

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§101.100 - 101.105, 101.107 - 101.109, 101.112, and 101.114 - 101.122.

The proposed new sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

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

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 require each SIP for ozone nonattainment areas classified as severe or extreme to include a requirement for the imposition of a penalty fee for major stationary sources of volatile organic compounds (VOC) located in the area if the area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date.

The Houston-Galveston-Brazoria (HGB) area is classified as severe for both the one-hour ozone NAAQS and the 1997 eight-hour ozone NAAQS. The FCAA, §182(f) requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO<sub>x</sub>). The fee is required to be paid for each calendar year after the attainment date until the area is redesignated as an attainment area for ozone. Additionally, the SIP must include procedures for the assessment and collection of the penalty fee.

As stated in FCAA, §185, the required penalty is \$5,000 per ton, as adjusted by the consumer price index, of VOC or NO<sub>x</sub> or both emitted in excess of 80% of the stationary source's baseline emissions (their baseline amount, as discussed elsewhere in this preamble). The source's baseline amount is proposed to be calculated as the lower of the baseline emissions or authorized emissions from the baseline year, 2007. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA impose and collect the fee.

A recent court ruling, *South Coast v. EPA*, 472 F.3d 882 (D.C. Cir. 2007), *decision clarified on reh'g by* 489 F.3d 1245 (D.C.Cir. 2007), *cert. denied by* 128 S.Ct. 1065 (U.S. 2008), vacated the EPA's Phase I ozone implementation rule that allowed areas to stay implementation of the penalty fee requirement for the one-hour ozone standard. Additionally, EPA is requiring such provisions be submitted for severe and extreme nonattainment area for the 1997 eight-hour ozone NAAQS. Future EPA rulemaking may specify how EPA interprets the applicability of the penalty fee requirement for future ozone standards. The EPA has been discussing with states possible flexibility options relating to the collection of a penalty fee but has issued no final guidance regarding these options. Given the lack of official guidance regarding applicability and implementation of the penalty fee requirement, the commission is proposing several flexibility options for comment and consideration at adoption.

The EPA has, however, described some basic principles for the applicability of the FCAA, §185 fee obligation applicability for severe ozone nonattainment areas. In a final rule published November 16, 2005, in the *Federal Register* (70 FedReg 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, the EPA noted in response to a comment that "Section 185 of the Act simply requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay 'a fee to the state as a penalty' for failure of that area to attain the ozone NAAQS by the area's attainment date. This penalty fee is based on the tons of volatile organic compounds or nitrogen oxides emitted above a source-specific trigger level during the 'attainment year.' It first comes due for emissions during the calendar year beginning after the attainment date and must be paid annually until the area is redesignated to attainment of the ozone NAAQS. ... Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be

assessed in calendar year 2006 for emissions that exceed 80% of the source's 2005 baseline emissions."

(See 70 FedReg 69440, 69441.)

The EPA goes on further to state that a "penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. However, the penalty fee does not ensure that any actual emissions reduction will ever occur, since every source can pay a penalty rather than achieve actual emissions reductions. The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of emissions reductions." (See 70 FedReg 69440, 69441-69442.)

The EPA issued guidance on March 21, 2008, regarding establishing emission baseline amounts. The March 21, 2008, guidance memo discusses alternative methods for calculating the baseline amount, as permitted by FCAA, §185. The EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions, because the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year. The EPA has indicated that relying on the EPA's regulations for Prevention of Significant Deterioration of Air Quality (PSD) found in 40 Code of Federal Regulations (CFR) §52.21(b)(48) would be an acceptable alternative method for calculating the baseline amount. Under the PSD rules, sources generally may use emissions data from any 24 consecutive month period within the last ten years (a 2-in-10 lookback period) to calculate their average annual actual emissions rate, referred to as baseline emissions in this proposed rule. The EPA determined the 2-in-10 lookback period to be reasonable because it allows sources to consider an average emissions rate for a full business cycle. The PSD rules modify this concept for electrical utility steam generating units to 24 consecutive months within the last five years (a 2-in-5 lookback period), due to a shorter business cycle for those units. The

commission agrees that use of the 2-in-10 and 2-in-5 lookback periods are reasonable for sources whose emissions are irregular, cyclical, or otherwise vary significantly from year to year, and proposes to provide this flexibility in the same manner as provided for in the Texas new source review program.

The EPA used this March 21, 2008, memorandum in evaluating the San Joaquin Valley (SJV) §185 fee rule, as noted in its proposed limited approval and limited disapproval published August 19, 2009, in the *Federal Register* (74 Fed. Reg. 41826). In reviewing the SJV §185 fee rule, the EPA noted that there were several provisions that conflict with FCAA, §185 that prevent full approval of the submitted SIP revision, including: (1) a provision that exempts units that begin operation after the attainment year; (2) a provision that exempts a clean emissions unit as a unit that is equipped with an emissions control technology that either has a minimum 95% control efficiency (or 85% for lean-burn internal combustion engines), or meets the requirements for achieved-in-practice Best Achievable Control Technology during the five years immediately prior to the end of the attainment year; (3) a provision defining the baseline period as two consecutive years consisting of the attainment year and the year immediately prior to the attainment year; (4) a provision allowing averaging over two to five years to establish baseline emissions; and (5) a provision that defines "major source" by referring to a version of the definition that, although it correctly defines the major source threshold, is not SIP approved. The EPA noted specifically that with regard to issue number two noted above, SJV did not request that the EPA review this option for acceptability as an equivalent alternative under FCAA, §172(e), and did not provide a demonstration that the program it submitted would ensure that controls are "not less stringent" than those required under FCAA, §172(e). This notice provides some information regarding EPA's current thinking regarding the requirements of the §185 fee program, but is not final. The EPA also noted in the SJV proposal that "{t}he State must adopt and submit a rule to collect fees ... from those units, or consistent with the Administrator's obligation

under FCAA, §185(d), EPA will collect those fees." (See 74 FedReg 41826, 41828.)

One flexibility option the commission is proposing for comment is to allow major sources to aggregate either pollutants (VOC or NO<sub>x</sub>) or sites (but not both) for purposes of determining their baseline amount and the penalty fee that applies to the major source. Because VOC and NO<sub>x</sub> do not impact ozone formation equally, the approach used by some SIP revisions is to target those pollutants in a way that will provide the most effective attainment strategy. This targeting is a result of the knowledge gained from detailed modeling of the particular nonattainment area, and states are required by the FCAA to assess and develop strategies for nonattainment areas to achieve attainment and maintenance of the NAAQS. In some SIP revisions, including revisions for the HGB nonattainment area, targeted emission reductions of one pollutant in preference to the other is an effective way to reduce ozone formation. The commission's proposed flexibility option to allow aggregation of VOC and NO<sub>x</sub> or site aggregation for either pollutant supports the approach used to reduce ozone formation in the HGB area by linking the control strategies for the HGB ozone nonattainment area to the baseline amount and penalty fee calculations. The targeted NO<sub>x</sub> emissions reduction control strategy used for the one-hour ozone attainment demonstration for the HGB area was approved by the EPA. Certain major sources have been allowed, under specific rules adopted and approved as part of the HGB ozone nonattainment plan, to participate in airshed-specific cap and trade programs for VOC and NO<sub>x</sub> as a part of a cost-effective approach to reducing ozone formation.

This proposal provides for restrictions for calculations of baseline amounts and fee obligations to remain consistent with VOC and NO<sub>x</sub> aggregation allowed for SIP compliance in EPA-approved SIP revisions. Baseline amounts and aggregation methods, once established, will remain fixed throughout the applicability of the penalty fee obligation in order to maintain consistency and transparency for reductions

of actual emissions over time, and to prevent gaming. If a major source chooses to combine VOC and NO<sub>x</sub> at a site, it will not be allowed to further aggregate emissions across multiple sites. Major sources aggregating VOC across multiple sites for baseline amount consideration may not further aggregate VOC with NO<sub>x</sub> at a particular site. This same principle applies for NO<sub>x</sub>; aggregation of NO<sub>x</sub> for a baseline amount across multiple sites will preclude combining NO<sub>x</sub> with VOC at a specific site. A site opting to aggregate VOC with NO<sub>x</sub> pollutants in calculating its baseline amount is also prohibited from using the Equivalent Alternative Obligation as defined in §101.121 provision of applying emissions banking and trading credits or allowances towards their Failure to Attain Fees as defined in §101.114.

Fee obligations are required to remain consistent with the baseline amount determination approach. Once a particular method for baseline amount calculation is chosen, the penalty fee calculation must remain consistent with that method, and will not be allowed to change. Therefore, if a major source has decided, based on its approach in meeting SIP requirements, to aggregate pollutants under one of the options of this subchapter as the most appropriate choice for determining a baseline, all subsequent fee obligations will remain consistent with that choice.

A draft EPA memo, dated February 10, 2009, provided to the Clean Air Act Advisory committee for consideration by the Section 185 Work Group (available at <http://www.epa.gov/air/caaac/185.html>) allows states to propose alternative programs for reduction in ozone pollution, rather than imposing fees, if the alternative program achieves the same environmental benefit as imposing a fee program. The commission agrees that allowing this kind of flexibility would provide an equivalent or better environmental benefit, and would meet or exceed the requirements of the FCAA. As discussed further in this preamble, the commission is proposing to allow a reduction of the fee on a dollar for dollar basis by funding a

supplement environmental project (if the project were not otherwise required). Additionally, the commission is proposing to allow a retirement of an emission reduction credit or cap and trade allowance on a ton per ton basis to reduce the amount of emissions at a site. This retirement is considered equivalent to other methods of reducing emissions to reduce fee obligation amount. However, since the EPA has not provided formal guidance or rules regarding alternative obligation programs under FCAA, §172(e) the commission requests comment regarding these flexibility options, and whether these flexibility options are equivalent alternatives under FCAA, §172(e). The commission proposes, and requests comment on, additional flexibility options for the application of FCAA, §185 fees, as discussed further in the SECTION BY SECTION portion of the preamble. Lastly, during the stakeholder process, some commenters raised concerns regarding whether it is appropriate (and legal) for the commission to adopt a rule that requires companies to pay a fee for emissions that occurred in the past (calendar year 2008). The commission solicits comment on the issue of whether it is more appropriate to adopt rule language that would require that the fee would be due only for emissions that occurred in full calendar years after the effective date of this rulemaking, e.g., calendar year 2011 and after.

#### SECTION BY SECTION DISCUSSION

##### *§101.100, Definitions.*

Proposed new §101.100 contains definitions necessary for applying the rules. The terms defined include actual emissions, aggregated pollutant baseline amount, attainment date, attainment year, baseline amount, baseline emissions, electric utility steam generating unit, extension year, major stationary source, multiple site baseline amount, and regulated entity.

Actual emissions are proposed to be defined to include emissions from normal operations, and emissions

associated with startups, shutdowns, maintenance (authorized or not otherwise authorized) and emissions from emissions events or other events not otherwise authorized and are reported annually to the commission for each calendar year.

The aggregated pollutant baseline amount would be proposed to be the sum of both VOC and NO<sub>x</sub> baseline amounts for a single regulated entity. Both the baseline basis, whether allowable emissions or baseline emissions, and the year used for the determination must be the same.

Attainment date is proposed to be defined as the date an area was scheduled to be designated as having attained the ozone NAAQS in a SIP. The attainment year is proposed as the full calendar year that contains the attainment date. Extension year would be proposed to be defined as a year that meets the requirements of FCAA, §181(a)(5).

Baseline emissions is proposed to be defined to include emissions from normal operations, and emissions associated with startups, shutdowns, and maintenance, but excludes emissions from emissions events.

Emissions events are excluded from the baseline amount calculations because they are not authorized and not representative of routine operations. For the purposes of this subchapter, baseline amount is the term referenced as "baseline amount" in the FCAA, §185 and in this subchapter, would be the lower of baseline emissions or authorized emissions at a site, as of the attainment year. If the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the average baseline emissions calculated from a consecutive 24-month historical period. Because the historical time period allowed by electrical utility steam generating units to determine an average based on 24 months differs from other types of emissions generating units, these units are specifically defined for this rule. The definition of

electric utility steam generating unit is consistent with the definition used in 30 TAC §116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions. An emissions inventory is required for major sources per §101.10, relating to Emissions Inventory Requirements. Emissions reported in this report by regulated entities and recorded by the commission would be included in the basis for calculating fees and, if baseline emissions are used, included in the baseline amount.

The definition for major stationary source applicability definition used in the 30 TAC §122.10, General Definitions, for VOC or NO<sub>x</sub> is proposed to be used.

Multiple site baseline amount is proposed to be defined as the sum of all VOC or NO<sub>x</sub> baseline amounts from multiple sites. An aggregated pollutant baseline amount is proposed to be defined in this rule as the combining of VOC and NO<sub>x</sub> baseline amounts at a site. This aggregation would be restricted in accordance with proposed §101.120. This aggregation would be restricted to sources participating in a local cap and trade program listed under the provisions of proposed §101.105.

A regulated entity is proposed as a major source for the pollutant exceeding the requirement in the section. The language is intended to define a regulated entity as a major source if it meets the requirement of either of the emissions thresholds listed. A major source may be major for only one or both pollutants.

#### *§101.101, Applicability*

The FCAA, §185 requires areas classified as severe or extreme to include a requirement for fees on VOC emissions in excess of 80% of a baseline amount for major sources located in an area failing to attain the standard. FCAA, §182(f), further requires that all SIP requirements applying to VOC also apply for sources of NO<sub>x</sub>. This section identifies that the provisions of this subchapter apply to the HGB one-hour

ozone nonattainment area, which failed to demonstrate attainment of the one-hour ozone standard by its attainment date. Additional language as proposed specifies future applicability for major stationary sources located in severe or extreme ozone nonattainment areas that fail to attain the ozone NAAQS by the area's attainment date.

*§101.102, New Source Exemption*

This section proposes that any major stationary source that was not in operation on or before the attainment date is exempt from the requirements of this subchapter. These sources did not contribute emissions to a baseline amount for the nonattainment area for the attainment date. The FCAA, §185 relates to the area not making attainment as scheduled by the SIP revision. Sources not in operation by this date and not operating at any time in the nonattainment area prior to the attainment date were not part of the SIP revision and did not contribute to the area's emissions and nonattainment status. These sources have already offset their new emissions and installed equipment meeting the lowest achievable emission rates.

*§101.103, Baseline Amount Calculation*

The method for a one-time determination of baseline amount for each VOC or NO<sub>x</sub> or both is outlined in this proposed section. A one-time baseline amount is determined for each pollutant for which the source qualifies as a major source. If the major stationary source is major for only one pollutant, the baseline amount estimate is required for just that pollutant. In subsection (a), the baseline amount is defined to mean the lower of annual, maintenance, start-up, and shutdown emissions reported on the emissions inventory during the attainment year or the emissions as allowed by the applicable Chapter 116 authorizations in effect for the site on the attainment date. Emissions inventory data are collected annually by the commission, and after a review process, are entered into the state's industrial emissions database. It

is proposed that regulated entities are provided an opportunity to review, and if necessary, modify data submitted that year and for the immediately preceding year. Although it is recognized that emissions calculation factors occasionally change, the commission uses the data as represented in the emissions inventory as the emissions record for planning in SIP revisions. Because the data represents emissions for a reporting year as accurately as possible, and is relied upon in SIP revisions by the commission for air quality planning, revising historical emissions inventory emissions rates is not supported.

Exclusion of emissions events from the baseline amount is consistent with the fact the emissions are not authorized or representative of normal operations. If a major stationary source has less than one year of operation, it may not have a complete year of annual, maintenance, start-up, and shutdown emissions and thus will only have allowable information representing a year of operation for a baseline amount determination.

If the regulated entity has emissions that are irregular, cyclical, or otherwise vary significantly from year to year, an alternative method for determining emissions would be allowed using a historical perspective of annual, maintenance, start-up, and shutdown emissions as outlined in subsection (b). The FCAA, §185 does not address the period by which a historical period is defined. However, as discussed elsewhere in this preamble, the EPA has issued a March 21, 2008, guidance memo stating an acceptable alternative method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found in EPA's PSD, 40 CFR §52.21(b)(48).

For the purposes of this proposed subsection, the target is the attainment year, so the five (for electric generating units (EGU)) or ten (non-EGU) years immediately preceding the attainment date would be used

as the window for the possible historical lookback period. The average consecutive 24-month period would be the basis for determining the baseline amount, in tons. All units at a site would be required to use the same 24-month period when calculating a baseline, but a separate 24-month period could be used for each pollutant. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions or authorized emissions to include emissions from an alternative method. Thus, the 24-month average amount must be lower than any total emissions authorization in effect on the attainment date.

When control or ownership changes for emission units during the attainment year, emissions from those emission units could be attributed to the regulated entity with control or ownership of the emission unit on December 31st of the attainment year.

The proposed rule would require the baseline amount calculation and supporting documentation are to be submitted to the agency on forms approved by the executive director. The baseline amount calculation would be subject to approval by the executive director.

The FCAA, §185 fee is required on emissions exceeding 80% of a baseline amount determined for the attainment year until the fee no longer applies for the area. A baseline amount is determined by each regulated entity that is a major source of VOC or NO<sub>x</sub> or both based on representative emissions or authorized emissions. Thus, the baseline amount would be a fixed value and would not be changed without the approval of the executive director.

*§101.104, Aggregated Pollutant Baseline Amount*

This proposed section provides for the aggregation of both VOC and NO<sub>x</sub> for a single site. The commission is proposing to allow aggregation of a site's VOC and NO<sub>x</sub> baseline amount with certain restrictions that are consistent with EPA-approved SIP revisions.

If VOC and NO<sub>x</sub> are aggregated at a single site, no other baseline amount aggregation, such as for sources under common control, would be allowed. The baseline amount would be calculated using the methodology in proposed §101.103, and the calculated baseline amount values for each pollutant are combined per this section. The baseline amount would be calculated using the same method for both pollutants. Because the pollutants are being combined into a single baseline, the proposed rule would require that the same period of time, and annual, maintenance, start-up, and shutdown emissions or authorized emissions basis be used to calculate the baseline amount for both pollutants. Regulated entities that choose to aggregate pollutants into a single baseline amount for a site would be prohibited from using the equivalent alternative obligation provision under proposed §101.120.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

*§101.105, Multiple Site Aggregation Baseline Amount*

This proposed section would provide for the aggregation of either VOC or NO<sub>x</sub> (but not both) at multiple sites, to align fee obligations with the EPA approved attainment demonstration emissions reduction approach. The proposed rules would allow owners or operators of major stationary sources to aggregate baselines amounts of NO<sub>x</sub> emissions from multiple sites if they are subject to Chapter 101, Subchapter H,

Division 3 or to aggregate VOC emissions if they are subject to Chapter 101, Subchapter H, Division 6.

This restriction limits the aggregation to the same regulated entities that are allowed to aggregate emissions for compliance under the applicable attainment demonstration SIP revision.

Baseline amounts are first calculated separately for each site for VOC or NO<sub>x</sub>, or both, if the regulated entity is a major source of both pollutants, using the method outlined in proposed §101.103 prior to any baseline amount aggregation for multiple sites. This separate initial calculation of baseline amount is intended to provide transparency and consistency in baseline amount determinations with any subsequent aggregation.

The proposed rules would not allow owners or operators of major stationary sources to aggregate VOC and NO<sub>x</sub> baseline amounts at a site and also aggregate across multiple major sources under common control. Owners or operators of major stationary sources opting to combine emissions from multiple major stationary sources under common control cannot further aggregate VOC and NO<sub>x</sub> at a site as allowed under proposed §101.115. The aggregation methodology must be consistent throughout the baseline amount calculation and fee obligation calculation. Thus, the same period of time would be required as a basis for the baseline amount calculation for all aggregated sites under a pollutant. A separate 24-month period can be used for each pollutant.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

*§101.107, Baseline Amount for Sources in Operation as a Minor Source on Attainment Date*

This proposed section provides that regulated entities owning or operating stationary sources that were not major sources for either pollutant (VOC or NO<sub>x</sub>) on the attainment date, that become major after the attainment date, would establish a baseline amount based on the first full year of operation as a major source for VOC or NO<sub>x</sub>, or both. The baseline amount calculation would be determined separately for VOC and NO<sub>x</sub>. The section would also require that a regulated entity report emissions to the commission to establish its baseline amount no later than May 31st following the first full year of operation as a major source. The baseline amount calculation would be subject to approval by the executive director, and would be fixed and not changed without approval of the executive director until the failure to attain fee no longer applies in the area.

Since the EPA has not provided final guidance or rules on the calculation of an appropriate baseline amount for sources that become major sources after the attainment date, the commission requests comment on this issue.

*§101.108, Adjustment of Baseline Amount*

The proposed new section would specify the limited circumstances in which baseline amounts may be adjusted. Regulated entities, as part of normal business, may transfer ownership of some or all of the equipment at a site to another regulated entity. The commission recognizes that a transfer of ownership could change the fee obligation of both regulated entities. This section would allow the transfer of the baseline amount and fee obligation associated with the equipment transferred. In a manner similar to transferring other obligations that do not change with ownership transfer, such as emissions authorizations, the commission is proposing to allow the affected regulated entities to transfer the baseline amount

associated with each piece of equipment without change to the calculated baseline amount for the transferred equipment. The transfer would not impact the time period or amounts used for baseline amount on the remaining equipment at either regulated entity. These baseline amounts were calculated based on the operation of the equipment at the attainment date, or for emissions that are cyclic, irregular, or otherwise varying, for the period preceding the attainment date. The transfer of equipment does not change the historical operation of the equipment. In order to transfer baseline amount and the fee obligations, the owner or operator would be required to submit a request to the executive director and the executive director must approve the request.

The EPA has not provided formal guidance regarding the transfer of portions of a baseline amount from one major source to another when equipment ownership is transferred. The commission is soliciting specific comments on this issue.

*§101.109, Adjustment of Baseline Amount for Sources with Less than 24 Months of Operation on Attainment Date*

This proposed section would specify the limited circumstances in which baseline amounts may be adjusted for regulated entities that become major (or are newly authorized) after the attainment date. Regulated entities new to the nonattainment area may not have sufficient data at a site to determine if emissions at this site are irregular, cyclical, or otherwise vary significantly from year to year. The provisions of this section are intended to allow major sources with less than 24 months of continual operation by the attainment date some additional flexibility in establishing the emissions history at their site. If these emissions are considered irregular, cyclical, or otherwise varying significantly from year to year, a regulated entity could be allowed to request a modification to their baseline amount within 60 calendar

days of completing 24 months of operation. The regulated entity may request the baseline amount be based on the average rate within the 24 months prior to the attainment date or the attainment year. The agency's use of a 24-month historical lookback period is shorter than the time allowed by the EPA under its rules for a cyclic determination, which provide for a 2-in-10 or 2-in-5 year lookback period.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble, the commission requests comment on this flexibility option.

*§101.112, Failure to Attain Fee Obligation*

This proposed section outlines the method used to determine the Failure to Attain Fee obligation for VOC or NO<sub>x</sub>, or both. If the major stationary source is major for just one pollutant, the fee obligation would apply for just the one pollutant, VOC or NO<sub>x</sub>. If the source is major for both VOC and NO<sub>x</sub>, the fee obligation would apply for both pollutants. FCAA, §185 requires that the Failure to Attain Fee must be assessed on actual emissions, including emissions from emission events, starting the first year after the attainment year, on emissions exceeding 80% of the approved baseline amount. Inclusion of emissions events in the fee obligation is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the year that the fee is owed.

For example, the first fee for a major source of VOC would be calculated using the actual emissions from the year following the attainment date - the attainment year. If the nonattainment area's attainment date is in 2007, the first year's VOC fee obligation is calculated using actual emissions from the 2008 emissions inventory. For fee purposes, the baseline amount for VOC, as determined in §101.103, is multiplied by

80%. If actual emissions for 2008 exceed 80% of the baseline amount, a fee is owed on the amount of emissions that exceed 80% of the baseline amount. The fee rate, as adjusted by the consumer price index, is multiplied by the emissions that exceed 80% of the baseline amount for the site. If the site is also a major source for NO<sub>x</sub>, the fee obligation amount would be calculated for NO<sub>x</sub> using the same method.

*§101.114, Failure to Attain Fee Obligation for Aggregated Pollutant Baseline*

This proposed section provides for calculation of the failure to attain fee obligation for regulated entities that opt to combine their baseline amounts for VOC and NO<sub>x</sub>. The commission is proposing that regulated entities that aggregate pollutants would also be required to pay any fee obligation based on aggregating actual VOC and NO<sub>x</sub> emissions. Regulated entities that have chosen to combine VOC and NO<sub>x</sub> at their site would not be allowed to aggregate pollutants from multiple sites at a later date, even if the major source later reduces emissions and is no longer major for a pollutant. The commission proposes to maintain consistency from baseline amount to fee obligation determination with this approach.

This proposed section would require that actual emissions from both pollutants must be used in defining fee obligation. The fee would be assessed on the combined actual emissions of VOC and NO<sub>x</sub>, starting the first year after the attainment year, in excess of 80% of the approved baseline amount. The baseline amount, calculated using the method outlined in proposed §101.104, is therefore, adjusted to 80% for the fee obligation. As required under the FCAA, §185, this adjusted baseline amount is subtracted from the sum of the actual emissions to estimate the emissions that exceed 80% of the aggregated baseline amount. The fee rate, as adjusted by the consumer price index, is multiplied by the emissions that exceed 80% of the aggregated baseline amount for the site.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble, the commission requests comment on this flexibility option.

*§101.115, Failure to Attain Fee Obligation for Multiple Site Aggregation*

This proposed section would provide for the calculation of the failure to attain fee for owners and operators of major sources in a nonattainment area that opt to aggregate either VOC or NO<sub>x</sub> at multiple sites under common control. The proposed rule language would allow aggregation of emissions from either VOC or NO<sub>x</sub> and subsequent fee obligation aggregation if the owners or operators of multiple sites operate under one of the two existing programs as required under §101.105(a) or (b). It is proposed that similar to the baseline amount determination, owners or operators of sources under common control that combined a single pollutant in a baseline amount calculation must aggregate actual emissions from the single pollutant. Aggregated VOC would not be combined with NO<sub>x</sub>; aggregated NO<sub>x</sub> would not be combined with VOC. The total fee shall be applicable to and calculated for each pollutant, VOC or NO<sub>x</sub>, for which the regulated entity meets the requirements of §101.101. Fee obligation from VOC or NO<sub>x</sub> emissions not qualified for baseline amount aggregation under §101.105 would remain separate and due from each site.

The commission proposes to maintain consistency between the baseline amount to fee obligation determination with this approach. The fee for a pollutant aggregated under multiple sites for a baseline amount would be calculated based on the aggregated actual emissions for all sites under common control minus 80% of the aggregated baseline amounts for all sites. For example, if multiple sites are combined for determining the NO<sub>x</sub> baseline amount, the actual emissions for all of the same sites would be aggregated for those sites. The payment would be due based on the calculation for this aggregation. The

baseline amount for VOC is considered separately for each of these sites. If any of these same sites do not have any aggregation for VOC, the calculation for VOC will be maintained at an individual site level. The fee obligation is due based on actual emissions minus 80% of the baseline amount for each individual site. Or, if some of these sites aggregate baseline amounts for VOC, the fee is due on the actual emissions for all the aggregated sites.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble, the commission requests comment on this flexibility option.

*§101.116, Failure to Attain Fee Payment*

This section proposes that payment of fees must be by check, certified check, electronic funds transfer, or money order made payable to the TCEQ, and sent to the TCEQ address printed on the billing statement within 30 calendar days of the invoice date. For the one-hour ozone standard in the HGB area, the first payment would be based on the first full calendar year actual emissions following the attainment year. For the HGB one-hour ozone nonattainment area, the attainment date was in 2007; the first payment would be due for calendar year 2008 emissions and thereafter until the Failure to Attain Fee no longer applies to the area. During the stakeholder process, some commenters raised concerns regarding whether it is appropriate (and legal) for the commission to adopt a rule that requires companies to pay a fee for emissions that occurred in the past (calendar year 2008). The commission solicits comment on the issue of whether it is more appropriate to adopt rule language that would require that the fee would be due only for emissions that occurred in full calendar years after the effective date of this rulemaking, e.g., calendar year 2011 and after. If adopted, the proposed rules state that the executive director can impose interest and

penalties on owners or operators of major sources subject to the provisions of §101.100 that fail to make full payment of the fees when due.

The 30 calendar day invoice due period and other provisions in this chapter are consistent with invoices issued for other programs within the agency. Fees would be due on actual emissions that exceed 80% of the established emission baseline amount.

*§101.117, Compliance Schedule*

This proposed section would require the submission of baseline amount emissions on a form prescribed by the executive director. For the HGB one-hour ozone nonattainment area, major sources would be required to submit their baseline amount emissions to the executive director no later than 90 calendar days from the mail date the executive director sends the baseline amount notification. For areas where the fee may become applicable in the future, major sources would be required to submit their baseline amount emissions no later than 90 calendar days after the end of the attainment year for the area. It is proposed that owners or operators would be required to submit a report establishing baseline amount emissions to the executive director no later than May 31st following the first full year of operation as a major source. The fee payment is due no later than 30 calendar days after the invoice date.

The commission is soliciting specific comments on the provisions of this chapter regarding the time allowed for baseline amount determinations.

*§101.118, Cessation of Program*

The proposed new section would end the applicability of the fee upon either: 1) redesignation of the

nonattainment area to attainment; 2) a finding of attainment by the EPA for the nonattainment area; or 3) submission to the EPA of three consecutive calendar years of quality assured ambient monitoring data demonstrating that the monitors did not exceed the NAAQS. The commission solicits comment on these three options for ending applicability of the fee.

*§101.119, Exemption from Failure to Attain Fee Obligation*

This section proposes that no FCAA, §185 fee payment is due for a year determined by the EPA to be an extension year under FCAA, §181(a)(5). The EPA may grant an extension year for a nonattainment area if all SIP obligations have been met and if one or fewer measured ozone exceedances occurred at any valid monitoring site in the nonattainment area in a year.

*§101.120, Eligibility for Equivalent Alternative Obligation*

This section proposes to allow regulated entities that owe a FCAA, §185 fee payment to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements of this subchapter. Additionally, the section provides that the entire fee obligation would be due for all regulated entities not meeting the requirements of §101.121 and §101.122. If an alternative obligation is not approved and funded, exercised, or otherwise completed by the fee due date, the payment of the fee would be due in full. The section also proposes that sites opting to aggregate VOC and NO<sub>x</sub> under the provisions of §101.104(a) be prohibited from using the equivalent alternative obligation.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

*§101.121, Equivalent Alternative Obligation*

This section proposes to allow regulated entities to request to fulfill their fee obligation by relinquishing an equivalent portion of emission reduction credits, discrete emission reduction credits, current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances, or current or banked Mass Emissions Cap and Trade (MECT) program allowances.

The proposed rules would require that emissions credits and allowances submitted for fee reduction purposes must be consistent with the program policies. Emission credits submitted for fee reduction purposes, on a ton for ton basis, would only be allowed for use as an equivalent alternative for the pollutant specified on the credit. VOC credits would only be used as an alternative equivalent for VOC tons in excess of the baseline; NO<sub>x</sub> credits would only be used as an alternative equivalent for NO<sub>x</sub> tons in excess of the baseline. The use of allowances is similarly restricted, such that MECT allowances would only be used as an equivalent for NO<sub>x</sub> tons in excess of the baseline amount. HECT allowances would only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for sites in Harris County. Significant digit rounding for equivalency would correspond to the respective emissions banking and trading program being used as an equivalent alternative. Removing these emissions, on a ton per ton basis, represented as allowances, furthers the goals of reducing ozone causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

*§101.122, Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation*

This section proposes to allow regulated entities to request to fulfill their fee obligation by contributing to a supplemental environmental project (SEP) on a pollutant specific basis, in either an amount equivalent to the tons on which the fee has been assessed or in an amount equivalent to the fee amount assessed. SEPs are projects that prevent or reduce pollution that exceeds existing regulatory requirements. Supporting a SEP guaranteeing reductions in the nonattainment area would provide cost effective opportunities more directly benefitting the air quality rather than imposition of a fee. Under this proposed rule, contributing to a SEP would reduce a source's fee obligation by a ton per ton basis or by a dollar per dollar basis by decreasing the fee obligation by the same amount.

The proposed rule language only allows funding for projects that have a direct benefit to the subject nonattainment area and exceed existing regulatory requirements. The SEP must directly benefit air quality and be in the nonattainment area for which the fee is due. These limitations restrict the SEPs to projects that offset the Failure to Attain Fee on a dollar per dollar or ton per ton basis without also offering regulated entities the ability to use the approved SEP as an alternative to paying all or a portion of a monetary penalty assessed for a violation of an environmental regulation. Additionally, the SEP may not be part of an agreement or enforceable order allowing the major stationary source to offset a portion of an imposed administrative penalty and not include projects that are necessary to bring the major stationary source into compliance with environmental laws. The SEP may not be used to offset a penalty or action or necessary to remediate environmental harm caused by a violation caused by the major stationary source. The established SEP program requires the participants to submit quarterly and annual project reports with expenditure and project completion information, providing validation of actual emissions reductions or

expenditures. The payment to the SEP must be approved by the due date of the fee; therefore, any SEP used for payment of the fee obligation must be approved by the fee date.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

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

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency in the form of increased revenue collections. Costs to the agency to implement the new fee provisions are not expected to be significant and would be offset by any increase in revenue subject to legislative appropriation. No fiscal implications are anticipated for other units of state government as a result of administration or enforcement of the proposed rules. Local governments who own or operate major stationary sources of VOC or NO<sub>x</sub> in ozone non-attainment areas classified as severe or extreme may be subject to the fee requirements in the proposed rule.

The proposed rules implement FCAA, §185. FCAA, §185 requires each SIP for ozone nonattainment areas classified as severe or extreme to include a penalty fee for major stationary sources of VOC located in the area if the area fails to attain the ozone NAAQS by the applicable attainment date. At this time, only the HGB severe ozone non-attainment area has not demonstrated attainment by the SIP date. The FCAA, §182(f) requires all SIP requirements for VOC to also apply for emissions of NO<sub>x</sub>. The fee is imposed for each calendar year after the attainment date until the area is re-designated as an attainment area for ozone.

The fee is \$5,000 per ton as adjusted by the consumer price index on VOC or NO<sub>x</sub> or both emitted in excess of 80% of a baseline. The baseline amount is based upon total baseline emissions or authorized emissions at a major source.

The proposed rules provide source applicability determination, emission baseline amount calculation methodology, determination of the required fee, and due dates for fee payment. Alternatives to a fee, allowed under the anti-backsliding provisions of FCAA, §172(e), will also be proposed.

As proposed, affected major stationary sources would need to submit a baseline amount determination on forms developed by the agency. The agency would then need to develop a process for reviewing and approving baseline amount determinations.

The agency would also need to develop a process for annually assessing and collecting the FCAA, §185 fee. The fee would be based on the annual emissions inventory and may be adjusted with alternative obligations. The agency would also assess and verify the appropriateness of SEPs and the retirement of credits as equivalent options to the FCAA, §185 fee program requirements.

A database would track baseline amounts, fees, and obligations.

It is anticipated that during the first year the rules are in effect, the agency would establish and approve the baseline amount for each affected major source. Fee assessment would commence once the baseline amount has been established for each major source. Database development would begin during the first year the rules are in effect and continue for up to two years, depending upon available staff and funding.

The agency would use current appropriations to implement the fee program.

The FCAA, §185 fee is expected to result in additional fee revenue deposited into the Clean Air Account 151. Estimated fee revenue collections are very difficult to project without knowing the baseline amount determination for each affected site. In addition, emissions reductions since the baseline year will have to be taken into consideration as well as the method of baseline amount determination selected by each site.

Even though baseline amount determinations have not been made, staff has attempted to provide potential fiscal implications of the proposed fee by providing a potential range of revenue based upon the 2007 emissions inventory and historical data trends. The proposed rules provide that the fee can be calculated using a baseline amount for VOC or NO<sub>x</sub>, or both. In addition, the fee can be calculated using VOC and NO<sub>x</sub> emissions combined for multiple sites. The essential calculation of the fee is as follows.

Figure: 30 TAC Chapter 101

$$\text{VOC Fee} = \$5,000 * (\text{CPI}/122.15) * (\text{VOC Actual} - 0.8 * \text{VOC Baseline Amount})$$

$$\text{NO}_x \text{ Fee} = \$5,000 * (\text{CPI}/122.15) * (\text{NO}_x \text{ Actual} - 0.8 * \text{NO}_x \text{ Baseline Amount})$$

The Consumer Price Index (CPI) is defined as the annual CPI adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31st of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with FCAA, §502(b)(3)(B)(v) and §185(b)(3). Using the 2007 CPI adjustment factor, staff have estimated the 2008 fee at \$8,126 per pollutant ton.

For the estimated 300 to 400 major sources that may be affected by the proposed rules, staff is not able to determine an average number of tons of pollutants over the baseline amount for all of the sources.

However, based upon the most recent emissions inventory, there are an estimated 219 major sources that are projected to average approximately 31.2 tons per year in VOC over the baseline amount. At \$8,126 per ton, fee revenue could total \$55,523,332 annually for these sites. There are an estimated 141 sites that average 60 tons per year over the baseline amount for NO<sub>x</sub>. At \$8,126 per ton, fee revenue could total \$68,745,960 annually for these sites. Total annual revenue would be roughly \$124,269,292. However, in order to take into account those sites with irregular or cyclical emissions, as well as those sites that are not over the baseline amount or have emissions lower than the sites mentioned above, the estimate for the average number of tons of pollutants over the baseline amount was lowered to 25 tons for both VOC and NO<sub>x</sub>. If 219 sites average 25 tons over the baseline amount for VOC, revenue would be estimated at \$44,489,850. If 141 sites average 25 tons over the baseline amount for NO<sub>x</sub>, revenue would be estimated at \$28,644,150. Total annual revenue using an average of 25 tons of pollutants over the baseline amount would be \$73,134,000. Depending upon the average number of tons of pollutants over the baseline, revenue could be between \$73,134,000 and \$124,269,292.

Any major source operated by a local government that exists in a severe or extreme ozone nonattainment area that did not demonstrate attainment would be subject to these rules. At this time, only the HGB severe ozone nonattainment area has not demonstrated attainment by the SIP date. Sources such as boilers at universities, sewerage facilities, landfills, and government research facilities are listed as major sources in the HGB nonattainment area and may be affected by the proposed rules.

At this time, only one site in the HGB area, a sewerage operated by a local government, has 2007

emissions greater than the applicability threshold defined by the Failure to Attain Fee rule. If other governmental entities increase emissions and become a major emitter of VOC or NO<sub>x</sub>, they too would be subject to the rule. Depending upon final baseline amount determinations, emissions reductions since the baseline year, as well as the method of baseline amount determination selected by the site, the sewerage may pay an annual fee of as much as \$203,150 assuming the average amount of emissions per site over a baseline amount of 25 tons.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be further reductions of ozone causing emissions in nonattainment areas.

It is estimated that there are 300 to 400 major sources of VOC or NO<sub>x</sub> or both in the HGB nonattainment area that would be affected by the proposed rules. These sources represent all of the industrial source categories in the area including electric generating utilities. It is not possible to predict what business decision would be made by individual companies in order to meet the fee obligation, but it can be assumed that some of these sources would be subject to the FCAA, §185 fee. Because baseline amounts and reductions in emissions between the attainment year and the years following are not known, the potential impacts to specific companies and consumers are not known.

Any major source of VOC or NO<sub>x</sub>, or both, is subject to the fee. The major source would calculate a one-time baseline amount level and annually pay fees based on actual emissions in excess of 80% of the baseline. Estimated fees paid by major sources are very difficult to project without the baseline amount

determinations. In addition, emissions reductions since the baseline year will affect the determination as well as the method of baseline amount determination selected by each site.

Even though baseline amount determinations have not been made, staff has attempted to provide potential fiscal implications of the proposed fee by providing a potential range of fees based upon the 2007 emissions inventory and historical data trends. For the estimated 300 to 400 major sources that may be affected by the proposed rules, staff is not able to determine an average number of tons of pollutants over the baseline amount for all of the sources. However, based upon the most recent emissions inventory, there are an estimated 219 major sources that will average approximately 31.2 tons per year in VOC over the baseline amount. At \$8,126 per ton, annual fees for each site would be \$253,532. There are an estimated 141 sites that average 60 tons per year over the baseline amount for NO<sub>x</sub>. At \$8,126 per ton, annual fees for each site would be \$487,560.

However, in order to take into account those sites with irregular or cyclical emissions, as well as those sites that are not over the baseline amount or have emissions lower than the sites mentioned above, the estimate for the average number of tons of pollutants over the baseline amount was lowered to 25 tons for both VOC and NO<sub>x</sub>. For 219 sites that average 25 tons over the baseline amount for VOC, annual fees would be \$203,150 per site. For 141 sites that average 25 tons over the baseline amount for NO<sub>x</sub>, fees for each site would also be estimated at \$203,150. Total annual fees for sites in the HGB area could be between \$73,134,000 and \$124,269,292.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed

rules. No small businesses are listed as a major source of emissions in the State of Texas Air Reporting System database and the major sources of emissions subject to the rules have indicated on their annual emissions inventory statement that they are not 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 a component of the state's plan to protect the environment and reduce risks to human health from environmental exposure to air pollutants, and the proposed rules 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 proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking 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.

Additionally, the proposed rulemaking does not 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 proposed rules are intended to enable Texas to comply with the requirements of the FCAA, §185 for the HGB one-hour ozone nonattainment area, and any future ozone nonattainment areas classified as severe or extreme. Fees are required to be collected under the FCAA, §185, for all major sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may also collect interest). The applicability of the fee may have a benefit in reducing emissions of ozone precursors in ozone nonattainment areas, by incentivizing sources to further reduce emissions, but the proposed rules will not require emission reductions; and appear to have been designed primarily as a penalty for failure to attain the ozone standard. Specifically, the proposed rulemaking would require that all major sources of VOC or NO<sub>x</sub> or both in the HGB ozone nonattainment area (or any future ozone nonattainment area classified as severe or extreme) pay fees on emissions emitted in excess of 80% of the source's baseline amount.

The proposed rulemaking would 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 the 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 the FCAA, that must be included in their SIPs, such as the requirement of FCAA, §185, in order to avoid SIP disapproval or sanctions under the FCAA. The proposed rules would incorporate requirements to fulfill the requirements of FCAA, §185.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Texas 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 exceeds 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. This proposed rulemaking will have no impact beyond the impact that is required by the FCAA, §185. 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 Texas 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 proposed 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 proposed rulemaking. Finally, this proposed rulemaking was not developed solely under the general powers of the agency but is also authorized by TCAA, §382.012. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet the definition of a "major environmental rule." Additionally, even if the rulemaking did meet the definition of a "major environmental rule" it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to implement the FCAA, §185 fee requirement in the HGB ozone nonattainment area, and in future severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, 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.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed 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). Fees are required to be collected under the FCAA, §185, for all major sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may also collect interest). The proposed rules will enable Texas to comply with the requirements of the FCAA, §185 for the HGB ozone nonattainment area, and any future ozone nonattainment areas classified as severe or extreme. Consequently, the proposed 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 proposed rulemaking.

#### 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

Chapter 101, Subchapter B is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed new sections to Chapter 101, Subchapter B are adopted, owners or

operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 101, Subchapter B requirements.

#### ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal in Austin on January 5, 2010, at 2:00 p.m. in the TCEQ Campus, Bldg E, Room 201S, at 12100 Park 35 Circle. A second hearing will be held in Houston on January 6, 2010, at 2:00 p.m. in the Houston-Galveston Area Council at 3555 Timmons, Room A. 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 hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Texas Register Team at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, 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 2009-009-101-EN. The comment period closes January 11, 2010. 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 Kathy

Pendleton, Emissions Assessment Section, at (512) 239-1936.

**SUBCHAPTER B: FAILURE TO ATTAIN FEE**

**§§101.100 - 101.105, 101.107 - 101.109, 101.112, 101.114 - 101.122**

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code (TWC), § 5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; TWC §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an

amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7511a(d)(3), (e), and (f), regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d, regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

The proposed new sections implement the requirements of THSC, §§382.002, 382.011, 382.012, and 382.017; TWC, §§5.701 - 5.703, 5.705, and 5.706; and FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d.

**§101.100. Definitions.**

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

(1) Actual Emissions - The actual emissions must include all quantifiable emissions reported in the annual emissions inventory, including emissions from normal operations, emissions associated with startups, shutdowns, maintenance, and emissions events, and other events not otherwise authorized.

(2) Aggregated Pollutant Baseline Amount - The summation of volatile organic compounds and nitrogen oxides emissions for calculating a baseline amount for a single regulated entity

per §101.104 of this title (relating to Aggregated Pollutant Baseline Amount), using a common year or period of operation and common ownership of authorized emissions or baseline emissions.

(3) Attainment Date - The date an area is scheduled to attain the National Ambient Air Quality Standard for ozone, as documented in the state implementation plan.

(4) Attainment Year - For the one-hour ozone standard, the attainment year is calendar year 2007. For the 1997 eight-hour ozone standard, the attainment year is the calendar year immediately following an ozone nonattainment area's attainment date.

(5) Baseline Amount - Tons of volatile organic compounds or nitrogen oxides emissions calculated separately at a site, using data submitted to and recorded by the commission, per §101.103 of this title (relating to Baseline Amount Calculation).

(6) Baseline Emissions - The baseline emissions rate must be the emissions reported in tons in the annual emissions inventory update submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title (relating to Emissions Inventory Requirements). The baseline emissions must include emissions associated with normal operations, startups, shutdowns, and maintenance activities (regardless of whether they are authorized) and excludes emissions from emissions events reported per the requirements of §101.10 of this title.

(7) Electric Utility Steam Generating Unit - Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and

more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(8) Extension Year - A year as defined in Federal Clean Air Act, §181(a)(5).

(9) Major Stationary Source - Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant, including volatile organic compounds (VOC) and nitrogen oxides (NO<sub>x</sub>) for which a National Ambient Air Quality Standard has been issued. The major source thresholds are for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1), effective June 19, 1977. For purposes of this subchapter, an affected regulated entity is one that meets any one of the following conditions:

(A) For sources in a severe ozone nonattainment area that has failed to demonstrate attainment, the regulated entity has the potential to emit, at maximum operation or design capacity, 25 tons per year (tpy) or more of VOC or NO<sub>x</sub> or both; or

(B) For sources in an extreme ozone nonattainment area that has failed to demonstrate attainment, the regulated entity has the potential to emit, at maximum operation or design capacity, ten tpy or more of VOC or of NO<sub>x</sub> or both.

(10) Multiple Site Baseline Amount - A summation of volatile organic compounds baseline amounts or a summation of nitrogen oxides baseline amounts from multiple sites per §101.105 of this title (relating to Multiple Site Baseline Amount).

(11) Site - The total of all stationary sources located on one or more contiguous or adjacent properties, that are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility will 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.

**§101.101. Applicability.**

The provisions of this subchapter apply to all regulated entities that are major stationary sources of volatile organic compounds or nitrogen oxides that are located in a severe or extreme nonattainment area that has failed to attain the National Ambient Air Quality Standard for ozone by the applicable attainment date.

**§101.102. New Source Exemption.**

Any major stationary source meeting the applicability requirements of §101.101 of this title (relating to Applicability) that was not in operation on or before the attainment date is exempt from the requirements of this subchapter.

**§101.103. Baseline Amount Calculation.**

(a) For purposes of this subchapter, the baseline amount must be computed as the lower of the following:

(1) total amount of baseline emissions in the attainment year;

(2) total emissions allowed under authorizations, including emissions from maintenance, shutdown and startup activities, applicable to the source in the attainment year; or

(3) total average baseline emissions as calculated under subsection (b) of this section.

(b) If the regulated entity's emissions are irregular, cyclical, or otherwise vary significant from year to year, then the baseline amount may be computed using any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute an average baseline emissions rate (tons per year) for the site. If used, the historical period must be:

(1) ten years for non-utilities; or

(2) five years for electrical utility steam generating units.

(c) When control or ownership of emission units changes during the baseline year, the emissions

from those emission units will be attributed to the regulated entity with control or ownership of the emission unit on December 31st of the attainment year.

(d) A baseline amount, reported in units of tons, must be calculated separately for volatile organic compounds and for nitrogen oxides. The calculation must be made for each pollutant for which the source meets the major source applicability requirements of §101.101 of this title (relating to Applicability).

(e) The baseline amount calculation is subject to approval by the executive director. The baseline amount will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area.

**§101.104. Aggregated Pollutant Baseline Amount.**

(a) Aggregation of Pollutants. Notwithstanding the requirements of §101.103 of this title (relating to Baseline Amount Calculation), a regulated entity that is a major stationary source of emissions meeting the applicability requirements of §101.101 of this title (relating to Applicability) may choose to combine emissions for both volatile organic compounds (VOC) and nitrogen oxides (NO<sub>x</sub>) into a single aggregated pollutant baseline amount for a site after calculating each pollutant's emission baseline amount in accordance with this subchapter. Both pollutants must have:

(1) the same time period for calculating the baseline amount; and

(2) the same basis of either baseline or authorized emissions to calculate the baseline amount.

(b) Failure to Attain Fee Obligation Requirement. If a major stationary source elects to aggregate pollutants in accordance with this section, then the owner and/or operator of the major stationary source shall also aggregate pollutants to calculate the Failure to Attain Fee in accordance with §101.114 of this title (relating to Failure to Attain Fee Obligation for Aggregated Pollutant Baseline).

(c) Exclusion from Aggregating Emissions from Multiple Sites. The owner and/or operator of a regulated entity that is a major stationary source choosing to combine emissions for both VOC and NO<sub>x</sub> into a single baseline amount for a site shall not aggregate emissions from multiple sites as allowed under §101.105 of this title (relating to Multiple Site Aggregation Baseline Amount).

(d) Exclusion from Aggregating Ozone Precursor Pollutants. The owner and/or operator of a regulated entity that is a major stationary source choosing to combine emissions for both VOC and NO<sub>x</sub> into a single baseline amount for a site is prohibited from using the Equivalent Alternative Obligation provision under §101.120 of this title (relating to Eligibility for Equivalent Alternative Obligation).

(e) Approval. The aggregated baseline amount calculation is subject to approval by the executive director. The aggregated baseline amount will be fixed and not be changed without the approval of the executive director, until the Failure to Attain Fee no longer applies for the area.

**§101.105. Multiple Site Aggregation Baseline Amount.**

(a) Aggregation of nitrogen oxides (NO<sub>x</sub>). Notwithstanding the requirements of §101.103 of this title (relating to Baseline Amount Calculation), the owner and/or operator of major stationary sources meeting the applicability requirements of §101.101 of this title (relating to Applicability), that are subject to Subchapter H, Division 3 of this chapter (relating to Mass Emissions Cap and Trade Program) may choose to aggregate NO<sub>x</sub> baseline emissions from multiple sites to calculate the multiple site baseline amount.

(b) Aggregation of volatile organic compounds (VOC). Notwithstanding the requirements of §101.103 of this title, the owner and/or operator of major stationary sources meeting the applicability requirements of §101.101 of this title, that are subject to Subchapter H, Division 6 of this chapter (relating to Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program) may aggregate VOC baseline emissions from multiple sites to calculate the multiple site baseline amount.

(c) Failure to Attain Fee obligation requirement. If the owner and/or operator of a regulated entity that is a major stationary source elects to aggregate emissions from multiple sites in accordance with this section, then the owner and/or operator of a regulated entity shall also aggregate emissions from multiple sites to calculate the Failure to Attain Fee in accordance with §101.115 of this title (relating to Failure to Attain Fee Obligation for Multiple Site Aggregation).

(d) Exclusion from Aggregating VOC with NO<sub>x</sub>. If the owner and/or operator of regulated entity that is a major stationary source elects to aggregate baseline emissions from multiple sites as allowed in

this section, then the owner and/or operator of a regulated entity may not also elect to aggregate pollutants as allowed under §101.104 of this title (relating to Aggregated Pollutant Baseline Amount).

(e) Use of VOC and NO<sub>x</sub> in Equivalent Obligation. The equivalent obligation amount shall be specific for NO<sub>x</sub> or VOC and not allow aggregation of these compounds when using an EPA-approved local cap and trade program.

(f) Approval. The multiple site aggregation baseline amount calculation is subject to approval by the executive director. The multiple site aggregation baseline amount will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies for the area.

**§101.107. Baseline Amount for Sources in Operation as a Minor Source on Attainment Date.**

(a) Minor sources at the attainment date. Owner and/or operators of regulated entities that are major stationary sources that did not meet the requirements of §101.101 of this title (relating to Applicability) on the attainment date will calculate a baseline amount for volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) or both. For purposes of this subchapter, the baseline amount must be computed as the lower of either of the following:

(1) total amount of baseline emissions in the first full calendar year of operation as a major source after the attainment date; or

(2) total emissions allowed under authorizations applicable to the source in the first full calendar year of operation as a major source after the attainment date.

(b) Calculation. A baseline amount, reported in units of tons, must be calculated separately for VOC and for NO<sub>x</sub>. The calculation must be made for each pollutant for which the source meets the major source applicability requirements of §101.101 of this title.

(c) Approval. The baseline amount calculation is subject to approval by the executive director. Baseline amounts will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area.

**§101.108. Adjustment of Baseline Amount.**

(a) Owner and/or operators of regulated entities may request adjustment of their baseline amount if ownership and operation of equipment has been transferred to another regulated entity. Adjustments to the baseline amount are limited as follows:

(1) The baseline amount, as calculated and reported for all equipment being transferred, will be transferred from the original reporting regulated entity to the new regulated entity without modification to the reported amount; and

(2) Baseline amounts for remaining equipment at a regulated entity will not be adjusted based on a change of ownership of equipment to or from a regulated entity.

(b) Within 90 calendar days of the effective date of ownership transfer of equipment, the owner or operator of each regulated entity affected by the transfer of equipment in an area meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report establishing its adjustment of a baseline amount on a form published by the executive director.

(c) The baseline amount adjustment calculation is subject to approval by the executive director. After approval, it will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area.

**§101.109. Adjustment of Baseline Amount for Sources With Less than 24 Months of Operation on Attainment Date.**

(a) Applicability. The baseline amount may be adjusted for regulated entities meeting the applicability in §101.101 of this title (relating to Applicability) if the regulated entity experienced less than 24 months of consecutive operation by the area's attainment date. The adjusted baseline amount must be computed as the lower of the following:

(1) amount of baseline emissions in the attainment year; or

(2) emissions allowed under authorizations applicable to the source in the attainment year.

(b) Baseline Amount Reporting. Within 60 calendar days of completing 24 months of operation,

the owner or operator of each regulated entity in an area meeting the requirements of §101.101 of this title shall submit to the executive director a report establishing its adjusted baseline amount on a form published by the executive director.

(c) Approval. The adjusted baseline amount calculation is subject to approval by the executive director. Baseline amounts will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies for the area.

**§101.112. Failure to Attain Fee Obligation.**

(a) Pollutant Applicability. The total fee will be applicable to and calculated independently for each pollutant for which the regulated entity meets the requirements of §101.101 of this title (relating to Applicability):

(1) volatile organic compounds (VOC); and

(2) nitrogen oxides (NO<sub>x</sub>).

(b) Obligation. The owner and/or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (c) of this section. Payment of all fees must be paid in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on the first full calendar year following the attainment year on actual emissions

exceeding 80% of the pollutant baseline amount. The fee is due every year thereafter, until the Failure to Attain Fee no longer applies to the area.

(c) Calculation. For the VOC fee, VOC emissions will be used for both the actual and the baseline amount. For the NO<sub>x</sub> fee, NO<sub>x</sub> emissions will be used for both the actual and the baseline amount. The fee will be calculated separately for VOC or NO<sub>x</sub> by:

Figure: 30 TAC §101.112(c)

$$Fee = \$5000 * \left( \frac{CPI}{122.15} \right) * \left( Actual - 0.8 * BaselineAmount \right)$$

Definitions:

Fee = The amount due amount due annually to the commission based on emissions of actual volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>).

CPI = The annual Consumer Price Index (CPI) adjustment factor that is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI that is most consistent with the CPI for calendar year 1989 in accordance with Federal Clean Air Act, §502(b)(3)(B)(v) and §185(b)(3).

Actual = All quantifiable emissions of VOC or NO<sub>x</sub> reported in the annual emissions inventory including emissions from emissions events in units of tons.

Baseline Amount = Baseline amount for VOC or NO<sub>x</sub> calculated per §101.103 of this title (relating to Baseline Amount Calculation).

**§101.114. Failure to Attain Fee Obligation for Aggregated Pollutant Baseline.**

(a) Pollutant Applicability. The fee will be applicable to both pollutants, volatile organic compounds (VOC) and nitrogen oxides (NO<sub>x</sub>) as combined, emitted from a major stationary source meeting the requirements of §101.101 of this title (relating to Applicability), that chooses to aggregate VOC and NO<sub>x</sub> as allowed under §101.104 of this title (relating to Aggregated Pollutant Baseline Amount).

(b) Obligation. The owner or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (c) of this section. Payment of all fees must be in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on the first full calendar year following the attainment year on actual emissions exceeding 80% of the aggregated pollutant baseline amount. The fee is due every year thereafter, until the Failure to Attain Fee no longer applies to the area.

(c) Calculation of fee. For the VOC fee, VOC emissions will be used for both the actual and baseline amount. For the NO<sub>x</sub> fee, NO<sub>x</sub> emissions will be used for both the actual and the baseline amount. The fee will be calculated as follows.

Figure: 30 TAC §101.114(c)

$$\text{AggregatedFee} = \$5000 \left( \frac{\text{CPI}}{122.15} \right) * \left[ \text{VOCActual} + \text{NOxActual} \right] - 0.8 * \text{AggregatedBaseline}$$

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Definitions:

Aggregated Fee = The total amount of fee due annually to the commission based on aggregation of volatile organic compounds (VOC) and nitrogen oxides (NO<sub>x</sub>) actual emissions.

CPI = The annual Consumer Price Index (CPI) adjustment factor that is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI that is most consistent with the CPI for calendar year 1989 in accordance with Federal Clean Air Act, §502(b)(3)(B)(v) and §185(b)(3).

VOC Actual = All quantifiable emissions of VOC reported in the annual emissions inventory including emissions from emissions events in units of tons.

NO<sub>x</sub> Actual = All quantifiable emissions of NO<sub>x</sub> reported in the annual emissions inventory including emissions from emissions events in units of tons.

Aggregated Baseline = Aggregated pollutant baseline amount for combined VOC and NO<sub>x</sub> calculated per §101.104 of this title (relating to Aggregated Pollutant Baseline Amount). The equivalent obligation amount will be limited to VOC for VOC and NO<sub>x</sub> for NO<sub>x</sub> and not allow aggregation of these compounds when using the local cap and trade program.

**§101.115. Failure to Attain Fee Obligation for Multiple Site Aggregation.**

(a) Pollutant Applicability. The total fee must be applicable to and calculated for each pollutant, volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>), for which the regulated entity meets the requirements of §101.101 of this title (relating to Applicability). Actual VOC or NO<sub>x</sub> emissions may be aggregated for multiple sites and limited to emissions from:

(1) Regulated entities allowed to aggregate NO<sub>x</sub> per §101.105(a) of this title (relating to Multiple Site Aggregation Baseline Amount); or

(2) Regulated entities allowed to aggregate VOC per §101.105(b) of this title.

(b) Separate Pollutant Obligation. Fee obligation from VOC or NO<sub>x</sub> emission sources not qualified for baseline aggregation under §101.105 of this title will remain separate and due from each regulated entity. The fee will be calculated by the method described in §101.112 of this title (relating to Failure to Attain Fee Obligation).

(c) Obligation. The owner or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (d) of this section. Payment of all fees shall must be paid in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on the first full calendar year following the attainment year on actual emissions exceeding 80% of the aggregated pollutant baseline amount. The fee is due every year thereafter, until the Failure to Attain Fee no longer applies to the area.

(d) Calculation of fee for emissions from aggregated sites. The owner and/or operator of a regulated entity will calculate the fee separately for each pollutant, VOC or NO<sub>x</sub>, aggregated across multiple sites. If VOC are aggregated per §101.105 of this title, VOC emissions must be used for aggregated actual emissions and the aggregated baseline emissions. If NO<sub>x</sub> are aggregated per §101.105(b) of this title, NO<sub>x</sub> emissions must be used for the aggregated actual and aggregated baseline emissions. The fee will be calculated for VOC or NO<sub>x</sub> as follows.

Figure: 30 TAC §101.115(d)

$$\text{AggregatedSiteFee} = \$5000 * \left( \frac{\text{CPI}}{122.15} \right) * \left( \text{AggregatedActual} - 0.8 * \text{AggregatedBaselineAmount} \right)$$

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Definitions:

Aggregated Site Fee = The amount due annually to the commission based on actual volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) emissions if one or more site's emissions are aggregated.

Aggregated Fee = The amount due annually to the commission based on actual VOC or NO<sub>x</sub> emissions if one or more site's emissions are aggregated.

CPI = The annual Consumer Price Index (CPI) adjustment factor that is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI that is most consistent with the CPI for calendar year 1989 in accordance with Federal Clean Air Act, §502(b)(3)(B)(v) and §185(b)(3) (relating to Multiple Site Baseline Amount).

Aggregated Actual = All quantifiable emissions of VOC or NO<sub>x</sub> reported in the annual emissions inventory including emissions from emissions events in units of tons for the regulated entities combined per §101.105 of this title. (relating to multiple site Aggregated Baseline Amount).

Aggregated Baseline Amount = Baseline amount in units of tons combined from multiple sites and calculated per §101.105 of this title.

**§101.116. Failure to Attain Fee Payment.**

(a) Payment. Payment of fees required by this subchapter must be paid by check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ), and sent to the TCEQ address printed on the billing statement.

(b) When Failure to Attain Fee begins. The first payment of the fee is due and calculated for actual emissions from the first full calendar year following the attainment year.

(c) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subchapter. Failure to pay the full emissions fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178. The provisions of TWC, §7.178, as first adopted and amended thereafter, are and will remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

(d) Late payments. The agency shall impose interest and penalties on owners or operators of accounts who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

**§101.117. Compliance Schedule.**

(a) Baseline Amount Determination. The owner or operator of each regulated entity meeting the requirements of §101.101 of this title (relating to Applicability) will submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director.

(1) Houston-Galveston-Brazoria one-hour nonattainment area. The Baseline Amount Determination forms are due no later than 90 calendar days from the mail date the agency sends the Baseline Amount notification.

(2) Future Areas that fail to attain. The Baseline Amount Determination forms are due to the executive director no later than 90 calendar days after the end of attainment year for the area.

(b) New Major Source Baseline Amount Reporting. No later than May 31st following the first full year of operation as a major source, the owner and/or operator of a regulated entity meeting the requirements of §101.101 of this title will submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director.

(c) Payment Due Date. The fee payment is due no later than 30 calendar days after the invoice date. If an account commences or resumes operation during the fiscal year in which the fee is assessed, the full emissions fee payment will be due prior to commencement or resumption of operations.

**§101.118. Cessation of Program.**

The Failure to Attain Fee will continue to apply until one of the following actions is final:

(1) redesignation of the nonattainment area by the United States Environmental Protection Agency (EPA) to attainment;

(2) finding of attainment by the EPA; or

(3) three consecutive calendar years of certified monitoring data submitted to the EPA demonstrating that the monitors did not exceed the National Ambient Air Quality Standards.

**§101.119. Exemption from Failure to Attain Fee Obligation.**

No owner and/or operator of a regulated entity that is a major stationary source shall be required to pay a fee during any year that has been determined by the United States Environmental Protection Agency to be an extension year under Federal Clean Air Act, §181(a)(5).

**§101.120 Eligibility for Equivalent Alternative Obligation.**

(a) Alternative option. Notwithstanding any requirement in this subchapter, the owner and/or operator of regulated entities that are major sources obligated to pay a Failure to Attain Fee may submit a request to the executive director to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements in accordance with §101.121 and §101.122 of this title (relating to Equivalent Alternative Obligation and Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation).

(b) Partially met fee obligation. Use of an equivalent alternative obligation to partially meet a fee obligation for a single pollutant or for an obligation based on aggregated pollutants or sites is not allowed.

(c) Obligation. The entire fee obligation is due in accordance with §101.117 of this title (relating to Compliance Schedule) for all regulated entities not meeting the requirements of §101.121 and §101.122 of this title.

(d) Notification Requirements. Upon receipt of notification from the executive director regarding the Failure to Attain Fee obligation calculated in accordance with §§101.112, 101.114, or 101.115 of this

title (relating to Failure to Attain Fee Obligation, Failure to Attain Fee Obligation for Aggregated Pollutant Baseline, and Failure to Attain Fee Obligation for Multiple Site Aggregation), an owner and/or operator of a regulated entity shall inform the executive director of their selection for the payment.

(1) The owner and/or operator of a regulated entity must inform the executive director if they are selecting an equivalent alternative obligation using forms approved by the executive director.

(2) The owner and/or operator of a regulated entity must submit a form selecting their equivalent alternative obligation.

(3) The form must be received by the executive director no later than 60 calendar days from the mail date the fee obligation notification was sent to the regulated entity.

(4) All equivalent alternative obligations must be approved and funded, exercised, or otherwise completed by no later than 60 calendar days from the mail date the notification was sent to the regulated entity.

(5) If the executive director does not receive notification of a selection of equivalent alternative obligation and the equivalent alternative obligation is not approved and funded, exercised, or otherwise completed, the fee payment will be due in full per the provisions of §101.116 of this title (relating to Failure to Attain Fee Payment).

(e) Restriction for Sites with Aggregated Pollutant Baseline Amount. Owners/operators of sites

opting to aggregate ozone precursor pollutants in calculating their emissions baseline amount under the provisions of §101.104(a) of this title (relating to Aggregating Pollutant Baseline Amount) are prohibited from using the Equivalent Alternative Obligation.

**§101.121 Equivalent Alternative Obligation.**

(a) The owner and/or operator of a regulated entity that is a major stationary source subject to this subchapter may submit a request to fulfill its Failure to Attain Fee Obligation by substituting emission reductions, on a volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) specific basis, in an amount equivalent to the tons on which the Failure to Attain Fee has been assessed by relinquishing an equivalent amount of either:

(1) emissions reduction credits;

(2) discrete emission reduction credits;

(3) current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances; or

(4) current or banked Mass Emissions Cap and Trade (MECT) program allowances.

(b) The multiple site aggregation baseline amount calculation is subject to approval by the executive director.

**§101.122 Using Supplemental Environmental Project to Fulfill an Equivalent Alternative**

**Obligation.**

(a) The owner and/or operator of a major stationary source subject to this subchapter may submit a request to fulfill its Failure to Attain Fee obligation by contributing to a Supplemental Environmental Project, on a pollutant specific basis by either:

(1) an amount equivalent to the tons on which the Failure to Attain Fee has been assessed;

or

(2) an amount equivalent to the fee amount assessed.

(b) The Supplemental Environmental Project must:

(1) directly reduce the amount of emissions reaching the atmosphere;

(2) benefit only the subject nonattainment area;

(3) not be part of an agreement or enforceable order allowing the major stationary source to offset a portion of an imposed administrative penalty; and

(4) not include projects that are necessary to bring the major stationary source into compliance with environmental laws or that are necessary to remediate environmental harm caused by a

violation caused by the major stationary source.

(c) The multiple site aggregation baseline amount calculation is subject to approval by the executive director.