

The Texas Commission on Environmental Quality (commission) proposes amendments to §§122.10, 122.12, and 122.120; and the repeal of §§122.440, 122.442, 122.444, 122.446, and 122.448.

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

On May 18, 2005, the United States Environmental Protection Agency (EPA) finalized the Clean Air Mercury Rule (CAMR) to permanently cap and reduce mercury emissions from new and existing coal-fired electric generating units (EGU) nationwide. From 2010 through 2017 (Phase I), the annual mercury budget for Texas is 4.656 tons per year, then reduces to 1.838 tons per year starting in 2018 and beyond (Phase II).

The 79th Legislature, 2005, enacted House Bill (HB) 2481, amending Texas Health and Safety Code (THSC), Chapter 382 by adding §382.0173, which requires Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of Title 40 Code of Federal Regulations (CFR) Part 96, Subparts AA - II and Subparts AAA - III (regarding Clean Air Interstate Rule (CAIR)), and Part 60, Subpart HHHH (regarding CAMR). Section 382.0173(d) also states that "This section applies only while the federal rules cited in this section are enforceable and does not limit the authority of the commission to implement more stringent emissions control requirements."

The 80th Legislature, 2007, enacted Senate Bill (SB) 1672, amending THSC, Chapter 382. The addition of THSC, §382.0173(e)(3), directs the commission to incorporate EPA final rulemaking action into state rules for both CAIR and CAMR.

Several petitions were filed against CAMR, and on February 8, 2008, the United States Court of Appeals, District of Columbia Circuit (Number 05-1097) vacated CAMR. The EPA petitioned the United States

Supreme Court to review the decision. On February 23, 2009, the United States Supreme Court declined to hear the case. This officially vacates CAMR at the federal level. The state rules and plan submitted to the EPA for CAMR are no longer valid. Additionally, facilities formerly subject to CAMR may now be subject to a case-by-case Maximum Achievable Control Technology determination for mercury.

Therefore, the proposed amendments and repealed sections remove the state rules that implement CAMR. The commission will notify the 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.

## SECTION BY SECTION DISCUSSION

### *Subchapter A: Definitions*

#### *§122.10 - General Definitions*

The commission is proposing to remove the phrase "Clean Air Mercury Rule" from §122.10(2)(I)(iii) because the CAMR was vacated by the United States Court of Appeals, District of Columbia Circuit.

#### *§122.12 - Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions*

The commission is proposing to remove the phrase "Clean Air Mercury Rule" from the title of this section and §122.12(5), Mercury budget permit, since the federal requirements have been vacated by the United States Court of Appeals, District of Columbia Circuit.

### *Subchapter B: Permit Requirements*

#### *Division 1: General Requirements*

*§122.120 - Applicability*

The commission is proposing to remove §122.120(a)(7) from this section because it requires mercury budget units, as defined by the vacated rule, to have a federal operating permit.

*Subchapter E: Acid Rain Permits, Clean Air Interstate Rule, Clean Air Mercury Rule*

*Division 3: Clean Air Mercury Rule*

*§122.440 - General Mercury Budget Trading Program Permit Requirements*

The commission is proposing to repeal this section because the United States Court of Appeals, District of Columbia Circuit has vacated the underlying federal regulation.

*§122.442 - Submission of Mercury Budget Permit Applications*

The commission is proposing to repeal this section because the United States Court of Appeals, District of Columbia Circuit has vacated the underlying federal regulation.

*§122.444 - Information Requirements for Mercury Budget Permit Applications*

The commission is proposing to repeal this section because the United States Court of Appeals, District of Columbia Circuit has vacated the underlying federal regulation.

*§122.446 - Mercury Budget Permit Contents and Term*

The commission is proposing to repeal this section because the United States Court of Appeals District of Columbia Circuit has vacated the underlying federal regulation.

*§122.448 - Mercury Budget Permit Revisions*

The commission is proposing to repeal this section because the United States Court of Appeals District of Columbia Circuit has vacated the underlying federal regulation.

#### 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 request a revision to remove CAMR requirements from their permits, but any such request is not expected to have a significant fiscal impact on these local governments.

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 Texas CAMR. The repeal of the Texas CAMR affects 30 TAC, Chapters 101 and 122. The fiscal impact of the repeal of Chapter 101, Subchapter H, Division 8 is detailed in a separate fiscal note. This fiscal note pertains to the repeal of requirements for permit applications for CAMR found in certain sections of Chapter 122, which pertain to Title V permits.

Repeal of CAMR permitting requirements will not have a significant fiscal impact on regulated entities. Although there are potential cost savings for facilities that will no longer have to comply with CAMR requirements, no mercury credits were generated so it is not possible to quantify savings. The process to request the removal of CAMR requirements from permits is expected to be a relatively uncomplicated

process, and regulated entities should not incur significant additional costs when making the request. No permit fees will be charged to process these Title V permit modifications. Staff estimates that there may be as many as 36 EGUs statewide at 18 sites (four units owned by local governments at three sites and 32 units at 15 sites owned by large businesses) that may request permit revision to remove CAMR requirements from their permits.

#### 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 compliance with federal law.

No fiscal implications are anticipated for individuals and no significant fiscal implications are anticipated for businesses as a result of the implementation of the proposed rules. The proposed repeal of the Texas CAMR will allow 32 coal-fired power plants owned by large businesses at 15 sites to request the removal of CAMR requirements from their permits. These businesses should not incur significant additional costs when requesting a permit modification to remove CAMR requirements, and no permit fees will be charged to process these permit modifications.

#### 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 Texas CAMR 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 the amendments and repealed sections in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposal 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 amend and 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 the CAMR rule, 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.

Comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### 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 mercury 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 the CAMR 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.

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

With these proposed changes to Chapter 122, the owners or operators of facilities subject to the federal operating permits program that have been issued permits with CAMR requirements would have the option of initiating a permit action to remove these requirements or waiting for the next permit action, such as a renewal, to remove these requirements.

#### ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal 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, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808.

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. All comments should reference Rule Project Number 2007-054-101-EN. 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 A: DEFINITIONS**

### **§122.10, §120.12**

#### STATUTORY AUTHORITY

The amendments 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 amendments 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 United States Code (USC), §§7401 *et seq.*, which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

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

**§122.10. General Definitions.**

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

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

(A) nitrogen oxides;

(B) volatile organic compounds;

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Chapter 101, Subchapter A of this title (relating to General Rules), §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Reports) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), §§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

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

(G) any site-specific requirement of the state implementation plan;

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

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

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

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

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

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

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

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

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surface Coatings containing less than 1.0% Lead), and §111.139 of this title (relating to Exemptions)).

(3) **Continuous compliance determination method**--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(4) **Control device**--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the

control device definition specified in 40 Code of Federal Regulations Part 64, concerning Compliance Assurance Monitoring, applies.

(5) **Deviation**--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(6) **Deviation limit**--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(7) **Draft permit**--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(8) **Emission unit**--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

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

(10) **Final action**--Issuance or denial of the permit by the executive director.

(11) **General operating permit**--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(12) **Large pollutant-specific emission unit**--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(13) **Major source--**

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

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

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

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

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

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

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

- (i) coal cleaning plants (with thermal dryers);
- (ii) kraft pulp mills;
- (iii) portland cement plants;
- (iv) primary zinc smelters;
- (v) iron and steel mills;
- (vi) primary aluminum ore reduction plants;
- (vii) primary copper smelters;
- (viii) municipal incinerators capable of charging more than 250 tons of refuse per day;
- (ix) hydrofluoric, sulfuric, or nitric acid plants;
- (x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

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

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO<sub>x</sub> Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO<sub>x</sub> in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO<sub>x</sub> in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO<sub>x</sub> in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

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

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(14) **Notice and comment hearing**--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

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

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

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

**(16) Permit anniversary--**The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

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

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

**(19) Permit revision--**Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(20) **Potential to emit**--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

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

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

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

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

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

(24) **Provisional terms and conditions**--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;  
and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

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

(26) **Reopening**--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(27) **Site**--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the research and development operation is a support facility for the manufacturing facility.

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

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

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

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

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

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

(3) **Clean Air Interstate Rule permit**--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations Part 96, Subpart CC or Subpart CCC, including any permit revisions, specifying the Clean Air Interstate Rule (CAIR) Nitrogen Oxides (NO<sub>x</sub>) Annual Trading Program and CAIR Sulfur Dioxide (SO<sub>2</sub>) Trading Program requirements applicable to a CAIR NO<sub>x</sub> source and CAIR SO<sub>2</sub> source, to each CAIR NO<sub>x</sub> unit and CAIR SO<sub>2</sub> unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.

(4) **Designated representative**--The responsible individual authorized by the owners and operators of an affected source and of all affected units at the site, as evidenced by a certificate of

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

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

## **SUBCHAPTER B: PERMIT REQUIREMENTS**

### **DIVISION 1: GENERAL REQUIREMENTS**

#### **§122.120**

##### **STATUTORY AUTHORITY**

The amendment is proposed under 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 amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §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 United States Code (USC), §§7401 *et seq.*, which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq.*

**§122.120. Applicability.**

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

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

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

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

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

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except for FCAA, §112(r) (relating to Prevention of Accidental Releases); or

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

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

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

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

(b) The following are not subject to the requirements of this chapter:

(1) any site that is a non-major source which the EPA, through rulemaking, has designated as exempt from the obligation to obtain a permit; or

(2) any site that is a non-major source which the EPA has allowed permitting authorities to defer from the obligation to obtain a permit.

**SUBCHAPTER E: ACID RAIN PERMITS AND[.] CLEAN AIR INTERSTATE RULE[, CLEAN AIR MERCURY RULE]**

**[DIVISION 3: CLEAN AIR MERCURY RULE]**

**[§§122.440, 122.442, 122.444, 122.446, 122.448]**

**STATUTORY AUTHORITY**

The 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 United States Code (USC), §§7401 *et seq.*, which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

The 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.*

**[\$122.440. General Mercury Budget Trading Program Permit Requirements.]**

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

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

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

**[\$122.442. Submission of Mercury Budget Permit Applications.]**

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

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

**[\$122.444. Information Requirements for Mercury Budget Permit Applications.]**

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

[(1) identification of the mercury budget source;]

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

[(3) the standard requirements under 40 CFR §60.4106;]

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

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

**[§122.446. Mercury Budget Permit Contents and Term.]**

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

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

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

**[\$122.448. Mercury Budget Permit Revisions.]**

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