

# Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

**To:** Commissioners **Date:** August 21, 2009

**Thru:** LaDonna Castañuela, Chief Clerk  
Mark R. Vickery, P.G., Executive Director

**From:** Susana M. Hildebrand, P.E., Chief Engineer

**Docket No.:** 2008-0334-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 101, General Air Quality Rules  
SB 1672: Federal Clean Air Interstate Rule Revision  
Rule Project No. 2007-053-101-EN

## Reasons for the rule package:

To meet the requirements established by the United States Environmental Protection Agency (EPA) for the Clean Air Interstate Rule (CAIR) Phase II (2015 and thereafter) nitrogen oxides (NO<sub>x</sub>) allocation submittal, Texas must submit a CAIR State Implementation Plan (SIP) revision to the EPA by early 2010. This revision will allow the EPA adequate time to review and approve the CAIR Phase II NO<sub>x</sub> allocation methodology specified in Senate Bill (SB) 1672, 80th Texas Legislature, Regular Session, 2007. In addition to the allocation issues relating to CAIR, the EPA has also revised the federal CAIR program five times since Texas adopted its initial CAIR rule.

For Texas to submit an approvable CAIR SIP revision, the state and federal requirements must be consistent. If Texas fails to submit a CAIR SIP revision that incorporates the federal revisions, the EPA's regulations would require Texas to use the EPA's model CAIR rule NO<sub>x</sub> allocation methodology. The model CAIR rule's NO<sub>x</sub> allocation methodology is substantially different than the methodology prescribed in SB 1672.

In 2007, the 80th Texas Legislature passed SB 1672, requiring the TCEQ to incorporate revisions to the federal CAIR rule finalized by the EPA following the initial adoption of the CAIR SIP revision on July 12, 2006, as well as revisions to the NO<sub>x</sub> allocation methodology. SB 1672 contains provisions correcting the number of minimum periods specified for NO<sub>x</sub> allocation readjustments directed by House Bill (HB) 2481 from the 79th Texas Legislature, Regular Session, 2005. HB 2481 specified readjusting the baseline heat input every five years using the highest three years' heat input data from the previous seven years. However, this seven-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations approximately four years in advance of the applicable control period. Therefore, SB 1672 changed the number of control periods from seven to nine and shifted the baseline heat input adjustment from 2016 to 2018.

Because of this legislative change in SB 1672, electric generating units (EGU) commencing operation on or after January 1, 2001, with five or more consecutive years of commercial operation will roll into the general pool, which is calculated as 90.5% of the Texas CAIR NO<sub>x</sub> trading budget, in the years 2016 and 2017. This is consistent with how these units are handled for the 2015 control period under the federal CAIR program. However, beginning in 2018, units in the general pool will have their baseline heat input adjusted based on the average of the highest three years from control periods one through five of the preceding nine control periods. In accordance with SB 1672, this baseline readjustment will happen every five years. Therefore, the number of NO<sub>x</sub> allowances will not fluctuate and will remain consistent for five years at a time.

Re: Docket No. 2008-0334-RUL

SB 1672 also omits the reference date of the federal CAIR program that was specified in HB 2481. This change will enable the commission to make subsequent changes as dictated by federal rule change for CAIR.

Revisions to the CAIR SIP and rule to implement SB 1672 were proposed to the commissioners on May 21, 2008. On July 11, 2008, the United States Court of Appeals District of Columbia Circuit (Court) (No. 05-1244) vacated CAIR and the CAIR Federal Implementation Plan (FIP). Because of the Court's ruling, the TCEQ withdrew the CAIR SIP and rule revision adoption packages from the November 19, 2008, agenda to await further direction from the EPA.

On December 23, 2008, the Court issued a revised opinion to remand without vacating CAIR back to the EPA. Therefore, CAIR will remain in effect while the EPA analyzes data and conducts rulemaking to modify the program to comply with the Court's July 2008 opinion. The Court declined to impose a schedule by which the EPA must complete the rulemaking, but reminded the EPA that the Court does ". . . not intend to grant an indefinite stay of the effectiveness of this Court's decision." Therefore, with CAIR in place, staff is proceeding with the CAIR program as directed by the Texas legislature.

**Under what authority are we proposing these changes?**

Texas Water Code,

- §5.103, Rules; and
- §5.105, General Policy.

Texas Health and Safety Code (THSC),

- §382.002, Policy and Purpose;
- §382.011, General Powers and Duties;
- §382.012, State Air Control Plan;
- §382.014, Emission Inventory;
- §382.016, Monitoring Requirements;
- §382.017, Rules;
- Act of May 10, 2007, 80th Legislature, 2007, SB 1672, §1 to be codified at §382.0173, Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; and
- §382.054, Federal Operating Permit.

**Is this rulemaking required by federal rule or state statute? Which ones?**

This rulemaking is required by both federal rule and state statute. The proposed rules would implement the CAIR trading program to meet the requirements of Federal Clean Air Act, §111. In addition, the proposed rulemaking implements the requirements of THSC, §382.0173, enacted under SB 1672 of the 80th Legislature, 2007.

**Are there any legal deadlines by which these rules must be proposed, adopted, or effective?**

To meet the requirements established by the EPA for CAIR Phase II NO<sub>x</sub> allocation submittal, Texas must submit a CAIR SIP revision to the EPA by early 2010. This revision will allow the EPA to review and approve the CAIR Phase II NO<sub>x</sub> allocation methodology, allowing Texas to use the NO<sub>x</sub>

Re: Docket No. 2008-0334-RUL

allocation methodology specified in SB 1672. The Phase II NO<sub>x</sub> allocations for the 2015 control period must be submitted to the EPA by October 31, 2011.

**What issue(s) or problem(s) are we trying to solve?**

The CAIR rule revision will incorporate federal rule changes and state statute changes allowing Phase II of the CAIR program for Texas to be approved by the EPA.

**Why is it important that we do this rule package?**

This rulemaking will allow the TCEQ to allocate CAIR NO<sub>x</sub> allowances to electric generating units for CAIR Phase II (2015 and thereafter), as directed by THSC, §382.0173.

**Other important background or historical information.**

Texas' NO<sub>x</sub> allocation methodology for Phase I and the compliance supplement pool was approved by the EPA on July 30, 2007 (72 FR 145).

On July 11, 2008, the Court vacated CAIR and the CAIR FIP. On December 23, 2008, the Court issued a revised opinion to remand without vacating CAIR back to the EPA. Therefore, the current CAIR rule remains in effect pending the promulgation by the EPA of new rules to replace it.

**Scope of the rulemaking:**

The rulemaking incorporates federal changes to CAIR and fulfills the requirements of SB 1672 by revising the minimum number of years from which the three highest years are averaged for the first five control periods. This minimum number is revised from a seven-year window to a nine-year window. The proposed revisions would also shift the initial baseline adjustment from the 2016 to 2018 control period. The proposed rule also removes the reference dates of the federal CAIR rule specified in HB 2481 allowing the commission to make subsequent changes as directed by federal rule changes for CAIR. Also, this rulemaking would remove the allocation provisions for untimely state allowance allocation submittals to match the removal of these provisions from the federal CAIR rule.

**Changes required by federal rule:**

On April 28, 2006, the EPA finalized removal of the allowance allocation provisions for untimely state allowance allocation submittals because there are no comparable provisions in the CAIR FIP trading rule and these allocation provisions would have resulted in total allocations that may not equal the respective state trading budget in 2015. This action also changed the submittal deadline from July 1st to May 1st to provide sufficient time for state permitting authorities to process allowance requests (71 FR 82).

**Changes required by state statute:**

SB 1672 amended THSC, §382.0173 requiring the readjustment of baseline heat inputs determined from control periods one through five of the previous nine control periods and shifting the initial control period to adjust the baseline heat inputs from 2016 to 2018. SB 1672 also removed the

Re: Docket No. 2008-0334-RUL

reference dates of the federal CAIR rule specified in HB 2481 allowing the commission to make subsequent changes as directed by federal rule changes for CAIR.

**Staff recommendations that are not expressly required by federal rule or state statute:**

The following recommendations are not expressly required by federal rule or state statute, but these recommendations are consistent with how units are handled under the federal CAIR program for the 2015 control period.

- For the 2016 and 2017 control periods, units commencing operation on or after January 1, 2001, with five or more consecutive years of commercial operation will be eligible to receive allowances from the general pool. The baseline heat input established from the first five consecutive years of commercial operation would be used for the 2016 and 2017 control periods.
- For units commencing operation before January 1, 2001, the baseline heat input established from the 2000 through 2004 control periods would be used for the 2016 and 2017 control periods.

**Impact on the regulated community:**

**Who will be affected?**

Electric utilities including investor-owned utilities, municipally owned utilities, independent power producers, electric cooperatives, and river authorities would be affected by the proposed rulemaking.

**Does it create a group of affected persons who were not affected previously? How?** No

**Will there be a fiscal impact? If so, estimate.** No

**Impact on the public:**

**Who will be affected?**

The public would realize public health and environmental benefits based on the reductions in NO<sub>x</sub> and sulfur dioxide (SO<sub>2</sub>) emissions. The EPA does not expect that regional electricity prices will be significantly impacted by CAIR. Further, according to the EPA, electricity prices are projected to be below 2000 levels.

**Does it create a group of affected persons who were not affected previously? How?** No

**Will there be a fiscal impact? If so, estimate.** No

**Impact on agency programs:**

The proposed rules primarily impact the Chief Engineer's Office; the Office of Permitting and Registration; the Office of Compliance and Enforcement; and the Office of Legal Services.

Re: Docket No. 2008-0334-RUL

**Stakeholder meetings:**

**Have any stakeholder meetings been held?** No

**With whom?** N/A

**What were the general sentiments?** N/A

**Were any changes made in response to stakeholder concerns?** N/A

**Policy issues:**

**What policy issues are affected?**

Units commencing operation on or after January 1, 2001, with five or more consecutive years of commercial operation will be eligible to move from the new unit set-aside pool to the general pool in 2016, 2017, and every five years thereafter beginning in 2018.

**Are any policies that are not currently based on rule being made into a rule?**

Because of the legislative change in SB 1672, units commencing operation on or after January 1, 2001, with five or more consecutive years of commercial operation are eligible to move from the new unit set-aside pool to the general pool in 2016 and 2017. This revision is consistent with how these units are handled for the 2015 control period under the federal CAIR program. However, beginning in 2018, the baseline heat input of each unit in the general pool would adjust to the average of the highest three years from control periods one through five of the preceding nine control periods. In accordance with SB 1672, this baseline readjustment is required every five years. During this five-year baseline readjustment, units commencing operation on or after January 1, 2001, with five or more years of commercial operation will be eligible to move from the new unit set-aside pool to the general pool. Therefore, the number of NO<sub>x</sub> allowances would not fluctuate and would remain consistent for five years.

**What are the consequences if this rulemaking is not approved to go forward?**

Texas will not have an approvable CAIR SIP for Phase II that begins in 2015 and therefore could not allocate CAIR NO<sub>x</sub> allowances as directed by SB 1672. The commission would also be out of compliance with the requirements of SB 1672.

**Are there alternatives?** No

**Potentially controversial matters:**

There are no known controversial matters at this time.

Commissioners  
Page 6  
August 21, 2009

Re: Docket No. 2008-0334-RUL

**Key points in proposed rulemaking schedule:**

**Anticipated proposal date:** September 9, 2009  
**Anticipated *Texas Register* publication date:** September 25, 2009  
**Public hearing date (if any):** October 20, 2009, Fort Worth; October 21, 2009, Austin; October 22, 2009, Houston  
**Public comment period:** September 25 – October 26, 2009  
**Anticipated adoption date:** February 2010

**Agency contacts:**

Brandon Greulich, Rule Project Manager, 239-4904, Air Quality Division  
Terry Salem, Staff Attorney, 239-0469  
Amy Browning, Staff Attorney, 239-0891  
Jessica Rawlings, Texas Register Coordinator, 239-4808

Attachments

cc: Chief Clerk, 5 copies  
Executive Director's Office  
Susana M. Hildebrand, P.E.  
Daniel Womack  
Kevin Patteson  
Betsy Bird  
Office of General Counsel  
Brandon Greulich  
Jessica Rawlings