

The Texas Commission on Environmental Quality (commission) adopts the repeal of §101.601 and §101.602 as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6607) *without changes* and the text will not be republished.

The commission will submit a request to the United States Environmental Protection Agency (EPA) to withdraw from consideration the Texas State Plan for the Control of Designated Facilities and Pollutants, Plan for Control of Mercury Emissions from Coal-Fired Electric Steam Generating Units, Clean Air Mercury Rule (CAMR).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

On May 18, 2005, the EPA finalized CAMR to permanently cap and reduce mercury (Hg) emissions from new and existing coal-fired electric generating units (EGU) nationwide. The EPA provided states with two compliance options for meeting the reduction requirements under CAMR: 1) meet the state's emission budget by requiring new and existing coal-fired EGUs to participate in an EPA-administered cap and trade system; or 2) meet an individual state emissions budget through measures of the state's choosing.

The CAMR model trading rule, under 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH, was a market-based cap and trade system designed to reduce the costs of complying with the new Hg reduction requirements. The Mercury Budget Trading Program capped nationwide annual Hg emissions by providing each state with an annual emissions budget to be applied to all coal-fired boilers and turbines serving an electrical generator with a nameplate capacity greater than 25 megawatts of electricity

(MWe) and producing electricity for sale. The trading rule provided flexibility in complying with the Hg reduction requirements through unrestricted banking of excess allowances and the trading of allowances between EGUs nationwide. States participating in the interstate trading program therefore were not subject to individual state caps. Under the model rule, states were provided flexibility in the allocation methodology used to determine Hg allowance allocations for each Hg budget unit. States were then responsible for submitting the allowance allocations to the EPA. Under the CAMR model rule, the EPA established Hg compliance accounts for each Hg budget source and maintained an allowance tracking system to record the deposit, transfer, and deduction for compliance of all Hg allowances. The Hg budget sources were required, under the model rule, to demonstrate compliance through the installation and operation of continuous emissions monitoring systems as required under 40 CFR Part 75. Also, the model rule required all elements of the Mercury Budget Trading Program to be federally enforceable through the issuance of an Hg budget permit as a complete and separable portion of each Hg budget source's Title V permit.

The 79th Legislature, 2005, enacted House Bill (HB) 2481 amending Texas Health and Safety Code (THSC), Chapter 382 by adding §382.0173, requiring Texas to participate in the EPA-administered interstate cap and trade programs through the incorporation by reference of 40 CFR Part 96, Subparts AA - II and Subparts AAA - III (regarding Clean Air Interstate Rule (CAIR)), and Part 60, Subpart HHHH (regarding CAMR).

THSC, §382.0173(d) provided that its provisions applied ". . . only while the federal rules cited in this section are enforceable . . ." and that the provisions of HB 2481 do ". . . not limit the authority of the

commission to implement more stringent emissions control requirements.” The commission interpreted the language of THSC, §382.0173(d) as not restricting existing authority to require further emissions control requirements, but not to interfere with, or change, the requirements of CAIR nitrogen oxides and sulfur dioxide, or the CAMR Hg emission trading programs. The legislature expressed clear intent that the commission implements the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by the EPA and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR nitrogen oxides allowances.

On June 9, 2006, the EPA finalized revisions to the CAMR rule reducing the Phase I Texas Hg budget from 4.657 to 4.656 tons of Hg per year, or a reduction of two pounds of Hg per year from the Phase I Texas Hg budget. The revisions also included clarification to the applicability of CAMR to municipal waste combustors and certain industrial boilers. New source performance standards were also clarified in this revision. For additional information regarding these revisions, please see the EPA final rule, published in the June 9, 2006, issue of the *Federal Register* (71 FR 33388), available online at www.epa.gov/fedrgstr/.

On July 12, 2006, the commission adopted Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 8, Clean Air Mercury Rule. The adoption of this rule required all EGUs meeting the applicability requirements of 40 CFR §60.4104 to be part of the CAMR trading program. The allocation methodology stated in 40 CFR §60.4142 (issued on May 12, 2005) was used to determine the Hg allowance allocations. From 2010 through 2014 (Phase I), the Texas Hg budget was

4.657 tons of Hg per year, then reduced starting in 2015 and thereafter (Phase II) to 1.838 tons of Hg per year.

The 80th Legislature, 2007, enacted Senate Bill (SB) 1672 amending THSC, Chapter 382. SB 1672 omitted the reference dates specified by HB 2481 enabling the commission to make subsequent changes as dictated by federal rule changes to CAMR.

On October 11, 2007, the EPA finalized additional revisions to the CAIR and CAMR rule, updating the definition of a cogeneration unit, technical corrections, and included other minor revisions. For additional information regarding these revisions, please see the EPA final rule, published in the October 19, 2007, issue of the *Federal Register* (72 FR 59190) available online at www.epa.gov/fedrgstr/.

On February 8, 2008, the United States Court of Appeals District of Columbia Circuit vacated CAMR (Number 05-1097) finding that the EPA did not follow the procedure set forth to remove EGUs from the requirements of the Federal Clean Air Act (FCAA), §112. Therefore, the emissions from EGUs could not be regulated under FCAA, §111 and a cap and trade system could not be implemented for controlling Hg emissions from oil-fired and coal-fired EGUs. On October 17, 2008, the EPA requested the United States Supreme Court review the case. However, on February 6, 2009, the Department of Justice filed a motion on behalf of the EPA to dismiss the EPA's request to review the case stating that the EPA decided to develop appropriate standards to regulate power plant emissions under FCAA, §112. On February 23, 2009, the United States Supreme Court decided not to hear the case. This officially vacated CAMR at the federal level; therefore, the state CAMR rule, incorporated by reference, and state plan are longer

applicable or necessary.

SECTION BY SECTION DISCUSSION

The commission adopts the repeal of §101.601 and §101.602 since the federal references cited in these sections are no longer valid. Section 101.601, Applicability, incorporated by reference the applicability requirements of 40 CFR §60.4104. Section 101.602, Clean Air Mercury Rule Trading Rule, incorporated by reference 40 CFR Part 60, Subpart HHHH.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a "major environmental rule" as defined in that statute. A "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. This rulemaking will repeal rules that incorporate by reference the federal CAMR emissions trading rules located in 40 CFR Part 60, Subpart HHHH. 42 United States Code (USC), §7411 created a system for the establishment of standards of performance to reduce emissions from stationary sources. The rules were originally adopted to fulfill the requirements of HB 2481 to incorporate CAMR by reference and to specify the sources to which the trading program is applicable. Since the adoption of these rules, however, CAMR has been overturned by the United States Court of Appeals for the District of Columbia. The United States Supreme Court declined to hear an appeal of this decision, rendering it

final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. The repeal of the state CAMR rule incorporating the federal CAMR requirements does not meet the definition of a "major environmental rule," and therefore a regulatory impact analysis is not required under Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the rulemaking is to repeal rules that incorporated by reference the federal CAMR emissions trading rules, located in 40 CFR Part 60, Subpart HHHH. Subpart HHHH established a Hg emissions cap and trade program for new and existing coal-fired EGUs for which standards of performance were promulgated under 42 USC, §7411. During the 79th Legislature, 2005, the legislature enacted HB 2481, which created a requirement in the Texas Clean Air Act, codified in THSC, §382.0173, to adopt the federal program rules by reference. Since the adoption of these rules, however, CAMR has been overturned by the United States Court of Appeals for the District of Columbia. The United States Supreme Court has declined to hear an appeal of this decision, rendering it final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007

does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission found that the repeal of §101.601 and §101.602 are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor do they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the repeal of §101.601 and §101.602 are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

Public hearings were held in Fort Worth on October 20, 2009; in Austin on October 21, 2009; and in Houston on October 22, 2009. The commission did not receive any oral comments at the public hearings. The comment period for this repeal closed on October 26, 2009. The commission did not receive any written comments.

[SUBCHAPTER H: EMISSIONS BANKING AND TRADING]

[DIVISION 8: CLEAN AIR MERCURY RULE]

[\§101.601, \§101.602]

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, \§5.103, concerning Rules, and \§5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), \§382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also adopted under THSC, \§382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; \§382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; \§382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; \§382.014, concerning Emission Inventory; \§382.016, concerning Monitoring Requirements; House Bill 2481, \§2, 79th Legislature, 2005, codified in THSC, \§382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; THSC, \§382.054, concerning Federal Operating Permit; and Federal Clean Air Act (FCAA), 42 United States Code (USC), \§\§7401 *et seq.*, which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

The adopted repeals implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq.*

§101.601. Applicability.

§101.602. Clean Air Mercury Rule Trading Program.