

The Texas Commission on Environmental Quality (commission) proposes the repeal of §101.601 and §101.602.

The commission will notify the United States Environmental Protection Agency (EPA) of the withdrawal of the Texas State Plan for the Control of Designated Facilities and Pollutants, Plan for Control of Mercury Emissions from Coal-Fired Electric Steam Generating Units, Clean Air Mercury Rule (CAMR), adopted on July 12, 2006.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

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

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

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

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

THSC, §382.0173(d) provided that its provisions applied ". . . only while the federal rules cited in this section are enforceable . . ." and that the provisions of HB 2481 do ". . . not limit the authority of the commission to implement more stringent emissions control requirements." The commission interpreted the language of THSC, §382.0173(d) as not restricting existing authority to require further emissions control requirements, but not to interfere with, or change, the requirements of CAIR nitrogen oxides and

sulfur dioxide, or the CAMR Hg emission trading programs. The legislature expressed clear intent that the commission implements the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by the EPA and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR nitrogen oxides allowances.

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

On July 12, 2006, the commission adopted Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 8, Clean Air Mercury Rule. The adoption of this rule required all EGUs meeting the applicability requirements of 40 CFR §60.4104 to be part of the CAMR trading program. The allocation methodology stated in 40 CFR §60.4142 (issued on May 12, 2005) was used to determine the Hg allowance allocations. From 2010 through 2014 (Phase I), the Texas Hg budget was 4.657 tons of Hg per year, then reduced starting in 2015 and thereafter (Phase II) to 1.838 tons of Hg per year.

The 80th Legislature, 2007, enacted Senate Bill (SB) 1672 amending THSC, Chapter 382. SB 1672

omitted the reference dates specified by HB 2481 enabling the commission to make subsequent changes as dictated by federal rule changes to CAMR.

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

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

#### SECTION BY SECTION DISCUSSION

The proposed rulemaking repeals §101.601 and §101.602 since the federal references cited in these sections are no longer valid. Section 101.601, Applicability, incorporated by reference the applicability

requirements of 40 CFR §60.4104. Section 101.602, Clean Air Mercury Rule Trading Rule, incorporated by reference 40 CFR Part 60, Subpart HHHH.

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

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant 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 that own or operate coal-fired EGUs are anticipated to experience cost savings due to the vacation of federal rules regarding Hg emissions.

The federal CAMR rule was vacated on February 8, 2008, in the United States Court of Appeals, District of Columbia Circuit, and the United States Supreme Court declined to hear the case on February 23, 2009. Because the federal CAMR rule was vacated, the proposed rules repeal the state CAMR rule.

The vacated federal CAMR rule would have required EGUs to either purchase emission allowances or install additional controls. Cost estimates to purchase allowances ranged from \$1,500 per ounce to \$2,400 per ounce depending on market price and the year of purchase. Control cost estimates varied widely depending on the control and the progressive requirement to lower Hg and sulfur dioxide emissions. Flue gas desulfurization controls to eliminate 30% to 40% of Hg emissions in Phase I of the vacated federal CAMR rule were estimated to cost \$400 to \$800 per ton. Phase II controls were more complicated and expensive.

Repeal of the federal CAMR rule eliminates the need for coal-fired power plants to purchase allowances

or add additional controls to reduce Hg emissions. Staff has estimated that as many as 36 EGUs statewide (four owned by local governments and 32 owned by large businesses) will no longer be required to either purchase emission allowances or install additional controls.

#### PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency with federal rules, which will reduce confusion within the regulated community.

No immediate fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules, but future cost savings would be anticipated. The proposed repeal of the state CAMR rule will eliminate the need for approximately 32 coal-fired power plants owned by large businesses to purchase allowances or add additional controls to reduce Hg emissions.

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#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Typically, small businesses do not own or operate EGUs, and the repeal of the state CAMR rule is not expected to affect the operations of small businesses.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 this proposed repeal in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed repeal does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking would repeal rules that incorporate by reference the federal CAMR emissions trading rules located in 40 CFR Part 60, Subpart HHHH. 42 United States Code (USC), §7411 created a system for the establishment of standards of performance to reduce emissions from stationary sources. The rules were originally adopted to fulfill the requirements of HB 2481 to incorporate CAMR

by reference and to specify the sources to which the trading program is applicable. Since the adoption of these rules, however, CAMR has been overturned by the United States Court of Appeals for the District of Columbia. The United States Supreme Court declined to hear an appeal of this decision, rendering the overturn final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. The repeal of the state CAMR rule incorporating the federal CAMR requirements does not meet the definition of a "major environmental rule," and therefore a regulatory impact analysis is not required under Texas Government Code, §2001.0225.

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

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

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

#### ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking are scheduled in conjunction with the proposed rule and SIP revisions to CAIR in Fort Worth on October 20, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on October 21, 2009, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at the commission's central office located at 12100 Park 35 Circle; and in Houston on October 22, 2009, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be

made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Michael Parrish, 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 2007-054-101-EN. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. The comment period closes October 26, 2009. Copies of the proposed rulemaking 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 Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

**[SUBCHAPTER H: EMISSIONS BANKING AND TRADING]**

**[DIVISION 8: CLEAN AIR MERCURY RULE]**

**[\§101.601, \§101.602]**

STATUTORY AUTHORITY

The repeals 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 Texas Health and Safety Code (THSC), \§382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also proposed under THSC, \§382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; \§382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; \§382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; \§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 Federal Clean Air Act (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 repeals implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq.*

**[\§101.601. Applicability.]**

[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.]