

for the period from the day after the license expired to the day the license issued, and for the period beginning on the day after the renewal license is issued, and otherwise comply with the section. If Mandatory Continuing Education (MCE) requirements are not met prior to the previous license expiration date, an applicant who wishes to renew the license on active status must pay an addition \$200 fee and complete the MCE not later than the 60th day after the expiration of the previous license. If the application to renew is filed more than 60 days but less than one year after the previous license expired and MCE requirements were not met before the license expired, the applicant must pay a \$200 MCE deferral fee, a \$250 late reporting fee, complete the MCE, and if a salesperson, provide certification of sponsorship for the period in which the license was expired to the day the license issued, and for the period beginning on the day after the renewal license is issued.

The reasoned justification for the new rule is full implementation of the statutory grace period in §1101.451, Texas Occupations Code as more fully described above.

No comments were received regarding the new rule as proposed.

The new rule is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapters 1101 and 1102 to ensure compliance with the provisions of the chapters.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 9, 2010.

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## SUBCHAPTER R. REAL ESTATE INSPECTORS

### 22 TAC §535.208

The Texas Real Estate Commission (TREC) adopts an amendment to §535.208, Application for a License, without changes to the proposed text as published in the January 1, 2010, issue of the *Texas Register* (35 TexReg 27) and will not be republished.

The amendment better implements the statutory requirement that applicants for inspector licenses who fail the examination three times must wait six months before reapplying. Prior to this amendment, applicants were able to circumvent the six-month wait requirement by filing a new application after the second

failure, so that a third failure would be registered in the agency's licensing database as occurring under a different application. The amendment will prevent applicants from filing a new application while another application is pending.

The reasoned justification for the amendment is full implementation of the statutory waiting period.

No comments were received regarding the amendment as proposed.

The amendment is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapter 1102 to ensure compliance with the provisions of the chapter.

The statute affected by this adoption is Texas Occupations Code, Chapter 1102. No other statute, code or article is affected by the amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 101. GENERAL AIR QUALITY RULES

##### SUBCHAPTER H. EMISSIONS BANKING AND TRADING

##### DIVISION 7. CLEAN AIR INTERSTATE RULE

#### 30 TAC §§101.502, 101.504, 101.506

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§101.502, 101.504, and 101.506.

The commission adopts the amendment to §101.506 *with changes* to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6599). Sections 101.502 and 101.504 are adopted *without changes* to the proposed text and will not be republished.

The amendments will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

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

The purpose of this Clean Air Interstate Rule (CAIR) revision is to incorporate legislative changes made during the 80th Legislature, 2007, as prescribed by Senate Bill (SB) 1672 and federal rule amendments that the EPA has promulgated since Texas adopted the state's initial CAIR rule on July 12, 2006. Also, clarifying language is adopted to explain the allocation methodology for the 2016 and 2017 control periods for CAIR nitrogen oxides (NO<sub>x</sub>) units commencing operation before January 1, 2001. Additionally, grammatical and formatting changes are adopted to conform with *Texas Register* and commission standards.

On May 12, 2005, the EPA promulgated CAIR to assist nonattainment areas in downwind states in complying with the National Ambient Air Quality Standards (NAAQS) for particulate matter less than or equal to 2.5 microns (PM<sub>2.5</sub>) and eight-hour ozone. Twenty-eight eastern states and the District of Columbia were identified as upwind contributors to the nonattainment of the PM<sub>2.5</sub> and/or eight-hour ozone NAAQS prompting the requirement for the reduction in emissions of either sulfur dioxide (SO<sub>2</sub>) or NO<sub>x</sub>, or both. Twenty-five states, including Texas and the District of Columbia, were found to contribute to the downwind nonattainment of the PM<sub>2.5</sub> NAAQS and are required to make reductions in annual emissions of SO<sub>2</sub> and NO<sub>x</sub>.

The 79th Legislature, 2005, enacted House Bill (HB) 2481, §2 (codified at Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0173), requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAIR model trading rule. HB 2481 also specified the methodology to be used in allocating the NO<sub>x</sub> trading budget provided to Texas, identified an amount of CAIR NO<sub>x</sub> annual allowances to be set aside for new sources, and specified that reductions associated with CAIR would only be required from new and existing electric generating units (EGUs) and not from other sources of SO<sub>2</sub> and NO<sub>x</sub> emissions.

In 2007, the 80th Legislature passed SB 1672 directing the commission to incorporate federal CAIR changes that the EPA finalized since the initial adoption of the CAIR rule on July 12, 2006. SB 1672 also revised the NO<sub>x</sub> allocation methodology and the number of minimum periods specified for NO<sub>x</sub> allocation readjustments that was directed by HB 2481. The readjustment of baseline heat inputs required in HB 2481 was the average of the three highest amounts of the CAIR NO<sub>x</sub> unit's total converted/adjusted control period heat input from control periods one through five of the previous seven control periods, with the baseline adjustment starting for the 2016 control period and readjusted every five years thereafter. However, the seven-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations to applicable EGUs approximately four years in advance. SB 1672 changed the number of control periods from seven to nine and shifted the initial baseline adjustment from 2016 to 2018. Therefore, beginning with the 2018 control period and for the control period beginning every five years after 2018, CAIR NO<sub>x</sub> units with a baseline heat input will be adjusted to reflect the average of the three highest amounts of the CAIR NO<sub>x</sub> unit's total converted control period heat input from control periods one through five of the previous nine control periods.

Because of the shift in control periods for readjusting the baseline heat input, an allocation method is needed for 2016 and 2017. For the 2016 and 2017 control periods, CAIR NO<sub>x</sub> units commencing operation on or after January 1, 2001, and having five or more consecutive years of commercial operation will

be eligible to receive a CAIR NO<sub>x</sub> allocation from the general pool, which is calculated as 90.5% of the Texas CAIR NO<sub>x</sub> trading budget. Beginning in the 2018 control period, CAIR NO<sub>x</sub> units commencing operation on or after January 1, 2001, and having five or more consecutive years of commercial operation will be eligible to receive CAIR NO<sub>x</sub> annual allowances from the general pool if the units have a baseline heat input calculated from the applicable control periods. For example, a CAIR NO<sub>x</sub> unit commences operation (i.e., the combustion chamber started) and commences commercial operation (i.e., begins to produce electricity) in 2010. Per SB 1672, the baseline heat input used for allocating general pool allowances for control periods 2018 through 2022 is determined from units that have 2009 through 2013 operating data. Therefore, this unit will not be eligible to receive an allocation of allowances from the general pool until 2023.

SB 1672 also omits the reference dates of the federal CAIR adoption that were specified in HB 2481 from the 79th Legislature. This change will enable the commission to make subsequent changes as dictated by federal rule changes for CAIR without further legislative authority.

The adopted rulemaking also incorporates revisions to the federal CAIR model trading rules. The EPA adopted revisions to 40 Code of Federal Regulations (CFR) Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III on April 28, 2006. In the April 28, 2006, revisions, the EPA changed the compliance date for companies to submit a request for allowances from the new unit set-aside trading budget (9.5% of the Texas CAIR NO<sub>x</sub> trading budget) from July 1st to May 1st of the control period. For additional information regarding these revisions, please see the EPA final rule, published in the April 28, 2006, issue of the *Federal Register* (73 FR 82), available online at [www.epa.gov/fedrgstr/](http://www.epa.gov/fedrgstr/).

On January 24, 2008, the EPA adopted revisions to 40 CFR Parts 72 and 75 that modify existing requirements for sources affected by CAIR. The revisions include changes implemented by the EPA's Clean Air Markets Division in its data system in order to utilize the latest modern technology. The EPA also adopted revisions to require individuals that perform emissions testing or continuous emissions monitoring system performance evaluations must comply with American Society for Testing and Materials (ASTM) D7036-04 "Standard Practice for Competence of Air Emission Testing Bodies." The ASTM standard sets minimum requirements for demonstrating that an air emission testing organization is competent to perform testing. For additional information regarding these revisions, please see the EPA final rule, published in the January 24, 2008, issue of the *Federal Register* (73 FR 16), available online at [www.epa.gov/fedrgstr/](http://www.epa.gov/fedrgstr/).

On July 11, 2008, the United States Court of Appeals District of Columbia Circuit (Court) vacated CAIR and the CAIR Federal Implementation Plan. The Court ruled that CAIR trading programs are flawed for the following reasons: 1) because the region-wide focus on emission reductions did not factor in each state's contribution to air pollution issues; 2) the EPA did not give independent significance to the "interfere with maintenance language" in Federal Clean Air Act (FCAA), §110(a)(2)(D) and thus did not provide enough protection to downwind areas; 3) the 2015 compliance date for Phase II of CAIR is inconsistent with downwind states' 2010 attainment deadlines for PM<sub>2.5</sub> and ozone NAAQS; 4) SO<sub>2</sub> and NO<sub>x</sub> budgets given to states were not based on the objectives of FCAA, §110(a)(2)(D) and were thus invalid; 5) the EPA lacked authority to remove Title IV al-

allowances through CAIR or change the amount of SO<sub>2</sub> emissions that an individual allowance authorizes; and 6) the EPA did not properly address certain claims of measurement errors raised by Minnesota regarding its contributions to NO<sub>x</sub> and SO<sub>2</sub> emissions.

On December 23, 2008, the Court issued a revised opinion to remand without vacating CAIR back to the EPA. Therefore, the federal CAIR rule requirements remain in effect pending the promulgation by the EPA of new rules to replace it. With CAIR incorporated by reference by THSC, §382.0173, the CAIR state rule remains in effect while the federal CAIR rule is in effect.

#### SECTION BY SECTION DISCUSSION

In addition to the adopted amendments to §§101.502, 101.504, and 101.506, this rulemaking includes grammatical and formatting changes to update rule language to current *Texas Register* style and formatting requirements. These changes are non-substantive and are not specifically discussed in this preamble.

##### *Section 101.502, Clean Air Interstate Rule Trading Program.*

The adopted revision to §101.502 updates the reference to the adoption date of October 19, 2007, effective November 19, 2007, for 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III.

##### *Section 101.504, Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.*

The adopted revisions to §101.504 update the deadlines by which the executive director must submit to the EPA the CAIR NO<sub>x</sub> annual allowance allocations for each CAIR NO<sub>x</sub> unit subject to this division in order to comply with the minimum lead time provided under 40 CFR §51.123(o)(2)(ii). The deadline to submit CAIR NO<sub>x</sub> allocations for 2016 is revised to October 31, 2012. Beginning in the 2017 control period and each control period thereafter, the CAIR NO<sub>x</sub> annual allowance allocations must be submitted to the EPA 38 months prior to the beginning of the applicable control period.

The adopted revisions include deleting §101.504(c) to coincide with the removal of the allocation provisions in the federal CAIR rule under 40 CFR §96.141(b)(2) and (c)(2). These provisions were originally incorporated so the EPA could allocate CAIR NO<sub>x</sub> annual allowances if a state failed to submit timely CAIR NO<sub>x</sub> annual allowance allocations for a control period, but the provisions were removed by the EPA in the revision published in the April 28, 2006, issue of the *Federal Register* (71 FR 82), available online at [www.epa.gov/fedrgstr/](http://www.epa.gov/fedrgstr/).

The existing subsection (d) is relettered as subsection (c).

##### *Section 101.506, Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.*

The adopted revisions to §101.506(a) describe the methodology used in distributing CAIR NO<sub>x</sub> annual allowances, in tons, for each CAIR NO<sub>x</sub> unit subject to this subsection. For control periods 2009 through 2017, the baseline heat input for CAIR NO<sub>x</sub> units commencing operation before January 1, 2001, is the average of the three highest amounts of the CAIR NO<sub>x</sub> unit's historical heat input, adjusted for fuel type, from calendar years 2000 through 2004. As required by SB 1672, beginning with the 2018 control period and for the control period beginning every five years thereafter, the baseline heat input for CAIR NO<sub>x</sub> units commencing operation before January 1, 2001, must be readjusted using the average of the three highest amounts of the CAIR NO<sub>x</sub> unit's control period heat input, adjusted for fuel

type, from control periods one through five of the previous nine control periods.

Under the adopted revisions to §101.506(b)(2) and (3), for control periods 2015, 2016, and 2017, CAIR NO<sub>x</sub> units commencing operation on or after January 1, 2001, with five or more consecutive years of operation are eligible to receive CAIR NO<sub>x</sub> annual allowances from the general pool by establishing a baseline heat input from the first five years of commercial operation. As required by SB 1672, for the 2018 control period and every five years thereafter, the baseline heat input for CAIR NO<sub>x</sub> units commencing operation on or after January 1, 2001, must be readjusted using the converted control period heat inputs from periods one through five of the previous nine control periods.

In response to comments, the commission adopts revisions to the figure in §101.506(c) with changes from the proposal. The adopted figure in §101.506(c) revises a reference of §101.506(a) to §101.503(a) when determining the total amount of allowances in the Texas NO<sub>x</sub> trading budget. Section 101.503(a) defines the total amount of allowances in the Texas NO<sub>x</sub> trading budget as listed in 40 CFR §96.140, State Trading Budgets, while §101.506(a) only provides the baseline heat input calculation methodology for units commencing operation before January 1, 2001.

The adopted revisions to §101.506(d) incorporate federal rule revisions to CAIR changing the submittal deadline from July 1st to May 1st. Therefore, the adopted amendment to §101.506(d) requires CAIR-designated representatives of CAIR NO<sub>x</sub> units that commence operation on or after January 1, 2001, and that have not established a historical baseline heat input in accordance with §101.506(b)(2) or (3), to submit requests for CAIR NO<sub>x</sub> annual allowances from the new unit set-aside trading budget on or before May 1st of the first control period for which the requests are being made and after the date that the CAIR NO<sub>x</sub> units commence commercial operation.

In response to comments, the commission adopts revisions to §101.506(e) with changes from proposal. Adopted §101.506(e) revises a reference of §101.506(a) to §101.503(a) when determining the total amount of allowances in the Texas NO<sub>x</sub> trading budget. Section 101.503(a) defines the total amount of allowances in the Texas NO<sub>x</sub> trading budget as listed in 40 CFR §96.140, while §101.506(a) only provides the baseline heat input calculation methodology for units commencing operation before January 1, 2001.

The adopted revisions to §101.506(g) incorporate federal rule revisions to CAIR changing the submittal deadline from July 1st to May 1st and delete the word "complete" to clarify the submittal deadline. Therefore, the adopted revision to §101.506(g) requires the gross electrical output of the generator or generators served by the CAIR NO<sub>x</sub> unit and total heat energy of any steam produced by the CAIR NO<sub>x</sub> unit to be submitted in writing to the executive director by the latter of May 1, 2011, or May 1st of the control period immediately following the CAIR NO<sub>x</sub> unit's fifth consecutive year of commercial operation. For example, CAIR NO<sub>x</sub> unit "B2" commences operation on December 23, 2003, and commences commercial operation on January 9, 2004. The CAIR-designated representative or alternate must submit to the commission by May 1, 2011, the total yearly gross electrical output and the total yearly heat energy of any steam produced by B2 from January 9, 2004, through December 31, 2008.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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

The adopted rules are an incorporation by reference of revisions to the federal CAIR. The commission previously adopted rules to incorporate the CAIR, as discussed elsewhere in this preamble. The CAIR includes EPA-administered emissions trading programs that will be governed by model rules provided in the CAIR, which states may incorporate by reference. The EPA found that Texas is among several states that contribute significantly to the nonattainment of the NAAQS for PM<sub>2.5</sub> in downwind states. The EPA is requiring upwind states to revise their SIPs to include control measures to reduce emissions of SO<sub>2</sub> and/or NO<sub>x</sub>, which are both precursors to PM<sub>2.5</sub> formation. Reducing upwind precursor emissions will assist downwind PM<sub>2.5</sub> nonattainment areas to achieve the NAAQS in a more equitable, cost-effective manner than if those areas implemented local emission control strategies. The EPA has specified the amount of each state's required reductions, but each state has flexibility in how these reductions occur. If states choose to control EGUs, then they must establish a budget or cap for those sources. The CAIR defines the EGU budgets for the affected states if the states choose to control only EGUs or if they choose to control other sources to achieve some or all of their reductions. A state may adopt the CAIR NO<sub>x</sub> model allowance allocation methodology or choose an alternative method to allocate the state budget of NO<sub>x</sub> emissions allowances to sources in that state.

Specifically, the adopted rulemaking will incorporate by reference revisions to the CAIR model emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III. In addition, the rulemaking adopts revisions to an alternative NO<sub>x</sub> allowance allocation methodology for Texas CAIR NO<sub>x</sub> sources in lieu of the model rule methodology in 40 CFR Part 96, Subpart EE. The adopted rulemaking fulfills the requirements of SB 1672, enacted by the 80th Legislature, to incorporate CAIR by reference, including the five subsequent rule revisions that the EPA has promulgated to CAIR since Texas adopted the initial CAIR SIP revision on July 12, 2006, as well as revisions to the NO<sub>x</sub> allocation methodology as prescribed by SB 1672. SB 1672 relates to correcting the number of minimum periods specified for NO<sub>x</sub> allocation allowance readjustments that were directed by HB 2481. HB 2481 revised the baseline of existing units by reviewing heat-input data every five years by look-

ing back at the three highest years of the previous seven years. However, the five-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations to them approximately four years in advance of the applicable period. Therefore, the number of control periods was changed from seven to nine in SB 1672, and the allocation update was shifted from 2016 to 2018. The incorporation of revisions to CAIR and the changes resulting from SB 1672 will allow CAIR to continue to be implemented in Texas, in accordance with the state statutory requirements. The adopted incorporation of the federal rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure by reducing NO<sub>x</sub> and SO<sub>2</sub> emissions from upwind states so that downwind states may reach attainment of the NAAQS for PM<sub>2.5</sub>. As discussed elsewhere in this preamble, the adopted revisions are not expected to impose significant costs on regulated entities. While continued implementation of the CAIR is intended to protect human health and the environment, it may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. Cost and benefits of the revisions to CAIR were analyzed by the EPA during the federal notice and comment rulemaking for the CAIR. CAIR is a required federal program, and the ability of states to modify the federal requirements is limited. Although CAIR was vacated by the United States Court of Appeals for the District of Columbia, it was not remanded. Therefore, its requirements remain in effect pending promulgation by the EPA of new rules to replace it. Because SB 1672 requires Texas to incorporate CAIR by reference, this adopted rulemaking will implement the CAIR requirements that are currently in effect.

The adopted rulemaking will implement requirements of the FCAA. Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter" (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under 42 USC, §7410(a)(2)(D), to address interstate transport of pollutants that contribute significantly to nonattainment in, or interfere with maintenance by, another state. In the CAIR, the EPA found that 28 states and the District of Columbia contribute significantly to nonattainment of the PM<sub>2.5</sub> or eight-hour ozone NAAQS in downwind areas. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO<sub>2</sub>

and/or NO<sub>x</sub>, with limited flexibility. Adoption of the federal CAIR, including revisions and participation in its emissions cap and trade approach for annual SO<sub>2</sub> and NO<sub>x</sub> emissions to reduce downwind PM<sub>2.5</sub> is the method Texas 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 SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule is a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states have flexibility to develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeded federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP 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." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to protect the environment and to reduce risks to human health by adoption of the revisions to the federal CAIR by reference in addition to changes resulting from SB 1672. The adopted rulemaking does not exceed a standard set by federal law nor exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Finally, this adopted rulemaking was not developed solely under the general powers of the agency but is required by THSC, §382.0173. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the adopted rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the adopted rulemaking is to incorporate by reference revisions to the federal CAIR emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III, and to incorporate legislative changes during the 80th Legislature as prescribed by SB 1672. In 2007, the 80th Legislature passed SB 1672 that allows the commission to incorporate federal CAIR changes that the EPA has finalized since the initial adoption of the CAIR rules on July 12, 2006, and revise the NO<sub>x</sub> allocation methodology as prescribed by SB 1672. SB 1672 revises the number of minimum periods specified for NO<sub>x</sub> allowance allocation readjustments that was directed by HB 2481, as discussed elsewhere in this preamble. Additionally, the EPA promulgated several changes to the federal CAIR, as discussed elsewhere in this preamble. Although CAIR was vacated by the United States Court of Appeals for the District of Columbia, it has not been remanded, and therefore its requirements remain in effect pending the promulgation by the EPA of new rules to replace it. Because SB 1672 requires Texas to incorporate CAIR by reference, this adopted rulemaking implements the CAIR requirements that are currently in effect. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The EPA promulgated the CAIR rule, and revisions to the CAIR, to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions from upwind states so that downwind states may reach attainment of the NAAQS for PM<sub>2.5</sub>. The adopted rules enable Texas to implement the federal emissions budget and trading program and impose its requirements on new and existing fossil fuel-fired electric utility units, ultimately ensuring reductions of SO<sub>2</sub> and NO<sub>x</sub> emissions. The action will specifically advance the health and safety purpose by reducing PM<sub>2.5</sub> levels through an emissions cap and gradual reductions in emissions of SO<sub>2</sub> and NO<sub>x</sub>. The rules specifically target a category of sources with significant SO<sub>2</sub> and NO<sub>x</sub> emissions, and through the cap and trade program support cost-effective control strategies. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants are authorized and the adopted rules will maintain at least the same level of or increase the level of emissions control as the existing rules. 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 51, concerning Requirements for Preparation, Adoption, and Submittal of Implementation Plans. 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 invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding consistency with the CMP.

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

The requirements of 42 United States Code, §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 CAIR.

#### PUBLIC COMMENT

Public hearings were held in Fort Worth on October 20, 2009; in Austin on October 21, 2009; and in Houston on October 22, 2009. The commission did not receive any oral comments at the public hearings. The comment period closed on October 26, 2009. The commission received a written comment from the EPA.

#### RESPONSE TO COMMENT

The EPA supported this rulemaking and appreciated the time and attention that the commission devoted to the CAIR rule. The EPA recommended revising the figure in §101.506(c) and (e) to reference §101.503(a) instead of §101.506(a). The EPA commented that §101.506(a) is the baseline heat input calculation methodology for units commencing operation before January 1, 2001, which is not necessary for the calculations in §101.506(c) and (e). The EPA commented that §101.503(a) defines the total amount of allowances in the Texas NO<sub>x</sub> trading budget as listed in 40 CFR §96.140, which is necessary for calculating the allowance allocations in §101.506(c) and (e).

The commission appreciates the support. The commission agrees with this comment and the rule has been changed in response to this comment. The commission adopts revisions to the figure in §101.506(c) and (e) to reference §101.503(a) when determining the total amount of allowances in the Texas NO<sub>x</sub> trading budget as listed in 40 CFR §96.140.

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under 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 (TCAA). The amendments are also adopted 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; §382.0173, concerning Adoption of Rules Regarding Certain State Implementation Plan Requirements and Standards of Performance for Certain Sources; and §382.054, concerning Federal Operating Permits; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to include in their adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the national ambient air quality standard in any other state.

The adopted 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.*

§101.506. *Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.*

(a) For units commencing operation before January 1, 2001:

(1) for each control period in 2009 - 2017, the baseline heat input, in million British thermal units (MMBtu), is the average of the three highest amounts of the unit's adjusted control period heat input for 2000 - 2004 with the adjusted control period heat input for each year calculated as follows:

(A) if the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 90%;

(B) if the unit is natural gas-fired during the year, the unit's control period heat input for such year is multiplied by 50%; and

(C) if the unit is not subject to subparagraph (A) or (B) of this paragraph, the unit's control period heat input for such year is multiplied by 30%.

(2) for the 2018 control period and for the control period beginning every five years thereafter, the baseline heat input must be adjusted to reflect the average of the three highest amounts of the unit's adjusted control period heat input from control periods one through five of the preceding nine control periods with the adjusted control period heat input for each year calculated as follows:

(A) if the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 90%;

(B) if the unit is natural gas-fired during the year, the unit's control period heat input for such year is multiplied by 50%; and

(C) if the unit is not subject to subparagraph (A) or (B) of this paragraph, the unit's control period heat input for such year is multiplied by 30%.

(b) For units commencing operation on or after January 1, 2001:

(1) for each control period in 2009 - 2014, Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO<sub>x</sub>) allowances must be allocated from the new unit set-aside identified under §101.503(b) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Annual Trading Budget) and determined in accordance with subsection (d) of this section;

(2) for the 2015, 2016, and 2017 control periods, for units operating each calendar year during a period of five or more consecutive years, the baseline heat input is the average of the three highest amounts of the unit's total converted control period heat input over the first such five years. The converted control period heat input for each year is calculated as follows:

(A) except as provided in subparagraph (B) or (C) of this paragraph, the converted control period heat input equals the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 British thermal units per kilowatt-hour (Btu/kWh), if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/MMBtu. If a generator is served by two or more units, then the gross electrical output of the generator must be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

(B) for a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commer-

cial, heating, or cooling purposes through the sequential use of energy, the converted heat input is the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and converted to MMBtu by dividing by 1,000,000 Btu/MMBtu; or

(C) for a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted heat input is determined using the equation in the following figure.

Figure: 30 TAC §101.506(b)(2)(C) (No change.)

(3) for the 2018 control period and for the control period beginning every five years thereafter, for units operating each calendar year during a period of five or more consecutive years, the baseline heat input must be adjusted to reflect the average of the three highest amounts of the unit's converted control period heat input from control periods one through five of the preceding nine control periods. The converted control period heat input for each year is calculated as follows:

(A) except as provided in subparagraph (B) or (C) of this paragraph, the converted control period heat input equals the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 Btu/kWh, if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/MMBtu, provided that if a generator is served by two or more units, then the gross electrical output of the generator must be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

(B) for a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted control period heat input equals the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and converted to MMBtu by dividing by 1,000,000 Btu/MMBtu; or

(C) for a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted control period heat input is determined using the equation in the following figure.

Figure: 30 TAC §101.506(b)(3)(C) (No change.)

(c) For units with a baseline heat input calculated under subsection (a) or (b)(2) or (3) of this section, CAIR NO<sub>x</sub> allowances must be allocated according to the equation in the following figure.

Figure: 30 TAC §101.506(c)

(d) For units commencing operation on or after January 1, 2001, and that have not established a baseline heat input in accordance with subsection (b)(2) or (3) of this section, CAIR NO<sub>x</sub> allowances must be allocated according to the following.

(1) Beginning with the later of the control period in 2009 or the first control period after the control period in which the CAIR NO<sub>x</sub> unit commences commercial operation and until the first control period for which the unit is allocated CAIR NO<sub>x</sub> allowances under subsection (c) of this section, CAIR NO<sub>x</sub> allowances must be allocated from the new unit set-aside identified under §101.503(b) of this title. For the first control period in which a CAIR NO<sub>x</sub> unit commences commercial operation, such CAIR NO<sub>x</sub> unit will not receive a CAIR NO<sub>x</sub> allocation from the new unit set-aside.

(2) To receive a CAIR NO<sub>x</sub> allowance allocation from the new unit set-aside, the CAIR designated representative shall submit to the executive director a written request on or before May 1 of the

first control period for which the CAIR NO<sub>x</sub> allowance allocation is requested and after the date that the CAIR NO<sub>x</sub> unit commences commercial operation.

(3) In a CAIR NO<sub>x</sub> allowance allocation request under paragraph (2) of this subsection, the amount of CAIR NO<sub>x</sub> allowances requested for a control period must not exceed the CAIR NO<sub>x</sub> unit's total tons of NO<sub>x</sub> emissions reported to EPA for the calendar year immediately preceding such control period.

(4) The executive director shall review each CAIR NO<sub>x</sub> allowance allocation request submitted in accordance with this subsection and shall allocate CAIR NO<sub>x</sub> allowances for each control period as follows.

(A) The executive director shall accept a CAIR NO<sub>x</sub> allowance allocation request only if the request meets, or is adjusted as necessary to meet, the requirements of this subsection.

(B) On or after May 1 of the control period, the executive director shall determine the sum of all accepted CAIR NO<sub>x</sub> allowance allocation requests for the control period.

(C) If the amount of CAIR NO<sub>x</sub> allowances in the new unit set-aside for the control period is greater than or equal to the sum under subparagraph (B) of this paragraph, then the executive director shall allocate the full amount of CAIR NO<sub>x</sub> allowances requested to each CAIR NO<sub>x</sub> unit covered under a CAIR NO<sub>x</sub> allowance allocation request that was accepted by the executive director.

(D) If the amount of CAIR NO<sub>x</sub> allowances in the new unit set-aside for the control period is less than the sum under subparagraph (B) of this paragraph, then the executive director shall allocate CAIR NO<sub>x</sub> allowances to each CAIR NO<sub>x</sub> unit covered under a CAIR NO<sub>x</sub> allowance allocation request accepted by the executive director according to the equation in the following figure.  
Figure: 30 TAC §101.506(d)(4)(D) (No change.)

(E) The executive director shall notify each CAIR designated representative who submitted a CAIR NO<sub>x</sub> allowance allocation request of the amount of CAIR NO<sub>x</sub> allowances, if any, allocated for the control period to the CAIR NO<sub>x</sub> unit covered under the request.

(e) If, after completion of the procedures under subsection (d) of this section for a control period, any unallocated CAIR NO<sub>x</sub> allowances remain in the new unit set-aside for the control period, the executive director shall allocate to each CAIR NO<sub>x</sub> unit receiving an allocation under subsection (c) of this section an amount of CAIR NO<sub>x</sub> allowances equal to the total amount of such remaining unallocated CAIR NO<sub>x</sub> allowances, multiplied by the unit's allocation under subsection (c) of this section, divided by 90.5% of the NO<sub>x</sub> trading budget identified in §101.503(a) of this title, and rounded to the nearest whole allowance as appropriate.

(f) A unit's control period heat input, and a unit's status as coal-fired or natural gas-fired, for a calendar year under subsection (a) of this section, and a unit's total tons of NO<sub>x</sub> emissions during a calendar year under subsection (d) of this section, must be determined in accordance with 40 Code of Federal Regulations (CFR) Part 75, to the extent the unit was otherwise subject to the requirements of 40 CFR Part 75 for the year, or must be based on the best available data reported to the executive director for the unit, to the extent the unit was not otherwise subject to the requirements of 40 CFR Part 75 for the year.

(g) On or before the latter of May 1, 2011, or May 1 of the control period immediately following a unit's fifth consecutive year of commercial operation, the CAIR designated representative of a unit establishing a baseline heat input in accordance with subsection (b)(2) or

(3) of this section shall submit, on a form specified by the executive director, written certification of the gross electrical output of the generator or generators served by the unit and the total heat energy of any steam produced by the unit during the first five years of commercial operation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 12, 2010.

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For further information, please call: (512) 239-2548



## DIVISION 8. CLEAN AIR MERCURY RULE

### 30 TAC §101.601, §101.602

The Texas Commission on Environmental Quality (commission) adopts the repeal of §101.601 and §101.602 as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6607) *without changes* and the text will not be republished.

The commission will submit a request to the United States Environmental Protection Agency (EPA) to withdraw from consideration 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).

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

Figure: 30 TAC §101.506(c)

$$A = \frac{HI}{\sum_{i=1}^n HI_i} \times B$$

Where:

- A = the amount of Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO<sub>x</sub>) allowances allocated to a CAIR NO<sub>x</sub> unit rounded to the nearest whole allowance.
- i* = each CAIR NO<sub>x</sub> unit qualifying for an allocation under this subsection.
- n* = the total number of CAIR NO<sub>x</sub> units qualifying for an allocation under this subsection.
- HI = the baseline heat input for a CAIR NO<sub>x</sub> unit qualifying for an allocation under this section as calculated under subsection (a) or (b)(2) or (3) of this section.
- B = a total amount of CAIR NO<sub>x</sub> allowances equal to 90.5% of the NO<sub>x</sub> trading budget identified in §101.503(a) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Annual Trading Budget), except as provided in subsection (e) of this section.