in the Department's stationary source emissions inventory.

“Bank” means a depository, established by the Department, in which upon satisfaction of all applicable requirements of this regulation and any underlying regulation, ERCs may be deposited and withdrawn for use.

“Building, structure, facility or installation” means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1987.

“Department” means the Delaware Department of Natural Resources and Environmental Control as defined in 29 **Del.C.** Ch 80, as amended.

“Emission reduction credit (ERC)” means an actual emission reduction equal to one whole ton per year of a particular pollutant from an emission unit that has been certified by the Department as enforceable, permanent, quantifiable, real, and surplus, in accordance with this regulation. To determine the number of whole ERCs, the number of ERCs shall be rounded down for decimals less than 0.50 and rounded up for decimals of 0.50 or

greater. An ERC is a limited, contingent, non-vested authorization to emit a certain amount of air pollutants and does not constitute a property right.

“Emissions unit” means any part or activity of a source that emits or has the potential to emit any regulated air pollutant. This term is not meant to alter or affect the definition of the term “unit” for purposes of Title IV (Acid Deposition Control) of the federal Clean Air Act.

“Enforceable” means any standard, requirement, limitation or condition established by an applicable federal or state regulation or specified in a permit issued or order entered thereunder, or contained in a SIP approved by the Administrator of the U.S. Environmental Protection Agency (EPA), and which can be enforced by the Department and the Administrator of the EPA.

“Federal Clean Air Act (CAA)” means the Clean Air Act, 42 U.S.C. Section 7401 et seq.

“Mobile source” means on-road (highway) vehicles (e.g., automobiles, trucks and motorcycles) and nonroad vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels).

“Nitrogen oxides” means oxides of nitrogen, including nitric oxide (NO) and nitrogen dioxide (NO₂) and not including, for purposes of this regulation, nitrous oxide (N₂O).

“Offset” means the use of an ERC to satisfy the requirements of 7 DE Admin. Code 1125 and Section 173 of the CAA as they apply to a major new or major modified stationary source, provided that particular ERC meets the requirements of 7 DE Admin. Code 1125 and Section 173 of the federal Clean Air Act (CAA).

“Owner” means a person who claims lawful possession of an ERC.

“Ozone season” means the period of time beginning on and including April 1 and continuing through October 31 of each calendar year.

“Ozone Transport Region” means the region designated by section 184 of the federal Clean Air Act and comprised of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia and northern Virginia.

“Permanent (reductions)” means that the actual emission reductions submitted to the Department for certification have been incorporated in a permit or a permit condition or, in the case of a shutdown, the permit to operate for the emission unit or units has been voided.

“Permit” (unless the context suggests otherwise) means any permit or group of permits covering an emission unit or units that is issued, renewed, amended, or revised, or otherwise made state and federally enforceable.

“Person” means an individual, corporation, partnership, association, State, municipality, firm, or political subdivision of a State; and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

“Quantifiable (reductions)” means that the amount, rate and characteristics of emission reductions can be determined by methods that are considered reliable by the Department and the Administrator of the EPA.

“Real (reductions)” means reductions in actual emissions released into the atmosphere.

“Responsible official” means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit, and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter, 1980 dollars); or

(ii) The delegation of authority to such representative is approved in advance in writing by the Department.

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively, or the delegation of authority to a representative approved in advance by the Department; or

(3) For a municipality, state, federal, or other public agency: Either a principal executive officer or ranking elected official. For purposes of this regulation, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency.

(4) Where not covered in (1) through (3) above, the owner of the ERC or ERCs.

“Shutdown” means the curtailment of all operations and emissions at a facility that involves the withdrawal of all permit or permits to operate issued by the Department.

“Source” means a stationary source, an area source, or a mobile source.

“Stationary source” means any building, structure, facility or installation which emits or may emit any air pollutant subject to regulation under the federal Clean Air Act.

“Surplus (reductions)” means actual emission reductions below the baseline (see 6.0 of this regulation) not required by regulations or proposed regulations, and not used by the source to meet any state or federal regulatory requirement.

“Synthetic minor” means a source for which federally enforceable conditions (e.g., a cap on production rates, maximum hours of operation, or type of fuel) have been incorporated into a permit in order to reduce allowable emission levels below the applicability threshold of an applicable requirement.

“Trade” means the purchase, sale, conveyance or other transfer of an ERC from one person to another person.

“Use” means that approval of the Department has been obtained to apply an ERC at an emission unit.

“Volatile organic compounds” (also denoted as VOCs) mean any carbon-containing compound, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions. This includes any such organic compound other than those listed in 7 **DE Admin. Code** 1101, which have been determined to have negligible photochemical reactivity.

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3.0 Applicability

- 3.1 The voluntary banking and trading program established by this regulation applies to any person who desires to have an emission reduction or reductions certified as an ERC or ERCs, any person who desires to trade an ERC or ERCs with another person, and any person who desires to use an ERC or ERCs.
- 3.2 A person who owned or operated a source after January 1, 1991 may submit an application for certification of an emission reduction to the Department.
- 3.3 ERCs may be generated or traded in accordance with this regulation. ERCs may be used subject to the restrictions in this regulation and any underlying regulation.
- 3.4 ERCs can be traded between emission sectors (e.g., from mobile sources to stationary sources) in accordance with 9.1 of this regulation.
- 3.5 An emission reduction at an emission unit located in another state within the Ozone Transport Region may be certified as an ERC by that other state and placed in the bank established under this regulation only if the emission reduction is approved by the Department, and is enforceable by the Administrator of the EPA and the other state. The first such certification from a particular state shall be the subject of a specific revision to the Delaware State Implementation Plan (SIP) and the SIP of that other state. Any subsequent certification shall be consistent with the method or methods and assumptions approved into the SIPs.

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4.0 Generating an Emission Reduction

- 4.1 An emission reduction is valid as an ERC only after certification by the Department. Emission reductions generated for the purpose of creating ERCs must meet, at a minimum, all of the following criteria:
 - 4.1.1 The reductions must be created from decreases of VOC or NO_x emissions;
 - 4.1.2 The emissions must be included in the 1990 or subsequent emission inventory;
 - 4.1.3 The reductions must have occurred after January 1, 1991;
 - 4.1.4 The emission reduction must be equal to or greater than one ton per year; and
 - 4.1.5 The reductions must be real, surplus, permanent, quantifiable, and enforceable.
- 4.2 Emission reductions may be achieved by:
 - 4.2.1 Installing control equipment to decrease actual emissions from an existing emission unit;
 - 4.2.2 Using lower emitting raw materials;
 - 4.2.3 Reducing production rate or the hours of operation;
 - 4.2.4 Modifying processes or process equipment;
 - 4.2.5 Shutting down an existing facility;
 - 4.2.6 Early implementation of any emission control requirement provided that, prior to the date of the public hearing that starts the official comment period for the proposed control requirement, the emission reduction has occurred and has either been certified by the Department as an ERC or ERCs or, an application requesting certification has been received by the Department and that certification is ultimately approved by the Department; or
 - 4.2.7 Other measures including reductions resulting from pollution prevention, mobile source or transportation control measures, or any other measures that reduce actual emissions and are determined to be acceptable by the Department.
- 4.3 Emission reductions made as required by settlement agreement, consent order, or any law, or emission reductions resulting from any illegal activity or not authorized by law shall not be eligible to generate ERCs to

be used or traded under this program. Nothing in this regulation shall be construed to limit the Department's authority to reduce or eliminate ERCs under the provisions of 8.8 of this regulation.

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5.0 Application for Certification of an Emission Reduction as an ERC

- 5.1 Any emission reduction to be used as an ERC shall be certified by the Department.
- 5.2 For emission reductions implemented after January 1, 1991 but prior to October 6, 1997, an ERC application must be received by the Department within 12 months of October 6, 1997. Applications for certification of such reductions received more than 12 months after October 6, 1997 will not be accepted.
- 5.3 For emission reductions implemented after October 6, 1997, an ERC application must be received by the Department within 12 months after the emission reduction has first occurred, except that if an emission reduction occurs after the date described in 4.2.6 of this regulation, and that proposal is later rescinded or adopted such that the particular emission reduction is not required by the final rule, an application must be received by the Department within 12 months from the date that the proposal was rescinded or the final rule was promulgated.
- 5.4 A single application must be made for each emission reduction measure employed. Multiple emission units may be covered in a single application provided that the emission reduction at each emission unit is attributable to the single emission reduction measure.
- 5.5 Applications for ERC certification shall express emission reductions in both ozone season tons per year and non-ozone season tons per year.
- 5.6 A person shall apply for certification of an emission reduction by submitting to the Department the following information:
 - 5.6.1 Company name and address, plant name and address, name and telephone number of the Responsible Official submitting the application, and when applicable, the permit number of each emission unit involved in the emission reduction;
 - 5.6.2 Citations of all applicable emission control regulations, including any applicable requirements as defined in **7 DE Admin. Code 1130**;
 - 5.6.3 The baseline emissions for each emission unit, a description of the method used to reduce emissions, the emissions reductions that resulted from implementing the reduction method, and the quantity of emission reductions submitted for certification, all expressed in ozone season and non ozone season tons per year;
 - 5.6.4 The test method used or the calculations used to quantify the baseline emissions and the post reduction emissions rate, along with all supporting documentation;
 - 5.6.5 A request for the Department to impose ozone season and non-ozone season operations, activity level, or emissions cap or caps in a permit or permits (if not already completed), or, for shutdowns, a request for the Department to cancel all applicable permit or permits;
 - 5.6.6 Compliance assurance measures such as monitoring, record keeping and reporting procedures;
 - 5.6.7 Certification by the Responsible Official that to the best of the Responsible Official's knowledge, and after reasonable inquiry:
 - 5.6.7.1 The information contained in the application is true, accurate and complete.
 - 5.6.7.2 The emission reductions generated are real, surplus, enforceable, permanent and quantifiable (if the emission reduction or reductions are not enforceable and permanent at the time of application then that criteria need not be certified at this time; the Department will make the reduction or reductions enforceable and permanent prior to certification).
 - 5.6.7.3 For reductions resulting from a shutdown or a reduction in production or the hours of operation, the shutdown or reduction in production or in the hours of operation were not undertaken solely to create ERCs from shifting utilization, and that demand for the services or product will not shift to any other emission unit at the facility resulting in no net decrease in emissions.
- 5.7 It shall be the responsibility of the applicant to supply all supplemental documentation that the Department requests as necessary to evaluate the application.
- 5.8 Applicants may claim confidentiality of information contained in the ERC application as provided by **7 Del.C. Ch 60, §6014**.

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6.0 Source Baseline

- 6.1 In order to establish the amount of an emission reduction that is surplus and thus eligible for credit, an ozone season and a non-ozone season emission baseline must be established for each emission unit or units associated with a particular emission reduction prior to submittal of that emission reduction to the Department for certification as an ERC.

- 6.2 The ozone season baseline and the non-ozone season baseline shall be the lower of actual or allowable emissions from the emission unit or units immediately prior to the date of implementation of the control measure that caused the emission reduction.
- 6.3 For a stationary or area source, the ozone season and the non-ozone season baselines shall be calculated as follows:

6.3.1 *Ozone season baseline.*

$$BL_1 = ER \times U_1 \quad (6-1)$$

where:

BL_1 = Ozone season baseline in tons of pollutant per year.

ER = The emission rate, in tons per year, which is the lower of the actual or allowable emissions rate for the emissions unit or units.

U_1 = Utilization factor, which is the representative percentage of the historical level of operation or production rate of the emissions unit or units during the ozone season (April 1 through October 31) for the time period approved by the Department for use in calculating actual emissions.

6.3.2 *Non-ozone season baseline.*

$$BL_2 = ER \times U_2 \quad (6-2)$$

where:

BL_2 = Non-ozone season baseline in tons of pollutant per year.

ER = The emission rate, in tons per year, which is the lower of the actual or allowable emissions rate for the emissions unit or units.

U_2 = Utilization Factor, which is the representative percentage of the historical level of operation or production rate of the emissions unit or units during the non-ozone season (November 1 through March 31) for the time period approved by the Department for use in calculating actual emissions.

6.3.3 Note that the sum of U_1 and U_2 shall equal 100%.

- 6.4 For computation of the ozone season and non-ozone season baselines for a mobile source category, the quantification method or methods shall be consistent with the method or methods established in the 1990 Base Year Emission Inventory and the Rate of Progress Plans. The applicant shall consult with the Department and the EPA in calculating the baselines and in establishing the assumptions to be used in said calculation or calculations. The first such application for a mobile source category that contains the calculation for that specific category shall be the subject of a specific revision to the SIP. Any subsequent application shall be consistent with the method or methods and assumptions used for the specific mobile source category in the approved SIP. The computation of baselines shall include the most current information available. Where appropriate, the latest version of EPA's emissions estimation model for gasoline-fueled and diesel-fueled highway motor vehicles shall be used. Where appropriate, vehicle miles traveled (VMT) and speeds shall be developed to be consistent with the 1990 Base Year Emission Inventory, the Rate of Progress Plans, and the Delaware Department of Transportation traffic model, including, but not limited to: the latest land-use patterns, population demographics, employment, and transportation infrastructure.

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7.0 Post-Reduction Emission Rate

- 7.1 The ozone season and the non-ozone season post-reduction emission rate from each emission unit or units where a reduction occurred and is submitted to the Department for certification shall, prior to certification by the Department, be demonstrated using the unit's allowable or proposed allowable operating hours, production rates, and types of materials used or processed, stored, or combusted, as applicable, and, in descending order and as required by applicable requirements:
- 7.1.1 Continuous emission monitoring (CEM) data, parametric monitoring data, or the monitoring of other surrogates, as approved by both the Department and the Administrator of the EPA.
- 7.1.2 Direct measurement of emissions conducted in accordance with test methods approved by both the Department and the Administrator of the EPA, which include, but are not limited to those methods referenced in 40 CFR Parts 60, 61, and 63, or in applicable state regulations, provided that a representative of the Department was afforded the opportunity to witness the measurement.
- 7.1.3 Any other quantification method that is approved for use by the Department and the Administrator of the EPA.

- 7.2 For computation of a mobile source category ozone season and non-ozone season post reduction emission rate, the quantification method or methods shall be consistent with the method or methods established in the 1990 Base Year Emission Inventory and the Rate of Progress Plans. The applicant shall consult with the Department and the EPA in calculating the emission rate, and in establishing the assumptions to be used in said calculation or calculations. The applicant shall also consult with the Department and the EPA in determining the duration of the resultant ERC or ERCs. The first such application for a mobile source category that contains the calculation for that specific category shall be the subject of a specific revision to the SIP. Any subsequent application shall be consistent with the method or methods and assumptions used in the specific mobile source category in the approved SIP.

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8.0 Certification of an Emission Reduction

- 8.1 An emission reduction can only be certified through written approval by the Department after issuance of an enforceable permit to operate to the applicant, which incorporates limits on operations, activity level or emissions that must be maintained to assure the integrity of the ERC, or, in the case of a facility shutdown, termination of applicable permit or permits.
- 8.2 An emission reduction may be certified as an ERC only after a reduction has actually occurred.
- 8.3 Schedule for Departmental review:
- 8.3.1 The Department shall use its best efforts to either deem an application for an ERC complete or return that application to the applicant with deficiencies noted within 60 days of it being received by the Department.
- 8.3.2 After receiving a complete application, the Department shall use its best efforts to grant or deny the certification of the emission reduction within 180 days from the date the application is deemed complete.
- 8.3.3 Failure of the Department to meet the time frame of 8.3.1 or 8.3.2 of this regulation shall not preclude certification of the ERC provided that the applicant submitted its initial application within the time period specified in 5.2 or 5.3 of this regulation, as applicable.
- 8.4 Denial of an ERC application shall be accompanied with appropriate correspondence identifying deficiencies.
- 8.5 Prior to certifying an emission reduction, the Department will make the following adjustments to both the ozone season and non-ozone season emission reductions that are submitted to the Department for certification:
- 8.5.1 Credit for all emission reductions, except any reductions generated by shutdowns or generated prior to October 6, 1997, will be reduced by the value of 10% of the total reductions to provide a net air quality benefit.
- 8.5.2 Credit for emission reductions generated by shutdowns will be reduced by the value of 50% of the total reductions. 25% of the total reductions will be retired to provide a net air quality benefit and 25% will be held in a separate account by the Delaware ~~Economic Development Office~~ Department of State, Division of Small Business, for economic development purposes after certification by the Department pursuant to 8.6 of this regulation.
- 8.5.3 Credit for reductions generated before October 6, 1997 will be adjusted by a discount factor relating to the uncertainty of the emission estimation method used. The amount of the discount will be determined by the Department on a case-by-case basis. Factors that the Department will take into consideration in determining the uncertainty of the emission estimation method used include the nature of the reduction, the validity of the baseline data, and any previous review or inspection of relevant test methods by the Department. The Department will then reduce the adjusted amount by the value of 10% to provide a net air quality benefit.
- 8.6 The Department shall notify the applicant in writing of the certification of an emission reduction as an ERC, which certification is accomplished by issuing an emission limiting operating permit that is federally enforceable or in the case of a shutdown, by canceling all applicable permit or permits, as applicable, to make the emission reduction permanent and enforceable. In order for the emission-limiting operating permit to become federally enforceable, it must contain the specific quantifiable emission limits reflecting the change in emission rate and reflecting the operating conditions, emissions controls, and other measures taken to generate the ERC. All emissions limitations, controls, and other requirements imposed by such permits must be at least as stringent as all other applicable limitations and requirements contained in the SIP, enforceable under the SIP, or otherwise federally enforceable. All limitations, controls, and other requirements imposed by such permits must be permanent, quantifiable, and otherwise enforceable as a practical matter.
- 8.7 The owner of an ERC may possess or trade that ERC subject to the restrictions contained in any emission limiting operating permit or permits and this regulation.
- 8.8 An ERC shall be valid for the life of the surplus emission reduction on which it was based and shall not "expire" or cease to exist after a set period of time unless any of the following occur:
- 8.8.1 The emission unit is in violation of the conditions under which the Department certified the ERC.

- 8.8.2 A particular ERC has not been used and a change in regulation affects the emission unit involved in the creation of that ERC, then that ERC may be eliminated under the following circumstances:
- 8.8.2.1 The Department has, as part of the proposal to make the change in regulation, identified its intent to eliminate all related ERCs that result from the change in regulation at the time the change in regulation takes effect; and
- 8.8.2.2 That ERC is in the emission bank (i.e., the ERC has not been used) at the time the new regulation takes effect.
- 8.8.3 The Department, after providing public notice and considering public comment on the intent to eliminate banked ERCs (i.e., ERCs that have not been used), eliminates any or all such ERCs. Nothing in this regulation shall be construed to limit the Department's authority to reduce or eliminate any particular ERCs, by written notice to the owner or owners. No compensation is due whatsoever as a result of such reduction or elimination.
- 8.8.4 For the purposes of 8.8.2 and 8.8.3 of this regulation, an ERC shall be considered used upon receipt by the Department of an application requesting approval to use that ERC, provided that an operating permit to use that ERC is ultimately issued.

10/06/1997

9.0 Trading and Use of ERCs

- 9.1 No person shall trade ERCs to another person unless written notice is given to the Department not later than 30 days after the trade, indicating that the trade is agreeable to both persons. This notification shall include the following information:
- 9.1.1 The names and addresses of the previous owner and the new owner, the name and address of generator (if different from owner), the name and telephone number of the Responsible Officials providing notice of the trade, and when applicable, the permit number of each emission unit involved in the emission reduction;
- 9.1.2 The quantity and the specific identity of the ERCs to be traded, as identified in the banking system established pursuant 11.0 of this regulation, expressed in ozone season tons per year and in non-ozone season tons per year; and
- 9.1.3 Certification by each Responsible Official that, to the best of the Responsible Official's knowledge, and after reasonable inquiry, the information contained in the notice is true, accurate and complete, the trade is agreeable to both persons and that the new owner will comply with all applicable requirements of this regulation, and acknowledges and accepts the possibility of reduction or elimination of the ERC or ERCs under the provisions of 8.8 of this regulation.
- 9.2 Each person applying to use ERCs under any applicable regulation shall obtain approval from the Department. The application shall include the following information (in cases where the notification for a trade is submitted simultaneously with the application for use, the applicant may omit any redundant information already provided under 9.1 of this regulation):
- 9.2.1 Owner's name and address, name and address of generator (if different from owner), name and telephone number of the Responsible Official submitting the application, and when applicable, the permit number of each source involved in the emission reduction;
- 9.2.2 The quantity of ERCs to be used in ozone season tons per year and in non-ozone season tons per year;
- 9.2.3 Identification and description of the source at which the ERCs are to be used;
- 9.2.4 Identification of the specific ERCs to be used, as identified in the banking system established pursuant 11.0 of this regulation;
- 9.2.5 The intended use for the ERCs (e.g., offsetting or compliance with an applicable emission standard or limitation), and a demonstration/discussion as to how the particular ERC or ERCs satisfy all requirements of all underlying applicable requirements, to include both the quantity of ERC or ERCs and the quality of the ERC or ERCs (i.e., geographic location, pollutant type, etc.);
- 9.2.6 A schedule for using the ERC, subject to applicable restrictions under 9.8 of this regulation;
- 9.2.7 Compliance assurance measures such as testing, monitoring, record keeping and reporting procedures that demonstrate sufficient ERCs are proposed to be used to satisfy the underlying applicable requirement; and
- 9.2.8 Certification by the Responsible Official that:
- 9.2.8.1 To the best of the Responsible Official's knowledge, and after reasonable inquiry, the information contained in the application is true, accurate and complete.
- 9.2.8.2 The emission unit shall be operated in compliance with all applicable requirements and the conditions and requirements for the use of ERCs under this regulation.
- 9.3 The Department shall use its best efforts to either deem an application concerning the proposed use of ERCs complete or return that application to the applicant with deficiencies noted within 60 days of it being received

by the Department. It shall be the responsibility of the applicant to supply all supplemental documentation that the Department requests as necessary to evaluate the application.

- 9.4 Rejection of an application by the Department regarding the proposed use of ERCs shall be accompanied with appropriate correspondence identifying deficiencies.
- 9.5 The methods used and operational changes made to accommodate the use of ERCs for which a complete application is submitted to the Department shall become legally enforceable operating requirements. Such operating requirements shall be incorporated into a permit to construct or an operating permit under 7 **DE Admin. Codes** 1102, 1125 or 1130.
- 9.6 As part of the permitting process, the Department will provide for public notice and comment pursuant to 12.3 of 7 **DE Admin. Code** 1102 or 7.10 of 7 **DE Admin. Code** 1130, as applicable.
- 9.7 Upon issuance of a permit to accommodate the use of ERCs, ERCs relied upon shall no longer be ERCs. The emission reductions associated with those ERCs may, after cancellation or modification of the permit that provides for the use, be again submitted to the Department for certification under this regulation provided all of the criteria of this regulation are satisfied.
- 9.8 The use of ERCs is subject to the following restrictions:
 - 9.8.1 ERCs shall not be used to satisfy an applicable requirement unless the particular ERCs meet all of the requirements of this regulation and the particular applicable requirement, and the use of ERCs is specifically provided for by that applicable requirement. ERCs generated by this program shall not be used to meet the requirements of, or result in violation of Delaware law or any requirement mandated by Congress in the Federal Clean Air Act, which include New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS), Lowest Achievable Emission Rate (LAER), Best Available Control Technology (BACT), standards for solid waste combustion (Section 129), requirements for vehicle inspection and maintenance programs (Section 182(b)(4)), clean fueled fleet requirements (Section 246), motor vehicle emission standards (Section 202), nonroad vehicle standards (Section 213), requirements for reformulated gas (Section 211(k)), requirements for Reid vapor pressure standards (Section 211(h) and (i)), any motor vehicle emission standards specified in 7 **DE Admin. Code** 1100 (the State of Delaware Regulations Governing the Control of Air Pollution), and any Maximum Achievable Control Technology (MACT). Use of ERCs shall also not result in a violation of National Ambient Air Quality Standards (NAAQS), including prevention of significant deterioration (PSD) increments for NO_x.
 - 9.8.2 ERCs may not be used to comply with performance standards established by regulation such as operating procedure requirements (e.g., covers on degreasers, operating within a specific temperature range) or to comply with requirements for record keeping, reporting or testing as may be required by the Department.
 - 9.8.3 Except as specifically provided for in an underlying applicable requirement an ERC generated through emission reductions of VOCs cannot be used to allow emission increases of NO_x, and an ERC generated through emission reductions of NO_x cannot be used to allow emission increases of VOCs.
 - 9.8.4 ERCs generated by the use of seasonal control of VOC and NO_x during the period April 1 through October 31 can be used at any time during the calendar year. ERCs generated by using seasonal control of VOC and NO_x during the period November 1 through March 31 can only be used in the same season as generated (November 1 through March 31).
 - 9.8.5 ERCs may not be used in an area with a higher nonattainment classification than the one in which they were generated. Emission units located in areas designated as attainment or marginal nonattainment areas that are located within the ozone transport region shall be considered located in moderate ozone nonattainment areas for the purpose of this regulation.
 - 9.8.6 The use of ERCs that would result in an increase in the maximum hourly emission rate from an emission unit at an existing stationary source or from an existing area source, is prohibited unless it can be demonstrated, and the Department agrees with the demonstration, that the increased hourly emission rate will not cause a condition of air pollution.
 - 9.8.7 ERCs cannot be used by major sources to attain synthetic minor status.

10/06/1997

10.0 Record Keeping Requirements

- 10.1 Any person who generates, uses, or trades ERCs under this regulation shall keep all records required by the permit terms and any other records specified by an applicable requirement.
- 10.2 The Department may require applicants for ERC certification to conduct source testing utilizing Department and EPA approved test methods, including but not limited to, those methods referenced in 40 CFR Parts 60, 61, and 63, or applicable state regulations as is appropriate for the eligible source.

- 10.3 The Department may require regular submittal of information, including but not limited to, production records, fuel use records, or any other appropriate means of measurement the Department determines is necessary to maintain the integrity of the ERC in conjunction with testing or during periods when testing is not conducted.
- 10.4 Records shall be kept in a manner acceptable to the Department and shall be maintained at the source or sources where the ERCs are generated or used or other location acceptable to the Department. Such records shall be maintained for a period of time five years longer than the time period during which the ERCs are generated or used. Records shall be made available to the Department upon verbal or written request.

10/06/1997

11.0 ERC Banking System

- 11.1 The Department shall establish and maintain an emission banking system that may include, but is not limited to, a computerized register for the following purposes:
 - 11.1.1 Recording emission reductions certified as ERCs;
 - 11.1.2 Tracking the use and trading of ERCs; and
 - 11.1.3 Recording emission reductions contributed to the State for retirement as an air quality benefit pursuant to 8.5 of this regulation.
- 11.2 The system will include, but is not limited to, the following information:
 - 11.2.1 Name and address of owner, name and address of generator, the geographical location of the source that generated the ERCs, and contact person for the source that generated ERCs;
 - 11.2.2 Number of ERCs generated, in tons per year, by pollutant, and attainment status and nonattainment classification for each pollutant;
 - 11.2.3 Whether the ERC is an ozone season or a non-ozone season ERC;
 - 11.2.4 The effective date that the emission reduction occurred, the duration of the emission reduction, and limitations on the life of the ERCs, if any;
 - 11.2.5 Name and address of owner, and contact person for the source using the ERCs;
 - 11.2.6 Quantity of ERCs used, in ozone season tons per year and in non-ozone season tons per year, by pollutant and attainment status
 - 11.2.7 The intended use (e.g., offsetting or compliance with applicable emission standards).
- 11.3 Information related to an ERC maintained in the emission banking system shall be available for public review.

10/06/1997

12.0 Fees

- 12.1 Applicants for ERC certification and use may be required to pay processing fees to the Department consistent with the fee schedule established from time to time by the Delaware General Assembly.
- 12.2 Processing fees may be waived for ERCs that are donated to the Department or another entity for the purpose of providing a permanent air quality benefit.
- 12.3 Nothing in this regulation shall alter obligations to pay fees associated with permitting actions under regulations promulgated under the Act.

10/06/1997

13.0 Enforcement

- 13.1 The Department shall enforce the provisions of this regulation under applicable laws.
- 13.2 Notwithstanding another person's liability, negligence or false representation, each person who owns or operates a source and participates in the generation or use of ERCs under this regulation shall be solely responsible to assure that any affected source under their ownership or control is in compliance with all applicable emission standards and limitations.
- 13.3 If the Department determines that a person has violated the provisions of this regulation, then the Department may take appropriate enforcement action. In any such enforcement proceedings, a person who generates emission reductions shall have the burden of proof that the emission reductions generated are real, surplus, enforceable, permanent, and quantifiable; and a person who uses ERCs shall have the burden to comply with applicable emission standards or limitations and the provisions of this regulation.

10/06/1997

14.0 Program Evaluation and Individual Audits

- 14.1 The Department shall maintain records of banked ERCs and shall account for them periodically as "emitted" in the context of any Rate of Progress Plan (RPP) so as to ensure that the banking and trading program will not interfere with the RPP or the attainment of any NAAQS.

- 14.2 The Department shall conduct an audit of the emission banking and trading program within three years from October 6, 1997, and every three years thereafter to ensure that the program is achieving the goals specified in 1.0 of this regulation. The audits will evaluate whether the emission banking and trading program:
- 14.2.1 Is consistent with the maintenance of NAAQS and does not interfere with Reasonable Further Progress (RFP) towards attainment of NAAQS;
 - 14.2.2 Requirements for monitoring, record keeping, reporting and enforcement have resulted in a sufficiently high level of compliance; and
 - 14.2.3 Has caused any localized adverse effects to the public health, safety or welfare or the environment.
- 14.3 The Department shall prepare a report on the evaluation of the program. The Department shall seek public input on the conclusions contained in the evaluation report and provide for a public notice, public comment period, and allow for the request to hold a public hearing on the conclusions contained in the report.
- 14.4 If after an evaluation of the program, the Department determines that it is necessary to make program modifications, or to eliminate the program, the Department within six months of the completion of the evaluation shall use its best efforts to propose a revised regulation and prepare a submittal to the Administrator of the EPA as a revision to the SIP.
- 14.5 The Department will retain an independent party to complete the audit if an audit is not completed within 12 months of October 6, 2000 or the conclusion of any three-year period thereafter as specified under 14.2 of this regulation.
- 14.6 The Department may conduct audits of individual transactions which take place under this regulation to determine compliance with all applicable requirements. These audits may include, but shall not be limited to, the following:
- 14.6.1 A compliance assessment of the sources that generate, bank, use or trade ERCs; and
 - 14.6.2 A review of the methods, procedures, determinations and calculations used to monitor, record, quantify, and certify emissions, emission reductions, and the generation and use of ERCs.
- 14.7 If after an audit of a source or the use or trading of ERCs under this regulation, the Department determines that all applicable requirements have not been complied with, the Department may, pursuant to reasonable notice, deny pending permit actions or take an appropriate enforcement action as provided under the Act and provisions of this regulation.