The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§122.10, 122.12, 122.120, and 122.410 and also proposes new §§122.420, 122.422, 122.424, 122.426, 122.428, 122.440, 122.442, 122.444, 122.446, and 122.448.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On May 12, 2005, the United States Environmental Protection Agency (EPA) published the Clean Air Interstate Rule (CAIR) to assist nonattainment areas in downwind states in achieving compliance with the national ambient air quality standards (NAAQS) for particulate matter less than or equal to 2.5 microns ($PM_{2.5}$) and eight-hour ozone. Twenty-eight eastern states and the District of Columbia were identified as upwind contributors to the nonattainment of the $PM_{2.5}$ and eight-hour ozone NAAQS prompting the requirement for the reduction in emissions of sulfur dioxide (SO_2) and/or oxides of nitrogen (NO_x). Twenty-three states, including Texas, and the District of Columbia were found to contribute to the downwind nonattainment of the $PM_{2.5}$ NAAQS and are required to make reductions in annual emissions of SO_2 and NO_x.

On May 18, 2005, EPA published the Clean Air Mercury Rule (CAMR) to permanently cap and reduce mercury emissions from new and existing coal-fired electric generating units (EGUs) nationwide. The mercury reduction requirements under CAMR will be implemented in two phases by providing states with declining budgets. Phase I begins in 2010 and continues through the year 2017. During those years Texas will receive an annual mercury budget of 4.657 tons. The Phase II mercury budget will begin in 2018, and Texas will receive an annual budget of 1.838 tons that year and each year thereafter.

EPA provided states with two compliance options for meeting the reduction requirements under CAIR and CAMR: 1) meet the state's emission budgets by requiring EGUs to participate in an EPA-administered interstate cap and trade program; or 2) meet an individual state emissions budget through measures of the state's choosing. The 79th Legislature, 2005, enacted House Bill (HB) 2481 requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAIR and CAMR model trading rules. HB 2481 also provided specific direction for the methodology to be used in allocating the CAIR NO_x budget provided to Texas, identified an amount of CAIR NO_x allowances to be set-aside for new sources, and specified that reductions associated with CAIR would only be required from new and existing EGUs and not from other sources of SO_2 and NO_x emissions.

The CAIR and CAMR model trading rules under federal regulations are market-based cap and trade systems designed to reduce the costs of complying with the new NO_x, SO_2, and mercury reduction requirements. The CAIR trading programs cap annual emissions of NO_x and SO_2 by providing each state in the named region with an annual emissions budget to be applied to all fossil fuel-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 program caps nationwide annual emissions of mercury 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 MWe and producing electricity for sale.

The commission is concurrently proposing an additional rulemaking to Chapter 101, General Air Quality Rules, in this issue of the *Texas Register* that would distribute the CAIR and CAMR trading budgets for Texas to each affected unit based on the specific direction provided under HB 2481. The commission is also proposing a CAIR state implementation plan (SIP) and CAMR state plan.

HB 2481 amended Texas Health and Safety Code (THSC), Chapter 382 by adding §382.0173. THSC, §382.0173(a) requires that the commission adopt rules "incorporat{ing} by reference 40 CFR Subparts AA through II and Subparts AAA through III of Part 96 and 40 CFR Subpart HHHH of Part 60." Additionally, THSC, §382.0173(b) requires the commission to "make permanent allocations that are reflective of the allocation requirements of 40 CFR Subparts AA through HH and Subparts AAA through HHH of Part 96 and 40 CFR Subpart HHHH of Part 60 . . . at no cost . . . using the {EPA's} allocation method as specified by Section 60.4142(a)(1)(i), as issued by that agency on May 12, 2005, or 40 CFR Section 96.142(a)(1)(i), as issued by that agency on May 18, 2005, as applicable with the exception of nitrogen oxides which shall be allocated according to the additional requirements of Subsection (c)." THSC, §382.0173(c) provides additional requirements regarding NO_x allocations, specifically a requirement to maintain a special reserve of allocations for certain units, and requirements relating to establishing allocations for specific control periods. THSC, §382.0173(d) provided that its provisions applied only while the federal rules were 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 interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission interprets the language of new 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 the CAIR NO_x and SO_2, or the CAMR mercury emission trading programs. The legislature expressed clear intent that the commission implement the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by EPA, and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR NO_x allowances.

Under the EPA model trading rules, each CAIR source and CAMR source must apply for and receive CAIR and CAMR permits as a separable part of the source's federal operating permit. These proposed new and amended sections will establish procedures and requirements for incorporating CAIR and CAMR permits into a source's federal operating permit.

CAIR permits may apply to NO_x, SO_2, or both. In rule language applicable to the issuance and administration of CAIR permits, the commission connects elements of the CAIR permit using the conjunction "and." The absence of one of the elements in individual permit circumstances does not affect the applicability of the rule to the remaining elements.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines.

§122.10, General Definitions

The proposed amendment would add the separable CAIR and CAMR permits to the definition of "Applicable requirement."

The commission also proposes to delete §122.10(21)(C). This subparagraph contains references to chapters of the Texas Administrative Code that no longer exist.

§122.12, Acid Rain Definitions

The proposed amendment to this section would add definitions for "Clean air interstate rule permit" and "Mercury budget permit" consistent with the federal definitions in 40 Code of Federal Regulations (CFR) §§60.4102, 96.102, and 96.202. In both definitions the permit is the legally binding and federally enforceable written document specifying annual trading program requirements applicable to the source and to the owners and operators and designated representative of the source and each unit. The title of the section would also be amended to "Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions."

§122.120, Applicability

The proposed amendment would add §122.120(a)(5) - (7) to include the requirements of Chapter 122 to CAIR NO_x, CAIR SO_2, and mercury budget units required to have a federal operating permit.

§122.410, Operating Permit Interface

This section currently contains language that incorporates by reference 40 CFR Parts 72, 74, and 76. The proposed amendment would incorporate the most recent version of 40 CFR Parts 72, 74, and 76 and would additionally incorporate 40 CFR Parts 73 and 77. These federal regulations relate to the implementation of an Acid Rain Program and include the requirements for CAIR and CAMR.

§122.420, General Clean Air Interstate Rule Annual Trading Program Permit Requirements

The proposed new section would establish the basic requirements for a CAIR permit. A CAIR permit will include sources of NO_x or SO_2, or both, that are required to have a federal operating permit. The CAIR permit will contain all applicable requirements of the annual trading programs and will be a separable part of the federal operating permit.

The proposed new section addresses the case of owners of units not required to have a federal operating permit that elect to opt-in to the CAIR program. The CAIR permit will become a part of the new source review permit.

The proposed new section would also state that no CAIR permit will be issued until EPA has received a copy of the certificate of representation for the affected source. The certificate of representation identifies the CAIR source and requires the name, address, e-mail address, and phone number of the designated representative for the source. The certificate also identifies the owners and operators of the source. The designated representative is responsible for and must have the authority to carry out the duties of the CAIR trading programs.

§122.422, Submission of Clean Air Interstate Rule Permit Applications

The proposed new section would require the designated representative for any CAIR NO_x source and CAIR SO_2 source required to have a federal operating permit to submit a complete CAIR permit application for the source by June 1, 2007, or at least 18 months prior to when a new CAIR source commences operation. The CAIR model rules require a complete CAIR permit application to be submitted to the permitting authority at least 18 months, or such lesser time provided by the permitting authority, prior to the start of the CAIR NO_x and SO_2 trading programs. Since the CAIR NO_x and SO_2 trading programs begin in 2009 and 2010, respectively, applicants would be required under EPA's model rule to submit separate permit applications for CAIR NO_x and CAIR SO_2 within one year of one another. The proposed permit application submittal deadline of June 1, 2007, would exercise the flexibility provided to states within the model rule while coordinating the permit deadlines for CAIR NO_x and SO_2 to require the submittal of one permit application for both CAIR NO_x and CAIR SO_2. The commission anticipates the coordination of the permit application submittal dates to be more efficient for both applicants and commission staff.

The proposed new section would also require that a new application covering each CAIR source be submitted by the designated representative in order to renew the CAIR permit.

§122.424, Information Requirements for Clean Air Interstate Rule Permit Applications

The proposed new section would establish content requirements for CAIR applications. The application should identify each CAIR source and unit and will contain the information required under 40 CFR §96.106, Standard Requirements. This section of the federal regulations addresses issues that

include compliance accounts, allowance trading, and source monitoring. The proposed new section would require that a copy of the certificate of representation that is submitted to the EPA, under §122.420, be provided to the executive director.

§122.426, Clean Air Interstate Rule Permit Contents and Term

The proposed new section would require that each CAIR permit contain the same information required in CAIR permit applications under §122.424. Each CAIR permit incorporates the definition in 40 CFR §96.102 and §96.202, Definitions, and every allocation, transfer, or deduction of CAIR NO_x or CAIR SO_2 allowances. The term of the CAIR permit would be established by the executive director in order to coordinate the renewal of the CAIR permit with the issuance, revision, or renewal of the source's federal operating permit.

§122.428, Clean Air Interstate Rule Permit Revisions

This proposed new section authorizes the executive director to revise CAIR permits as necessary in accordance with the requirements of this chapter.

§122.440, General Mercury Budget Trading Program Permit Requirements

The proposed new section establishes the basic requirements for a mercury budget permit. A mercury budget permit will include sources with a mercury budget that are required to have a federal operating permit. The mercury budget permit will contain all applicable requirements of the annual trading program and will be a separable part of the federal operating permit.

The proposed new section would also state that no mercury budget permit will be issued until the EPA has received a copy of the certificate of representation for the affected source. The certificate of representation identifies the mercury budget source and requires the name, address, e-mail address, and phone number of the designated representative for the source. The certificate also identifies the owners and operators of the source. The designated representative is responsible for and must have the authority to carry out the duties of the Mercury Budget Trading Program.

§122.442, Submission of Mercury Budget Permit Applications

The proposed new section would require the designated representative for any mercury budget source required to have a federal operating permit to submit a complete mercury budget application for the source by June 1, 2007, or at least 18 months prior to when the new mercury budget source commences operation. The CAMR model rule requires a complete mercury budget permit application to be submitted to the permitting authority at least 18 months, or such lesser time provided by the permitting authority, prior to the start of the Mercury Budget Trading Program. Since the Mercury Budget Trading Program begins in 2010, applicants would be required under EPA's model rule to submit permit applications for mercury budget permits one year after submittal of their application for a CAIR permit. The proposed permit application submittal deadline of June 1, 2007, would exercise the flexibility provided to states within the model rule while coordinating the permit deadlines for CAMR and CAIR to require the submittal of permit application for the mercury budget, CAIR NO_x, and CAIR SO_2 trading programs. The commission anticipates the coordination of the permit application submittal dates to be more efficient for both applicants and commission staff.

The proposed new section would also require that a new application covering each mercury budget source be submitted by the designated representative in order to renew the mercury budget permit.

§122.444, Information Requirements for Mercury Budget Permit Applications

The proposed new section would establish content requirements for mercury budget permit applications. The application must identify each mercury budget source and unit and will contain the information required under 40 CFR §60.4106, Standard Requirements. 40 CFR §60.4106 addresses issues that include compliance accounts, allowance trading, and source monitoring. The proposed new section would require that a copy of the certificate of representation submitted to the EPA under §122.440, be provided to the executive director.

§122.446, Mercury Budget Permit Contents and Term

The proposed new section would require that each mercury budget permit contain the same information required in mercury budget permit applications under §122.444. Each mercury budget permit would incorporate the definition in 40 CFR §60.4102, Definitions, and every allocation, transfer, and/or deduction of mercury allowances. The term of the mercury budget permit would be established by the executive director in order to coordinate the permit with the issuance, revision, or renewal of the source's federal operating permit.

§122.448, Mercury Budget Permit Revisions

This proposed new section authorizes the executive director to revise mercury budget permits as necessary in accordance with the requirements of this chapter or other rule concerning new source review permits.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

In March 2005, EPA promulgated the CAIR and the CAMR to reduce the emissions of SO_2, NO_x, and mercury. EPA provided two compliance options to meet the reduction requirements under the CAIR and CAMR. States could require EGUs to participate in an interstate cap and trade program or meet emission budgets through measures of the state's choosing. HB 2481 required Texas' participation in the interstate cap and trade program by incorporating EPA's CAIR and CAMR model trading rules by reference. EPA rules require CAIR and CAMR permits to be a separable part of federal operating permits. The proposed rulemaking establishes procedures and requirements for incorporating CAIR and CAMR permits into a source's federal operating permit.

Local governments owning or operating EGUs will have to follow the proposed procedures and requirements to incorporate CAIR and CAMR permits into their federal operating permit. Owners or operators of EGUs will incur the cost associated with preparing permit amendments, but

implementation of the proposed rulemaking is not expected to have a significant fiscal impact for local governments or other owners of EGUs.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased protection of human health and safety because of the reduction of SO_2, NO_x, and mercury emissions.

The proposed rulemaking establishes procedures and requirements for incorporating CAIR and CAMR permits into a source's federal operating permit. Owners or operators of EGUs will have to follow the proposed procedures and requirements to incorporate these permits into their federal operating permit, and they will incur the cost associated with preparing permit applications. Staff is unable to estimate these costs, but implementation of the proposed rulemaking is not expected to have a significant fiscal impact for local governments or other owners of EGUs.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Typically, small or micro-businesses are not owners or operators of EGUs. If a small or micro-business does own or operate an EGU, they will incur the same application preparation costs as those incurred by local governments or large businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of the Texas Government Code, §2001.0225, and determined that the proposed rulemaking meets 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. The proposed rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rulemaking is an incorporation by reference of changes relating to the federal Acid Rain Program in addition to requirements for federal operating permits to support CAIR and CAMR. The CAIR includes EPA-administered emissions trading programs that will be governed by model rules provided in CAIR, which states may incorporate by reference. The EPA found that Texas is among several states that contribute significantly to nonattainment of the NAAQS for $PM_{2.5}$ in downwind states. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, which are precursors to $PM_{2.5}$ formation. Reducing upwind precursor emissions will assist downwind $PM_{2.5}$ nonattainment areas to achieve the NAAQS in a more equitable, cost-effective manner than if those areas implemented local emissions reductions alone. The EPA has specified the amount of each states' required reductions, but states have flexibility to choose the measures by which they achieve them. If states choose to control EGUs, then they must establish a budget or cap for those sources, which will be incorporated into the EGU federal operating permit. 42 United States Code (USC), §7411 creates a system for the establishment of standards of performance to reduce emissions from stationary sources. The CAMR establishes standards of performance for mercury emissions from new and existing coal-fired EGUs. 40 CFR Part 60, Subpart HHHH creates a trading program for EGUs that will provide a mechanism to meet the mercury standards by capping and then reducing emissions over time.

Specifically, the proposed rulemaking would incorporate by reference the provisions of 40 CFR Part 72 as published by EPA on May 12, 2005, with an effective date of July 1, 2006; 40 CFR Part 73 as published by EPA on May 12, 2005, with an effective date of July 1, 2006; 40 CFR Part 74 as published by EPA on May 12, 2005, with an effective date of July 1, 2006; 40 CFR Part 76 with an

effective date of May 1, 1998; and 40 CFR Part 77 as published by EPA on May 12, 2005, with an effective date of July 1, 2006, for purposes of implementing an Acid Rain Program that meets the requirements of FCAA, Title IV and supports the CAIR and CAMR. Additionally, the proposed rulemaking incorporates requirements for federal operating permits for sources subject to CAIR and CAMR. The proposed rulemaking fulfills the requirements of HB 2481, enacted by the 79th Legislature, 2005, to incorporate CAIR and CAMR by reference, which includes requirements for federal operating permits for sources subject to CAIR and CAMR and compliance with the Acid Rain Program.

The proposed incorporation of the federal rules are intended to protect the environment and to reduce risks to human health and safety from environmental exposure by supporting the reductions of NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$ and by reducing emissions of mercury. The CAIR includes revisions to the Acid Rain Program regulations under Federal Clean Air Act (FCAA), Title IV, particularly the regulatory provisions governing the SO_2 cap and trade program. The revisions streamline the operation of the acid rain SO_2 cap and trade program and facilitate its interaction with the CAIR trading program. While the proposed rulemaking is intended to protect human health and the environment, it may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. Cost and benefits of the CAIR and CAMR were analyzed by EPA during the federal notice and comment rulemaking for the CAIR and the CAMR. CAIR and CAMR are required federal programs, and the ability of states to modify their requirements is limited.

The proposed rulemaking would implement requirements of the FCAA. Under 42 USC, §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (42 USC, Chapter 85, Air Pollution Prevention and Control). Under 42 USC, §7411(b)(1)(A), EPA must establish a list of stationary source categories that it has determined "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 USC, §7411(b)(1)(B), then requires EPA to set national standards of performance for new sources within each listed source category. Standards of performance for existing sources of pollutants in the same source categories must then be issued. Under 42 USC, §7411(d), EPA is authorized to promulgate standards of performance that states must adopt through a SIP-like process, which requires state rulemaking action followed by review and approval by EPA under 40 CFR Part 60, Subpart B, Adoption and Submittal of State Plans for Designated Facilities. One of these requirements is that sources subject to CAIR and CAMR must make appropriate changes to their federal operating permits, and comply with changes to the Acid Rain Program.

The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states,

affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410 and §7411. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. While 42 USC, §7411, like 42 USC, §7410 (SIPs), does not require specific programs, methods, or reductions in order to meet the standard, state plans must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (42 USC, Chapter 85). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet emission standards. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for meeting the standards. Thus, while specific measures are not generally required, the emission reductions of 42 USC, §7411 are required. States are not free to ignore the requirements of 42 USC, §7411, and must develop strategies to assure that the emission standards for new and existing sources are met. Adoption of the federal CAIR and CAMR and participation in its emissions cap and trade approach for NO_x, SO_2, and mercury emissions is the method the state has chosen to achieve those reductions in a flexible and cost-effective manner, and the proposed rules relating to federal operating permits and compliance with the Acid Rain Program requirements are required elements of both CAIR and CAMR.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and meet the requirements of 42 USC, §§7410 *et seq.*, the commission routinely proposes and adopts SIP rules and other federally required rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP or otherwise federally required was considered to be a major environmental rule that exceeds federal law, then every rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost

estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP or otherwise federally required fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to protect the environment and to reduce risks to human health by adoption of the federal revisions to the Acid Rain Program by reference, and to specify requirements for federal operating permits for sources subject to CAIR and CAMR. The proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency, but is required by THSC, Texas Clean Air Act (TCAA), §382.0173. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because, although the proposed rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is an incorporation by reference of changes relating to the federal Acid Rain Program in addition to requirements for federal operating permits to support the federal CAIR and federal CAMR. The 79th Legislature enacted HB 2481, which created a requirement in THSC, TCAA, §382.0173, to adopt the federal CAIR and CAMR program rules by reference, which include requirements relating to the federal Acid Rain Program and federal operating permits. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this rulemaking action is exempt under Texas Government Code, §2007.003(b)(13). EPA promulgated the CAIR rule to reduce NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. The proposed rulemaking will enable Texas to implement the federal emissions budget and trading program and impose its requirements on new and existing fossil fuel-fired electric utility units, ultimately ensuring reductions of NO_x and SO_2 emissions. The proposed rulemaking specifically targets a category of

sources with significant NO_x and SO_2 emissions, and through the cap and trade program supports cost-effective control strategies. EPA also promulgated federal standards of performance for mercury emissions to reduce emissions of mercury. The proposed rulemaking will enable Texas to implement, through the federal operating permit program, the federal cap and trade program and impose its requirements on new and existing coal-fired electric utility units, ultimately ensuring reductions of mercury emissions into the environment. The rulemaking action will specifically advance the health and safety purpose by reducing mercury levels through an emissions cap and gradual reductions in emissions. The proposed rulemaking specifically targets a category of sources with significant mercury emissions, and through the cap and trade program supports cost-effective control strategies.

Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, the commission's rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals

and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the proposed revisions will maintain at least the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans and 40 CFR Part 60, Subpart B, Adoption and Submittal of State Plans for Designated Facilities. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new and amended sections in this proposal are applicable requirements under Chapter 122. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permit Program will be subject to the amended requirements of these sections.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled in Austin on April 11, 2006, at 2:00 p.m. in Building E, Room 201S at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle; in Fort Worth on April 12, 2006, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; and in Houston on April 13, 2006, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 5425 Polk Street, Suite H, 3rd Floor. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during each hearing; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions after each hearing.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Patricia Durón, Office of Legal Services at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or

faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-046-101-EN. Comments must be received by 5:00 p.m. April 17, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Kim Herndon, Quality Planning Section, at (512) 239-1421.

SUBCHAPTER A: DEFINITIONS

§122.10

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §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 TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed 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; HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of the NAAQS in any other state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq.*

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, [shall] have the following meanings, unless the context clearly indicates otherwise.

(1) **Air pollutant**--Any of the following regulated air pollutants:

(A) - (B) (No change.)

(C) any pollutant for which a national ambient air quality standard [(NAAQS)] has been promulgated;

(D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA) [FCAA], §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the United States Environmental Protection Agency (EPA) [EPA] by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established under [pursuant to] FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under [pursuant to] FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to [the] FCAA, §112(g)(2) requirement.

(2) **Applicable requirement**--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) [EPA] through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all [All] of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site;[.]

(B) all [All] of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;[.]

(C) all [All] of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;[.]

(D) all [All] of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;[.]

(E) all [All] of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site;[.]

(F) the [The] following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) - (iv) (No change.)

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;[.]

(G) any site-specific [Any site specific] requirement of the state implementation plan; [SIP.]

(H) all [All] of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit; [.]

(I) all [All] of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA) [FCAA], §111 (Standards of Performance for New Stationary Sources);

(ii) (No change.)

(iii) any standard or other requirement of the Acid Rain, Clean Air Interstate Rule, or Clean Air Mercury Rule Programs [Program];

(iv) - (ix) (No change.)

(x) any increment or visibility requirement under FCAA, Title I, Part C or any national ambient air quality standard [NAAQS], but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and [.]

(J) the [The] following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) - (vii) (No change.)

(3) (No change.)

(4) **Control device**--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations [CFR] Part 64 concerning Compliance Assurance Monitoring applies.

(5) - (8) (No change.)

(9) **Federal Clean Air Act [FCAA], §502(b)(10) changes**--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally-enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(10) - (12) (No change.)

(13) **Major source**--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA) [FCAA], §112(b) (Hazardous Air Pollutants);

(ii) (No change.)

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) [EPA] through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has [shall have] the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in

determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) - (xxv) (No change.)

(xxvi) fossil fuel-fired [fossil-fuel-fired] steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) (No change.)

(D) - (E)

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) (No change.)

(14) (No change.)

(15) **Permit or federal operating permit**--

(A) (No change.)

(B) any general operating permit [GOP] issued, renewed, or revised by the executive director under this chapter.

(16) (No change.)

(17) **Permit application**--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit [GOP], or any other similar application as may be required.

(18) **Permit holder**--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit [GOP].

(19) (No change.)

(20) **Potential to emit**--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for

New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency [EPA]. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA) [FCAA], or the term "capacity factor" as used in acid rain provisions of the FCAA or the acid rain rules.

(21) **Preconstruction authorization**--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA) [FCAA], §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit). [; and]

[(C) where appropriate, any preconstruction authorization under Chapter 120 of this title (relating to Control of Air Pollution from Hazardous Waste or Solid Waste Management

Facilities) (as effective until December 1996) or Chapter 121 of this title (relating to Control of Air Pollution from Municipal Solid Waste Management Facilities).]

(22) **Predictive emission monitoring system [(PEMS)]**--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(23) **Proposed permit**--The version of a permit that the executive director forwards to the United States Environmental Protection Agency [EPA] for a 45-day review period. The proposed permit may be the same document as the draft permit.

(24) (No change.)

(25) **Renewal**--The process by which a permit or an authorization to operate under a general operating permit [GOP] is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(26) (No change.)

(27) **Site**--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common

control). A research and development [(R&D)] operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the *Standard Industrial Classification Manual*, [Standard Industrial Classification Manual] 1987) or the research and development [R&D] operation is a support facility for the manufacturing facility.

(28) **State-only requirement**--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act [FCAA] or under any applicable requirement.

(29) **Stationary source**--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations [CFR] Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

§122.12. Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions.

The following words and terms, when used in this chapter, [shall] have the following meanings, unless the context clearly indicates otherwise.

(1) **Acid rain permit**--The legally binding and segregable portion of the federal operating permit issued under this chapter, including any permit revisions, specifying the Acid Rain Program [acid rain program] requirements applicable to an affected source, to each affected unit at an affected source, and to the owners and operators and the designated representative of the affected source or the affected unit.

(2) **Acid Rain Program [rain program]**--The national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with Federal Clean Air Act [FCAA], Title IV, contained in 40 Code of Federal Regulations [CFR] Parts 72 - 78 [72, 73, 74, 75, 76, 77, and 78].

(3) **Clean Air Interstate Rule permit**--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations Part 96, Subpart CC or Subpart CCC, including any permit revisions, specifying the Clean Air Interstate Rule (CAIR) Nitrogen Oxides (NO_x) Annual Trading Program and CAIR Sulfur Dioxide (SO_2) Trading Program requirements applicable to a CAIR NO_x source and CAIR SO_2 source, to each CAIR NO_x unit and CAIR SO_2 unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.

(4) [(3)] **Designated representative**--The responsible individual authorized by the owners and operators of an affected source and of all affected units at the site, as evidenced by a certificate of representation submitted in accordance with the Acid Rain Program [acid rain program],

to represent and legally bind each owner and operator, as a matter of federal law, in matters pertaining to the Acid Rain Program [acid rain program]. Such matters include, but are not limited to: the holdings, transfers, or dispositions of allowances allocated to a unit; and the submission of or compliance with acid rain permits, permit applications, compliance plans, emission monitoring plans, continuous emissions monitor (CEM), and continuous opacity monitor (COM) certification notifications, CEM and COM certification and applications, quarterly monitoring and emission reports, and annual compliance certifications. Whenever the term "responsible official" is used in this chapter, it shall refer to the "designated representative" with regard to all matters under the Acid Rain Program [acid rain program].

(5) **Mercury budget permit**--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations §§60.4120 - 60.4124, including any permit revisions, specifying the Mercury Budget Trading Program requirements applicable to a mercury budget source, to each mercury budget unit at the source, and to the owners and operators and the mercury designated representative of the source and each such unit.

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 1: GENERAL REQUIREMENTS

§122.120

STATUTORY AUTHORITY

The amendment is proposed under TWC, §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 TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed 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; HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, and 382.054; and FCAA, 42 USC, §§7401 *et seq.*

§122.120. Applicability.

(a) Except as identified in subsection (b) of this section, owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) (No change.)

(2) any site with an affected unit as defined in 40 Code of Federal Regulations Part [CFR] 72 subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under Federal Clean Air Act (FCAA) [FCAA], §129(e) (relating to Solid Waste Combustion); [or]

(4) any site that is a non-major source which the United States Environmental Protection Agency (EPA) [EPA], through rulemaking, has designated as no longer exempt or no longer eligible for a deferral from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) - (B) (No change.)

(C) any non-major source in a source category designated by the EPA; [.]

(5) any Clean Air Interstate Rule (CAIR) oxides of nitrogen unit, as defined in 40 CFR §96.102, Definitions, if the CAIR oxides of nitrogen unit is otherwise required to have a federal operating permit;

(6) any CAIR sulfur dioxide unit, as defined in 40 CFR §96.202, Definitions, if the CAIR sulfur dioxide unit is otherwise required to have a federal operating permit; or

(7) any mercury budget unit, as defined in 40 CFR §60.4102, if the mercury budget unit is otherwise required to have a federal operating permit.

(b) (No change.)

SUBCHAPTER E: ACID RAIN PERMITS, CLEAN AIR INTERSTATE RULE, CLEAN AIR MERCURY RULE

DIVISION 1: ACID RAIN PERMITS

§122.410

STATUTORY AUTHORITY

The amendment is proposed under TWC, §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 TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed 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; HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, and 382.054; and FCAA, 42 USC, §§7401 *et seq.*

§122.410. Operating Permit Interface.

(a) The commission hereby adopts and incorporates by reference, except as specified in this section, the provisions of 40 Code of Federal Regulations (CFR) Part 72 as published by United States Environmental Protection Agency (EPA) on May 12, 2005 (70 FR 25162), [(]with an effective date of July 1, 2006 [June 25, 1999,] ; 40 CFR Part 73 as published by EPA on May 12, 2005 (70 FR 25162), with an effective date of July 1, 2006; [(] 40 CFR Part 74 as published by EPA on May 12, 2005 (70 FR 25162), [( ] with an effective date of July 1, 2006, [May 18, 1998, and] Part 76 [( ]with an effective date of May 1, 1998; and 40 CFR Part 77 as published by EPA on May 12, 2005 (70 FR 25162), with an effective date of July 1, 2006, for purposes of implementing an Acid Rain Program [acid rain program] that meets the requirements of Federal Clean Air Act [FCAA], Title IV.

(b) Applicants for sources subject to 40 CFR Parts 72 - 74 [72, 74, and] 76, and 77 shall comply with those requirements.

(c) If the provisions of 40 CFR Parts 72 - 74), [72, 74, and] 76, and 77 conflict with or are not included in this chapter, the provisions of 40 CFR Parts 72 - 74, [72, 74, and] 76, and 77 shall apply and take precedence except for the following.

(1) References to 40 CFR Part 70 in 40 CFR Parts 72 - 74, [72, 74, and] 76, and 77 shall be satisfied by the requirements of this chapter for the purposes of implementing the Acid Rain Program [acid rain program].

(2) The procedural requirements for acid rain permit revisions in 40 CFR Part 72, Subpart H (Acid Rain Permit Revisions) shall be satisfied by §122.414 of this title (relating to Acid Rain Permit Revisions).

SUBCHAPTER E: ACID RAIN PERMITS, CLEAN AIR INTERSTATE RULE, CLEAN AIR MERCURY RULE

DIVISION 2: CLEAN AIR INTERSTATE RULE

§§122.420, 122.422, 122.424, 122.426, 122.428

STATUTORY AUTHORITY

The new sections are proposed under TWC, §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 TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed 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; HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The proposed new sections implement THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, and 382.054; and FCAA, 42 USC, §§7401 *et seq.*

§122.420. General Clean Air Interstate Rule Annual Trading Program Permit Requirements.

(a) For each Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) source and CAIR sulfur dioxide (SO_2) source required to have a federal operating permit, such permit must include a CAIR permit. The CAIR portion of the federal permit must be administered in accordance with this chapter as applicable, except as provided otherwise by 40 Code of Federal Regulations (CFR) Part 96, Subpart CC and Subpart CCC.

(b) Each CAIR permit must contain, with regard to the CAIR NO_x source and CAIR SO_2 source and the CAIR NO_x units and CAIR SO_2 units at the source covered by the CAIR permit, all applicable CAIR NO_x Annual Trading Program, and CAIR SO_2 Trading Program requirements and must be a complete and separable portion of the federal operating permit or other federally enforceable permit under subsection (c) of this section.

(c) For each CAIR NO_x opt-in unit and CAIR SO_2 opt-in unit that is required to have a federally enforceable permit, such permit must include a CAIR permit. The CAIR portion of the federally enforceable permit must be administered in accordance with the commission's regulations for such permit as applicable, except as otherwise provided under 40 CFR Part 96, Subparts II and III.

(d) No CAIR permit may be issued, amended, reopened, or renewed until the United States Environmental Protection Agency has received a complete certificate of representation under 40 CFR §96.113 or §96.213, Certificate of Representation for a CAIR designated representative of the CAIR NO_x and CAIR SO_2 source and the CAIR NO_x and CAIR SO_2 units at the source.

§122.422. Submission of Clean Air Interstate Rule Permit Applications.

(a) The Clean Air Interstate Rule (CAIR) designated representative of any CAIR oxides of nitrogen (NO_x) source and CAIR sulfur dioxide (SO_2) source required to have a federal operating permit shall submit to the executive director a complete CAIR permit application under §122.424 of this title (relating to Information Requirements for Clean Air Interstate Rule Permit Applications) for the source covering each CAIR NO_x unit and CAIR SO_2 unit at the source by June 1, 2007, or at least 18 months prior to the date that the CAIR NO_x unit and CAIR SO_2 unit commences operation.

(b) For a CAIR NO_x source and CAIR SO_2 source required to have a federal operating permit, the CAIR designated representative shall submit a complete CAIR permit application to the executive director under §122.424 of this title for the source covering each CAIR NO_x unit and CAIR SO_2 unit at the source to renew the CAIR permit in accordance with this chapter.

§122.424. Information Requirements for Clean Air Interstate Rule Permit Applications.

A complete Clean Air Interstate Rule (CAIR) permit application must include the following elements concerning the CAIR oxides of nitrogen (NO_x) source and CAIR sulfur dioxide (SO_2) source for which the application is submitted, in a format prescribed by the executive director:

(1) identification of the CAIR NO_x source and CAIR SO_2 source;

(2) identification of each CAIR NO_x unit and CAIR SO_2 unit at the CAIR NO_x source and CAIR SO_2 source;

(3) the standard requirements under 40 Code of Federal Regulations §96.106 and §96.206; Standard Requirements;

(4) a copy of the complete certificate of representation submitted to the United States Environmental Protection Agency as required under §122.420(d) of this title (relating to General Clean Air Interstate Rule Annual Trading Program Permit Requirements); and

(5) any other information requested by the executive director.

§122.426. Clean Air Interstate Rule Permit Contents and Term.

(a) Each Clean Air Interstate Rule (CAIR) permit must contain, in a format prescribed by the executive director, all elements required for a complete CAIR permit application under §122.424 of this title (relating to Information Requirements for Clean Air Interstate Rule Permit Applications).

(b) Each CAIR permit must incorporate the definitions of terms under 40 Code of Federal Regulations §96.102 and §96.202 and, upon recordation by the United States Environmental Protection Agency administrator under 40 Code of Federal Regulations Part 96, Subparts FF, GG, II, FFF, GGG, and III every allocation, transfer, and deduction of a CAIR oxides of nitrogen (NO_x) allowance and CAIR sulfur dioxide (SO_2) allowance to or from the compliance account of the CAIR NO_x source and CAIR SO_2 source covered by the permit.

(c) The executive director shall set the term of the CAIR permit as necessary to facilitate coordination of the renewal of the CAIR permit with issuance, revision, reopening, or renewal of the CAIR NO_x source's and CAIR SO_2 source's federal operating permit.

§122.428. Clean Air Interstate Rule Permit Revisions.

Except as provided in §122.426(b) of this title (relating to Clean Air Interstate Rule Permit Contents and Term), the executive director shall revise the CAIR permit, as necessary, in accordance with this chapter or the regulations for other federally enforceable permits regarding permit revisions as applicable addressing permit revisions.

SUBCHAPTER E: ACID RAIN PERMITS, CLEAN AIR INTERSTATE RULE, CLEAN AIR MERCURY RULE

DIVISION 3: CLEAN AIR MERCURY RULE

§§122.440, 122.442, 122.444, 122.446, 122.448

STATUTORY AUTHORITY

The new sections are proposed under TWC, §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 TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed 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; HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any

source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The proposed new sections implement THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislative Session, to be codified at §382.0173, and 382.054; and FCAA, 42 USC, §§7401 *et seq*.

§122.440. General Mercury Budget Trading Program Permit Requirements.

(a) For each mercury budget source required to have a federal operating permit, such permit must include a mercury budget permit. The mercury budget portion of the federal operating permit shall be administered in accordance with this chapter except as provided otherwise by 40 Code of Federal Regulations §§60.4120 - 60.4124.

(b) Each mercury budget permit must contain, with regard to the mercury budget source and the mercury budget units at the source covered by the mercury budget permit, all applicable Mercury Budget Trading Program requirements and must be a complete and separable portion of the federal operating permit.

(c) No mercury budget permit may be issued, amended, reopened, or renewed until the United States Environmental Protection Agency has received a complete certificate of representation under 40 Code of Federal Regulations §60.4113 from a mercury designated representative of the mercury budget source and the mercury budget units at the source.

§122.442. Submission of Mercury Budget Permit Applications.

(a) The mercury designated representative of any mercury budget source required to have a federal operating permit shall submit to the executive director a complete mercury budget permit application under §122.444 of this title (relating to Information Requirements for Mercury Budget Permit Applications) for the source covering each mercury budget unit at the source by June 1, 2007, or 18 months prior to the date that the mercury budget unit commences operation.

(b) For a mercury budget source required to have a federal operating permit, the mercury budget designated representative shall submit a complete mercury budget permit application for the source under §122.444 of this title covering each mercury budget unit at the source to renew the mercury budget permit in accordance with this chapter.

§122.444. Information Requirements for Mercury Budget Permit Applications.

A complete mercury budget permit application must include the following elements concerning the mercury budget source for which the application is submitted, in a format prescribed by the executive director:

(1) identification of the mercury budget source;

(2) identification of each mercury budget unit at the mercury budget source;

(3) the standard requirements under 40 CFR §60.4106, Standard Requirements;

(4) a copy of the complete certificate of representation submitted to United States Environmental Protection Agency as required under §122.440(c) of this title (relating to General Mercury Budget Trading Program Permit Requirements); and

(5) any other information requested by the executive director.

§122.446. Mercury Budget Permit Contents and Term.

(a) Each mercury budget permit must contain, in a format prescribed by the executive director, all elements required for a complete mercury budget permit application under §122.444 of this title (relating to Information Requirements for Mercury Budget Permit Applications).

(b) Each mercury budget permit incorporates automatically the definitions of terms under 40 Code of Federal Regulations §60.4102 and, upon recordation by the United States Environmental Protection Agency administrator under 40 Code of Federal Regulations §§60.4150 - 60.4162, every allocation, transfer, and/or deduction of a mercury allowance to or from the compliance account of the mercury budget source covered by the permit.

(c) The executive director shall set the term of the mercury budget permit as necessary to facilitate coordination of the renewal of the mercury budget permit with issuance, revision, reopening, or renewal of the mercury budget source's federal operating permit.

§122.448. Mercury Budget Permit Revisions.

Except as provided in §122.446(b) of this title (relating to Mercury Budget Permit Contents and Term), the executive director shall revise the mercury budget permit, as necessary, in accordance with this chapter or the regulations for other federally enforceable permits regarding permit revisions, as applicable.