

# **Texas Commission on Environmental Quality**

## **Interoffice Memorandum**

**To:** Commissioners **Date:** September 16, 2011

**Thru:** Melissa Chao, Acting Chief Clerk  
Mark R. Vickery, P.G., Executive Director

**From:** Susana M. Hildebrand, P.E., Chief Engineer

**Docket No.:** 2011-0845-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 101, General Air Quality Rules  
Chapter 117, Control of Air Pollution from Nitrogen Compounds  
Repeal of Chapter 101 System Cap Trading Rules and Revisions to Chapter 117  
Rule Project No. 2011-018-101-EN

**Background and reason(s) for the rulemaking:**

Title 30 Texas Administrative Code (TAC) Chapter 101, Subchapter H, Division 5 as adopted on March 21, 2001, and amended on July 25, 2007, specifies the requirements of the System Cap Trading (SCT) program. The SCT program was created to provide owners or operators of electric generating facilities (EGF) with additional compliance flexibility to meet the system cap emission limits specified in 30 TAC Chapter 117. The SCT program compliance option is available to affected EGFs located in the Beaumont-Port Arthur 1997 eight-hour ozone maintenance area, consisting of Hardin, Jefferson, and Orange Counties; the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area, consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; and in certain East and Central Texas counties, as listed in §117.3000(a)(4). The SCT program has seen minimal participation by affected sources. In addition, affected sources have alternative means of compliance with the system cap emission limits of Chapter 117 in the form of the Emission Credit Banking and Trading, and Discrete Emission Credit Banking and Trading programs.

The Chapter 101 SCT program rules were submitted to the United States Environmental Protection Agency (EPA) for inclusion in the state implementation plan (SIP) on May 1, 2001, and the amendments to §101.383 and §101.385 were submitted to the EPA as revisions to the SIP on August 16, 2007. While the system cap emission limits in Chapter 117 are approved as part of the SIP (73 FR 73565), the Chapter 101 SCT program rules were not approved by the EPA for inclusion in the SIP.

The EPA sent a letter, dated October 25, 2010, to the commission requesting revisions to the Chapter 101 SCT program rules. In the letter the EPA stated its intent to conditionally approve the Chapter 101 SCT program rules if the commission agreed to commit to a rulemaking action to implement the EPA's requested revisions within a one-year time frame. The EPA required a verbal commitment by November 1, 2010, followed by a signed letter from the executive director by November 15, 2010. On November 2, 2010, the executive director responded to the EPA's request stating that due to the minimal

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participation in the SCT program and the limited timeline to implement the extensive revisions requested by the EPA, the commission would not be able to commit to any rulemaking action. The letter also stated the executive director's intention to seek approval from the commission to withdraw the Chapter 101 SCT program rules from the EPA's consideration as a SIP revision. The EPA published its proposed disapproval of the Chapter 101 SCT program rules in the *Federal Register* (75 FR 70654) on November 18, 2010.

On February 23, 2011, the commission approved the withdrawal of the Chapter 101 SCT program rules from consideration by the EPA as a revision to the SIP. The EPA was notified of the withdrawal of the Chapter 101 SCT program rules as a SIP revision in a letter dated March 4, 2011. The EPA acknowledged the withdrawal of the Chapter 101 SCT program rules from consideration as a SIP revision in a letter received by the commission on April 4, 2011. The EPA also published the withdrawal of its proposed disapproval of the SCT program rules in the *Federal Register* (76 FR 19739) on April 8, 2011.

In addition, the commissioners directed the executive director's staff to initiate rulemaking to repeal the Chapter 101 SCT program rules in order to avoid potential regulatory confusion among regulated entities. Since the Chapter 117 rules have been approved by the EPA and are included in the SIP, if the revisions to Chapter 117 are adopted, the amended sections of Chapter 117 would be submitted to the EPA as a revision to the SIP. The repeal of Chapter 101 SCT program rules will not be resubmitted to the EPA since they have already been withdrawn from the EPA's consideration as a revision to the SIP.

**Scope of the rulemaking:**

**A.) Summary of what the rulemaking will do:**

The rulemaking would repeal all rules pertaining to the SCT program specified in Chapter 101, Subchapter H, Division 5, §§101.380, 101.382, 101.383, and 101.385. The rulemaking would also amend §§117.1020, 117.1120, 117.1220, 117.3020, and 117.9800 to remove references to the Chapter 101 SCT program rules.

**B.) Scope required by federal regulations or state statutes:**

The repeal of the Chapter 101 SCT program rules and the corresponding revisions to Chapter 117 are not specifically required by federal regulation. However, repealing the Chapter 101 SCT program rules and removing the references to the SCT program in Chapter 117 will avoid confusion among regulated entities that are subject to the system cap rules in Chapter 117. It would also address any potential concerns the EPA might have regarding the use of a compliance option that is not a part of the SIP for the purposes of complying with the EPA-approved Chapter 117 rules that are included in the SIP.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

Various non-substantive revisions to the Chapter 117 sections opened for this rulemaking would be made to conform to current *Texas Register* style and formatting requirements.

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**Statutory authority:**

The repeal and amendments would be proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal and amendments would also be proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments would also be proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit SIP revisions that specify the manner in which National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

**Effect on the:**

**A.) Regulated community:** No impact is expected. The SCT program was established to provide owners or operators of EGFs with additional compliance flexibility to meet the Chapter 117 system cap emission limits. There has been minimal use of the program by the regulated community, with most reports submitted for compliance purposes showing no trades. In addition, the regulated community has alternative means of compliance such as the use of Emission Credit Banking and Trading and Discrete Emission Credit Banking and Trading programs.

**B.) Public:** No impact is expected.

**C.) Agency programs:** Staff currently receives quarterly and annual reports detailing operation and emissions data from owners of EGFs participating in the SCT program. These reports are filed and no action is taken. These tasks will no longer be performed.

**Stakeholder meetings:**

No stakeholder meetings were conducted for this rulemaking project.

**Potential controversial concerns and legislative interest:**

Regulated entities might prefer to retain the SCT program so as to have multiple compliance options available to them. Retaining the SCT program would require the

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commission to substantially revise and resubmit the Chapter 101 SCT program rules to the EPA as a SIP revision.

**Potential alternatives:**

The Chapter 101 SCT program rules could be revised and resubmitted to the EPA for consideration and approval as a SIP revision. For the EPA to approve the Chapter 101 SCT program rules as a SIP revision, the rules would have to be revised to meet the EPA's extensive criteria for approval as specified in the letter dated October 25, 2010, from the EPA. The revisions required by the EPA in order to approve the Chapter 101 SCT program rules will require significant agency staff resources to implement. In addition, the EPA's recommended revisions require additional requirements from regulated entities participating in the program such as advance notice for potential trades and penalty requirements. These revisions will reduce the flexibility of the program making the program less attractive as a compliance option.

**Will this rulemaking affect any current policies or require development of new policies?**

The proposed rulemaking will not affect any current policies or require development of new policies.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

If the Chapter 101 SCT program rules are not repealed, regulated entities could use the SCT program to comply with the Chapter 117 system cap emission limits. The Chapter 117 rules have been approved by the EPA as a SIP revision, while the Chapter 101 SCT program rules have been withdrawn from consideration by the EPA as a SIP revision. The use of the SCT program, which is not a federally enforceable program, to comply with Chapter 117 rules, which are federally enforceable, would open regulated entities to potential federal action by the EPA. In addition, the EPA might revoke the approval of the Chapter 117 rules as a SIP revision.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** October 5, 2011

**Anticipated *Texas Register* publication date:** October 21, 2011

**Public hearing date (if any):** November 15 and 17, 2011

**Public comment period:** October 21, 2011 – November 21, 2011

**Anticipated adoption date:** March 28, 2012

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