

The Texas Commission on Environmental Quality (commission) proposes new §101.601 and §101.602. 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 PROPOSED 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 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 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, 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 would establish mercury compliance accounts for each mercury budget source and maintain an allowance tracking system to record the deposit, transfer, and deduction for compliance of all mercury allowances. The mercury budget sources would be 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 (to be codified in THSC, §382.0173), the commission is proposing 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 proposed 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 proposed new §101.602 would incorporate by reference the CAMR trading program for mercury codified under 40 CFR Part 60, Subpart HHHH, finalized on May 18, 2005. The proposed section would require owners and operators of sources subject to 40 CFR Part 60, Subpart HHHH, to comply with the requirements of that subpart.

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 would 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 would represent and, through its representations, actions, inactions, or submissions, legally bind 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, would 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 would be 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 would be 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 would no longer be eligible for an allocation from the new unit set-aside and would receive their mercury allowance allocation from the general mercury trading budget on a modified output basis. The baseline heat input would be 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 would be 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 would be 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 would be 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 would be added after conversion to an equivalent heat input by multiplying the electrical output by 3,413 Btu/kWh. The sum would yield 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 would 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 would require 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 would be 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 would 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 would 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 would 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 would 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 proposed allocation methodology, new units would 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 would be required to hold allowances covering the emissions from the new unit for the control period in which the new unit commences commercial operation, but would not receive an allocation for that control period. Mercury allowance allocations for a new unit in subsequent control periods would 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 proposed allocation methodology would be 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 would be 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 would also require, 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 would require 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 would require 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 would be submitted to EPA by October 31, 2008.

The model rule also describes the actions EPA would 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 would 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 would 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 would be 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 would assume that no allowances are to be allocated for the applicable control period to any mercury budget unit that would otherwise receive 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 would allow for the unlimited banking of excess allowances. Deductions for compliance would be 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.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst for the 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 government as a result of administration or enforcement of the proposed rules. Local governments owning coal-fired EGUs with a nameplate capacity of more than 25 MWe used to produce electricity for sale may experience adverse fiscal implications as a result of the proposed rules.

On March 15, 2005, EPA issued the CAMR, the first federally mandated reduction of mercury emissions on coal-fired power plants. CAMR establishes a market-based cap and trade system to achieve mercury emission reductions. The CAIR, issued by EPA on March 10, 2005, aims to reduce air pollution that moves across state boundaries. EPA anticipates that CAIR and CAMR will create an

effective multi-pollutant strategy, the goal of which is to better protect public health and the environment without interfering with the steady flow of affordable energy. Many of the same strategies used to reduce sulfur dioxide and nitrogen oxides will also reduce mercury emissions. As a result of emission reductions mandated under CAIR, mercury emissions will also decrease.

The proposed rules, as required by House Bill 2481, implement the CAMR model trading rule for mercury by incorporating the federal requirements by reference. The statewide emissions budget for mercury is provided in two phases. Phase I, which runs from 2010 to 2017, allows Texas an annual allowance budget of 4.657 tons of mercury. Phase II, starting in 2018 and continuing every year thereafter, declines to an annual allowance budget of 1.838 tons for Texas sources.

Staff estimated that there are 36 EGUs statewide that will be affected by the proposed rules. Of those 36 EGUs, approximately four are owned by local governments and 32 are owned by large businesses.

Local governments owning the four EGUs have two options to comply with the emissions limits established by CAMR as implemented by the proposed rules: utilize control technology to reduce emissions or purchase allowances in order to cover emissions that exceed their allocations. The method chosen by each local government to comply with its cap will depend on whether it is more cost efficient to install additional controls or purchase allowances from others.

The cost of reducing emissions with additional controls can vary widely and generally becomes more expensive as higher rates of emission reduction are achieved. In addition to the cost of allowances and

capital equipment costs, municipalities must consider the associated operations and maintenance costs of the additional controls, as well as required monitoring costs. CAIR Phase I reductions are relied on to reduce mercury emissions to Phase I levels of acceptable mercury emissions under CAMR. Most units are unlikely to install additional controls until Phase II reductions are required, contributing to some uncertainty about costs.

The cost of purchasing allowances can also vary significantly depending on the supply of and demand for allowances. EPA projects the 2010 allowance price will be approximately \$1,500 per ounce. Allowance costs are projected to increase to \$2,400 per ounce by 2020.

If a local government wishes to install additional controls, EPA estimates that additional controls for sulfur dioxide and mercury emissions using flue gas desulfurization will cost approximately \$400 to \$800 per ton to achieve 30% to 40% removal of mercury.

To meet Phase II budgets for mercury emissions, emerging technologies, such as sorbent injection of powdered activated carbon may be needed. The cost of this newer technology is relatively unknown since such controls are under development.

Regardless of how a local government chooses to control its emissions, CAMR also requires the local government to monitor mercury emissions utilizing a continuous emissions monitoring system or sorbent trap monitor. A continuous emissions monitoring system for a new coal-fired unit will cost approximately \$95,000 to \$135,000 for capital equipment and \$45,000 to \$65,000 for operation and

maintenance of the system. Sorbent trap monitors may cost as much as \$18,000 for capital equipment with annual operating, maintenance, and laboratory costs ranging from \$65,000 to \$125,000. The costs for each unit will depend in part on what systems are already installed or planned that can be modified or expanded to include mercury emissions monitoring.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be reduced mercury emissions and greater protection of human health and the environment.

Staff estimated that there are 36 EGUs statewide that will be affected by the proposed rules. Of those 36 EGUs, approximately 32 are thought to be owned by large businesses.

Large businesses, like local governments, will have the same options to either purchase allowances for excess emissions or install additional emission controls. Large businesses will incur monitoring costs associated with continuous emissions monitoring systems or sorbent trap monitors. Operation and maintenance costs for monitoring systems or for additional control technologies, if chosen, must also be considered. Large businesses will experience the same costs for allowance purchases, capital equipments purchases, and operations and maintenance costs as those experienced by local governments.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. None of the 36 EGUs that will be affected by the proposed rules are known to be owned or operated by small or micro-businesses. If there are small or micro-businesses affected by the proposed rules, they will experience the same costs for capital, maintenance, monitoring, and purchasing allowances as those experienced by local governments and 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 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 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 would incorporate 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 proposes to adopt. 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 proposed 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 proposed 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 proposed 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 proposed rulemaking would implement 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 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 proposed 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 proposed 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 proposed rules meet the definition of a "major environmental rule," they do 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 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 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 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 proposed 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 proposed 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 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 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(1)). No new sources of air contaminants will be authorized and the proposed 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.

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



#### 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 Joyce Spencer, Office of Legal Services at (512) 239-5017. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, 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 2005-047-101-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](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html)

For further information, please contact Kim Herndon, Air Quality Planning Section, (512) 239-1421.

**SUBCHAPTER H: EMISSIONS BANKING AND TRADING**

**DIVISION 8: CLEAN AIR MERCURY RULE**

**§101.601, §101.602**

STATUTORY AUTHORITY

The new sections are proposed 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 proposed 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, to be codified in §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 proposed 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, except as specified in this division, 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.