

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.: 2009-0845-RUL
Subject: Commission Approval for Proposed Rulemaking
Chapter 101, General Air Quality Rules
Chapter 122, Federal Operating Permits Program
Repeal of the Clean Air Mercury Rule
Rule Project No. 2007-054-101-EN

Reasons for the rule package:

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 (EGUs) nationwide. The 79th Legislature, 2005, enacted House Bill (HB) 2481 amending Texas Health and Safety Code (THSC), Chapter 382 by adding §382.0173, that requires Texas to participate in the EPA-administered CAMR program through the incorporation by reference of Title 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH.

On February 8, 2008, the United States Court of Appeals District of Columbia Circuit vacated CAMR finding that the EPA did not follow the procedure set forth to remove EGUs from the requirements of the Federal Clean Air Act (FCAA), §112. Therefore, the emissions from EGUs could not be regulated under FCAA, §111 and a cap-and-trade system could not be implemented for controlling mercury emissions from oil-fired and coal-fired EGUs. On October 17, 2008, the EPA requested the United States Supreme Court to review the case. However, on February 6, 2009, the Department of Justice filed a motion on behalf of the EPA to dismiss the EPA's request to review the case stating that the EPA decided to develop appropriate standards to regulate power-plant emissions under FCAA, §112. The United States Supreme Court decided not to hear the case on February 23, 2009. This action officially vacated CAMR at the federal level; therefore, the state CAMR rule, incorporated by reference, and associated state plan are no longer applicable.

Under what authority are we proposing these changes?

Texas Water Code,

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

Texas Health and Safety Code,

- §382.002, Policy and Purpose;
- §382.011, General Powers and Duties;
- §382.012, State Air Control Plan;
- §382.017, Rules;
- §382.0173, Adoption of Rules Regarding Certain State Implementation Plan Requirements and Standards of Performance for Certain Sources; and
- FCAA, 42 United States Code §§7401 *et seq.*

Re: Docket No. 2009-0845-RUL

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

THSC, §382.0173(d) requires the state CAMR rule to apply only while the federal CAMR rule references are enforceable. The vacatur of the federal CAMR rule renders the rule unenforceable. Therefore, the requirement to implement CAMR is no longer applicable and the rules implementing CAMR are no longer enforceable and need to be removed.

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

THSC, §382.0173(d) does not specify a date to remove the unnecessary state CAMR rule.

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

The repeal of CAMR would reduce public confusion by removing an unnecessary rule. The rule proposal complies with state statute requirements of THSC, §382.0173(d).

Why is it important that we do this rule package?

The importance of this rule proposal is to reduce public confusion by removing an unnecessary rule and to comply with state statute requirements of THSC, §382.0173(d).

Other important background or historical information.

The 80th Legislature, 2007, enacted Senate Bill (SB) 1672 promulgating THSC, §382.0173(e)(3) directing the commission to incorporate the EPA's final rulemaking action into state rules for both CAIR and CAMR. SB 1672 also omitted the reference dates specified by HB 2481, thus enabling the commission to make subsequent changes as dictated by federal rule changes for CAMR.

Scope of the rulemaking:

The proposed rulemaking removes CAMR requirements by repealing Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 8, Clean Air Mercury Rule, §101.601 and §101.602; and amending §§122.10, 122.12, and 122.120 and repealing §§122.440, 122.442, 122.444, 122.446, and 122.448 of Chapter 122, Federal Operating Permits Program.

Changes required by federal rule:

There are no changes required by federal rule.

Changes required by state statute:

THSC, §382.0173(d) requires the state CAMR rule to apply only while the federal CAMR rule references are enforceable. The vacatur of the federal CAMR rule invalidated the federal CAMR rule references; therefore, the state CAMR rule is unenforceable and no longer a necessary rule.

Re: Docket No. 2009-0845-RUL

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

Because THSC, §382.0173(d) does not specify a date to remove the unnecessary rule, staff recommends removing the requirements of the state CAMR rule to reduce public confusion by removing this unnecessary rule and therefore fulfilling the requirements of THSC, §382.0173(d) in a timely manner.

Impact on the regulated community:

Who will be affected?

The proposed repeal of the state CAMR rule would allow the representatives of as many as 36 EGUs at 18 sites to request the removal of CAMR requirements from their Title V permits.

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

Will there be a fiscal impact? If so, estimate.

Repeal of the CAMR permitting requirements will not have a significant fiscal impact on regulated entities. No permit fees will be charged to process these Title V permit modifications.

Impact on the public:

Who will be affected?

The public would benefit from reduced confusion from the removal of an unnecessary rule.

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 rulemaking allows owners or operators of facilities subject to the federal operating permits program that have been issued permits with CAMR requirements to initiate a permit action through the Office of Permitting and Registration to remove these requirements or wait for the next permit action, such as a renewal, to remove these requirements.

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

Re: Docket No. 2009-0845-RUL

Policy issues:

What policy issues are affected?

THSC, §382.0173(d) requires the commission to have an applicable state CAMR rule only while the federal CAMR rule is enforceable.

Are any policies that are not currently based on rule being made into a rule? No.

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

The consequences of not approving the proposed repeal of the CAMR rule is the continuation of a rule that cannot be enforced because the references to the federal CAMR rule are invalid.

Are there alternatives?

An alternative to this proposal is to postpone the repeal of the CAMR requirements. This would leave the CAMR requirements in place, but cannot be enforced, causing confusion within the regulated community and general public.

Potentially controversial matters: None.

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

Michael Parrish, Texas Register Coordinator, 239-2548

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
Michael Parrish