

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST

**for Withdrawal of Rule Sections from Consideration by the
Environmental Protection Agency as Revisions to the State
Implementation Plan**

AGENDA REQUESTED: February 23, 2011

DATE OF REQUEST: February 4, 2011

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS
REQUEST, IF NEEDED: Joyce Spencer, 239-5017**

CAPTION: Docket No. 2010-1983-MIS. Consideration of the withdrawal from the United States Environmental Protection Agency of 30 Texas Administrative Code (TAC) Chapter 101, Subchapter H, Division 5, Sections 101.380, 101.382, 101.383, and 101.385, as adopted on March 21, 2001, and amendments to Sections 101.383 and 101.385, as adopted on July 25, 2007, as revisions to the state implementation plan. These sections concern the System Cap Trading Program applicable to facilities with system cap emission limits specified in 30 TAC Chapter 117. (Shantha Daniel, Amy Browning)

Susana M. Hildebrand, P.E.
Deputy Director

David Brymer
Division Director

Joyce Spencer
Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** February 4, 2011

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G. Executive Director

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

Docket No.: 2010-1983-MIS

Subject: Commission Approval for Withdrawal of Title 30 Texas Administrative Code §§101.380, 101.382, 101.383, and 101.385, System Cap Trading from the United States Environmental Protection Agency's (EPA) Consideration as a Revision to the State Implementation Plan (SIP)

Background and reason(s) for the rulemaking:

Title 30 Texas Administrative Code (TAC) §§101.380, 101.382, 101.383, and 101.385 as adopted on March 21, 2001, and amended on July 25, 2007, are included in the revisions to the SIP. These sections specify the requirements of the System Cap Trading (SCT) Program, created to provide additional flexibility to facilities with system cap emission limits specified in 30 TAC Chapter 117.

The sections were submitted to the EPA as revisions to the 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. On October 25, 2010, the EPA, which is under a consent decree deadline that requires final action on the SCT Program by December 31, 2010, sent a letter to the commission requesting revisions to the program. The October 25, 2010, letter from the EPA also stated its intent to take favorable action on the SCT Program if the Texas Commission on Environmental Quality (TCEQ) agreed to commit to a rulemaking action to implement the EPA's requested revisions. 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 submitted a letter in response to the EPA's request stating that due to the short timeline, the TCEQ would be unable to present the EPA's requested revisions to the commission, and the commission would be unable to take any action to implement these revisions on the EPA's proposed timeline. The letter also stated the Executive Director's intention to seek approval from the commission to withdraw the SCT Program from the EPA's consideration based on a preliminary review of the program that indicated 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 Program and the Discrete Emission Credit Banking and Trading Program. On November 18, 2010, the EPA published its proposed disapproval of the SCT Program in the *Federal Register* (75 FR 70654). The EPA has received an extension until May 30, 2011, to take final action on the SCT Program.

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Staff recommends removing from consideration by the EPA as a revision to the SIP §§101.380, 101.382, 101.383, and 101.385 which contain the requirements of the SCT Program and were created to provide additional flexibility to facilities with system cap emission limits specified in §§117.320, 117.1020, 117.1120, 117.1220, and 117.3020. The program allows source owners to trade surplus emission allowables within a single nonattainment area or within another single area with unique emission limits as identified in Chapter 117.

Sections 101.380, 101.382, 101.383, and 101.385 are proposed for disapproval by the EPA, and the EPA is subject to a settlement agreement that requires final action by May 30, 2011. It is therefore recommended that §§101.380, 101.382, 101.383, and 101.385 be removed from the EPA's consideration as a SIP revision prior to the EPA taking final action to disapprove the rules.

Scope of the recommendation:

A.) Summary of what the rulemaking will do: If approved, a request will be made to the EPA to remove §§101.380, 101.382, 101.383, and 101.385 from consideration as a revision to the SIP.

B.) Scope required by federal regulations or state statutes: No.

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

- remove §§101.380, 101.382, 101.383, and 101.385 from consideration by the EPA as a revision to the SIP; and
- initiate rulemaking at a later time to remove the SCT Program and any references to the SCT Program in Chapter 117.

Statutory authority:

Texas Clean Air Act, Texas Health and Safety Code, §382.011, relating to General Powers and Duties; §382.012, State Air Control Plan; §382.014, relating to Emission Inventory; §382.016, relating to Monitoring Requirements; Examination of Records; and §382.017, Rules.

Effect on the:

A.) Regulated community: No impact is expected. There has been minimal participation in the SCT Program by the regulated community due to the availability of alternative compliance means such as the use of Emission Credit Banking and Trading Program and the Discrete Emission Credit Banking and Trading Program.

B.) Public: No direct fiscal impact is anticipated to the public.

C.) Agency programs: A rulemaking project to remove the SCT Program and any references to the program in Chapter 117 should be completed as soon as practicable.

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Stakeholder meetings:

Not Applicable

Potential controversial concerns and legislative interest:

If the SCT Program is repealed, the compliance options available to the regulated community will become limited, especially if the regulated community does not have access to the required Discrete Emission Credits or Emission Credits to meet the system cap emission limits specified in Chapter 117.

Will this rulemaking affect any current policies or require development of new policies? Future rulemaking will be required to remove the SCT Program and any references to the program in Chapter 117.

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

The EPA has already published a proposed disapproval of the SCT Program (75 FR 70654). If request to withdraw the SCT Program from the EPA's consideration does not go forward, the EPA will issue a final disapproval of the SCT Program. The rules pertaining to the SCT Program will have to be repealed or revised and resubmitted to the EPA, and rules in Chapter 117 will need to be revised to reflect this repeal. However, the EPA has stated that since the SCT Program was not submitted to meet a mandatory requirement of the Federal Clean Air Act, no sanctions and Federal Implementation Program timelines will be initiated (75 FR 70656).

Agency contacts:

Shantha Daniel, Ph.D., Project Manager, 239-3930, Air Quality Division
Amy Browning, Staff Attorney, 239-0891

Attachments

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Kevin Patteson
Curtis Seaton
Ashley Morgan
Office of General Counsel
Shantha Daniel, Ph.D.

ORDER

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On February 23, 2011, the Texas Commission on Environmental Quality (Commission) considered the withdrawal of 30 Tex. Admin. Code Chapter 101, Subchapter H, Division 5, §§ 101.380, 101.382, 101.383, and 101.385 as adopted by the Commission on March 21, 2001 and July 25, 2007, from consideration by the United States Environmental Protection Agency as revisions to the State Implementation Plan (SIP).

IT IS THEREFORE ORDERED BY THE COMMISSION that 30 Tex. Admin. Code Chapter 101, Subchapter H, Division 5, §§ 101.380, 101.382, 101.383, and 101.385 are hereby withdrawn from submission to the EPA as revisions to the SIP.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Government Code, § 2001.033.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Issued date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman