

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §101.601 and §101.602. Section 101.602 is adopted *with changes* to the proposed text as published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1884). Section 101.601 is adopted *without changes* to the proposed text and will not be republished.

These new sections are being adopted in Subchapter H, Emissions Banking and Trading, new Division 8, Clean Air Mercury Rule. The new sections will be submitted to the United States Environmental Protection Agency (EPA) as part of the Texas State Plan for the Control of Designated Facilities and Pollutants.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On May 18, 2005, EPA finalized 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 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. During the 79th Legislature, 2005, the legislature enacted House Bill 2481 requiring Texas to participate in the EPA-administered interstate cap and trade

program through the incorporation by reference of the CAMR model trading rule.

House Bill (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 nitrogen oxides (NO<sub>x</sub>) 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 House Bill 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 Clean Air Interstate Rule (CAIR) nitrogen oxides and sulfur

dioxide (SO<sub>2</sub>), 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 nitrogen oxides allowances.

The CAMR model trading rule, under 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH, is a market-based cap and trade system designed to reduce the costs of complying with the new mercury reduction requirements. The Mercury Budget Trading Program caps nationwide annual mercury 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 provides flexibility in complying with the mercury reduction requirements through unrestricted banking of excess allowances and the trading of allowances between EGUs nationwide. States participating in the interstate trading program therefore are not subject to individual state caps. Under the model rule, states are provided flexibility in the allocation methodology used to determine mercury allowance allocations for each mercury budget unit. States are then responsible for submitting the allowance allocations to EPA for recordation. Under the CAMR model rule, EPA establishes mercury compliance accounts for each mercury budget source and maintains an allowance tracking system to record the deposit, transfer, and deduction for compliance of all mercury allowances. The mercury budget sources are 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. Finally,

the model rule requires all elements of the Mercury Budget Trading Program to be federally enforceable through the issuance of a mercury budget permit as a complete and separable portion of each mercury budget source's Title V permit.

As directed by House Bill 2481, §2 (codified in THSC, §382.0173), the commission is adopting under Subchapter H, new Division 8 of Chapter 101 to incorporate 40 CFR Part 60, Subpart HHHH, by reference for the purpose of complying with the CAMR.

#### SECTION BY SECTION DISCUSSION

##### *Section 101.601, Applicability*

The adopted new §101.601 states that the requirements of Chapter 101, Subchapter H, Division 8, apply to any stationary, coal-fired boiler or stationary, coal-fired combustion turbine meeting the applicability requirements under 40 CFR §60.4104. The referenced applicability requirements under 40 CFR §60.4104 apply to stationary, coal-fired boilers or combustion turbines serving at any time, since the startup of the unit's combustion chamber, a generator with a nameplate capacity of more than 25 MWe producing electricity for sale. The referenced applicability requirements also include cogeneration units serving at any time a generator with nameplate capacity of more than 25 MWe and supplying in any calendar year more than one-third of the unit's potential electric output capacity or 219,000 megawatt-hour (MWh), whichever is greater, to any utility power distribution system for sale.

##### *Section 101.602, Clean Air Mercury Rule Trading Program*

The adopted new §101.602 incorporates by reference the CAMR trading program for mercury codified

under 40 CFR Part 60, Subpart HHHH, finalized on May 18, 2005. The section requires owners and operators of sources subject to 40 CFR Part 60, Subpart HHHH, to comply with the requirements of that subpart. Based on comment, §101.602(a) was revised to remove the phrase “except as specified in this division” because the additional language is unnecessary since nothing elsewhere in the division contradicts the incorporated federal rule.

The requirements of 40 CFR Part 60, Subpart HHHH, establish the Mercury Budget Trading Program of the CAMR. Specifically, the rules under Subpart HHHH outline a model cap and trade program that may be adopted by states to comply with CAMR. The rules provide for the applicability of the Mercury Budget Trading Program to stationary, coal-fired boilers and combustion turbines serving a generator with a nameplate capacity greater than 25 MWe producing electricity for sale. The Mercury Budget Trading Program provides for an exemption from the program’s permitting, monitoring, and reporting requirements for retired units. Retired units continue to receive mercury allowance allocations. The model trading rule outlines standard requirements for each mercury budget source and mercury budget unit, including the requirements to obtain a mercury budget permit; comply with the monitoring, reporting, and recordkeeping requirements of 40 CFR §§60.4170 - 60.4176; and hold mercury allowances not less than the amount of total mercury emissions for each control period, January 1 through December 31 of each calendar year. The requirements under 40 CFR §§60.4110 - 60.4114 describe the procedures for the authorization of a mercury designated representative, the representative’s responsibilities, and the responsibilities of both the mercury designated representative and alternate mercury designated representative for a mercury budget source. The mercury designated representative or alternate represents and, through its representations, actions, inactions, or

submissions, legally binds each owner and operator of a mercury budget source in all matters pertaining to the Mercury Budget Trading Program. For each mercury budget source required to have a Title V operating permit, 40 CFR §§60.4120 - 60.4124 describe the requirements for each mercury budget source to apply for and obtain a mercury budget permit containing all applicable Mercury Budget Trading Program requirements for each mercury budget unit at the source.

State trading budgets and the methodology and procedures for allocating mercury allowances are provided under 40 CFR §§60.4140 - 60.4142. State budgets are provided in two phases, with Phase I beginning in 2010 and continuing through the year 2017. In each Phase I year, Texas will receive a mercury budget of 4.657 tons. The Phase II mercury budget will begin in 2018, with Texas receiving 1.838 tons in 2018 and each year thereafter. Mercury allowance allocations, in ounces, will be distributed to each mercury budget unit in accordance with the methodology outlined under 40 CFR §60.4142. For units commencing operation before January 1, 2001, mercury allowances are allocated based on the average of the three highest amounts of heat input, in million British thermal units (mmBtu), from calendar years 2000 through 2004 adjusted for the type of coal burned. The coal type adjustment is performed by multiplying the respective portion of the unit's baseline heat input for the year by the following: 3.0 for lignite, 1.25 for subbituminous, and 1.0 for all other coal types. Units commencing operation on or after January 1, 2001, and operating each calendar year for a period of five or more consecutive years will not be eligible for an allocation from the new unit set-aside and will receive their mercury allowance allocation from the general mercury trading budget on a modified output basis. The baseline heat input is the average of the three highest amounts of the unit's total converted control period heat input from the first five years of operation. In calculating a unit's

converted control period heat input on a modified output basis, the unit's gross electrical output is multiplied by a heat rate conversion factor of 7,900 British thermal units per kilowatt-hour (Btu/kWh). For cogeneration units, the converted heat input is calculated by converting the available thermal output, in Btu, of useable steam to an equivalent heat input by dividing the thermal output by a general boiler/heat exchanger efficiency of 80%. For combustion turbine cogeneration units, the converted heat input is calculated by converting the available thermal output of useable steam from the heat recovery steam generator or heat exchanger to an equivalent heat input by dividing the thermal output by a general boiler/heat exchanger efficiency of 80%. To this, the electrical generation from the combustion turbine is added after conversion to an equivalent heat input by multiplying the electrical output by 3,413 Btu/kWh. The sum yields the total equivalent heat input for the combustion turbine cogeneration unit.

The model rule provides for each state to set aside a portion of its annual allowance allocation for units newly beginning operation. The model rule allocation methodology allocates a total amount of mercury allowances for the 2010 through 2014 control periods equal to 95% of the Texas mercury trading budget to each mercury budget unit with a baseline heat input determined under 40 CFR §60.4142(a). The allocation will be made in proportion to each mercury budget unit's share of baseline heat input compared to the total baseline heat input for all mercury budget units with a baseline heat input determined under 40 CFR §60.4142(a). Beginning with the 2015 control period, and for each control period thereafter, a total amount of mercury allowances equal to 97% of the mercury trading budget will be allocated to each mercury budget unit with a baseline heat input determined under 40 CFR §60.4142(a) in proportion to each mercury budget unit's share of baseline

heat input compared to the total baseline heat input for all mercury budget units with a baseline heat input determined under 40 CFR §60.4142(a).

The model allocation methodology requires the executive director to distribute mercury allowances from the new unit set-aside upon receipt of a request from the mercury budget designated representative for the mercury budget unit. Submittal of each request for a mercury allowance allocation from the new unit set-aside is required on or before July 1 of the first control period for which the request is being made and after the date on which the mercury budget unit commences commercial operation. Mercury allowances requested from the new unit set-aside will not be allocated in excess of the new unit's total tons of mercury emissions reported to EPA for the previous control period. On or after July 1 of each control period, the executive director shall review each mercury allowance allocation request, determine the sum of all such requests, and allocate mercury allowances from the new unit set-aside for the control period. If the amount of mercury allowances in the new unit set-aside is greater than or equal to the sum of all allowances requested, then the executive director shall allocate the amount of mercury allowances requested. If the amount of mercury allowances in the new unit set-aside is less than the sum of all allowances requested, then the executive director shall allocate to each mercury budget unit covered under a request an amount of allowances in proportion to the amount of allowances requested by a mercury budget unit compared to the total amount of allowances requested by all mercury budget units. In the adopted allocation methodology, new units begin receiving allowances from the set-aside for the control period immediately following the control period in which the new unit commences commercial operation, based on the unit's emissions reported for the previous control period. Therefore, a mercury budget source operating a new unit is required



to hold allowances covering the emissions from the new unit for the control period in which the new unit commences commercial operation, but will not receive an allocation for that control period.

Mercury allowance allocations for a new unit in subsequent control periods will continue to be based on the unit's emissions from the previous control period until the unit establishes a baseline in accordance with 40 CFR §60.4142(a)(1)(ii). All mercury allowance allocations under the adopted allocation methodology are rounded to the nearest whole allowance.

The model rule allows for the distribution of any unallocated mercury allowances remaining in the new unit set-aside for a given control period to mercury budget units with a historical baseline heat input receiving an allocation under 40 CFR §60.4142(b). This distribution is performed by multiplying the amount of unallocated allowances remaining in the set-aside by each mercury budget unit's allocation determined under 40 CFR §60.4142(b), divided by 95% of the Texas mercury trading budget for 2010 to 2014, and divided by 97% for 2015 and thereafter.

The model rule also requires, for the purposes of determining allowance allocations, a mercury budget unit's control period heat input and total ounces of mercury emissions during each calendar year to be determined in accordance with the continuous emission monitoring requirements of 40 CFR Part 75 to the extent that the unit was otherwise subject to those requirements for the year. If a mercury budget unit commencing operation before January 1, 2001, was not otherwise subject to the requirements of 40 CFR Part 75 for any given year, the unit's control period heat input, status as coal-fired or natural gas-fired, and total ounces of mercury emissions during a calendar year will be based on the best available data reported to the executive director. The types and amounts of fuel combusted by such a

mercury budget unit will also be based on the best available data reported to the executive director.

The model trading rule requires the executive director to submit to EPA by October 31, 2006, the mercury allowance allocations for the 2010 through 2014 control periods for mercury budget units with a historical baseline heat input determined under 40 CFR §60.4142(a). Subsequently, by October 31, 2008, and October 31 of each year thereafter, the model rule requires submittal to EPA of the mercury allowance allocations for mercury budget units with a historical baseline heat input determined under 40 CFR §60.4142(a) for the control period beginning in the sixth year after the year of the applicable submittal deadline. For example, the mercury allowance allocations determined under 40 CFR §60.4142(a) for the 2015 control period shall be submitted to EPA by October 31, 2008. The model rule also describes the actions EPA may take should the executive director fail to submit the mercury allowance allocations by the applicable deadlines. If the mercury allowance allocations are not provided to EPA by the applicable deadlines in 40 CFR §60.4141(b)(1) for each control period, EPA will assume the mercury allowance allocations for the applicable control period are the same as for the immediately preceding control period. If the applicable control period for which the allowance allocation is not submitted is 2018, EPA will assume the mercury allowance allocations equal the allocations for the 2017 control period multiplied by the state trading budget for Phase II and divided by the state trading budget for Phase I. Finally, by October 31, 2010, and October 31 of each year thereafter, the executive director is required to submit to EPA the mercury allowance allocations distributed from the new unit set-aside under 40 CFR §60.4142(c) and (d) for that control period. If the executive director fails to submit the allowance allocations by the applicable deadline in 40 CFR §60.4141(c)(1) for each control period, EPA will assume that no allowances are to be allocated for the

applicable control period to any mercury budget unit that is otherwise receiving an allocation from the new unit set-aside.

The mercury allowance tracking system; methods for establishing compliance accounts and general accounts; the recording of mercury allowance allocations into a mercury budget source's compliance account; the procedures for deducting allowances for compliance; and the banking of mercury allowances are outlined under 40 CFR §§60.4151 - 60.4157. The Mercury Budget Trading Program allows for the unlimited banking of excess allowances. Deductions for compliance are based on the monitoring and reporting requirements under 40 CFR §60.4154 with "penalty" deductions for emissions in excess of the amount of allowances held in a compliance account being equal to three times the number of ounces emitted in excess. The procedures for the submission and recordation of mercury allowance trades are outlined under 40 CFR §§60.4160 - 60.4162. The model rule, under 40 CFR §§60.4170 - 60.4176, requires mercury budget units to meet the continuous emissions monitoring requirements under 40 CFR Part 75 and outlines the initial certification and recertification procedures for monitoring systems, as well as the applicable recordkeeping and reporting requirements.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that it 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 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 adopted rulemaking incorporates by reference the federal CAMR emissions trading rules located in 40 CFR Part 60, Subpart HHHH. 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. Facilities will demonstrate compliance with the standard by holding one allowance for each ounce of mercury emitted each year. EPA has determined that the cap and trade approach to limiting mercury emissions is the most cost-effective way to achieve reductions. However, states may elect not to participate in the trading program and adopt other strategies to meet their state budgets, which would function as caps in those states. If states choose to participate in the cap and trade program, as has Texas, they must adopt

the model rule. The model rule provides an example allowance allocation methodology, which Texas has adopted. The CAMR is designed to achieve initial mercury reductions through implementation of the federal CAIR. The CAIR also imposes cap and trade programs on EGUs that will reduce emissions of sulfur dioxide and oxides of nitrogen. Emission controls installed to comply with CAIR will achieve mercury reductions as a co-benefit during the first phase of the mercury trading program.

This adopted rulemaking fulfills the requirements of House Bill 2481 to incorporate CAMR by reference and to specify the sources to which the trading program is applicable. The incorporation of CAMR will require emission reductions from certain new and existing stationary coal-fired electric utility units, including boilers and combustion turbines, and certain cogeneration units that meet specific applicability criteria. The incorporation of the federal rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure to mercury. The required emissions reductions are based on controls that are known to be highly cost-effective for EGUs, but the requirements may have adverse impacts on certain utilities, which could be considered a sector of the economy. The exact cost for each unit cannot be predicted, but significant costs to comply with the emission reduction requirements may be expected for at least some units that install or upgrade emission controls or that purchase allowances. The adopted rulemaking may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. The cost and benefits of the CAMR were analyzed by EPA during the federal notice and comment rulemaking for the CAMR. CAMR is a required federal standard, and the ability of states to modify its requirements is limited.

The adopted rulemaking implements the requirements of the Federal Clean Air Act (FCAA). 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 state implementation plan (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.

Under 42 USC, §7411, states such as Texas that have been delegated the authority to enforce the FCAA must enforce performance standards for new and existing sources of mercury emissions. New sources must comply with Standards of Performance for New Stationary Sources (NSPS) for mercury, as promulgated in the CAMR. In addition, new sources will be covered under the mercury cap of the trading program, and will be required to hold allowances equal to their emissions. For existing sources, 42 USC, §7411, requires EPA to "prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title (SIPs) under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance." While 42 USC, §7411, like §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," (meaning Chapter 85, Air Pollution Prevention and Control). 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. 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, §7411. Thus, while specific measures are not generally required, the emission reductions 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 rule and participation in its emissions cap and trade approach for mercury emissions is the method the state has chosen to achieve those reductions in a flexible and cost-effective manner.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 during the 75th legislative session. The intent of Senate Bill 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 Senate Bill 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 exceeded a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet emission standards; thus, states must develop strategies to help ensure that those standards for new and existing sources are met. Because of the ongoing need to address both national ambient air quality standards for criteria pollutants and NSPS and existing source standards for designated pollutants, the commission routinely proposes and adopts SIP rules and 42 USC, §7411 rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP or the 42 USC, §7411 plans was considered to be a major environmental rule that exceeds federal law, then every SIP rule and 42 USC, §7411 rule would require the full regulatory impact analysis contemplated by Senate Bill 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 Senate Bill 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the 42 USC, §7411 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 to implement and enforce the federal standards of performance and 42 USC, §7411 state plan 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 adopted rules is to adopt and incorporate by reference the federal CAMR emissions trading rules, with the objective to protect the environment and to reduce risks to human health. The adopted rules do 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 the Texas Clean Air Act, as codified in THSC, §382.0173. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because, although the adopted rules meet the definition of a "major environmental rule," they do not meet any of the four applicability criteria for a major environmental rule.

#### 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 adopted rulemaking is to incorporate by reference the federal CAMR emissions trading rules, located in 40 CFR Part 60, Subpart HHHH. Subpart HHHH establishes a mercury emissions cap and trade program for new and existing coal-fired EGUs, for which standards of performance have been promulgated under 42 USC, §7411. During the 79th Legislature, 2005, the legislature enacted House Bill 2481, which created a requirement in the Texas Clean Air Act, codified in THSC, §382.0173, to adopt the federal program rules by reference. 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.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted 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 action is exempt under Texas Government Code, §2007.003(b)(13). EPA promulgated federal standards of performance for mercury emissions to reduce presently uncontrolled emissions of mercury. The adopted rules will enable Texas to implement the federal cap and trade program and impose its requirements on new and existing EGUs, ultimately ensuring reductions of mercury emissions into the environment. The action will specifically advance the health and safety purpose by reducing mercury levels through an emissions cap and gradual reductions in emissions. The rules specifically target a category of sources with significant mercury emissions, and through the cap and trade program support cost-effective control strategies. Consequently, the adopted rules meet the exemption criteria in Texas Government Code, §2007.003(b)(13). This rulemaking therefore meets the exemptions in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Chapter 2007 does not apply to this adopted 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 rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission 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 adopted rules will maintain at least the same level of or increase the level of emissions control. The CMP policy applicable to this rulemaking action is the policy that commission 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 60, Standards of Performance for New Stationary Sources. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The requirements of 42 USC, §7410, are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permits Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order to include CAMR.

PUBLIC COMMENT

The commission conducted public hearings on the proposed rules on April 11, 2006, in Austin; April 12, 2006, in Fort Worth; and April 13, 2006, in Houston. During the public comment period, which closed at 5:00 p.m., April 17, 2006, the commission received comments from Association of Electric Companies of Texas, Inc. (AECT); Austin Physicians for Social Responsibility (APSR); Clean Water Action (CWA); Downwinders at Risk Education Fund; Entergy Services Inc. (Entergy); Environment Texas; FPL Group (FPL); Greater Houston Area Smog Prevention (GHASP); Gulf Coast Lignite Coalition (GCLC); League of Women Voters of Texas (LWV); NRG Texas (NRG); Public Citizen; Representative Dennis Bonnen, District 25; Senator Ken Armbrister, District 18; Sierra Club of Dallas-Fort Worth (DFW Sierra Club); Sierra Club - Houston Regional Group (Houston Sierra Club); Southwestern Public Services (SPS); Suez Energy Generation NA, Inc. (SEGNA); Texas Association of Business (TAB); Texas Impact; Texas Mining and Reclamation Association (TMRA); Texas Campaign for the Environment (TCE); The Sustainable Energy and Economic Development Coalition (SEED); TXU Power (TXU); Working Effectively for Clean Air Now (WECAN); and 140 individuals.

NRG supported comments submitted by GCLC; TMRA supported comments submitted by AECT and GCLC; GCLC supported comments submitted by TMRA and AECT; and Entergy and TXU supported comments submitted by AECT.

TXU, Entergy, AECT, and SPS concurred with Representative Bonnen's comments.

RESPONSE TO COMMENTS

*MORE STRINGENT CONTROLS*

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, LWV, APSR, CWA, Texas Impact, GHASP, and 56 individuals requested that the commission adopt rules more stringent than the federal rules by requiring a 90% reduction in mercury emissions from coal-fired power plants by the year 2010. In addition, the commenters stated that the goal of the commission should be a total phase-out of mercury emissions from utilities. Texas Impact commented that toxic emissions threaten to stifle growth and development in Texas.

**The rules have not been revised in response to this comment. Under House Bill 2481, 79th Legislature, 2005, the commission was directed to adopt and incorporate by reference 40 CFR Part 60, Subpart HHHH, thus requiring the commission to allocate the mercury budget as provided under the federal CAMR model trading rule. Therefore, the commission does not have the authority to require additional mercury reductions from coal-fired EGUs in conjunction with implementing CAMR.**

Representative Dennis Bonnen and Senator Armbrister commented that the legislature did not intend Section 2 of HB 2481 to be interpreted to allow more stringent emission control requirements in the TCEQ rules adopting the federal CAMR.

**The commission appreciates the information provided by Representative Bonnen and Senator Armbrister.**

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, CWA, and 127 individuals requested that the timeline for mercury reductions be accelerated to require reductions from EGUs to be met by 2010. GCLC and TMRA commented that the commission should reject any request to accelerate the timeline for complying with the proposed mercury reductions due to the technical and logistical constraints with retrofitting the appropriate control equipment on existing lignite-fired units.

**The rules have not been revised in response to this comment. Under House Bill 2481, 79th Legislature, 2005, the commission was provided specific direction to adopt and incorporate by reference 40 CFR Part 60, Subpart HHHH. Based on this legislative directive, the commission must adhere to the timelines established by EPA under the federal CAMR model trading rule for mercury. Under the federal CAMR model trading rule, Phase I mercury reductions will result from NO<sub>x</sub> and SO<sub>2</sub> controls initially implemented in 2009 and 2010 under the CAIR. The commission does not have the authority to accelerate the timelines for coal-fired EGUs to comply with these emission reduction requirements.**

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, LWV, CWA, DFW Sierra Club, and 43 individuals commented that the commission was provided the authority under HB 2481 to implement more stringent mercury controls than those required under the federal

rules. SEED commented, and provided information to support its comment, that other states are implementing more stringent mercury standards than is Texas. AECT, Entergy, GCLC, NRG, SPS, TMRA, and TXU commented that HB 2481 does not provide the commission with the authority in implementing the federal CAMR program to impose more stringent mercury control requirements than those required under the federal rule.

**The commission has made no changes in response to these comments. The Texas Legislature, during the 79th Legislative Regular Session, 2005, enacted House Bill 2481, which requires the commission to participate in the EPA-administered cap and trade program for mercury by incorporating the federal CAMR by reference. HB 2481 also provided that its provisions applied only while the federal rules were enforceable and that its provisions did not limit the authority of the commission to implement more stringent emissions control requirements. As indicated in the proposal preamble, the commission interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission continues to interpret the language of new THSC, §382.0173(d) as not restricting existing authority to require further emission control requirements, but not to interfere with, or change, the requirements of the CAMR mercury trading program.**

**The legislature expressed clear intent that the commission implement the CAMR model trading program by requiring the incorporation by reference of the CAMR program rules as promulgated by EPA. Those rules include a mercury allowance allocation methodology in 40 CFR §60.4142 that the commission is adopting as part of the trading program, requiring the use**



**of EPA-specified allocation methodology. Requiring more stringent mercury reductions than required by the federal CAMR would not be in accord with the statutory requirement to incorporate the CAMR by reference, which specifies the emission budget for mercury in 40 CFR §60.4140 in two phases, 2010 - 2017 and 2018 and thereafter. By requiring the commission to incorporate the federal rule by reference, the commission must also incorporate the allocation methodology and the emission budget contained in the federal CAMR in 40 CFR Part 60.**

AECT, Entergy, FPL, GCLC, NRG, SPS, TAB, TMRA, and TXU commented in support of the proposed rule and opposed any revisions to the rule imposing more stringent mercury emission requirements than those required under the federal rule. GCLC and TMRA commented that the legislative directive provided to the commission under HB 2481 is grounded in sound science and based on available control technologies. Lignite coals contain high amounts of elemental mercury which is the hardest form of mercury to capture and control. The adoption of mercury reductions that cannot be met through technologically feasible and commercially available controls threatens the viability of lignite as an electric generation fuel. TAB commented that regulatory certainty afforded by adoption of the federal rule in Texas will increase economic development.

**The commission appreciates the support. As discussed elsewhere in this preamble, House Bill 2481, 79th Legislature, 2005, specifically directed the commission to adopt and incorporate by reference 40 CFR Part 60, Subpart HHHH, thus requiring the commission to allocate the mercury budget as provided under the federal CAMR rule. Therefore, the commission does not**

**have the authority to require additional mercury reduction requirements for coal-fired EGUs in conjunction with implementing CAMR.**

Houston Sierra Club commented that CAMR should be implemented in Texas as specified by the legislature via an incorporation by reference of the federal CAMR model trading rule. However, through the commission's authority to protect public health, welfare, safety, and the environment, the commission should require through future rulemaking further reductions in mercury emissions that result in an 80% to 90% total mercury reduction, with the overall goal being a total phase-out of mercury emissions.

**The commission has made no changes in response to this comment. Decisions regarding future rulemaking activities must be properly made in those future actions, after public notice and comment.**

#### *HEALTH IMPACTS*

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, APSR, DFW Sierra Club, Texas Impact, and 124 individuals commented that the federal CAMR rule is insufficient to protect human health. SEED provided information regarding studies about health effects of mercury. These groups and individuals are specifically concerned about autism and brain development in prenatally exposed children, in addition to other health impacts. One individual noted that it is possible that lower levels of mercury exposure could be toxic, and that, more likely than not, there is no safe blood level of mercury. Stronger protections are recommended.

**The commission has made no changes in response to this comment. As discussed elsewhere in this preamble, the adopted rules are designed to implement the federal CAMR program.**

**Exhaustive health effects analyses were conducted as part of the federal rulemaking process that resulted in the CAMR. (See the discussions regarding studies conducted and reviewed by EPA in the proposed and adopted federal rules, links to which may be found at <http://www.epa.gov/air/mercuryrule/rule.htm>.) These analyses focused on health effects in fetuses, children, and adults. EPA also prepared an analysis of the final rule entitled “Regulatory Impact Analysis of the Final Clean Air Mercury Rule” in which the results of these health effects studies are discussed. Links to this document and to many others containing EPA’s public health analyses may be found at <http://www.epa.gov/ttn/atw/utility/utiltoxpg.html>.**

**The commission agrees that mercury is a toxin that can lead to neurological deficits in children and adults. However, the levels at which these toxicities occur is significantly above blood mercury levels in the United States. EPA updated the Reference Dose (RfD) for methylmercury in 2001. The RfD is set at a concentration to protect the most sensitive population (developing fetuses) from the most sensitive health effect (neurological deficit) over a lifetime of exposure. To develop the RfD, EPA used an extensive epidemiological study conducted in the Faroe Islands on a group of natives who consume large amounts of fish and whale blubber over a lifetime. The benchmark dose lower limit or BMDL was derived by first identifying a measurable (5%) adverse change that correlated to cord blood mercury levels and then determining the lower 95% limit of this concentration. The National Research Council recommended a BMDL of 58 parts per billion (ppb) mercury in cord blood based on significant effects measured on the Boston Naming Test.**

The dose was then converted from cord blood levels to ingested maternal levels. Assuming a 1:1 ratio between cord and maternal blood concentrations, this value was calculated to be 1.081 micro grams ( $\mu\text{g}$ ) mercury/kilogram (kg) body weight/day. This value was then divided by an uncertainty value of 10 to account for variability, including potential differences between cord blood and maternal blood mercury levels and interindividual variability in mercury metabolism, as well as potential long-term effects not yet measured by this study. Ultimately, a value of 0.1  $\mu\text{g}$  mercury/kg body weight/day (5.8 ppb) was set as the RfD to protect against neurological effects over a lifetime. According to the 1999 - 2000 National Health and Nutrition Examination Survey, the average mercury concentration in women of childbearing age (16 - 49 years) is 1.02 ppb, well below the conservative RfD value of 5.8 ppb. Approximately 5 - 8% of women in the United States have blood mercury levels greater than 5.8 ppb. However, very few, if any, women have blood mercury levels above the BMDL of 58 ppb. In addition, no studies to date have shown a causal relationship between mercury exposure and autism incidence. In fact, the only case-control study published in the peer-reviewed literature by Ip, *et al.* in 2004 indicated no causal relationship between mercury and autism. Therefore, the commission agrees that control of mercury from coal-burning power plants is beneficial, but disagrees that the federal CAMR rule is insufficient to protect human health.

An individual commented that no specific and appropriate public health measures currently exist to evaluate health effects resulting from coal-fired power plants. SEED commented that regional routine testing of fish should be required as part of permitting.

**The commission has made no change in response to this comment. The commission agrees that no public health measures are currently underway in Texas to evaluate the health effects of mercury from coal-fired power plants. However, the commission is not authorized to require state hospitals and/or doctors to report specific symptoms or health effects that are potentially related to environmental contaminants. In addition, although correlations may occur between reported symptoms and environmental exposure, no direct causal relationship can be identified.**

**Compliance with CAMR will be determined according to the monitoring, reporting, recording, and testing requirements of the Acid Rain program, which are outlined and described in both the CAIR and CAMR.**

LWV and GHASP commented that ESLs should be set at enforceable levels based on what is in the airshed now and what might be added in the future in order to protect public health.

**The commission has made no change in response to this comment. As discussed elsewhere in this preamble, the adopted rules are designed to implement the federal CAMR program and not to develop effects screening levels (ESLs). There is currently an ESL for mercury. The methodology for developing ESLs recently underwent a peer-review process and public comment period. When the methodology is finalized, the current mercury ESL will be reviewed accordingly and will be available for public comment.**

*TRADING*

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, CWA, DFW Sierra Club, Texas Impact, and 45 individuals commented that trading of mercury should be prohibited under the adopted rules, and that the trading of toxics has never before been allowed and should not be allowed with mercury. However, if trading must be allowed, it should be limited to within set regions of the state. Additionally, all parties of such trading should be jointly and severably liable for all emissions violations with financial penalties levied against all facilities of the companies involved in the trade.

**The rules have not been revised in response to this comment. As discussed elsewhere in this preamble, the commission was provided specific direction by the legislature under HB 2481 to adopt and incorporate by reference the federal CAMR model trading rules, thus requiring EGUs in Texas to participate in the EPA-administered cap and trade program for mercury. In incorporating by reference the federal trading rules, EPA does not provide states with the flexibility to limit or prohibit interstate trading. Based on legislative direction and the federal rule requirements, the commission does not have the authority to prohibit or limit the trading of mercury allowances under the Mercury Budget Trading Program.**

**In addition, the federal CAMR model trading rule sets forth a specific penalty for sources that produce emissions in excess of the number of mercury allowances in their compliance account. The penalty provision under the federal CAMR model trading rule requires the deduction of mercury allowances to be allocated in the control period immediately following the exceedance**

**equivalent to three times the number of ounces emitted in excess. This penalty does not preclude formal enforcement action by the commission or financial penalties resulting from such enforcement action. The commission disagrees with the commenter, however, that all parties involved in a trade should be held jointly liable. It is unreasonable to hold the seller of allowances responsible for the actions of another party over which the seller has no operational control.**

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, and 45 individuals commented that the proposed cap and trade program will allow utilities to buy their way out of making the required reductions, possibly resulting in no mercury reductions from utilities in Texas, and will result in mercury hot spots. SEED commented that Northeast Texas is a hot spot and that an Ohio study shows that mercury deposition occurs within 400 miles of coal-burning power plants. DFW Sierra Club commented that Texas leads the nation in both global warming and mercury emissions and that Northeast Texas is a hot spot. TCE commented that Texas is one of the worst states for all types of pollution and that the Trinity River is a virtual dead zone. CWA commented that the closer a waterway is to a power plant that discharges mercury, the more likely it is to be impaired with mercury. CWA and Environment Texas commented that numerous waterways in Texas are impaired as indicated by the quantity of mercury in fish tissue. GCLC and TMRA commented that the proposed rule will not result in utility attributable hot spots because the form of mercury found in the lignite coals in Texas, elemental mercury, does not deposit locally. GCLC and TMRA stated that the proposed rules will decrease the mercury deposition in Texas.

**The rules have not been revised in response to this comment. As discussed elsewhere in this preamble, the adopted rules are designed to implement the federal CAMR program, as required by statute. A cap and trade program, when properly implemented and enforced, is an effective means of achieving overall emission reductions by encouraging the most cost-effective reductions to be implemented first. In addition, in finalizing the CAMR, EPA has deemed that a cap and trade approach to limiting mercury emission is the most cost-effective way to achieve reductions from the power sector. The commission acknowledges that, under a cap and trade approach, some sources may purchase allowances to comply rather than install additional controls; however, the imposed cap is finite and will require mercury reductions to occur.**

**In addition, EPA has defined a “utility hot spot” as “a waterbody that is a source of consumable fish with Methylmercury tissue concentrations, attributable solely to utilities, greater than the EPA’s Methylmercury water quality criterion of 0.3 mg/kg.” Based on this definition, EPA conducted modeling of utility mercury deposition before and after the implementation of both CAIR and CAMR, and concluded that there was no evidence of utility hot spots resulting from implementation of these rules. Concerns about global warming emissions are outside the scope of this rulemaking.**

#### *MISCELLANEOUS*

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, and Environment Texas commented that affordable control technologies are already available and have been proven effective at reducing mercury emissions, even for lignite-fired utilities. SEED, Public Citizen, TCE, Downwinders at Risk,



WECAN, Environment Texas, and 44 individuals commented that all new proposed coal-fired power plants should be required to use the latest mercury control technology, including integrated gasification combined cycle (IGCC) technology. Additionally, no new coal-fired power plants should be permitted until rules to require cleaner coal-fired utilities are implemented. SEED commented that mercury controls and continuous emissions monitors should be required from startup for new coal-burning power plants.

**The commission has made no changes in response to this comment. The commission is aware of recent pilot tests of several mercury control technologies for lignite-fired utility boilers. In comparison to other coals, however, the mercury content of lignite is typically higher and more variable. Also, the control technologies evaluated had lower mercury removal efficiencies with lignite than with other coals. The commission is not aware of any testing that has shown 90% or higher mercury removal efficiency with lignite. The commission also notes that market-based cap and trade systems provide flexibility in the manner companies comply with emission budgets, instead of specifying particular control technology requirements.**

**IGCC is a production process designed to generate electric energy and usable thermal energy, not a specific control technology designed to reduce emissions. The commission does not dictate the choice of production processes. The existing permitting process requires a Best Available Control Technology (BACT) review to ensure the use of control technologies that result in cleaner electric generation. The commission does not have the discretion to withhold the issuance of pending permits to require a level of control based on the determination of future BACT. The Texas**

**Clean Air Act requires the commission to issue permits upon a finding that the applicant has met BACT requirements at the time of application. In addition to the emissions limitation imposed by the mercury emissions budget cap, standards of performance for mercury have been finalized in the CAMR. The federal CAIR and CAMR as adopted by Texas require continuous emissions monitoring and controls that reduce mercury emissions for all new coal-fired utilities.**

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, APSR, DFW Sierra Club, and 48 individuals commented that by the year 2010 the proposed rules would allow an increase in mercury emissions from 2003 levels.

**The commission has made no changes in response to this comment. According to the commission's 2003 Emissions Inventory, the reported mercury emissions from the 36 existing coal-fired EGUs equal 4.9376 tons. The Phase I mercury budget for Texas under CAMR is 4.657 tons. This equates to a decrease of 0.2806 tons annually. Phase I mercury emission reductions will result from implementation of the federal CAIR. The CAMR does not require the implementation of new mercury-specific controls until Phase II begins in 2018.**

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, and Environment Texas commented that the economic analysis for the proposed rule is incomplete and does not address the cost to school districts or the economic impacts on bays, estuaries, and the fishing industry. SEED attached to its written comments a copy of the opinion in *Reilly v. U.S. EPA*, decided April 13, 2006, by the United States District Court in Massachusetts. SEED does not explain how the case supports its comments.

SEED submitted information about studies critical of the EPA's economic analysis supporting the CAMR.

**The commission has made no changes in response to these comments. Because the *Reilly v. U.S. EPA* opinion deals with a Freedom of Information Act request for modeling runs performed by EPA in the process of promulgating the CAMR, and because the opinion discusses the EPA's attempt to withhold modeling run information relating to cost studies relevant to CAMR, the commission interprets SEED's comment to relate to inadequacy of the information about cost studies presented by EPA as part of the CAMR. The EPA provided public notice and opportunity for comment during the promulgation of CAMR. The federal CAMR has been adopted as a final rule and concerns about its promulgation are outside the scope of this rulemaking.**

**Extensive economic analyses were conducted as part of the federal rulemaking process that resulted in the CAMR. (See the discussion in the proposed and adopted federal rules, links to which may be found at <http://www.epa.gov/air/mercuryrule/rule.htm>.) These analyses focused on benefits and costs of the implementation of the CAMR on the regulated industry, government, business, and the public. EPA also prepared an economic analysis of the final rule entitled "Regulatory Impact Analysis of the Final Clean Air Mercury Rule." Links to this document and to many others containing EPA's economic analyses may be found at <http://www.epa.gov/air/mercuryrule/index.html>.**

**The commission also conducted analyses of the costs and benefits of the implementation of the federal rule through its incorporation by reference in Chapter 101. The commission's fiscal analysis indicates that the primary near-term effect of the CAMR will be the benefits of reduced mercury emissions and greater protection of human health and the environment. Generally, both the EPA and state analyses so far have found no significant adverse effects of the CAMR with the exception of additional costs to utilities.**

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, and one individual commented that the commission has yet to complete its study on mercury, as required under HB 2481, and should do so prior to adopting any rules concerning mercury.

**The rules have not been revised in response to this comment. According to the requirements of HB 2481, the commission must report the findings of the mercury study to the Texas Legislature by September 1, 2006. Given the abbreviated amount of time between the effective date of the federal rule and the deadline for the state to complete its rulemaking and state plan for implementation of the CAMR, the study could not be completed prior to proposal and adoption of the state rule incorporating the CAMR by reference. Staff are currently in the process of conducting the study and developing this report.**

Seventy-four individuals commented that the announcement of the public hearings for the proposed rule should have been broadcast on local news stations to increase public awareness.

**The commission has made no changes in response to this comment. The commission has complied with the requirements for public hearings and notification under 40 Code of Federal Regulations §51.102 and §60.23; Texas Government Code, Subchapter B, Chapter 2001; and under Texas Health and Safety Code, Texas Clean Air Act, §382.017. The commission strives to give all citizens of Texas appropriate prior notification and opportunity to comment, including the ability to submit written comments. Hearing notices for these rules were published in the following newspapers: *Austin American-Statesman*, March 9, 2006; *Corpus Christi Caller-Times*, March 8, 2006; *El Paso Times*, March 8, 2006; *Fort Worth Star-Telegram*, March 8, 2006; *Houston Chronicle*, March 8, 2006; and the *Midland Reporter-Telegram*, March 8, 2006. In addition, on March 9, 2006, a media release was posted to the TCEQ Web site and faxed to radio and television stations and daily and weekly newspapers in the Austin, Dallas-Fort Worth, and Houston markets. The release was also delivered on March 9 via the media relations listserve, to which anyone may subscribe. (See “email alerts” under News Releases on the TCEQ Web site.) The commission has no control over the conditions under which media choose to publish or broadcast the content of these releases.**

Two individuals commented that the CAIR and CAMR do not comply with “the rule between the states.” SEED commented that the promulgation of the CAIR and CAMR was not accomplished through a “just process.” Environment Texas commented that the EPA illegally delisted power plants from the list of sources requiring maximum controls and illegally set up the cap and trade program.

**The commission is unsure what is meant by the comment asserting that the federal rules do not comply with the rule between the states; however, the ultimate result of the implementation of CAIR and CAMR will be reductions in mercury emissions from coal-fired utilities nationwide. CAIR and CAMR underwent public notice and comment and have been adopted by the EPA as final rules. Challenges to or concerns about their promulgation are outside the scope of this rulemaking.**

One individual commented that the commission should require monitoring of and regulate mercury from gas streams.

**The rules have not been revised in response to this comment. The adopted rules are designed to implement the federal CAMR program which applies specifically to coal-fired EGUs. Monitoring of mercury emissions from these sources is a requirement under these rules. Requirements to monitor or regulate mercury emissions from gas processing facilities are outside the scope of this rulemaking and would need to be addressed in a separate, future rulemaking.**

Houston Sierra Club commented that the commission should calculate the specific mercury reduction for Texas based on the allocated Phase I and Phase II mercury budgets so that the public can easily understand its significance for the proposed rule.

**Under the federal CAMR rule, Texas has been given an annual mercury budget of 4.657 tons for Phase I (2010 - 2017) and 1.838 tons for Phase II (2018 - and thereafter). Based on this budget,**

**EPA predicted the mercury reductions associated with CAMR compliance. According to EPA's predictions, CAMR compliance in Texas will result in a mercury reduction of 7% or 0.4 tons by 2010 and a total of 63% or 3.2 tons by 2018. However, it is important to note that because Texas will be participating in the EPA-administered cap and trade program for CAMR, reductions could be higher if EGUs elect to over-control beyond their CAMR allocations or the reductions could be less if EGUs choose to purchase CAMR allowances to stay in compliance. Regardless of the number of new coal-fired EGUs in Texas, the state's mercury budget will not increase.**

AECT recommended revising proposed §101.602(a) to remove the phrase "except as specified in this division" on the basis that the phrase is unnecessary and confusing since there is nothing specified elsewhere in the division that is contrary to the statement made in proposed §101.602(a).

**The rule has been revised based on this comment to remove the phrase "except as specified in this division" from §101.602(a). The phrase is unnecessary because there is no language elsewhere in Division 8 that contradicts the language in §101.602(a).**

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 8: CLEAN AIR MERCURY RULE**

**§101.601, §101.602**

**STATUTORY AUTHORITY**

The new sections 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 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 new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission 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, codified in THSC, §382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; §382.054, concerning Federal Operating Permit; and FCAA, 42 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 new sections implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, 382.054, and FCAA, 42 USC, §§7401 *et seq.*

**§101.601. Applicability.**

This division applies to all stationary, coal-fired boilers and stationary, coal-fired combustion turbines meeting the applicability requirements under 40 Code of Federal Regulations §60.4104.

**§101.602. Clean Air Mercury Rule Trading Program.**

(a) The commission adopts and incorporates by reference the provisions of 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH, Emission Guidelines and Compliance Times for Coal-Fired Electric Steam Generating Units, as adopted May 18, 2005 (70 FR 28606), for purposes of implementing the clean air mercury rule (CAMR) trading program for mercury to meet the requirements of Federal Clean Air Act, §111.

(b) Owners and operators of sources subject to 40 CFR Part 60, Subpart HHHH, shall comply with those requirements.