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**Re: Comments of the Texas Industry Project
EBT Stakeholder Group Issues**

Dear Mr. Thomas:

TCEQ has invited public comments on its stakeholder process to consider issues for future rulemaking in connection with the emissions banking and trading program rules. The Texas Industry Project¹ (“TIP”) respectfully submits the following comments on the issues raised in TCEQ staff’s February and March 2014 stakeholder meetings.

TIP’s comments at this stage of the stakeholder process focus on TCEQ’s suggested areas for rule changes, rather than on further development of guidances. Separately, TIP will be recommending further flexibility in the application of guidances, including TCEQ’s emerging guidance for use of Mass Emission Cap and Trade (“MECT”) and Highly Reactive VOC Cap and Trade (“HECT”) allowances and for inter-basin and inter-pollutant credits.

I. TCEQ should preserve current, EPA-approved rule language to the greatest extent possible.

With the exception of certain narrowly targeted changes, TIP recommends that TCEQ preserve current banking and trading rule language. The divisions of TCEQ’s Chapter 101 rules on Emission Reduction Credits (“ERC”), MECT, Discrete Emission Reduction Credits, and HECT have all been approved by EPA and thus are currently part of the federally enforceable Texas State Implementation Plan (“SIP”). 40 C.F.R. § 52.2270.

As a general matter, these rules and TCEQ staff’s historical implementation practices provide sufficient certainty and flexibility for affected companies to comply with the rules and efficiently obtain authorization for new projects. The benefits of the program’s current federally-approved status are substantial. While there can be benefits of improved clarity and flexibility, these benefits must be weighed against the risks associated with a gap between state rules and the approved SIP. Thus, with three exceptions described in these comments, TIP requests that TCEQ preserve the current rule language.

¹ TIP is composed of 70 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, transportation, and national defense industries with operations in Texas.

In particular, TIP requests that TCEQ preserve the following existing rule language:

- Provisions addressing inter-basin and inter-pollutant trading at 30 Tex. Admin. Code §§ 101.302 and 101.372. The current rule language provides for protection of air quality in connection with inter-basin and inter-pollutant emission offsets while allowing substantial flexibility. As offsets remain scarce and Texas industries expand, efforts to secure offsets through inter-basin and inter-pollutant trades are likely to continue. Any change to make the current rule provisions on inter-basin and inter-pollutant transfers more prescriptive could thus foreclose offset approaches that would allow new economic development projects to go forward.
- Rule provisions addressing the availability of MECT and HECT program allowances as offsets, at 30 Tex. Admin. Code §§ 101.352(e) and 101.393(d). This existing rule language provides sufficient regulatory certainty and flexibility.

As noted above, TIP believes that TCEQ should continue to develop its guidance on practice in implementing rules in both of these areas. TIP will follow up separately on these guidances.

II. TIP supports three targeted changes to current rule language.

TIP requests that TCEQ make three targeted changes to current emissions banking and trading rule language.

A. TCEQ should eliminate the 180-day deadline to submit an EC-1.

Current TCEQ rules provide that “Facilities with potential ERCs must submit, to the executive director, an EC-1 Form, Application for Certification of Emission Credits, within 180 days of the implementation of the emission reduction strategy.” 30 Tex. Admin. Code § 101.303(d)(1) (emphasis added).

TIP requests that TCEQ delete this sentence from § 101.303(d)(1). The 180-day deadline is not necessary to ensure ERC program integrity, but it does create a paperwork barrier to generating ERC. Eliminating the 180-day EC-1 submission deadline would not extend the life of any current or future ERC, as the rules provide that ERC generated since 2001 “shall be available for use for 60 months from the date of the emission reduction,” 30 Tex. Admin. Code § 101.309(b)(3), regardless of when the EC-1 was submitted.

Notably, EPA rules do not require offsets to be certified within 180 days of the reduction taking place, nor do EPA rules establish an expiration date for offsets. *See* 40 C.F.R. § 51.165(a)(3).

Further, states with similar emissions banking and trading programs allow ERC applications to be submitted for longer periods of time. For example, Pennsylvania's ERC registry application need only be submitted within two years of the initiation of an emissions reduction used to generate ERC. See 25 Pa. Code § 127.207(2).

B. TCEQ should adjust the deadlines for identifying ERC as potential offsets and submitting an EC-3 to "prior to operation."

Current ERC regulations provide as follows:

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

30 Tex. Admin. Code § 101.306(c)(1) (emphasis added).

TIP requests that TCEQ amend this rule language to insert "prior to operation" where the rule currently reads "prior to permit issuance" or "prior to construction," and to delete the clause "along with the original credit certificate."² Such a revised § 101.306(c)(1) would read as follows:

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

Changing the deadline to "prior to operation" would help to avoid paperwork compliance requirements that do not help to ensure the validity of an offset. For example, in the current economic climate, companies are evaluating options to generate and acquire the most cost effective offset options available. These options will likely continue to evolve even after a permit is issued for a new-build project and construction has begun, and it is likely that many sources will ultimately seek to rely on offsets that became available during the period shortly

² Removing the reference to the original credit certificate is appropriate as we understand that TCEQ practice no longer includes issuance of paper certificates.

before beginning operation. By moving back the offset deadlines to “prior to operation,” these sources will not be in a position of seeking to retract earlier EC-3 submissions or update permit application representations.

The requested change would be consistent with federal requirements. EPA regulations do not require an offset to be identified prior to permit issuance or in place prior to construction. *See* 40 C.F.R. § 51.165(a)(3). Changing these deadlines to “prior to operation” as TIP recommends would also align with the federal Clean Air Act, which provides:

Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

42 U.S.C. § 7503(c)(1) (emphasis added).

C. TCEQ should clarify rule language on the emissions inventory year that sets a cap on each facility’s potential ERC baseline.

TCEQ’s February and March 2014 stakeholder meeting presentations indicate that the agency is considering amending 30 Tex. Admin. Code § 101.303(b)(1), which currently provides that ERC or other offsets’ baselines “may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP.” TIP supports TCEQ’s historical practice of interpreting the “SIP” in this context to mean the most recent attainment demonstration SIP.

We understand that the amendments under consideration would clarify that the SIP for purposes of this rule provision is the most recent attainment demonstration SIP, and specify an alternative for areas that do not yet have an attainment demonstration SIP. TIP concurs with TCEQ that adding the term “attainment demonstration” before “SIP” would be a good clarification that should not affect the approved SIP.

III. Conclusion

TIP appreciates your consideration of these comments. If you have questions, please do not hesitate to contact me.

Sincerely,


Zach Craft