The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §101.27 *with changes* to the proposed text as published in the March 11, 2011, issue of the *Texas Register* (36 TexReg 1641), and the text will be republished.

Background and Summary of the Factual Basis for the Adopted Rule

The commission collects annual fees from sources that are subject to the permitting requirements of the Federal Clean Air Act (FCAA), Titles IV and V as required by Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0621, Operating Permit Fee. THSC, §382.0621 states the commission shall collect an annual fee based on emissions for each source that is subject to the FCAA, Title V. The revenue collected from the emissions fee is deposited in the Operating Permits Fees Account 5094, as required by THSC, §382.0622(b)(1).

As part of its air program activities, the commission implements a United States Environmental Protection Agency (EPA)-approved program (FCAA, Titles IV and V, referred to hereafter as "Title V"). In order to obtain this approval, FCAA, §7661a(b)(3)(A) provides that state law must require sources subject to the operating permit program pay an annual fee "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements."

Additionally, this fee must be dedicated for use only on Title V activities. These activities include, but are not limited to, the costs for preparing applicable regulations; reviewing and issuing permits, ambient air monitoring, modeling, implementing and enforcing any Title IV or V permits, and preparing emissions inventories. These requirements in state law are reflected in THSC, §382.0621 and §382.0622.

In direct support of the Title V program, the commission conducts investigations at Title V sites or in-office file reviews to determine whether the entity is operating in accordance with applicable rules, permits, or orders of the commission or applicable state enforceable federal rules. Investigations include citizen complaint response and scheduled and unscheduled investigations at sources subject to Title V in order to assist in the development and enforcement of Title V permits and applicable rules. The staff complete on-site reviews to characterize ambient conditions of an area and operates stationary and photochemical assessment monitoring stations throughout the state in order to establish compliance with the National Ambient Air Quality Standards (NAAQS), conduct monitoring around Title V sources, and verify conditions are as represented in permit applications.

All permitting activity at a major site is considered to be Title V permitting activity. Office of Permitting and Registration staff supports revising, amending, and altering permits due to state implementation plan (SIP) changes, rule changes, and new source review (NSR) activities. Staff also coordinate notice and comment hearings and support rule development efforts that affect Title V sources.

In support of the Title V program, commission staff also collect, assess, and report emissions inventory information from Title V sites, implement the Title V fee program, perform data analysis, and complete modeling of emission inventory data in support of nonattainment and near-nonattainment area control strategy development for SIP planning and submittal. The commission is also responsible for developing SIP revisions, submitting the SIP revisions to the EPA, and strategies to attain and maintain the NAAQS. This rule revision includes regulations affecting Title V source activities.

The Office of Legal Services staff provides support with enforcement cases, Title V and NSR permitting activities, and with rulemaking. Legal staff prepare cases for administrative enforcement, participate in SIP rule development and demonstrations, and enforcement with Title V issues. Legal staff also provide legal support for all Title V permitting activities, and provide legal advice and briefings on matters related to permitting.

The existing rule language in §101.27 structures the emissions fees as a billed system. The emissions fee rate per ton is based on a base rate of $25 per ton modified by the rate of change of the consumer price index (CPI) and percentage of the carbon monoxide (CO) fraction of total emissions assessed a fee the previous year. This fee is commonly referred to as the air emissions fee (AEF) rate and, by calculation, using the aforementioned parameters, is currently set at $33.58 per ton for Fiscal Year (FY) 2011, down from $33.71 in FY 2010. Fees are due on all regulated pollutants (all criteria and any pollutant that is permitted at a site) emitted from the site during the last full calendar year preceding the beginning of the fiscal year that a fee is due. Therefore, FY 2011 fees are based on Calendar Year 2009 emissions. Emissions in excess of 4,000 tons per pollutant at a site are currently excluded from being assessed a fee. This is a statutory cap found in THSC, §382.0621(d).

Beginning in FY 2009, annual expenditures, i.e., funds used to administer the Title V permit program in Texas, exceeded annual revenue in the form of emissions fees. Revenue was $32.7 million and the total Title V obligation was $34.7 million. Fund surpluses will keep the fund balance positive until FY 2012. Beginning in FY 2012, emissions fee revenue based on FY 2011 projections, in conjunction with the fund balance, will be insufficient to adequately fund the operating costs associated with the Title V program. The FY 2011 projected cost to administer the Title V program is $34.7 million while the revenues are projected to be $26 million for FY 2011.

The AEF revenue has declined as a result of emissions decreasing at an average rate of 5% annually over the past eight fiscal years. Although CPI has increased by an average rate of change of 3% over the past eight fiscal years, the CPI increased by only 0.19% for

FY 2009 and 1.47% for FY 2010. Additionally, all categories of emissions have decreased annually since 2001; the reductions have been most notable in emissions other than CO largely because of regulations targeted on other criteria pollutants such as ozone precursors. Consequently, the CO fraction has increased from 22.0% to 24.47% over the last eight fiscal years, further reducing the annual revenue. Thus, in spite of a slight increase in the recent CPI, revenue has fallen from $35.5 million in FY 2007 and $32.7 million in FY 2009 to a projected $26 million in FY 2011.

Although revenue has declined, the Title V operating obligation has not. Despite the decline in emissions, for example, Title V permits must be renewed every five years. Existing Title V sites revise their operating permits frequently due to changes in operations and equipment or changes to applicable state or federal requirements. The number of emissions inventories reviewed has remained consistent since 2004. Mobile monitoring resource allocation has remained nearly constant since 2004. Regulatory and non-regulatory stationary ozone monitors are not funded by Title V. However, the number of ozone monitors has increased since 2004 from 98 to 128, and the data from these monitors are used in Title V activities.

As a portion of the combined salary and operating costs (excluding fringe and indirect), Title V salary costs have increased slightly from $22.3 million in FY 2004 to $24.5 million in FY 2010. Over a similar time period, budgeted full-time staff was 472 in FY

2006 and fell slightly to 464 in FY 2010. Despite staff reduction, a 8.3% increase in cost over a seven-year period is attributable to an increase in staff costs including state mandated cost of living pay increases.

New sources may become subject to Title V as a result of the federal impending revisions to the National Ambient Air Quality Standard. The impact of incorporating these sources into the Title V program is not yet known but may increase the Title V budget. However, these sources are not expected to be large emitters nor would the revenue based on their emissions be sufficient to make up the budget shortfall.

In the adopted rule, the commission is removing the CO fraction to collect at least $35 million in FY 2012 and incorporating the flexibility to adjust the base rate annually as needed up to a set cap. The adopted flexibility in the base rate will also enable the commission to incorporate any new workload in its budget as a result of changing federal standards or state mandates related to Title V sources. Advantages to the adopted adjustable base rate also include the flexibility to compensate for fluctuating CPI, declining emissions rates, and new regulations.

Section Discussion

The commission adopts the amendment to §101.27(f) to remove the CO fraction from the fee rate calculation and replace the base rate of $25 per ton with an adjustable base rate. The base rate is adjustable up to a cap of $45 per ton in subsequent years. The base rate will be set at $25 per ton for FY 2012.

The commission had proposed replacing the base rate of $25 per ton with $35 per ton for FY 2012. The commission solicited comments about the appropriateness of removing the CO fraction from the emissions fee equation. The CO fraction provided a discount on emissions fees based on the amount of CO emissions assessed a fee the previous year. With removal of the CO fraction, the base rate will not need to be set at $35 per ton as originally proposed in the rule. The base rate can be maintained at $25 per ton for FY 2012 to adequately fund the state’s Title V program.

The commission received comments supporting the removal of the CO fraction from the fee equation. It will be easier to estimate a fee rate because the fee calculation equation will be simplified and more predictable by removing one of the parameters that varies annually. However, commenters did not support both removing the CO fraction and increasing the base rate to $35 per ton in FY 2012. Based on comments received, the commission is adopting the amendments to §101.27(f) to remove the CO fraction and revise the base fee amount by deleting the fixed $25 base amount and in its place is setting a lower than proposed adjustable base rate of $25 per ton in FY 2012. As was intended with the proposal, the adopted fee equation meets the requirement that the Title V program needs to maintain sufficient funding. The adopted rule also provides flexibility to adjust the base rate up to a maximum base rate amount of $45 per ton that could be assessed in subsequent years.

The removal of the CO fraction from the fee calculation equation with the base rate of $25 per ton for FY 2012 is estimated to generate approximately the same amount of overall revenue as in the original proposed rule. The adopted changes are expected to generate an additional $9 million in revenue in FY 2012. Establishing an initial base of $25 per ton, with removing the CO fraction, will generate an estimated revenue of $35 million for FY 2012 if emissions decline 5% and the CPI increases 2% from the previous year. The commission estimates the average impact to sites will remain approximately the same as in the proposed rule, that had a base rate of $35 per ton in FY 2012 and kept the CO fraction in the equation. The average impact impact to sites is estimated to be 35% if emissions continue to decline 5% and the CPI increases 2%.

The cost to administer the Title V program is estimated to be $35 million while the revenues are expected to be $26 million in FY 2011. This shortfall is expected to continue if the rule were not amended. The adopted changes are expected to generate an additional $9 million in revenue in FY 2012. Revenue is anticipated to continue to decrease in subsequent years because of the declining emissions. Thus, removal of the CO fraction is not a long-term solution, and an increase in the base rate in subsequent years may be required to provide sufficient revenue. For example, if emissions continue to decline at the current average rate of 5% per year and the CPI increases at 2% per

year, a base rate of $35 per ton combined with the continued removal of the CO fraction may be required to generate $35 million in revenue by FY 2018. Thus, the adopted rule language allows the commission to annually adjust the base rate, as required, to generate adequate revenue to fund the state's Title V program. An adjustable base rate allows the commission flexibility to adjust to changes in the program that affect the fee revenue or obligations. Changes could include the fluctuating CPI, legislative mandates, and changes in staffing patterns.
The removal of the CO fraction and maximum amount are an increase above the fixed dollar amount currently in the rule. The adopted change in §101.27(f) will remove the CO fraction and leave the base rate at $25 per ton for FY 2012 and allow future adjustments to the base rate. Although the CO fraction is removed, fees are still assessed on all regulated pollutants, including CO, up to a cap of 4,000 tons per pollutant.

No standard agency practice exists for determining what percentage of the anticipated expenditures constitutes an adequate or appropriate fee amount. A common accounting practice is to generate revenue sufficient to have enough cash per year to account for 105% of expected expenditures. The fees corresponding to 5% above expected program expenses are expected to cover the additional unknown expenditures of the account. Thus, starting in FY 2013, the commission will adjust the base rate to cover 105% of the expected obligation for the FY. Any surplus in the fund balance from a previous year's revenue will be included in estimating future adjustments. The estimate will be made each spring when the commission sends the billing notices to the Title V companies. In addition to eliminating the negative fund balance starting in FY 2012, this practice should maintain smaller positive fund balances in future fiscal years than experienced historically.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendment to §101.27 are not intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. These changes are specifically intended to adjust the base rate for assessing fees from Title V sources and to provide future flexibility in assessing these fees. Therefore, the commission finds that it is not a "major environmental rule." Additionally, the fee collected under the adopted revision to Chapter 101 generally should not 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. By federal and state statute, emission fees are to be assessed and collected from Title V sources sufficient to fund the Title V permitting program.

As defined in the Texas Government Code, §2001.0225 only applies 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. This rulemaking does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the emissions fee is required under federal law to be sufficient to support the air permit program under FCAA, Title V (42 United States Code (USC), §§7661 - 7661f), which includes, but is not limited to, issuance of acid rain permits under FCAA, Title IV (§§7651 - 7651o). The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Title IV and Title V programs. This adopted rule does not exceed an express requirement of federal or state law. The rule does not exceed a requirement of a delegation agreement, but the emissions fee is specifically required by EPA's approval of the Title V programs to the commission. The rule was not developed solely under the general powers of the agency but was specifically developed and authorized under TCAA, §§382.011, 382.017, 382.0621, and 382.0622.

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

Takings Impact Assessment

The commission conducted a takings impact evaluation for the adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rulemaking is to ensure sufficient funding of the Title V permit program as required under federal and state law. Promulgation and enforcement of the adopted rule will not burden private, real property because this is a fee rule that supports air quality programs of the commission. Although the adopted rule revision does not directly prevent a nuisance or prevent an immediate threat to life or property, the change in the emissions fee requirements does fulfill a federal mandate under 42 USC, §§7661 - 7661f. The emissions fee is also required by state law, THSC, §382.0621 and §382.0622, to be sufficient to support the Title V programs. Consequently, the adopted amendment to the fee requirements is an action reasonably taken to fulfill an obligation mandated by federal and state law. Therefore, this adopted rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rule, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

Effect on Sites Subject to the Federal Operating Permits Program

Owners and operators of Title V sites may be required to pay higher annual emissions fees. The emissions fee is required under federal law to be sufficient to support the permit program under Title V. The emissions fee is also required by state law, THSC, §382.0621 and §382.0622, to be sufficient to support the Title V programs. The intent of this adopted amendment is to collect sufficient revenue to support the permit program under Title V as required by state and federal law.

Public Comment

The commission offered two public hearings on this proposal, in Houston on April 4, 2011, and in Austin on April 7, 2011. However, there were no commenters signed up to speak in Austin, so this hearing was not held. The comment period closed April 11, 2011.

Written comments were received from: Association of Electric Companies of Texas, Inc (AECT), Calpine Corporation (Calpine), City of Kingsville Landfill (City of Kingsville), CPS Energy (CPS), Dow Chemical (Dow), Exxon Mobil (Exxon), Luminant Power (Luminant), North American Insulation Manufacturer's Association (NAIMA), Solvay Solexis, Incorporated (Solvay), Texas Oil and Gas Association (TxOGA), and the Texas Chemical Council (TCC).

Three commenters supported raising the rate to support the program and one supported a smaller increase, if one were needed. Three commenters were silent with respect to supporting an actual rate increase but urged the commission to look for efficiencies in the program to cut costs. One commenter did not state anything with respect to the rate increase but requested a longer notice for rate increases. However, three commenters were against raising the fee rate. Four of the commenters suggested a rule change that the Title V sources that pay the inspection fee into the Clean Air Account should pay into the Title V account instead.

Response to Comments

CPS Energy supported changing the base rate to accommodate the proper funding of the program.

The commission thanks the commenter for its support.

The City of Kingsville stated that raising the fee will raise its operating budget. Calpine added that the mid-year change in the fee will result in available operations funds being reduced to fund the fee increase.

The commission acknowledges that the fee rate for each ton of emissions emitted, up to 4,000 tons per pollutant, will increase for each site. At the current rate of revenue generation, FY 2012 revenue will be insufficient to fully fund the Title V program in FY 2012 unless the rule is changed. To collect an adequate fee in FY 2012, the rule must be effective by the end of FY 2011. Federal rule requires the Title V program to be fully funded, and consequently, the commission is adopting this rule revision at this time in order to generate sufficient revenue to fully fund the Title V program in the

next fiscal year. The rule was not changed in response to this comment.

Calpine recommended that the commission include mechanisms in the rule that will minimize the fiscal impact of the initial and future fee rate changes such as providing for a minimum of 12 months notice of rate changes.

The commission will provide as much notice as possible for any future fee increase but is currently unable to support a 12-month notice of a rate change. As stated in the Background and Summary of the Factual Basis for the Adopted Rule section of this rulemaking, this change is based upon an expected shortfall in FY 2012 that must be addressed immediately. A fee rate cannot be established until the CPI and the emissions are known. The actual emissions used in the basis of the fee calculation are not known until spring. The CPI varies monthly and the average CPI number is not known until mid-September. The fees are billed in November after the average CPI is developed by the United States Bureau of Labor Statistics. For example, the FY 2012 fees will be based on calendar-year 2010 emissions, which are determined in spring 2011 and the CPI in mid-September 2011. The rule was not changed in response to this comment.

The TCC states that relying on fee increases is not acceptable in light of the growing budgetary constraints by many government programs.

In order to obtain approval for administering the Title V program, FCAA, §7661a(b)(3)(A) provides that state law must require sources subject to the operating permit program pay an annual fee sufficient to cover all reasonable costs required to develop and administer the Title V program. It is the commission's understanding that the EPA rules require fees as a funding source for the program and that the fees must adequately fund the program. Due to falling revenue, as a result of decreasing emissions and flat CPI, increases in the program fees per ton of emissions are necessary to adequately fund the program obligations. The rule was not changed in response to this comment.

NAIMA stated that enacting the fee increase will demoralize the Texas economy without decreasing global emissions.

Controlling global emissions is out of the scope of the state Title V program. However, the increase in fees will return the Title V program revenue to within $0.5 million less than the level in 2007. The commission recognizes that the adopted rule results in an increase in the fee rate per ton of emissions and the current economy is less robust. However, the

commission is required to adequately fund the Title V program and a fee increase is required to fully fund the obligations of the program. The rule was not changed in response to this comment.

Dow Chemical stated that the rule should limit future years' fee increases. The TCC added the rule did not contain any restraints on future years' increases and further recommended that the commission establish the suggested policy setting the funding at 105% of the budget in rule.

In each Texas legislative session, the legislature sets an appropriation amount for the Title V account for the biennium. The commission cannot spend more than the amount in the appropriation for direct operations costs. As addressed in the preamble, the commission's intended practice on fee assessment is to estimate and assess a fee to generate sufficient revenue that does not exceed 105% of the budget. Any surpluses from the previous year will be included in estimating future adjustments.

The commission will not assess emission fees in excess of the amount estimated to fund direct and indirect costs associated with the Title V program. The fee has a collection rate of above 95% but if TCEQ were to set in rule the assessment at a cap of 105% it would require a 99% collections

rate to ensure the program remains fully funded. This would place a large amount of stress on the account and would require that the agency use fund balances in certain years if revenue collections are below 99%. The fund balance has already been depleted and cannot be used as a reliable source to supplement revenue shortages. The commission may need to have the ability to assess rates in excess of 105% in order to fully fund the program in certain years. Thus, the 105% funding level remains a goal.

Due to uncontrollable variables of the fee (emissions and CPI), the commission will need to adopt an adjustable rate to ensure adequate funding annually for the program. Under the adopted rule, the commission has set a maximum base rate of $45 per ton and will not charge that amount unless it is required to generate sufficient revenue.

The new structure will be implemented in a manner to prevent the development of a large fund balance in Title V Operating Permit Fees account and the fee rate will only be increased as needed. The maximum rate will not impact the fee unless the uncontrollable variables of fees require it, but it is not anticipated to be required for a number of years because the CO fraction is removed in the adopted rule. The rule is amended in §101.27(f)(1) to reflect the removal of the CO fraction, establishment of

an adjustable base rate, and for FY 2012, set a base rate at $25 per ton.

Solvay opposed the rate increase and stated that a 40% increase is unacceptable and out of line with typical inflationary cost increases. The TCC stated that the $10 increase in fee is very large.

The increase returns the revenue to $0.5 million less than the amount collected in 2007 and is required to compensate for decreases in fee revenue experienced by the program. The fee rate has been held at a lower level because a large fund surplus covered annual program funding shortfalls since FY 2009. The fund surplus is now exhausted, and a fee increase is needed to cover program obligations. Because emissions are declining at a rate of approximately 5% per year, the overall average fee increase from all sources is estimated to be approximately 35%. The amount will vary at each site, depending on the relative change in emissions at that site. The rule was not changed in response to this comment.

AECT stated that the TCEQ should evaluate all options prior to raising the fee. TxOGA stated that if a rate increase were required, it supported a $30 per ton increase instead of the proposed $35 per ton. AECT requested the commission ascertain that the proposed increase in the fee rate and other changes to the formula are the only solution to adequately and appropriately fund the Title V program

In order to obtain approval for administering the Title V program, FCAA, §502(b)(3)(A) and 40 CFR §70.9 provide that the state's Title V program must require sources subject to the operating permit program pay an annual fee sufficient to cover all reasonable costs required to develop and administer the Title V program. The fee revenue generated is fully dedicated to Title V activities, and the program is funded only by the Title V fees.

Starting in FY 2009, fee revenue fell below obligations. Surpluses will keep the fund positive until FY 2012 when this shortfall is expected to exceed $8 million dollars if not addressed. The commission is adopting a fee rate increase because of the estimated shortfall in future years if a rate change is not adopted. To simplify equation and improve its predictability, the CO fraction is removed, and to provide flexibility needed as a result of decreasing emissions and a flat CPI, an adjustable base rate is adopted in §101.27(f)(1).

The commission, in its proposal, recommended a fee base rate increase to $35 per ton, not a net increase of $35 per ton and requested comments on removing the CO fraction. By removing the CO fraction, the commission is

adopting a change from the rule proposal. Additionally, the adjustable base rate will be kept at $25 per ton for FY 2012.

Solvay asked the commission to simplify the change by making it escalate/de-escalate according to some price index to be consistent with what is occurring in the market place.

The fee increase is required to offset the revenue decreases experienced by the program. To be certain, economic conditions are reflected in the fee calculation through the CPI; however the FCAA requires that fees assessed are based on emissions and are sufficient to cover all reasonable direct and indirect costs for the Title V program. The average CPI that allows for cost of living increase in the fee rate has not been sufficiently high to compensate for the rapidly decreasing emissions in the state. As a result, Title V revenue from these sources has been decreasing. Despite decreasing emissions, Title V obligations are not declining in cost. Revenue was $36.9 million in 2004 and exceeded the program obligation of $32.3 million by $4.5 million. The revenue continued to fall but remained greater than the program obligation until 2009. The surpluses generated in the program allowed the fund to remain positive through FY 2011. The rule was not changed in response to this comment.

CPS Energy supported removing the CO fraction of the equation used to calculate the annual emission fee rate. The equation will be more stable and therefore make budgeting easier for the company and the state.

The commission thanks the commenter for its support. The rule is amended in §101.27(f)(1) to reflect the removal of the CO fraction.

Exxon Mobil, TCC, and Dow Chemical stated that the commission should not both increase the base rate to $35 per ton and remove the CO fraction. TxOGA added that removing the CO fraction alone will raise the fee rate 33%. Solvay does not believe that removing the CO fraction and lessening the base rate will generate the $9 million in revenue that the TCEQ believes will occur. The TCC stated that if the CO fraction were removed, the increase in the base rate should be adjusted accordingly to generate sufficient revenue to fund the Title V program.

The commission concurs that it is not necessary to increase the base rate to $35 per ton if the CO fraction is removed. The commission estimates that removal of the CO fraction should generate sufficient revenue in FY 2012. By removing the CO fraction without changing the base rate, the fee is expected to generate a total of $35 million in FY 2012.

However, beginning in FY 2013, removal of the CO fraction, by itself, may not generate sufficient funds. Consequently, the FY 2013 base rate may still need to be adjusted to compensate for a relatively flat CPI and projected emissions decreases. For FY 2013 fees, the base rate is estimated to increase by $1.00 per ton if the average CPI increase remains at 2% and the emissions decline 5%. Based on average emissions reductions of 5% per year and a CPI growth of 2% per year, TCEQ projects that fees will be limited to $30 per ton or less for the next three bienniums with the removal of the CO fraction. This projection is based on $35 million annual program costs.

Due to uncontrollable variables (emissions and CPI) the commission adopted an adjustable rate to ensure adequate funding annually for the program. Under the adopted rule, the commission has set a maximum base rate of $45 per ton and will not charge that amount unless it is required to generate sufficient revenue.

The rule is amended in §101.27(f)(1) to reflect the removal of the CO fraction and establishment of an adjustable base rate. The base rate will be set at $25 ton for FY 2012.

Exxon Mobil, Luminant, Dow Chemical, TCC, and City of Kingsville recommended that the commission look for efficiencies in the Title V program and discontinue performing discretionary activities in order to contain program costs prior to raising the fee. AECT listed several activities that it did not believe should be funded by Title V, including rule development, all permitting activity, photochemical modeling, operating stationary and photochemically reactive ambient monitoring stations, and performing data analysis in support of nonattainment and near-nonattainment areas. The TCC questioned whether modeling for control strategy development for state implementation planning and submissions should be funded under the Title V account. The TCC suggested that the commission should exercise as much flexibility as possible within statutory guidance to maintain program funding.

The commission is committed to meeting program requirements while minimizing future increases in program costs. The commission is reviewing all options for maintaining an adequate funding level for the Title V program, including appropriate program efficiencies and cost-reduction measures. Historically, program expenditure increases have been modest. Between 2004 and 2011, program costs have increased 8.3%, an average of 1.2% per year, while revenue dropped 29%. In order to minimize program costs while implementing additional required program requirements, the

agency has increased program efficiencies.

The FCAA requires the fees assessed from Title V sources are sufficient to cover all reasonable (direct *and indirect*) costs required to administer and develop the operating permits program. (*See* **FCAA, §502(b)(3)(A)). EPA guidance states that Title V program activities "are those which are necessary for the issuance and implementation of the Title V permits." (*Grant-Fee Transition: Questions and Answers, Office of Air and Radiation*, U.S. EPA, July 21, 1994.) These activities include, but are not limited to, the costs for preparing applicable regulations; reviewing and issuing permits, ambient air monitoring, modeling, implementing and enforcing any Title IV or V permits, and preparing emissions inventories. These requirements in state law are reflected in THSC, §382.0621 and §382.0622. As EPA further elaborated in the 1992 final 40 CFR Part 70 rulemaking: " . . . the fee provisions of title V mandate that the permit fees be collected in sufficient amount to support several air pollution control program activities that are relevant to title V sources and implemented through the operating permit program. This is clear from the list of such activities in §502(b)(3)(A) of the Act, which includes some activities that are not strictly part of the permitting program, but for which costs related to stationary sources must be recovered." (57 FR 32250, 32292)**

EPA's longstanding Title V fee guidance clearly indicates that fee activities include implementing and enforcing applicable requirements, which in turn include implementing and enforcing Title I permits (Prevention of Significant Deterioration (PSD)/Nonattainment (NA) and minor New Source Review (NSR)) issued to Title V sources. (*See* specifically: Memo from John S, Seitz Director, Office of Air Quality Planning and Standards, U.S. EPA, Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V, August 4, 1993, and the associated Matrix of Title V-Related and Air Grant-Eligible Activities, available at http://www.epa.gov/Region7/air/title5/t5memos/fees.pdf). The EPA-approved Texas Title V program, 30 TAC Chapter 122, lists all preconstruction permits issued under 30 TAC Chapter 106, Permits by Rule (PBR) and 30 TAC Chapter 116, New Source Review (NSR) as applicable requirements under Title V and therefore are included in the Title V program. Therefore, these permits at Title V sources are considered "Title V activities."

NSR permit requirements such as permitting maintenance, startup, and shutdown (MSS) activities, converting flexible permits to permits with individual emission limits, and NSR permits that require PSD and

nonattainment review at Title V major sources are additional examples of "Title V activities" that add to the workload of the agency. The rule was not changed in response to this comment.

The TCC commented that it does not support a long-term solution of increasing base fees over the next several years to compensate for reduced revenues resulting from decreasing emissions. The TCC also stated that that the TCEQ should develop a long range plan that includes efficiency measures rather than relying solely on fee increases.

The commission agrees with the concept of increasing efficiency and has implemented efficiency measures in the past and continues to look for appropriate streamlining changes to the Title V program.

The TCEQ has evaluated and implemented measures to streamline the issuance of Title V permits. TCEQ no longer requires a pre-site inspection prior to sending the permit to public notice which has reduced agency resources required for permit review and reduced permit issuance times by 90-120 days. The change also allows inspections to be scheduled according to the usual inspection schedule and not be impacted by the permitting process.

TCEQ has automated the production of Title V permits using database tools that reproduce applicable federal and state requirements from agency and contractor-developed flowcharts. Also, permits are now sent directly to permit applicants for the resolution of any technical deficiencies, reducing permit review times for both TCEQ staff and applicants. Additionally, TCEQ uses the EPA grants to fund the use of contractors to develop and maintain many of these automated permitting tools in order to reduce the TCEQ staff resources that would be dedicated to these tasks.

Other areas within the agency have also developed databases and process to improve efficiency within the state's Title V program . The TCEQ has developed a web-based Emissions Inventory system that supports electronic submissions of emissions that will reduce TCEQ resources associated with printing, mailing, and entering emissions data. These increases in efficiency have resulted in the agency minimizing cost increases to program administration over the past 7-plus years.

The AECT and Luminent commented that the costs for of the TCEQ's Title V program should have decreased over time because the workload should have decreased over time. AECT stated that since initial issuance has been accomplished for virtually all existing major sites and there are very few Greenfield sites, the Title V program should be processing a large percentage of permit renewals, which is assumed to be less resource intensive.

The commission respectfully disagrees with this comment. Title V permits must reflect changes in applicable requirements that occur during their five-year life cycles. Operational changes at sites generate revisions to existing Title V permits. In addition, there have been several new federal rules promulgated that trigger a large number of Title V permit revisions. Examples include the engine and boiler Maximum Achievable Control Technology (MACT) and amendments to several federal and SIP rules, such as 30 TAC Chapters 115 (Control of Air Pollution from Volatile Organic Compounds) and 117 (Control of Air Pollution From Nitrogen Compounds). These same operational and regulatory changes that trigger revisions often are present during the processing of renewals. Also, off-permit and operational flexibility changes are frequently made during the course of a permit's five-year term and become a part of the renewal. Therefore, the TCEQ's Air Permits Division (APD) has found that Title V renewals are generally larger and more complex than when a permit was initially issued.

In addition to processing the permit revisions themselves, APD has invested significant resources to provide guidance to applicants and to automate, as

much as possible, the matching of emission unit attributes to the applicable monitoring, reporting, recordkeeping, and testing requirements. With every new rule and rule change, the various permitting tools must be maintained. Over time, these maintenance costs have increased due to sheer number of new and amended regulations that are currently on the books compared to when Texas was delegated initial Title V program approval.

Also, APD's work load has increased since initial program approval due to actions taken to respond to various EPA requirements concerning the use of general operating permits (GOPs). Based on these comments, GOPs have over time become increasingly focused and resulted in several changes to various GOPs and an increase in the number of site operating permits due to changes in qualification criteria. As stated in a previous response to comment, the commission has initiated many streamlining processes in the permitting programs while still complying with Title V program requirements. However, recent EPA objections and public petitions on several commission-issued operating permits has increased staff work load and threatened some of these efficiency efforts. Continued EPA objections may actually increase program costs in the future. The effort to administer the program in other sections of the agency remains the same although the

emissions have decreased. For example, the number of emissions inventories submitted by industry and reviewed by staff has remained constant since 2004. The number of mobile monitors has remained approximately the same but the number of stationary monitors has increased slightly and will increase in the future due to new NAAQS monitoring network requirements. Compliance Certification is a perpetual part of the Title V program. The FCAA Stationary Source Compliance Monitoring Strategy requires review of compliance certification and deviation reports for all Title V sources annually as well as review of all federally enforceable regulation at Title V sites on a consistent basis. The number of investigation activities related to the TCEQ Office of Compliance and Enforcement's Office Compliance Certification has remained steady. The number of Title V compliance investigations directly correlates to the number of active permits. Therefore, the number of investigations conducted has not decreased.

Fulfilling these activities are needed for the commission to meet the statutory and regulatory requirements of Title V program and, thus, maintain federal program approval. The rule was not changed in response to this comment.

The TCC, Luminant, and AECT stated the rule penalizes industry for emissions reductions that are a direct result of the billions of dollars invested by industry in additional control strategies and improvements in best management practices. NAIMA stated that companies should be rewarded for reducing emissions.

The commission acknowledges the significant contribution sources have made towards reducing emissions and improving the air quality and understands the commenters' concern regarding the increase in emission fees despite efforts that have reduced emissions. However, the commission also recognizes that in order to maintain EPA approval of the Title V program it is obligated to adequately fund the program through user fees as required by the CFR and authorized by the THSC. As discussed in the preamble, the program must collect sufficient funds to cover the Title V program requirements. The rule was not changed in response to this comment.

Exxon Mobil, the TCC, TxOGA, and Dow Chemical commented that to reduce the obligation on all Title V sources, the Title V sources paying the inspection fee should pay into the Title V emissions account. TxOGA added that all Title V sources should pay the Title V fee even if it is smaller. TxOGA added if a site were subject to both fees, then it should pay the emissions fee even if it is lower.

Currently sites that are subject to both the inspection fee (§101.24) and the emissions fee (§101.27) pay the higher of the two per language in both rules. To have sites pay only the Title V fee would require amendment to both of the fee rules. Because §101.24 was not open for revision, such an action is outside the scope of this rulemaking.

Inspection fee revenue collected under §101.24 from Title V sources is currently deposited to the FCAA account, not the Title V Federal Operating Permits account. The commission examined the possibilities of transferring the funding to the Title V Operating Permits Fees account. Through the review, the commission determined that it does not have the authority to deposit or transfer revenue collected from the inspection fee to the Operating Permit Fees account. If the commission had the authority to deposit fee collected from Title V sources currently paying the inspection fee and deposit the funds into the Title V Operating Permit Fees account, it would only generate approximately $1.3 million per year. This amount would not have a significant impact on the Title V revenue shortage and would reduce deposits to the FCAA account. This shortfall would still require the commission to increase emission fees by $8 million per year. The rule was not changed in response to this comment.

NAIMA stated that the benefits to the environment from mineral wool products should be taken into consideration in fee increases. These products provide significant environmental benefits in reducing emissions through energy efficiency.

The commission's understanding is that the FCAA does not allow for weighing the environmental benefits of one type of industry for assessing this fee. The Title V fee is assessed on actual emissions emitted or on permitted allowable. The rule was not changed in response to this comment.

NAIMA requested the commission make an exception to the fee increase based on small businesses as defined by the Small Business Association by the number of employees , not the EPA which based the definition for a major source subject to the fee on emissions.

Federal Title V rules in 40 CFR Part 70 require that a state program "require that the owners or operators of a part 70 source pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs." 40 CFR Part 70 sources are defined as "any source subject to the permitting requirements of this part." For purposes of

applicability of Title V, the commission is relying on the EPA's determination of applicability. Additionally, the commission did not provide notice to consider such an exemption from the fee for certain sources. The rule was not changed in response to this comment.

Calpine asked that the commission clarify that is does not intend to prospectively approve changes in the collection of the fee based on a future action by the federal government.

The commission is adopting this rule based on what is currently known; revenue is not sufficient to cover the existing Title V program obligations because of decreasing emissions of currently regulated pollutants, increasing CO fraction, and a flat CPI. The commission does not believe that it is sound policy to prospectively adopt fee changes based on proposed or potential future federal requirements. If regulations that are referenced by incorporation in current TCEQ rules are amended in the future, then the commission will determine at that time whether to initiate a rulemaking, as appropriate, to incorporate such amendments. The rule was not changed in response to this comment.

The TCC questioned whether the commission was considering retroactive adjustments of the emissions fee.

No retroactive adjustments will be made on past fees. The rule is effective beginning FY 2012. The rule was not changed in response to this comment.

SUBCHAPTER A: GENERAL RULES

§101.27

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §§5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The amendment is also adopted under THSC, Texas Clean Air Act (TCAA), §382.011, which authorizes the commission to administer the requirements of the TCAA; THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and THSC, §382.0621, which authorizes the commission to adopt, charge, and collect an annual fee from regulated entities subject to the permitting requirements of the Federal Clean Air Act Title V.

The adopted amendment implements TWC, §§5.102. 5.103, and 5.105; and THSC, §§382.011, 382.017, and 382.0621.

§101.27. Emission Fees.

(a) Applicability. The owner or operator of an account that is required to obtain a federal operating permit as described in Chapter 122 of this title (relating to Federal Operating Permits Program) shall remit to the commission an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. Each account will be assessed a separate emissions fee. An account subject to both an emissions fee and an inspection fee, under §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year that a fee is being assessed, a full emissions fee is due. If the commission is notified in writing that the account is not and will not be in operation during that fiscal year, a fee will not be due.

(b) Self reported/billed information. Emissions/inspection fees information packets will be mailed to each account owner or operator prior to the fiscal year that a fee is due. The completed emissions/inspection fees basis form must be returned to the address specified on the emissions/inspection fees basis form within 60 calendar days of the date the agency sends the emissions fees information packet. The completed emissions/inspection fees basis form must include, at least, the company name, mailing address, site name, all commission identification numbers, applicable Standard Industrial Classification (SIC) category, the emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment. If more than one SIC category can apply to an account, the category reported must be the one with the highest associated fee as listed in §101.24 of this title. Subsequent to a review of the information submitted, a billing statement of the fee assessment will be sent to the account owner or operator.

(c) Requesting fee information packet. If an account owner or operator has not received the fee information packet described in subsection (b) of this section by June 1 prior to the fiscal year that a fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year that a fee is due. For accounts that begin or resume operation after September 1, the owner or operator of the account shall request an information packet within 30 calendar days prior to commencing operation.

(d) Payment. Fees must be remitted by check, certified check, electronic funds transfer, or money order and sent to the address printed on the billing statement.

(e) Due date. Payment of the emissions fee is due within 30 calendar days of the date the agency sends a statement of the assessment to the account owner or operator.

(f) Basis for fees.

(1) The fee must be based on allowable levels or actual emissions at the account. For purposes of this section, allowable levels are those limits as specified in an enforceable document such as a permit, certified registration of emissions, or Commission Order that are in effect during the fiscal year that a fee is due and actual emissions are the emissions of all regulated pollutants emitted from the account during the last full calendar year preceding the beginning of the fiscal year that a fee is due. Under no circumstances may the fee basis be less than the actual emissions at the account. The fee applies to the regulated pollutant emissions at the account, including those emissions from point and fugitive sources. The fee basis must include emissions during all operational conditions, including all emissions from emissions events and maintenance, startup, and shutdown activities as described in Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities). Although certain fugitive emissions are excluded for applicability determination purposes under subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A maximum of 4,000 tons of each regulated pollutant will be used for fee calculations. The fee for each fiscal year is set at the following rates.

Figure: 30 TAC §101.27(f)(1)

Emissions Fee Schedule		
Fiscal Year	**Rate Per Ton**	**Minimum Fee**
1992	$3	
1993	$5	$25
1994	$25	$25
1995 - 2002	$26	$26

For Fiscal Year 2003 through Fiscal Year 2011, the rate per ton must be calculated using the following formula. The minimum fee must be equal to the rate per ton.

Rate per ton = $25.00X(1 - *CO*)X(*CPI*/122.15)

For Fiscal Year ar 2012 and subsequent years, the rate per ton must be calculated using the following formula. The minimum fee must be equal to the rate per ton.

Rate per ton = $AdjBaseRateX(*CPI*/122.15)

Where:
AdjBaseRate = an adjustable base rate, equal to $25 for Fiscal Year 2012, and adjusted annually, as necessary, thereafter between $25 and $45.

CO = carbon monoxide fraction of the fee basis, for all emissions fee payers for the previous fiscal year;

CPI = average of the consumer price index for the 12 months preceding the fiscal year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100); and

122.15 = average consumer price index for Fiscal Year 1989 (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100).

(2) The emissions tonnage for the account for fee calculation purposes will be the sum of those allowable levels or actual emissions for individual emission points or process units at the account rounded up to the nearest whole number, as follows.

(A) Where there is an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for individual emission points or process units, the actual emissions from all individual emission points and process units at the account may be used to calculate the fee basis only if a complete and verifiable emission inventory for the account is submitted as described in §101.10 of this title (relating to Emissions Inventory Requirements). Where a complete and verifiable emissions inventory is not submitted, the executive director may direct that the fee be based on all of the allowable levels for the account.

(B) Where there is not an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for individual emissions points or process units; actual emissions from all individual emission points and process units must be used to calculate the fee basis. Actual production, throughput, or measurement records must be submitted along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and emission factors used in such calculations.

(3) For purposes of this section, the term "regulated pollutant" includes any volatile organic compound, any pollutant subject to Federal Clean Air Act (FCAA), §111, any pollutant listed as a hazardous air pollutant under FCAA, §112, each pollutant that a national primary ambient air quality standard has been promulgated (including

carbon monoxide), and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders.

(g) 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 remit the full emissions fee by the due date must result in enforcement action under Texas Water Code, §7.178. The provisions of this section, as first adopted and amended thereafter, are and must 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.

(h) 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).