

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§101.100 - 101.102, 101.104, 101.106 - 101.110, 101.113, 101.116 - 101.118, and 101.120 - 101.122.

Sections 101.100 - 101.102, 101.104, 101.106 - 101.108, 101.110, 101.113, 101.117, 101.118, 101.120, and 101.122 are adopted *with changes* to the proposed text as published in the November 30, 2012 issue of the *Texas Register* (37 TexReg 9468). Sections 101.109, 101.116, and 101.121 are adopted *without changes* and the text will not be republished.

The commission does not adopt the proposal of §101.119 as published in the November 30, 2012, issue of the *Texas Register* (37 TexReg 9468).

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

### **Background and Summary of the Factual Basis for the Adopted Rules**

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

requirements that apply for VOC emissions to also apply for nitrogen oxides (NO<sub>x</sub>) emissions. The Houston-Galveston-Brazoria (HGB) area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) was originally classified as severe for the one-hour ozone NAAQS of 0.12 parts per million (ppm) and was required to attain this standard by November 15, 2007. The HGB one-hour ozone nonattainment area did not attain the one-hour ozone NAAQS by its attainment date, and preliminary 2012 data indicate that the area is not demonstrating attainment of the 0.026 parts per billion (ppb) design value at this time. EPA's finding that the HGB one-hour ozone nonattainment area did not attain the one-hour ozone standard by its attainment date was published in the *Federal Register* on June 19, 2012, and was effective on July 19, 2012. The fee is required to be paid 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, §182(d)(3) and (e) and §185, the required penalty is \$5,000 per ton, as adjusted by the consumer price index (CPI), of VOC, NO<sub>x</sub>, or both (depending upon how a stationary source is determined to be a major source) emitted in excess of 80% of a major stationary source's baseline amount. A stationary source that is major for VOC is subject to fees on VOC; a stationary source that is major for NO<sub>x</sub> is subject to fees on NO<sub>x</sub>; and a stationary source that is major for both VOC and NO<sub>x</sub> will be subject to the fee on both VOC and NO<sub>x</sub>. The source's baseline amount is calculated as the lower of the

baseline emissions or authorized emissions from the baseline year, which is 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.

Although EPA has revoked the one-hour ozone NAAQS, FCAA, §185 requirements still apply for one-hour ozone nonattainment areas that were classified severe or extreme. EPA's implementation rule for the transition from the one-hour ozone standard to the 1997 eight-hour ozone standard originally provided that areas no longer were required to meet the requirements of FCAA, §185, but that rule was vacated by the District of Columbia (D.C.) Circuit court in *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 (United States 2008). Future EPA rulemaking may specify how the EPA interprets the applicability of the penalty fee requirement for future ozone standards.

The commission previously proposed FCAA, §185 rules under Chapter 101, Subchapter B, in the December 4, 2009 issue of the *Texas Register* (34 TexReg 8644). The previously proposed rules reflected the explicit FCAA, §185 fee-based calculation and considered alternative approaches to meet this obligation. The commission did not pursue adopting the rules because in January 2010 the EPA issued a guidance memo, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, (available at

<http://www.epa.gov/glo/pdfs/20100105185guidance.pdf>) indicating that states could meet the one-hour ozone standard FCAA, §185 obligation through a SIP revision containing either the fee program or an equivalent alternative program. The memo further stated that an area showing attainment of the more stringent 1997 eight-hour ozone standard, based on permanent and enforceable reductions, would no longer be required to submit a fee program SIP revision to satisfy anti-backsliding requirements associated with the transition from the one-hour ozone standard to the 1997 eight-hour ozone standard. The commission submitted a request for termination of the fee program in May 2010 based on data showing attainment of the 1997 eight-hour standard.

The EPA's January 2010 guidance memo was challenged by environmental groups, and on July 5, 2011 the United States Court of Appeals District of Columbia Circuit issued an opinion in *Natural Resources Defense Council v. EPA*, No. 10-1056 (D.C. Cir.), vacating the January 2010 guidance document. Previous to this ruling, on July 7, 2011, the EPA had taken final action on one termination determination request from the State of Louisiana for the Baton Rouge area. On July 25, 2011, the EPA denied the commission's fee program termination request based on 2011 data that failed to show attainment of the 1997 eight-hour ozone standard and the July 5, 2011, appeals court decision.

Additionally, preliminary 2012 data fail to show attainment of the one-hour standard in the HGB ozone nonattainment area. On August 30, 2011, EPA proposed redesignation of the Baton Rouge nonattainment area to attainment for the 1997 eight-hour ozone

standard and further discussed its position regarding the application of the January 2010 guidance vacated by the D.C. Circuit. The EPA has stated that "the Court's opinion does not preclude EPA from terminating the one-hour §185 anti-backsliding requirement for areas like Baton Rouge, that EPA has determined through notice and comment rulemaking, have attained the one-hour ozone standard due to permanent and enforceable emissions reductions. We believe that, for the purpose here of evaluating applicable requirements pertaining to redesignation, Louisiana's obligation to satisfy the one-hour ozone anti-backsliding requirement for §185 fees has been terminated" (*See, Proposed Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Louisiana; Baton Rouge Ozone Nonattainment Area: Redesignation to Attainment for the 1997 eight-hour Ozone Standard (See August 30, 2011 issue of the Federal Register (76 FR 53853 and 53863))*).

Since the HGB one-hour ozone nonattainment area is currently not attaining the one-hour ozone standard, the commission is adopting rules to implement the requirements of FCAA, §182(d)(3) and (e) and §185. Given the lack of additional EPA guidance or rules regarding applicability and implementation of the penalty fee requirement and recent actions by the EPA, the commission is adopting several flexibility options combined with a fee-based program. The TCEQ adopts a program under FCAA, §172(e) with flexibility aspects not directly described in the FCAA, §185 rule, including but not limited to, alternative revenue, baseline aggregation, and timing of fees.

As a result of comments received, the rule is revised to have the Fee Equivalency Account credited beginning with 2012 revenue from the Texas Emissions Reduction Plan (TERP), the Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Repair Plan (LIRAP), and the Local Initiative Project (LIP). The first fee will be based on the 2012 emissions.

To be consistent with the New Source Review (NSR) program (40 Code of Federal Regulations (CFR) Part 52 and 30 TAC Chapter 116), language was added requiring baseline amounts to be adjusted downward if a historical 24-month period is used for a baseline amount determination. This adjustment is to exclude emissions from a baseline amount that would have exceeded an emission limitation with which the source had to comply in 2007 had the source been required to comply with that limitation during the consecutive 24-month period. Although the preamble language addressed this adjustment issue, the rule language did not specifically, and this requirement is clarified with the addition of the downward adjustment in the rule.

The EPA originally described some basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee obligation for severe or extreme ozone nonattainment areas. In a final rule published in the November 16, 2005 issue of the *Federal Register* (70 FR 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 compound or nitrogen oxide emitted above a source-specific trigger level during the 'attainment year.' It {the fee} 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 FR 69440 and 69441).

The EPA further stated 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 FR 69440 - 69442).

The EPA issued guidance (*Guidance on Establishing Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment*) on March 21, 2008, (available at [www.epa.gov/ttn/caaa/t1/memoranda/20080321\\_harnett\\_emissions\\_baseline.pdf](http://www.epa.gov/ttn/caaa/t1/memoranda/20080321_harnett_emissions_baseline.pdf)) regarding establishing emission baseline amounts. The March 21, 2008, guidance memo discussed 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 a source's emissions may be irregular, cyclical, or otherwise significantly varied from year to year. The EPA indicated in its guidance that relying on its regulations for Prevention of Significant Deterioration (PSD) of Air Quality, which are found in 40 CFR §52.21(b)(48), would be an acceptable alternative method for calculating the baseline amount. Under the PSD rules, sources may use emissions data from any period of 24 consecutive months within the previous ten years (a two-in-ten look-back period) to calculate an average annual actual emissions rate, referred to as baseline emissions in these adopted rules. The EPA determined the two-in-ten look-back 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 (EGU) to 24 consecutive months within the previous five years (a two-in-five look-back period) due to a shorter business cycle for those units. The commission agrees that use of the

two-in-ten and two-in-five look-back periods are reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission provides this flexibility in the same manner as provided for in the Texas NSR Program.

The EPA's 2008 guidance stated that it is fair and reasonable for a source to use a ten-year look-back period for calculating baseline actual emissions because it allows the source to consider a full business cycle in determining a baseline emissions rate. This look-back period is restricted to five years for electrical utility steam generating facilities. A variability analysis was performed to determine if emissions were variable over the ten-year period preceding the attainment date in the HGB one-hour ozone nonattainment area. The variability analysis conducted for the HGB one-hour ozone nonattainment area was similar to one performed by the South Coast Air Quality Management District (SCAQMD) in developing its \$185 fee program. Data for the HGB variability analysis were analyzed for VOC and NO<sub>x</sub> combined. As in SCAQMD's approach, variability, "V," was determined for each source using the following formula:

Figure: 30 TAC Chapter 101 Preamble

$$V = \frac{\text{Range of Emissions (highest reported value - lowest reported value)}}{\text{Median Reported Value}}$$

SCAQMD analyzed 112 sources with data for ten years. The emissions data showed variation from 20% to greater than 300%. Additionally, 84 of the 112 sources (75%) showed variation in emissions between 40% and 140%.

VOC and NO<sub>x</sub> emissions from 1998 through 2008 for the HGB nonattainment area were analyzed. Only sources that were potentially major (either pollutant had actual emissions greater than 20 tons) and had data for all ten years were evaluated. Of approximately 254 major stationary sources previously identified as potentially subject to the fee program, 186 sources had data submitted for each of the ten years preceding and including the attainment date. These sources were used for the variability analysis.

Variability ranged from 10.5% to over 3,425% over the ten years examined. Nineteen sources showed variability greater than 300%. Ten sources showed variability greater than 500%. Ninety-nine of the 186 sources (53%) showed emissions variability greater than 100% over the ten years examined. The median variability for all sources was 177%. The middle 140 sources (75%) varied from 51% to 263%.

The variability analysis shows that a high level of source-level emissions variability occurred between 1998 and 2007 in the HGB one-hour ozone nonattainment area;

therefore, it is appropriate to use a 24-month period during the previous ten years (or five years if the source is an electric utility steam generating unit) to establish a baseline for the FCAA, §185 fee program.

In the EPA's 2010 guidance (available at:

<http://www.epa.gov/glo/pdfs/20100105185guidance.pdf>) and in a rule published in the December 14, 2012 issue of the *Federal Register* (77 FR 7432) for SCAQMD, the EPA is allowing the use of equivalent programs to fulfill the FCAA, §185 fee program.

Under the SCAQMD rule, the EPA approved programs funded to reduce VOC and NO<sub>x</sub> that are qualified programs, surplus to the one-hour ozone SIP, and designed to result in direct reductions or facilitate future reductions of VOC or NO<sub>x</sub> emissions as consistent with the principles of the anti-backsliding principle of FCAA, §172(e). The EPA required an equivalent alternative program to achieve the same emissions reductions, raise the same amount of revenue and establish a process by which penalty funds would be used to pay for emission reductions that would further improve ozone air quality or a combination of emissions reductions or revenue collection.

The EPA, in its January 2010 memo, states that it may allow alternative programs for which "the proceeds are spent to pay for emissions reductions of ozone-forming pollutants (NO<sub>x</sub> and/or VOC) in the same geographic area subject to the §185 program."

The EPA further states: "Under this concept, states could develop programs that shift

the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to §185, to other non-major sources of emissions, including owners/operators of mobile sources." From these statements, the TCEQ understands that the EPA supports equivalent alternative options to a fee-based program provided the option is "no-less stringent" than a strict fee-based program and generally meets the stated criteria. The EPA has also approved San Joaquin Valley's (SJV) and SCAQMD's equivalent alternative programs pursuant to the 2010 guidance. The EPA's published approval of the SJV rules in the August 20, 2012 issue of the *Federal Register* (77 FR 50021) included an alternative fee revenue by assessing a fee on mobile sources. Revenue under SJV's FCAA, §185 fee program is used to offset any obligation due from major sources in the SJV one-hour ozone nonattainment area.

The EPA published approval of SCAQMD Rule 317 as an equivalent alternative fee program in the December 14, 2012 issue of the *Federal Register* (See 77 FR 74372). The SCAQMD Rule 317 established an equivalency account that is credited with expenditures from qualified programs that are surplus to that area's one-hour ozone SIP. No actual funding is transferred from the approved programs to the equivalency account; it is an accounting of the funds. The EPA considered this option equivalent to the principles of FCAA, §172(e). In its approval of the SCAQMD program, the EPA indicated that it will accept alternative programs, whether through the incentives created by a penalty fee levied on pollution sources, through other funding of pollution

control projects, or through a combination of both.

Consistent with SCAQMD's and SJV's approaches, the TCEQ adopts rules to allow funding collected for qualified programs intended to directly reduce VOC or NO<sub>x</sub> emissions in the HGB one-hour ozone nonattainment area to offset the FCAA, §185 fee obligation. As with SCAQMD's and SJV's approaches, no actual funding is transferred to the equivalent alternative program. The TCEQ will focus on providing incentives for programs that collect revenue in the HGB one-hour ozone nonattainment area to maintain a focus on achieving further emission reductions to further support the equivalent alternative.

Revenue for the TERP provides funds for programs that provide incentives to reduce NO<sub>x</sub> and other pollutants including VOC. The TCEQ will use TERP revenue that was collected beginning in 2012 from the HGB one-hour ozone nonattainment area to offset the FCAA, §185 fee obligation for that area. In the HGB one-hour ozone nonattainment area, on-road motor vehicle NO<sub>x</sub> emissions are the single largest category of anthropomorphic emissions at 46% of the NO<sub>x</sub> emissions inventory in 2011. Non-road mobile NO<sub>x</sub> emissions comprise 25% of the 2011 inventory. Revenue available for appropriation by the legislature and allocated to programs to reduce NO<sub>x</sub> in these categories are an effective method to reduce ozone in the area.

Funding for TERP is generated from mobile sources in all areas of the state, including the HGB one-hour ozone nonattainment area. However, the TCEQ will identify TERP revenue generated only in the HGB one-hour ozone nonattainment area and record it in a Fee Equivalency Account to be used to demonstrate equivalency of the alternative to the imposition of a fee on major stationary sources only.

The programs funded through TERP revenue include clean school buses, heavy-duty diesel replacement programs, and other emission reduction strategies associated with mobile emissions that decrease ozone precursor emissions more directly than a penalty fee assessed on major stationary sources with this rulemaking. The TCEQ is adopting rules to credit the funding collected for these programs under TERP as an equivalent approach because TERP meets one of the three types of alternative programs that satisfies the FCAA, §185 fee requirement addressed in EPA's proposed final determinations regarding equivalent alternatives to FCAA, §185 fee programs and the EPA 2010 guidance memo. The programs funded through TERP revenue are similar to the SCAQMD and SJV programs that were given final approval by the EPA as meeting the requirements for equivalency for the FCAA, §185 fee program.

The objectives of TERP are specifically described in statute and are consistent with the objective described by the EPA for an equivalent program. TERP program objectives, listed in Texas Health and Safety Code (THSC), §386.052, address "achieving maximum

reduction in oxides of nitrogen to demonstrate compliance with the state implementation plans" and "advancing new technologies that reduce oxides of nitrogen from facilities and other stationary sources." TERP, as described in THSC, §386.053, is restricted to having "safeguards that ensure that funded projects generate emissions reductions not otherwise required by state or federal law."

As a result of comments received, the commission is no longer using all revenue associated with the Inspection and Maintenance (I/M) program as an equivalent funding alternative but will only use the LIRAP/LIP portion of the I/M program. LIRAP provides financial assistance for qualified owners of vehicles to make repairs or purchase replacement vehicles when their vehicle cannot pass emissions standards inspections. The LIRAP reduces the VOC and NO<sub>x</sub> emissions from mobile sources by repairing or, through replacements, accelerating the turnover rate of older, more polluting vehicles. The LIP program, described under THSC, §382.220, was established in 2008, after the HGB one-hour ozone nonattainment area's attainment deadline under the one-hour ozone standard. The LIP program allows funds to be used for air quality improvement projects, including projects that expand and enhance existing I/M programs such as the AirCheck Texas Repair and Replacement Program. With this rulemaking, the TCEQ will credit the funds collected for the LIRAP and LIP portion of the I/M program in the HGB one-hour ozone nonattainment area as an alternative to collecting a FCAA, §185 fee because the LIRAP/LIP programs meet the characteristics of

one of the three types of alternative programs that satisfy the FCAA, \$185 fee requirement addressed in EPA's SCAQMD and SJV actions and the 2010 EPA guidance memo.

Revenue will only be credited for the years in which revenue is also expended on air emission reduction related projects in the HGB one-hour ozone nonattainment area for these programs. Historically funding has been generally allocated back to the area that generated the funds. Between 2008 and 2012, the amount of HGB area LIRAP and LIP revenue was \$84.8 million while \$92.7 million was expended through LIRAP and LIP in the HGB area. Between 2008 and 2012, the amount of TERP funds expended was \$155.8 million in the HGB area while the revenue collected was \$172.0 million.

The commission has a biennial cycle for funding TERP and LIRAP/LIP due to the Texas legislative process. The first year of the biennium is dedicated to modifying rules, grant review, and funding awards. Consequently, a lower amount of expenditure is commonly associated to the first half of the biennium and funding can be heavily skewed to the second year of the biennium. If expenditures were used for crediting the Fee Equivalency Account instead of revenue, this cyclic nature on the Fee Equivalency Account would add additional unnecessary uncertainty to a major stationary source's fiscal planning requirements.

Revenue associated with both TERP and LIRAP/LIP after the one-hour ozone attainment date for the HGB one-hour ozone nonattainment area are surplus to the one-hour ozone SIP and result in a direct benefit to the area. Annually, both programs fund projects that are statutorily required to reduce ozone-causing emissions. These programs include vehicle replacements or school bus retrofits. These activities are each discrete actions that result in continually decreasing emissions by permanently removing an emissions source, such as a higher-emitting school bus, from the area.

The first crediting will occur for 2012, which is five years after the attainment date and corresponds to the first year a \$185 fee will be assessed. Under the adopted rules, the commission will be required to annually estimate the expected Failure to attain Fee obligation and compare this estimate with the expected revenue from the alternative program. To obtain the estimated total FCAA, \$185 fee obligation due from all major stationary sources, a baseline amount will be established for each of the major stationary sources (or group of sources, if aggregated per §101.107) in the HGB one-hour ozone nonattainment area. This baseline amount will be subtracted from each major stationary source's actual emissions, and a Failure to Attain Fee will be applied. The resultant amount due from each major stationary source (or aggregated sources) will be summed to determine the HGB one-hour ozone nonattainment area FCAA, \$185 obligation.

If revenue generated from TERP and LIRAP/LIP programs is insufficient to fully offset the HGB one-hour ozone nonattainment area FCAA, §185 obligation, then the remaining difference will be assessed as a fee on major stationary sources in the area on a prorated basis. The amount collected from each major stationary source will be discounted based on the amount of revenue credited in the Fee Equivalency Account. In this manner, these adopted rules will "backstop" any equivalent alternative funding with fees directly assessed on major stationary sources to meet each year's fee obligation. The FCAA, §185 fee obligation will be fully met either through the demonstration utilizing the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees. This method of fee equivalency is "no less stringent" than a direct fee program required by FCAA, §185.

To determine a major stationary source's baseline amount and the Failure to Attain penalty fee that would apply to each major stationary source, the commission will allow major stationary sources to aggregate emissions of VOC and NO<sub>x</sub> in general, but also to aggregate those emissions across multiple major stationary sources under common control. In attachment C of the EPA's January 2010 memo, the EPA stated that it would ". . . allow for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." The EPA's 2010 memo further stated that the EPA would allow aggregation of VOC with

NO<sub>x</sub>. The memo stated: "Provided that aggregation is not used to avoid a 'major source' applicability finding, and aggregation is consistent with the attainment demonstration . . . we believe states have discretion to allow a major source to aggregate VOC and NO<sub>x</sub> emissions." The TCEQ's adopted rules require a major stationary source to first determine its major source applicability for both VOC and for NO<sub>x</sub>. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 Failure to Attain Fee rule.

In making determinations of whether common control exists, the commission will consider EPA guidance regarding common control. For example, in a final rule on the *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emissions Offset Interpretive Ruling* (September 11, 1980 45 FR 59878), the EPA stated it would determine common control guided by the general definition of control used by the Securities and Exchange Commission (SEC). In SEC considerations of control, control "means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting shares, contract, or otherwise" (17 CFR §210.1 and §210.2(g)). The commission will also use other criteria to determine common control consistent with participation in local area banking programs, such as the Mass Emissions Cap and Trade or the Highly-Reactive Volatile Organic Compound Cap and Trade programs. A group of major stationary sources choosing to aggregate under common control as a single customer

will be identified with a single common customer identifier used by the commission, the customer number (CN).

VOC and NO<sub>x</sub> emissions do not impact ozone formation equally; therefore, the commission has employed a strategy of targeting those pollutants in a way that will allow ozone nonattainment areas to attain the standard as expeditiously as practicable. This targeting is a result of the knowledge gained from research and detailed modeling of each particular nonattainment area, and states are required by the FCAA to assess and develop strategies for nonattainment areas as part of the SIP revision process to achieve attainment and maintenance of the NAAQS. The emissions reduction strategy for the HGB ozone nonattainment area has included targeted measures to reduce NO<sub>x</sub> emissions in preference to VOC emission reductions as an effective way to reduce ozone formation in the area. Owners or operators of major stationary sources may have also chosen to significantly reduce one pollutant at one major stationary source as part of a cost-effective control strategy to reduce ozone. The commission's adopted flexibility option, allowing aggregation of VOC and NO<sub>x</sub> emissions as well as major stationary source aggregation for both pollutants, continues to support this approach and is particularly relevant for the HGB ozone nonattainment area. The emission reduction strategy is discussed in detail in previous rulemaking actions involving individual control strategies applicable in the HGB one-hour ozone nonattainment area and in revisions to the HGB ozone nonattainment area SIP. The aggregation method adopted

in this rule links the multi-pollutant control strategies in the EPA-approved one-hour SIP revision for the HGB ozone nonattainment area to an aggregated baseline amount and Failure to Attain Fee calculations that will be applicable in the HGB ozone nonattainment area. This method will appropriately encourage further emission reductions in the area while continuing to support the control strategies that were determined through photochemical modeling to be most effective for the area.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the imposition of a Failure to Attain Fee on major stationary sources of emissions of VOC in a severe or extreme ozone area that failed to attain the standard by its applicable due date. FCAA, §182(f) states that requirements "for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in §7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen." Thus, the requirement to assess a fee on major stationary sources of NO<sub>x</sub> emissions is also required. This language in FCAA, §182(f) does not explicitly state that requirements for NO<sub>x</sub> sources are to be held separate from those for VOC, but that they are "also required" for sources of NO<sub>x</sub> emissions. In fact, VOC control strategies may be addressed separately because the nature of the control equipment used to reduce VOC emissions differs from those typically needed to reduce NO<sub>x</sub> emissions. However, both VOC and NO<sub>x</sub> control strategies have a common goal: to reduce ozone-forming emissions. The stated objective of FCAA, §182(f) and §185 is to assess a fee for VOC and

NO<sub>x</sub> emissions on major stationary sources emitting above a certain baseline amount of emissions. The per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC or NO<sub>x</sub>, thus there is no reason to require that a fee be assessed separately for each pollutant. The commission will allow a major stationary source to combine these emissions for baseline amount determinations and fee assessments providing that specified criteria are met to ensure consistency.

Additionally, the commission notes that EPA guidance allows for NO<sub>x</sub> substitution in its Reasonable Further Progress SIP revisions as further support for allowing VOC and NO<sub>x</sub> to be aggregated for both baseline amount determinations and fee assessments. In its December 1993 NO<sub>x</sub> Substitution Guidance (available at <http://www.epa.gov/ttn/oarpg/t1/memoranda/noxsubst.pdf>), the EPA stated: "The condition for demonstrating equivalency is that the State-proposed emission control strategies must be consistent with emission reductions required to demonstrate attainment of the ozone NAAQS for the designated year of attainment."

To ensure equitable treatment among all major stationary sources, maintain consistency within the fee program, and facilitate transparency for the public, the adopted rules require that baseline amounts and aggregation methods, once established, will remain fixed except as consistent with §101.109 throughout the applicability of the Failure to Attain Fee obligation. Additionally, the adopted rules require that calculation of fee

obligations 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. Therefore, if a major stationary source elects to aggregate pollutants as the most appropriate choice for determining a baseline, all subsequent Failure to Attain Fee obligations must remain consistent with that selection.

The EPA used the March 21, 2008, memorandum to evaluate the SJV FCAA, §185 fee rule, as noted in its proposed limited approval and limited disapproval published in the August 19, 2009 issue of the *Federal Register* (74 FR 41826). In reviewing the SJV FCAA, §185 fee rule, the EPA noted that there were several provisions that conflicted with FCAA, §185, which prevented full approval of the submitted SIP revision. The provisions included exemptions for emissions units that begin operation after the attainment year or for a clean emissions unit that is equipped with 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 Available Control Technology (BACT) during the five years immediately prior to the end of the attainment year. Provisions also defined the baseline period as two consecutive years consisting of the attainment year and the year immediately prior to the attainment year, allowed averaging over two to five years to establish baseline emissions, and defined "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, with regard to the second provision listed above, that 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). The EPA stated, in its approval of the SJV rule in the August 20, 2012 issue of the *Federal Register* (77 FR 50021), that it will "result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185 consistent with the principals of section 172(e)." The EPA additionally noted that the program will "raise this amount by a combination of fees from sources that do not qualify as 'clean units' as defined in Rule 3170 and from a fee from vehicles." In its January 2010 memo, the EPA stated that it is acceptable to exempt or reduce the FCAA, §185 fee obligation on well-controlled sources and to assign the required fees to poorly controlled sources as an incentive for further reductions. Excess fees are not expected to be collected under the commission's adopted rules; therefore, the commission will not exempt well-controlled units from the fee obligation.

Lastly, during the stakeholder process conducted for the development of this FCAA, §185 Failure to Attain Fee program in 2009, 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 prior to rule adoption. The commission will collect Failure to Attain Fees on the most currently available quality-assured emissions inventory at the time of rule adoption (2012 emissions inventory data) to ensure appropriate and timely implementation of the FCAA, §185 fee obligation.

The commission recognizes that the fee is due for the HGB one-hour ozone nonattainment area because the area failed to demonstrate attainment of the one-hour ozone standard by the attainment date, and EPA has taken final action to make the determination of failure to attain. FCAA, §185 specifies that the fee is due until the area is redesignated as attainment; however, the one-hour ozone standard was revoked by the EPA, and the commission understands that the EPA will make no further designations relating to the one-hour ozone standard. Consequently, the fee obligation will end when the EPA redesignates the area to attainment (in the event that EPA changes its policy regarding redesignations for the one-hour ozone standard) or makes a finding of attainment. Additionally, the commission will hold the collection of the fee in abeyance if three years of quality-assured data resulting in a design value that did not exceed the NAAQS are submitted to the EPA. This will facilitate a prompt end to the fee payment obligation while the EPA considers the quality-assured monitoring data.

The EPA commented that the proposed rule language specifically exempting sources from paying a §185 Failure to Attain fee during any year that was determined to be an

extension year was not necessary because the one-hour standard has been revoked. The commission removed §101.119, Exemption from Failure to Attain Fee Obligation, as a result of this comment.

### **Section by Section Discussion**

#### *§101.100, Definitions*

Adopted new §101.100 contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 obligation, attainment date, attainment year, baseline amount, baseline emissions, electric utility steam generating unit, extension year, equivalency credits, major stationary source, and Section 185 Account.

The *Area §185 Obligation* is defined as the total amount of the *Failure to Attain Fee* that is due for the HGB one-hour ozone nonattainment area based on summing the *Failure to Attain Fee* that is estimated to be due from each major stationary source. The EPA's 2010 guidance states that an equivalent program could be acceptable under FCAA, §172(e) if an alternative fee or program is equivalent to the fee that would be assessed on an area failing to meet the one-hour ozone standard. The Area §185 obligation is the basis for making an equivalency demonstration for the commission's adopted alternative program.

*Attainment date* is defined as the date an area was scheduled to have attained the ozone

NAAQS under the FCAA. The *attainment year* is the full calendar year that contains the *attainment date*.

*Baseline emissions* are defined to include emissions from normal operations and emissions associated with startups, shutdowns, and maintenance but exclude emissions from emissions events during a baseline period. Emissions events will be excluded from the baseline amount calculations because they are not authorized and are not representative of routine operations. The exclusion of emissions from emissions events in a baseline emissions calculation in the adopted rule is consistent with the PSD definition of baseline actual emissions in §116.112 and 40 CFR §52.21(b)(48) that does not include non-compliant emissions in a baseline amount determination. For the purposes of this subchapter, baseline amount is the term referenced as "baseline amount" in the FCAA, §185 and will be the lower of baseline emissions or authorized emissions at a major stationary source 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 will be calculated from a consecutive 24-month historical period. *Electrical utility steam generating units* are specifically defined for this rule because the historical time period allowed in determining an average based on 24 months for those units differs from other types of emissions generating units. The definition of *electric utility steam generating unit* is consistent with the definition used

in §116.12.

The *Failure to Attain Fee* is defined as the fee due from each major stationary source or Section 185 Account based on actual emissions of VOC, NO<sub>x</sub>, or both exceeding the baseline amount.

The definition for *major stationary source* uses the definition in §116.12 for determining a major source of VOC or NO<sub>x</sub> emissions.

Because major stationary sources under common control may opt to aggregate for purposes of baseline amount determination and Failure to Attain Fee payment, a name for the group of one or major stationary sources is defined as a *Section 185 Account*. A single identifying name will be used by the commission to track baseline amounts and Failure to Attain Fee obligations. Because each aggregation may have its own Section 185 Account, a major stationary source may be in one Section 185 Account for VOC aggregation and in a second Section 185 Account for NO<sub>x</sub> aggregation. Thus, a single major stationary source could belong to two separate Section 185 Accounts. Conversely, a Section 185 Account may only have one major stationary source.

#### *§101.101, Applicability*

The FCAA, §185 requires areas classified as severe or extreme for ozone 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 by the attainment date applicable to that area. FCAA, §182(f) further requires that all SIP requirements applying to VOC also apply for sources of NO<sub>x</sub>. This section identifies the provisions of this subchapter that apply to the HGB one-hour ozone nonattainment area, which failed to demonstrate attainment of the one-hour ozone standard by its attainment date, November 15, 2007.

The original rule language restricted applicability to sources that were major in the HGB one-hour ozone nonattainment area as of the attainment date, November 15, 2007. This was not intended as evidenced by the discussion of applicability regarding existing major stationary sources and new sources in the preamble and in the discussion for this section, in addition to other provisions of the proposed rule that clearly discussed how new major sources could establish an emissions baseline amount. This also is not the commission's interpretation of the applicability required by FCAA, §185. The rule is applicable to all major stationary sources in the HGB one-hour ozone nonattainment area each year that the §185 fee is applicable as required by the FCAA, §185. The attainment date was removed from this section to clarify the commission's intent.

*§101.102, Equivalent Alternative Fee*

With adoption of these rules, the executive director will establish a Fee Equivalency

Account. This account will be a listing of revenues available for appropriation by the legislature to programs with goals to reduce VOC or NO<sub>x</sub> emissions in the HGB one-hour ozone nonattainment area. As a result of comments received, the commission will no longer use the total revenue associated with the I/M program as an equivalent alternative to a fee but will restrict the amount to only the LIRAP/LIP portion of the I/M program.

Only the revenue collected in the HGB one-hour ozone nonattainment area will be credited and available for use for offsetting the \$185 fee obligation in the Fee Equivalency Account. Specifically, revenue collected for the TERP and the LIRAP/LIP programs will be used to offset the HGB one-hour ozone nonattainment area FCAA, \$185 Obligation when funds are also expended in the area. This will result in a benefit directly to the area from revenue collected. All programs have been identified with stated goals and statutory restrictions to provide funding for programs that result in a reduction in VOC, NO<sub>x</sub>, and other pollutant emissions into the atmosphere. Equivalent programs, such as crediting revenue for a Fee Equivalency Account, will be restricted to funding from the HGB one-hour ozone nonattainment area.

*§101.104, Equivalent Alternative Fee Accounting*

The Area \$185 Obligation is based on actual emissions over a baseline amount and will be determined annually for the HGB one-hour ozone nonattainment area. An FCAA,

§185 fee obligation (Failure to Attain Fee) will be calculated for each Section 185 Account. These resultant individual obligations will be summed to determine the overall Area §185 Obligation for the HGB one-hour ozone nonattainment area.

Funds, calculated on a dollar basis, associated with the Fee Equivalency Account will be credited starting with the emissions inventory year for which the first fee is assessed. The funding associated with the Fee Equivalency Account for a given year will be compared with the one-hour ozone Area §185 Obligation for a given year. Any surplus amount in the Fee Equivalency Account may be used to offset any future obligation without being discounted over time. If the Fee Equivalency Account is not sufficiently funded to fully meet the Area §185 Obligation, a backstop provision will be invoked under which major stationary sources will be assessed a prorated Failure to Attain Fee to generate sufficient revenue to meet the Area §185 Obligation. The prorated Failure to Attain Fee will be calculated based on the amount in the Fee Equivalency Account and the overall Area §185 Obligation. The amount that the Section 185 Account obligates affected sources to pay, based on the calculations in §101.113, will be reduced to the prorated amount. This process will be documented and made publicly available.

*§101.106, Baseline Amount Calculation*

The method for a one-time determination of the baseline amount for VOC, NO<sub>x</sub>, or both (depending upon how a stationary source is determined to be a major source) is outlined

in this section. A baseline amount is required to be determined for each pollutant (VOC and NO<sub>x</sub>) for which the source is major. If a stationary source is major for both VOC and NO<sub>x</sub>, a baseline amount estimate will be determined for both VOC and NO<sub>x</sub>. If the major stationary source is major for only VOC or NO<sub>x</sub>, the baseline amount estimate is required for just that pollutant (VOC or NO<sub>x</sub>). However, for aggregation purposes, a source may choose to determine a baseline amount for a pollutant for which it is not major. The baseline amount is defined as the lower of either annual emissions, which include planned maintenance, startup, and shutdown (MSS) emissions reported on the emissions inventory in the attainment year, or the emissions as allowed by the applicable authorizations in effect for the major stationary source on the attainment date. Emissions from emissions events are not included in the baseline amount.

If the major stationary source has reported emissions that are irregular, cyclical, or otherwise vary significantly from year to year, an alternative method for determining emissions will be allowed using a historical perspective of annual and planned MSS emissions as outlined in §101.106(b).

The FCAA, §185 does not address how to define a historical period; however, the EPA issued a March 21, 2008 guidance memo, which is referenced elsewhere in this preamble, stating that an acceptable alternative method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found

in the EPA's PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008 guidance, the EPA uses these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission levels for each emissions unit. The guidance continues by stating, "Once calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity utilized during a period of time may be referenced but not the non-compliant emissions levels if a historical 24-month period is selected. Legally enforceable emissions limits include any state or federal requirements including BACT or Lowest Achievable Emissions Rate (LAER). Additionally, language was added to subsection (c)(3) to require a downward adjustment of baseline emissions that would have exceeded an emissions limit at the close of the attainment year if the source had to comply with that limit when a historical 24-month period is selected. This addition reflects language in §116.12(3)(B) and 40 CFR §52.21(b)(48)(ii)(c) for baseline actual emissions with the exception that the close of the attainment year was added to clearly indicate the effective date.

For the purposes of this adopted section, the target is the attainment year, 2007. The window used for the possible historical look-back period will be five years (2002 through 2006) for EGU or ten years (1997 through 2006) for non-EGU immediately preceding the attainment date of November 15 2007. The average consecutive 24-month period will be the basis for determining the baseline amount, in tons. All units at a major stationary source will be required to use the same 24-month period when calculating a baseline, but a separate 24-month period may be used for each pollutant only if the pollutants are not aggregated into a single baseline amount. 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.

Emissions inventory data are collected annually by the commission and after quality assurance review are loaded into the state's point source emissions database. Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, modify emissions inventory data submitted for the current reporting year and for the year immediately prior. Revisions to historical inventory data outside of this time frame are done on a case-by-case basis usually as a result of an agency-directed emissions inventory improvement initiative or the agency's compliance and enforcement processes. The commission uses the annual emissions inventory data as the emissions baseline for air quality planning as detailed in SIP revisions. Although emissions determination methods improve over time, emissions inventory data

represent emissions for a reporting year as accurately as possible. Since the commission relies upon emissions inventory data in SIP revisions for air quality planning purposes, revising historical emissions inventory emissions rates is not supported solely for purposes of adjusting the baseline amount calculation.

Exclusion of emissions events from the baseline amount is consistent with the fact the emissions are not authorized or representative of normal operations. Exclusion of the emissions events in the 24-month average if an alternative baseline is used is consistent with the EPA's and TCEQ's PSD rules that do not include non-compliant emissions.

If control or ownership changed for emission units during the attainment year, then emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on December 31st of the HGB one-hour ozone attainment year (2007).

The adopted rule will require the baseline amount calculation and supporting documentation to be submitted to the agency in a format approved by the executive director. The baseline amount calculation is 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 Failure to Attain Fee no longer applies to the area. A baseline amount is determined by each major stationary source that is a major source of VOC, NO<sub>x</sub>, or both based (depending on how the source is determined to be major) on representative emissions or authorized emissions. Thus, the baseline amount will be a fixed value and will not be changed without the approval of the executive director except as consistent with §101.109.

*§101.107, Aggregated Baseline Amount*

This section provides for the aggregation of either VOC or NO<sub>x</sub> (or both) at multiple major stationary sources to align fee obligations with the EPA-approved attainment demonstration emissions reduction approach. The adopted rule allows owners or operators of major stationary sources under common control to aggregate baseline amounts of VOC emissions from multiple major stationary sources, to aggregate NO<sub>x</sub> emissions from multiple major stationary sources, or both. Owners or operators may also choose to aggregate VOC with NO<sub>x</sub> at a single major stationary source or VOC with NO<sub>x</sub> across multiple major stationary sources under common control.

Baseline amounts will first be calculated separately for each major stationary source for VOC, NO<sub>x</sub>, or for both, using the method outlined in §101.106, prior to any baseline amount aggregation for multiple major stationary sources. If an owner or operator of a major stationary source chooses to include VOC or NO<sub>x</sub> emissions from a source that is

not a major source for the pollutant that is being aggregated in an aggregated baseline amount determination, Failure to Attain Fees will remain due on that pollutant. This separate initial calculation of baseline amount is intended to provide transparency and consistency in baseline amount determinations with any subsequent aggregation.

The adopted rule allows owners or operators of major stationary sources to aggregate VOC and NO<sub>x</sub> baseline amounts at a major stationary source. Sources under common ownership and/or control may also aggregate baseline amounts across multiple major stationary sources. Sources under common control that have an alternative baseline amount as described under §101.108 may be included in the aggregate group. The aggregation methodology must remain consistent throughout the baseline amount calculation and Failure to Attain Fee obligation calculation. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for Failure to Attain Fee calculations. The attainment year or same 24-month period will be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation. A separate 24-month period may be used for each pollutant if the pollutants are not aggregated. A separate 24-month baseline for each pollutant is allowed consistent with NSR procedures that remain on a pollutant by pollutant basis for separate projects.

*§101.108, Alternative Baseline Amount*

In addition to using emissions rates authorized by December 31, 2007, the adopted rule allows major stationary sources to use the authorized emissions rates resulting from a permit application that was administratively complete by December 31, 2007, if final authorization had not been received by the attainment date in the baseline amount calculation. The alternative baseline amount determination is restricted to operators of major stationary sources who reported these emissions in the emissions inventory as required under §101.10. Some operators of major stationary sources submitted administratively complete applications for authorizing previously unauthorized emissions prior to the close of the attainment year, 2007. To not penalize sources that were in the process of obtaining an authorization by the end of the attainment year, the commission will allow the emission limits established by permits that were administratively complete by the end of the attainment year, December 31, 2007, for determining the baseline amount.

The approach adopted with this rule aligns with the FCAA intent of comparing authorized emissions with reported actual emissions to determine a baseline amount. This adopted rule restricts the affected sources to use the first authorized emissions limits on permits issued after the attainment date for emissions. The language in this section is intended to clarify how owners and operators who had filed an application but not been issued a permit can account for the emissions limits ultimately authorized after end of the attainment year due to the permitting application administrative process.

The commission, in its proposal, included newly authorized emissions (or those in the process of being authorized) from MSS activities in an Alternative Baseline Amount calculation and requested comment on this approach. The EPA commented that it could not approve a portion of a rule that relied on §101.222(h) because it was disapproved on November 10, 2010. As a result of this comment, the commission withdrew the language relating to MSS emissions from this adopted rule.

The adopted rule requires the baseline amount calculation and supporting documentation to be submitted to the agency on forms approved by the executive director. The baseline amount calculation is subject to approval by the executive director.

A baseline amount is determined by each major stationary source that is a major source of VOC, NO<sub>x</sub>, or both (depending on how the source is determined to be major) based on representative emissions or authorized emissions. Thus, the baseline amount will be a fixed value and will not be changed without the approval of the executive director except as consistent with §101.109 or as described in this section.

#### *§101.109, Adjustment of Baseline Amount*

The adopted new section specifies the limited circumstances in which baseline amounts

may be adjusted. Emissions units may not always be under the same common ownership or control. For example, owners or operators of major stationary sources, as part of normal business, may transfer ownership of some or all of the equipment at a major stationary source to another major stationary source. The commission recognizes that a change in ownership or control of emissions units could change the Failure to Attain Fee obligation of both major stationary sources. The change in control of emissions units does not change the historical operation or reported emissions of the emissions units.

Under the adopted rule, a change in common control or ownership, such as with emissions unit transfer, will not affect the time period or amounts selected for the baseline amount on the remaining emissions units at either major stationary source. These baseline amounts will be calculated based on the operation of the emissions units at the attainment date, or for emissions that are cyclic, irregular, or otherwise varying, for the period preceding the attainment date.

In a manner similar to transferring other obligations that do not change with ownership transfer, such as emissions authorizations, the commission will allow the affected major stationary sources to transfer the baseline amount and Failure to Attain Fee obligation associated with each emissions unit having a change in control without changing the calculated baseline amount for the transferred emissions units. In order to transfer the

baseline amount and the Failure to Attain Fee obligation, the new owner or operator of each major stationary source affected by the change in common control will be required to submit a request to the executive director within 90 days of the ownership change for the executive director's approval.

*§101.110, Baseline Amount for New Major Stationary Sources, New Construction at a Major Stationary Source, or Major Stationary Sources with Less Than 24 Months of Operation*

This section specifies the limited circumstances in which baseline amounts may be determined or adjusted for stationary sources that became major (or were newly authorized) after the November 15, 2007 attainment date. Major stationary sources that began operation within one year of, or after, the applicable nonattainment area's attainment date may not have sufficient data to determine their baseline amount using reported emissions data. Additionally, sources that began operation after the applicable nonattainment area's attainment date would not have the applicable authorizations for such a determination.

Under this rule, the TCEQ is also allowing an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction and are built with emission

limits that are the lowest achievable emissions rate.

The commission requested comment on the appropriateness of including changes in a baseline amount as a result of expansions at a major stationary source for new emissions units authorized under a nonattainment permit. The TCEQ also requested comment regarding the appropriateness of exempting new emissions units authorized under a nonattainment permit from a Section 185 fee, and if exempted, how this exemption should impact the fee obligation from the HGB one-hour ozone nonattainment area. The commission requested suggestions on sources of revenue that may be needed to offset revenue that would have been collected from these exempted sources and how a clean unit should be defined. Although commenters supported this approach, some commenters suggested exempting them altogether. Although these sources may have the lowest achievable emissions rates, they do emit VOC and NO<sub>x</sub> into the atmosphere and, as such, would owe a penalty if the emissions exceeded 80% of a baseline amount. No other sources of revenue were suggested to offset this fee amount from clean units, other than directly assessing a fee on mobile sources, and no additional definitions were suggested for how a clean unit could be defined. The commission does not have authority to directly assess a fee on mobile stationary sources for the Section 185 fee. The commission is adopting rules that provide a method for these sources to determine a baseline amount and to estimate a fee from these sources.

The EPA, in its December 14, 2012, issue of the *Federal Register* (77 FR 74372) notice of final approval of the SCAQMD SIP revision, allowed a major stationary source subject to the FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation to set a baseline amount. Similarly, the commission's adopted rule requires the source to make a determination on the lower of actual or allowable data available in its first year of operation as a major stationary source.

Because data did not exist for newer sources at the time of the applicable nonattainment area's attainment date, the commission will allow those sources to use their first year of actual operation as a major stationary source (12 consecutive months) to make the baseline determination.

A major stationary source that is new to the nonattainment area after the attainment date may not have sufficient data as a major stationary source to determine if emissions at that major stationary source are irregular, cyclical, or otherwise vary significantly from year to year. The first submitted emissions inventory may have been based on a partial year of operation. The provisions of this section are intended to allow a major source with less than 24 months of continual operation at the time of the applicable nonattainment area's attainment date some additional flexibility in establishing the emissions history at that major stationary source. The major stationary source may

request that the baseline amount be based on the average rate within the first 24 months of continuous operation. If these emissions varied significantly during 24 months of operation, the major stationary source may be considered irregular, cyclical, or otherwise varying significantly. Under the rules, a major stationary source will be allowed to request a modification to its baseline amount within 60 calendar days of completing 24 months of operation. The agency's use of a 24-month historical look-back period is shorter than the time allowed by the EPA under its rules for a cyclic determination, which provide for a two-in-ten or two-in-five year look-back period. The EPA published approval for a similar approach for new sources for SCAQMD in August 2012.

*§101.113, Failure to Attain Fee Obligation*

The adopted new section outlines the method used to determine the Failure to Attain Fee obligation for VOC, NO<sub>x</sub>, or both emissions. If the major stationary source is major for just one pollutant, the Failure to Attain Fee obligation will apply for just the one pollutant, VOC or NO<sub>x</sub>, unless the other pollutant was used in an aggregated baseline amount per §101.107. If the major stationary source is major for both VOC and NO<sub>x</sub> emissions, the fee obligation will apply for both pollutants.

This adopted section also provides for the calculation of the Failure to Attain Fee for owners and operators of major sources in a nonattainment area that opt to aggregate

VOC, NO<sub>x</sub>, or both emissions. The aggregation of VOC with NO<sub>x</sub> may occur at one major stationary source or across multiple major stationary sources under common control.

Because both pollutants were in the baseline amount, the Failure to Attain Fee would be due on actual emissions of both VOC and NO<sub>x</sub> even if the major stationary source was not a major source for one of the pollutants.

Consistency between the baseline amount and the fee obligation determination will be maintained with this approach. An owner or operator of multiple sources under common control who chose to combine a single pollutant from multiple major stationary sources in a baseline amount calculation must aggregate actual emissions of that single pollutant in the fee payment. If an owner or operator opted to combine VOC with NO<sub>x</sub> emissions at a major stationary source, both VOC and NO<sub>x</sub> emissions must be aggregated for the fee payment. Similarly, owners or operators who chose to combine VOC and NO<sub>x</sub> emissions in a baseline amount calculation and to aggregate those pollutants across more than one major stationary source must combine actual VOC and NO<sub>x</sub> emissions from all aggregated major stationary sources to determine the fee.

The total fee would be applicable to, and calculated for, each pollutant (VOC or NO<sub>x</sub>) for which the major stationary source meets the requirements of §101.101. The fee obligation from VOC or NO<sub>x</sub> emissions that are part of the baseline amount aggregation under §101.107 would remain separate and due from each major stationary source.

The fee for a pollutant aggregated under multiple major stationary sources for a baseline amount will be calculated based on the aggregated actual emissions from all the affected major stationary sources minus 80% of the aggregated baseline amounts for all major stationary sources as calculated in §101.107.

For example, if multiple major stationary sources were combined for determining the NO<sub>x</sub> baseline amount, then the Failure to Attain Fee payment would be based on all actual NO<sub>x</sub> emissions from those combined major stationary sources. The fee payment for VOC emissions would be considered separately for these major stationary sources. Similarly, if owners or operators chose to combine multiple major stationary sources into one baseline amount for VOC and NO<sub>x</sub> emissions, then the payment would be due from the combined major stationary sources for both pollutants together.

Actual emissions include emissions from annual operations, MSS operations and other events not otherwise authorized (emissions events). 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.

The FCAA, §185 requires the annual fee to be adjusted by the CPI and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502

requires the fee to be adjusted annually per the CPI for all-urban consumers published by the United States Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. Because the FCAA, §185 requires these fees to be assessed on a calendar-year basis and the inflation factor based on the CPI is applied in September for fiscal year (based on the previous September through August data). The calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January through August and one third of the fee associated with September through December). For example, a 2012 calendar year fee would span the 2012 fiscal year and the 2013 fiscal year. Thus, a calendar 2012 fee requires two thirds of the annual CPI ending in August 2012 and one third of the annual CPI ending in August 2013. The EPA suggested that the commission adopt the methodology to calculate the fee used in its guidance memo (Page 2010, available at <http://www.epa.gov/glo/pdfs/20100105185guidance.pdf>). As a result of this comment, the commission changed its fee calculation to use the 40 CFR Part 70 Presumptive Minimum fee basis used in EPA's guidance memo. The Part 70 fee rate is published by the EPA and is available at [www.epa.gov/airquality/permits/fees.html](http://www.epa.gov/airquality/permits/fees.html). The Part 70 fee is the rate used to calculate emissions-based fees for Part 70 permit programs.

The adopted fee calculation is similar to the one proposed by the commission that annualizes the fee rate over two fiscal years. Rather than calculating the rate directly

from the CPI, the adopted method uses the Part 70 fee rate published by the EPA. The Part 70 fee already has the required CPI adjustment incorporated into it.

*§101.116, Failure to Attain Fee Payment*

This section stipulates that payment of Failure to Attain Fees must be made by check, certified check, electronic funds transfer, or money order made payable to the TCEQ. Payment must be sent to the TCEQ address printed on the billing statement within 30 calendar days of the invoice date.

FCAA, §185 requires that the Failure to Attain Fee be assessed on actual emissions, starting the first year after the attainment year, on emissions exceeding 80% of the approved baseline amount. For the HGB one-hour ozone nonattainment area, the first year after the attainment date was 2008 because the attainment year for the HGB one-hour ozone nonattainment area was 2007. However, assessing a Failure to Attain Fee for 2008 could be considered a retroactive rulemaking. Sources would not have had an opportunity to reduce emissions (and thus, fees) by adjusting processes or operations. Therefore, this rule will assess the FCAA, §185 Failure to Attain Fee using the emissions inventory from the year prior to the rule adoption date. Thus, because the rule was adopted in 2013, the most current inventory was for 2012. The first payment is due for calendar year 2012 emissions and annually thereafter until the FCAA, §185 Failure to Attain Fee no longer applies to the area.

This rule allows the executive director to impose interest and penalties in accordance with 30 TAC Chapter 12 to owners or operators of major sources subject to the provisions of §101.101 who fail to make full payment of the Failure to Attain Fees when due.

As a result of comments requesting the commission to include dates for invoicing, a date for the first invoice for the end of the year following the adoption of this rule is included in the adopted language. Thus if the rule is adopted in 2013, the first invoice will be issued by the end of December 2014.

Failure to Attain Fees will be due within 30 calendar days of the date on the invoice. Adequate time is required for the actual emissions to be quality assured, the baseline amount to be calculated, alternative revenue to be reported, and invoices developed. That provision, along with others in this chapter, is consistent with the due date for invoices issued for other programs within the agency.

*§101.117, Compliance Schedule*

This adopted new section requires the submission of baseline amount emissions on a form prescribed by the executive director. For the HGB one-hour ozone nonattainment area, major sources are required to submit their proposed baseline amount emissions to

the executive director no later than 120 calendar days from rule adoption on forms or other media approved by the executive director. For sources that become major stationary sources after this rule is adopted, the TCEQ will require owners or operators to submit a report on forms approved by the executive director establishing baseline amount emissions to the executive director no later than 90 days following the first full year (12 consecutive months) of operation as a major source.

A timely and accurate baseline amount is required from each applicable major stationary source to implement the required penalty fee program. If a major stationary source does not submit baseline amount data or does not submit the data in accordance with the rules of §§101.106, 101.107, or 101.108, the executive director may need to determine a baseline amount for that major stationary source. In accordance with the requirements of the FCAA, §185, authorized or baseline emissions data from the attainment year, 2007, will be used, if available, to establish a baseline amount. Emissions inventory data reported under §101.10 will be used. If no data are available, a baseline amount of 12.5 tons for VOC and 12.5 tons for NO<sub>x</sub> will be used. The major stationary source threshold for an area classified severe for the one-hour ozone NAAQS is 25 tons of potential emissions for VOC and 25 tons of potential emissions for NO<sub>x</sub>. Potential emissions are typically higher than the annual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or potential, so the executive director will use half the potential as an average baseline amount for a source

with no data reported in the emissions inventory. Additionally, the executive director, using the plain language of FCAA, §185, will not use any alternatives for calculating a baseline amount, such as aggregating VOC and NO<sub>x</sub> or aggregation of pollutants across multiple major stationary sources, because the executive director will not have all information necessary to make these determinations. Loss of these options will provide an additional incentive for sources to comply with all reporting obligations.

*§101.118, Cessation of Program*

The EPA does not clearly define the mechanism to end the Failure to Attain Fee program in an area with a revoked standard. FCAA, §185 requires the fee payment to be due until the area is redesignated to attainment; however, the EPA has indicated that it will no longer redesignate areas under the revoked one-hour ozone standard. To address this issue, the TCEQ adopts mechanisms to end the Failure to Attain Fee program for the HGB one-hour ozone nonattainment area. The adopted new section will end the applicability of the Failure to Attain Fee upon either redesignation of the nonattainment area to attainment for the one-hour ozone NAAQS or a finding of attainment by the EPA for the one-hour ozone nonattainment area. Because the EPA does not have a defined mechanism to end the program, commenters suggested adding a provision that would terminate the fee program based on any action or rulemaking by the EPA to end the fee program. The rule was changed to incorporate this suggestion.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the Failure to Attain Fee may be assessed, but the fee collection may be placed in abeyance by the executive director if three years of quality-assured data resulting in a design value that did not exceed the one-hour ozone NAAQS are submitted to the EPA. As a result of comments received, the commission is including as part of the design value determination, the ability to exclude days that exceeded the NAAQS because of exceptional events or emissions emanating outside the United States.

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

As a result of comments received from the EPA indicating that an exemption for an extension year is not necessary for the revoked one-hour ozone standard, this section is removed.

*§101.120, Eligibility for Equivalent Alternative Obligation*

This section allows major stationary sources owing a Failure to Attain Fee payment to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements of this subchapter. If an equivalent alternative obligation does not fully meet a major stationary source or Section 185 Account's full obligation, the remaining portion of the Failure to Attain Fee remains due.

As a result of comments requesting the commission to include dates for invoicing, a date

for the first invoice for the end of the year following the adoption of this rule is included in the adopted language. To support an invoicing date, the commission must be timely informed of all equivalent options exercised for the program. Thus a date has been included requiring that no later than July 31 in the year following the rule adoption and annually thereafter, all equivalent alternatives need to be approved; allowances traded under §101.121 must be completed and Supplemental Environmental Projects (SEPs), under §101.122 must be funded. If an alternative obligation under §101.121 is not approved and funded, exercised, or otherwise completed by the July 31 due date, the equivalent option will not be applied to the Failure to Attain Fee. Because a SEP may be a capital project requiring more than 30 days to complete, SEPs must be approved and funded by the July 31 due date.

All requests to use a SEP as an equivalent alternative obligation are subject to the executive director's approval.

*§101.121, Equivalent Alternative Obligation*

This adopted new section allows Section 185 Accounts to request to fulfill their Failure to Attain 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.

Emission credits submitted for fee reduction purposes, on a ton-for-ton basis, will only be allowed for use as an equivalent alternative for the pollutant (VOC or NO<sub>x</sub>) specified on the credit. VOC credits or HECT allowances must only be used as an alternative equivalent for VOC tons in excess of the baseline; NO<sub>x</sub> credits must only be used as an alternative equivalent for NO<sub>x</sub> tons. The use of allowances will be similarly restricted, such that MECT allowances will only be used as an equivalent for NO<sub>x</sub> tons. HECT allowances will only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for major stationary sources in Harris County. Significant digit rounding of the emissions reduction must be limited to one-tenth of a ton. Removing these emissions, represented as allowances, on a ton-per-ton basis 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.

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

This adopted new section allows Section 185 Accounts to request to fulfill all or part of their fee obligation by contributing to a SEP within the HGB one-hour ozone nonattainment area 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 beyond existing regulatory requirements. Supporting a

SEP guaranteeing emissions reductions in the nonattainment area would provide cost-effective opportunities that more directly benefit air quality in the affected area than the imposition of a fee. Under this adopted new rule, contributing to a SEP would reduce a major stationary source or Section 185 Account's fee obligation on a dollar-per-dollar basis by decreasing the fee obligation by the same amount. The rule also allows a major stationary source or Section 185 Account to use surplus SEP funds from year to year. The funding will not be discounted or depreciated over time.

The adopted rule language only allows funding for air-related projects that are implemented in the HGB one-hour ozone nonattainment area. This rule restricts SEPs to projects that offset the Failure to Attain Fee on a dollar-per-dollar basis. The established SEP program requires participants to submit quarterly and annual project reports with expenditure and project completion information, providing validation of actual emissions reductions or expenditures.

The TCEQ requested and received comments on whether additional requirements or restrictions should be placed on the use of SEP funds as an equivalent obligation under FCAA, §172(e). Because a SEP can be used to offset an administrative penalty, the EPA commented that it was inappropriate for those funds to also be used for credit or offset for the §185 penalty. For many SEPs, only half the dollar amount of the SEP may be used to offset an administrative penalty. The commission has added language restricting

§185 Failure to Attain fee credit from the SEP to be a portion of funds not used to offset an administrative penalty. Additional language was also added to require that the SEP be enforceable through an Agreed Order or other enforceable document to ensure compliance with the SEP objectives.

**Final Regulatory Impact Analysis Determination** The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the proposed regulatory impact analysis determination. The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking 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 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 rules are intended to enable Texas to comply with the requirements of the FCAA, §182 and §185 for the HGB one-hour ozone nonattainment area. Fees are required to be collected for all major stationary 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 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 reduce emissions further, but the rules will not require emission reduction; and appear to have been designed primarily as a penalty for failure to attain the ozone standard.

The 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." 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, §182 and §185, in order to avoid SIP disapproval or sanctions under the FCAA. The rules would incorporate requirements to fulfill the requirements of FCAA, §182 and §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 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, as long as the requirements of the FCAA are met. 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 were considered 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 Texas 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 rulemaking will have no impact beyond the impact that is required by FCAA, §182 and §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 unchanged. 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." (*See Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue,

960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The 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 rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency but is also authorized by THSC, §382.012. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas

Government Code, §2001.0225(b), because the 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.

### **Takings Impact Assessment**

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the rulemaking is to implement the FCAA, §182 and §185 fee requirements in the HGB ozone nonattainment area. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this 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 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). Ozone is a criteria pollutant that is regulated under the FCAA to protect public health and welfare. Fees are required

to be collected under FCAA, §182 and §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 collect interest). The rules will enable Texas to comply with the requirements of FCAA, §182 and §185 for the HGB one-hour ozone nonattainment area. Consequently, the 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 rulemaking.

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted 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 adopted 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 not an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program.

### **Public Comment**

The comment period for the adopted rulemaking opened on November 30, 2012, and closed on January 14, 2013. A public hearing was offered in Houston on January 9, 2013.

Comments were received from Air Alliance Houston; Business Coalition for Clean Air Appeal Group (BCCAAG), Calpine Corporation (Calpine); Environmental Defense Fund (EDF); Environmental Integrity Project; Greater Houston Partnership (GHP); Green Environmental Consulting, Inc (Green Environmental); LyondellBasell; Magellan Midstream Partners, L.P. (Magellan); Oiltanking Houston, LP (Oiltanking); NRG Texas Power LLC (NRG); Occidental Chemical Corporation and its affiliated company Oxy Vinyls, LP (OCC); Petrologistics; Printing Industries of the Gulf Coast (Printing Industries); Section 185 Working Group; Sierra Club; Texas Association of Business (TAB); Texas Chemical Council (TCC) and Texas Oil and Gas Association (TxOGA); Texas Pipeline Association (TPA); the United States Environmental Protection Agency (EPA); and 487 public citizens (individual or commenter).

The Section 185 Working Group members are Albemarle, BASF, BP America, Chevron Phillips Chemical, Dow Chemical, Entergy Texas, Enterprise Products, ExxonMobil, Kinder Morgan, Lyondell Chemical Company, Magellan Midstream Partners, Marathon Petroleum Corporation, NRG Texas Power LLC, Oiltanking North American, Phillips 66, Shell Oil Company, TPC Group, and Valero. Magellan endorsed and incorporated by

reference the comments submitted by the Section 185 Working Group. Oiltanking supported the comments submitted by the Section 185 Working Group. OCC fully endorsed the comments submitted by TCC.

All comments received from public citizens and environmental groups were generally opposed to the rule with one exception as noted elsewhere in this preamble. The EPA submitted comments that supported some aspects of the rule and suggested changes for those aspects of the rule it did not support. All other comments received, those from affected sources and from groups representing affected sources, generally supported the rulemaking. Changes were made to the rule as a result of some of the comments received, and those changes are discussed in the Section by Section discussion portion of this preamble.

## **Response to Comments**

### *Health and Air Quality*

#### Comment

Several commenters were concerned about air quality and its impacts on human health and the environment. Four individuals commented that the NAAQS are protective of human health and should be met, and one individual commented that the TCEQ should not encourage any entity to continue to threaten human health. Thirty-six commenters

stated that the TCEQ should require the full penalty fee to be paid because the agency is responsible for protecting public health and the environment and improving air quality.

One commenter stated that everything that can be done should be done to protect the environment, and one individual commented that the TCEQ does nothing while air quality in Texas progressively worsens.

Sixteen commenters discussed being concerned about air quality conditions in and around the HGB one-hour ozone nonattainment area. Five of those individuals commented that poor air quality conditions in the HGB one-hour ozone nonattainment area make it difficult for citizens to breathe and can aggravate asthma conditions. One individual added that she developed an irregular heart rhythm, which she believes is also related to the area's poor air quality conditions. An individual commented that asthma and mercury poisoning are directly correlated to oil refineries and coal plants, which should be stopped. Alternatively, a commenter thanked the TCEQ for working to protect the health of Texans and citizens of surrounding states.

A commenter stated that citizens in the HGB one-hour ozone nonattainment area suffer from illness and lost productivity due to air pollution, and four other individuals commented that citizens suffer from increased healthcare costs due to poor air quality

conditions. Another individual stated that the potential cost of healthcare makes it essential that the oil and gas industry be as clean as possible.

### **Response**

**The commission appreciates the comments related to air quality and the health effects of ozone. The commission is committed to attaining the NAAQS as expeditiously as practicable. The purpose of this rule is to comply with FCAA, §182(d)(3) and (e) and §185 for the revoked one-hour ozone standard. Since revocation of the one-hour ozone standard in 2005, the commission has focused exclusively on attaining the 1997 eight-hour ozone standard; however, as monitored eight-hour ozone design values have decreased in the HGB area (about which this rulemaking was developed), so have monitored one-hour ozone design values. These decreasing design values indicate decreasing levels of ozone. From 2005 through 2011, monitored design values for the revoked one-hour ozone standard decreased 26%. Preliminary 2012 monitoring data show that the HGB one-hour ozone nonattainment area is now within one ppb of monitoring attainment for the revoked one-hour ozone standard.**

**It is well known that some air pollutants, including ozone at elevated levels,**

**can aggravate existing respiratory diseases. The primary health concerns for ozone are effects to the lungs and respiratory system. Health effects from ozone generally can resolve quickly once an individual is no longer exposed to high levels. The commission is striving to attain the 1997 eight-hour ozone standard and preparing for the 2008 eight-hour ozone standard, which has been determined by the EPA to be the most protective, health-based standard for ozone.**

**The FCAA requires the EPA to set NAAQS to protect public health with an adequate margin of safety and including the most sensitive part of the population, and the commission follows procedures in accordance with FCAA requirements for areas that do not meet the NAAQS. The commission strives to protect our state's human and natural resources, including those in the HGB one-hour ozone nonattainment area, consistent with sustainable economic development.**

### *Background*

#### Comment

OCC understood that if the TCEQ did not implement an FCAA, §185 fee rule for a severe ozone area that failed to attain the ozone NAAQS, the EPA would be required to collect

the fee. Additionally it was noted by Calpine that a fee approval was required.

**Response**

**The commission also understands this to be the case and appreciates the comment.**

Comment

An individual commented in favor of the proposed rulemaking and stated that the EPA's rules are "excessively restrictive, arbitrary, and politically motivated."

**Response**

**The commission appreciates the commenter's support for this rulemaking.**

Comment

NRG, BCCAAG, and the Section 185 Working Group stated that before any fees are assessed, the TCEQ should evaluate all avenues to determine that the HGB one-hour ozone nonattainment area has attained the one-hour standard and that the fees do not apply. The groups suggested that the TCEQ include an "exceptional events" determination taking into consideration exceptional items such as wildfires.

Additionally, the Section 185 Working Group, BCCAAG, and GHP stated the fees should be expeditiously terminated in the event of attainment taking into consideration exceptional events. The Section 185 Working Group and BCCAAG added that the TCEQ should seek a determination from the EPA that the area would have attained but for exceptional events. LyondellBasell suggested the TCEQ submit technical data to the EPA about exceptional events to determine if the fee program can be suspended.

LyondellBasell added that the TCEQ flagged high one-hour ozone readings at the Houston East (CAMS 1) air quality monitor as potentially influenced by exceptional events. The Section 185 Working Group and BCCAAG added that if monitoring data currently flagged by the TCEQ are accepted by the EPA, then the area would be attaining the one-hour ozone standard, and the fee should not be imposed.

## **Response**

**In January 2012, the EPA indicated in the *Federal Register* (77 FR 36400) that the HGB one-hour ozone nonattainment area has not demonstrated attainment of the one-hour ozone standard. Consequently, a fee is due from the area until it is designated attainment or other action is taken to terminate the program. The commission flagged data on August 26, 2011, and on August 29, 2011, as potentially influenced by exceptional events.**

**The commission proposed exceptional event flags to EPA for ozone on the two days in August 2011 for particular matter impacts from wildfires on several days as well as other days in 2011 for both ozone and particulate matter. In the letter to EPA, dated June 29, 2012, the commission stated that it plans to submit demonstration documents for the flagged data to be considered exceptional events in accordance with the time specified in the rules.**

**The commission is currently collecting and reviewing data and information that may support the demonstration. The commission is committed to developing the best technical analysis and accompanying documentation for the appropriate identified flagged days as soon as practicable.**

#### Comment

NRG, BCCAAG, and the Section 185 Working Group stated that an ozone attainment determination should take into account international emissions. The Section 185 Working Group, BCCAAG, and LyondellBasell indicated that an area is exempt from the FCAA, §185 fee if it would have attained the ozone standard by the applicable date but for international emissions. LyondellBasell suggested that the TCEQ conduct a

boundary condition analysis as soon as possible to determine if the area is in attainment. Additionally, the Section 185 Working Group, BCCAAG, and GHP stated that the penalty fee should be expeditiously terminated in the event of attainment, taking into consideration international emissions.

### **Response**

**The commenters may be referring to §179B of the 1990 Amendments to the FCAA. This section, *International Border Areas*, allows a state with such an area designated nonattainment for the ozone NAAQS to submit a SIP that demonstrates that the area would attain and maintain the NAAQS by the required attainment date but for emissions emanating from outside the United States. Additionally, the commenters seem to be suggesting that the HGB nonattainment area would be attainment of the one-hour ozone NAAQS, but for international emissions (i.e., but for emissions emanating from outside the United States). Therefore, the commission understands the commenters to be implying that the HGB nonattainment area should be exempt from FCAA, §185 requirements and that a boundary condition analysis would likely provide the required demonstration.**

**There are numerous studies that have identified the meteorological**

**conditions most conducive to the formation of ozone concentrations in excess of the one-hour NAAQS, and those conditions are typically associated with emissions from local sources and ozone transport from continental regions within the United States rather than emissions sources in distant countries (See Sullivan, David; 2009; Effects of Meteorology on Pollutant Trends; available at [www.tceq.texas.gov/assets/public/implementation/air/am/contracts/reports/da/5820586245FY0801-20090316-ut-met\\_effects\\_on\\_pollutant\\_trends.pdf](http://www.tceq.texas.gov/assets/public/implementation/air/am/contracts/reports/da/5820586245FY0801-20090316-ut-met_effects_on_pollutant_trends.pdf)). There have also been several publications documenting the increased impact of foreign emissions on the United States. The commission is reviewing information relevant to international transport and may submit such information to EPA, if appropriate.**

**Regardless, on June 19, 2012, the EPA published its final determination that the HGB one-hour ozone nonattainment area failed to attain the one-hour ozone standard by the November 15, 2007 deadline (77 FR 36400). In that final notice, the EPA stated that the HGB one-hour ozone nonattainment area is subject to FCAA, §182(d)(3) and (e) and §185 requirements. This nonattainment area will remain subject to those requirements until the EPA makes a determination otherwise.**

Comment

An individual questioned why the HGB one-hour ozone nonattainment area had not yet attained the one-hour ozone standard.

**Response**

**The HGB area's unique coastal meteorology, significant population, and emission sources in conjunction with incoming levels of ozone have shown to be conducive to elevated levels of ozone, even to high enough concentrations that exceed the one-hour ozone standard on occasion. However, emissions and one-hour ozone concentrations in the HGB area have decreased significantly due to local, state, and federal controls bringing the preliminary 2012 one-hour ozone design value within one ppb of attainment.**

**As part of the periodic review of the NAAQS required by the FCAA, the structure of the ozone standard is developed by the EPA with substantial input from various scientific and health experts from across the United States. In 1997, the EPA revised the health-based NAAQS for ozone, transitioning from the one-hour standard of 0.12 ppm to an eight-hour**

**standard of 0.08 ppm. By 2005, the one-hour standard was revoked. On July 20, 2012, the EPA revised its health-based NAAQS for ozone once again and is now transitioning from the eight-hour standard of 0.08 ppm to an eight-hour standard of 0.075 ppm. The 1997 eight-hour standard is expected to be revoked by July 2013.**

**Since revocation of the one-hour standard in 2005, the commission has focused exclusively on attaining the more recent and according to the EPA the more health protective, eight-hour standard; however, as monitored eight-hour ozone design values have decreased in the HGB one-hour ozone nonattainment area, so have monitored one-hour ozone design values. From 2005 through 2011, monitored design values for the revoked one-hour ozone standard have decreased 26%. Design values are calculated using the measured ozone levels; thus, reductions in design values reflect ozone reductions. Preliminary 2012 monitoring data show that the HGB one-hour ozone nonattainment area is now within one ppb of monitoring attainment for the revoked one-hour ozone standard.**

Comment

NRG and TAB generally supported the proposed rule. TAB stated that it would support

any changes or amendments to the TCEQ's budget or legislative appropriations authority that are required to ensure implementation of a rational \$185 fee program.

OCC, the Section 185 Working Group, BCCAAG, and GREEN Environmental supported the flexibility in the proposed rule. Petrologistics, LyondellBasell, Printing Industries, Oiltanking, and GHP supported a rule that is both flexible and approvable by the EPA.

## **Response**

**The commission thanks the commenters for their support.**

## Comment

An individual stated that 50 - 75% of the ozone in Houston is background pollution, international pollution, or interstate pollution that Houston cannot control or that Congress has not provided Houston the legal authority to control. Of the remaining 25 - 50% of that potentially locally generated ozone, the individual stated that 50 - 65% was generated from federally preempted mobile sources that the area was generally prohibited from controlling. The individual commented that the area is left with the ability to potentially control approximately 9 - 25% of the problem yet must pay 100% of the penalty for the failure to attain.

## **Response**

**The commenter does not provide a reference, and the commission has not been able to reproduce the percentage ranges included in the comment. The commission is familiar with several published studies regarding background, but none provide this level of background attributable to international transport for Houston's ozone. The commission submitted source apportionment modeling for the one-hour ozone standard in its 2004 HGB SIP revision (Project No. 2004-042-SIP-NR, available at the TCEQ's Web site ([http://www.tceq.texas.gov/airquality/sip/dec2004hgb\\_mcr.html](http://www.tceq.texas.gov/airquality/sip/dec2004hgb_mcr.html)) and for the 1997 eight-hour standard in its 2010 HGB SIP revision (Project No. 2009-017-SIP-NR). The modeling adopted with these SIP revisions provides indications of what background would be and the contribution of HGB sources.**

**As reported in the 2004 submission for the one-hour ozone standard, results of source apportionment modeling for the maximum are shown for the modeled domain-wide one-hour ozone concentration for August 31, 2000. The boundary conditions, which are considered background, were**

**estimated to only account for approximately 15% of the peak modeled ozone concentration.**

**Source apportionment modeling conducted for the 2010 submission for the eight-hour ozone standard may not be applicable to the issues concerning this rulemaking. The distribution of sources and source regions contributing to exceedances of the eight-hour ozone NAAQS is not necessarily, and would not be expected to be, the same as the distribution for exceedances of the one-hour ozone NAAQS. In addition, the source apportionment modeling conducted and submitted with the HGB eight-hour ozone SIP revision was based on 2018 projections (the attainment year for the 1997 eight-hour ozone standard) and not the 2006 base-year modeling or 2007, which was the HGB one-hour ozone nonattainment area's one-hour ozone NAAQS attainment year and more relevant to the issues concerning this rulemaking.**

**The commission agrees that its authority regarding mobile sources is severely restricted by the FCAA, and that emissions from mobile sources remain a significant contributor to formation of ozone in the HGB area. While the commission appreciates the commenter's concerns regarding the**

**FCAA, they are beyond the scope of this rulemaking.**

Comment

One individual commented that not collecting the full \$185 penalty fee from industrial sources would remove an incentive that could be a catalyst for people to transition away from the use of fossil fuels.

**Response**

**The purpose of this rule is to comply with FCAA, §182(d)(3) and (e) and §185 for the revoked one-hour ozone standard. The commission will not speculate on the possibility that imposing the full \$185 fee on applicable major stationary sources would drive a reduction in the consumption of fossil fuels.**

Comment

An individual stated that the Houston community should not be penalized and assessed a fine for part of the ozone problem that the federal government failed to control from mobile sources in a time frame consistent with law. TCC and TxOGA stated that point sources contribute minimally to ozone in the HGB one-hour ozone nonattainment area

but would bear the brunt of a \$185 penalty fee.

An individual stated that Congress should assess a fee against the federal government for a portion of the area's emissions that the government failed to control. However, Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club did not support the alternatives in the rules and said fees on major stationary sources created an incentive and opportunity to decrease emissions by avoiding payment of a fee.

### **Response**

**As discussed elsewhere in this preamble, the commission recognizes that a significant portion (25% of VOC and 72% of NO<sub>x</sub> in 2011) of emissions comes from mobile sources; however, FCAA, §185 requires a fine on major stationary sources if the area fails to attain the ozone standard. The EPA has crafted guidance that allows revenue from mobile source alternatives in an area with a revoked standard. These plans allow a state to take credit for clean air activities that are surplus to the SIP for the area. The commission crafted a program that incorporates revenue from mobile sources, a major contributor of emissions to the HGB one-hour ozone nonattainment area, to offset a portion of the fee on major stationary sources because they are. Although a fee assessed on major stationary sources may (or may not)**

**result in a company reducing its emissions, the commission considers an alternative program that credits fees from other sources, such as TERP, LIRAP, and LIP, to be a more equitable approach to the fee program based on NO<sub>x</sub> emissions in the HGB area. The commission has no authority to assess a fee against the federal government for the portion of emissions attributable to sources the federal government failed to adequately control. The commission does not agree that equivalent alternatives in the rule will provide a disincentive for companies to avoid paying fees. As discussed elsewhere in this preamble, there is no guarantee that other funds will be available to offset the fee obligation, and the amount available will vary from year to year.**

#### Comment

The GHP commented that it was concerned that the major stationary source fee could be as high as \$90 million for the area, and it was concerned by the disproportionate impact the fee will have on the region despite clear and sustained progress on air quality goals. The Section 185 Working Group and BCCAAG stated that the proposed rule could impose a substantial new financial burden on the HGB one-hour ozone nonattainment area's economy, hindering economic growth. The TAB appreciated that the proposed rulemaking minimized penalties that could negatively affect business in Texas.

An individual commented that jobs would not be lost if the full penalty fee is enforced, and three individuals commented that jobs could be created for pollution control and air quality improvement.

**Response**

**The commission agrees that the HGB one-hour ozone nonattainment area has achieved clear and sustained progress toward meeting air quality goals. Fee obligations resulting from imposing FCAA, §185 requirements will not be known until baseline amounts are determined, but the commission estimates that fees could be up to \$90 million dollars. Additional flexibility, such as offsetting the area's §185 obligation using credits from the equivalent alternative program, provides a more equitable distribution of responsibility for the area failing to attain the one-hour ozone standard.**

**The commission appreciates the commenters' concerns about jobs; however, the commission has no accurate data regarding job creation or losses.**

Comment

The proposed rules were opposed by 465 individuals, and 47 individuals commented that the TCEQ should enforce the full penalty fee on those applicable companies that violate the FCAA. Four individuals commented that the TCEQ should be enforcing environmental quality standards, but with the proposed rule the agency appears to be siding with industrial polluters.

Six individuals commented that the public should not have to pay for penalties incurred by companies that violate FCAA, §185, and 459 individuals stated that waiving the §185 penalty fee would be rewarding HGB-area oil refineries and chemical plants for failing to meet the one-hour ozone NAAQS. An individual commented that industry has been avoiding compliance with FCAA regulations with the TCEQ's cooperation.

Three individuals stated that waiving the penalty fee would not help control pollution from industrial sources, and 22 commenters indicated a belief that waiving the penalty fee would only encourage more pollution from industry. One individual stated that the energy industry should not be allowed to pollute without a penalty. A commenter suggested that not only should the full penalty be enforced, but also that the penalty fees be increased by a factor of 100 because industrial violators could afford to pay. Alternatively, that commenter suggested that the TCEQ offer monetary and other incentives to the first company that meets requirements.

## **Response**

**The FCAA requires the EPA to set standards to protect public health with an adequate margin of safety including the most sensitive parts of the population, and the commission follows procedures in accordance with FCAA requirements for areas that do not meet those standards. The commission strives to protect our state's human and natural resources consistent with sustainable economic development. The commission's goal is clean air, clean water, and the safe management of waste.**

**FCAA, §185 requires that major stationary sources in the HGB one-hour ozone nonattainment area pay a fee as a penalty because the area did not attain the one-hour ozone standard by the attainment deadline for severe nonattainment areas. Because the area has not attained the revoked one-hour standard, major stationary sources will be penalized if their emissions exceed a threshold set as part of this rulemaking. Exceeding the threshold does not mean that a source has violated its permitted emissions limits that are established through the FCAA programs, such as the state's NSR program. Point sources (major industrial) in the HGB area made over 78% NO<sub>x</sub> reductions between 2000 and 2010.**

**The fee rates included in this rulemaking are established by the language in FCAA, §185. The commission has no authority to offer monetary or other incentives to industry, and no such incentives are allowed under FCAA, §185.**

**The EPA, in its approval of the SCAQMD and SJV programs in California, indicated that approved alternative programs are acceptable as a means of offsetting the FCAA, §185 fee imposed on major stationary sources, whether through the incentives created by a penalty fee levied on pollution sources, through other funding of pollution control projects, or through a combination of both. Consistent with that indication, this rule will allow funding collected for qualified programs that intend to directly reduce VOC or NO<sub>x</sub> emissions in the HGB one-hour ozone nonattainment area to offset the FCAA, §185 fee obligation. It is not certain that the FCAA, §185 obligation will be fully or even significantly offset in any applicable year; therefore, it is in the best interest of the affected major stationary sources to remain under 80% of its FCAA, §185 baseline amount.**

**The FCAA, §185 fee will not result in new or additional fee to be paid by the**

**public, and the fee will not be waived for affected major stationary sources. The fee paid by major stationary sources may, however, be offset by revenue collected in the HGB one-hour ozone nonattainment area for TERP and LIRAP/LIP. These are not new fees on the public but take full credit for emission reduction strategy fees already paid in the HGB area. The commission's purpose in adopting these rules is to comply with FCAA requirements, which includes establishing an approvable \$185 fee program with which affected major stationary sources must comply.**

#### Comment

The Sierra Club stated that the proposed rules are weaker than the TCEQ's 2009 proposed rules.

#### Response

**The commission disagrees that this rulemaking is less stringent. The current rulemaking incorporates additional flexibility outlined by the EPA in its guidance memo, previously referenced, and in its approval of the SCAQMD and SJV \$185 rules, also previously referenced as being allowed under the anti-backsliding provisions of FCAA, §172(e), which were not identified during the 2009 proposal. Regardless, the 2009 proposal was not**

**adopted, and changes to those proposed rules are irrelevant with respect to the current proposal.**

#### Comment

A commenter was opposed to tax breaks and allowing wealthy individuals and corporations to avoid paying taxes in the United States by "hiding" their profits in other countries.

#### Response

**The purpose of this rule is to comply with FCAA, §182(d)(3) and (e) and §185 for the revoked one-hour ozone standard. The FCAA, §185 fee is not a tax, and this comment is outside the scope of this rulemaking.**

#### Comment

An individual stated that FCAA, §185 is unfair and should be removed. The individual suggested that the TCEQ challenge the rule if the agency believes the rule is unfair.

#### Response

**This request is outside the scope of this rulemaking action. FCAA, §185 is**

**part of an act of Congress, and accordingly, only Congress can repeal or amend this provision. The TCEQ can only challenge the applicability of this section of the FCAA on Texas once the agency has taken an action to adopt an implementing rule, or chooses not to do so, and the EPA takes a corresponding action to approve, disapprove and/or impose a fee.**

#### Comment

The Section 185 Working Group and BCCAAG requested that the TCEQ clarify the process by which sources will be identified as subject to the rule. The Section 185 Working Group and BCCAAG noted that determining applicability for some sources is likely to require individual determination, and the group questioned how a source's status would be confirmed. LyondellBasell asked whether there was an ability within the rulemaking to demonstrate to the TCEQ why a facility should be exempted from the fee obligation.

#### Response

**Each individual source in the HGB one-hour ozone nonattainment area that has actual or potential emissions of VOC and/or NO<sub>x</sub> meeting the major source definitions defined by §116.12 for VOC or NO<sub>x</sub> that are located in the HGB one-hour ozone nonattainment area are subject to fee obligation.**

**These sources, either individual or as part of an aggregated group, will submit a baseline amount request for executive director approval. The amount of the approved baseline amount will be conveyed to the Section 185 Account.**

*Equivalent Alternative Program*

Comment

The Section 185 Working Group and BCCAAG stated that TCEQ's proposal is a "not less stringent program" as allowed under the EPA's guidance for alternative programs under FCAA, §172(e) and is appropriate in an area with a revoked standard. TPA stated that the proposed alternative fee program satisfied the FCAA anti-backsliding obligations as well as the requirement that alternative program monies to offset the §185 fee obligation match the §185 penalty fee.

**Response**

**The commission concurs with the commenters.**

Comment

The TCC and TxOGA, TPA , and TAB supported the use of an equivalent alternative

program. TPA commented that California had equivalent programs that were approved by the EPA. OCC supported the rule's flexibility and commented that because mobile sources account for the largest portion of the emissions of VOC and NO<sub>x</sub> in the area, the proposal rightfully provides several options for funding the fee program. GHP stated that any \$185 rule should maximize the use of fee alternatives such as SEPs, retirement of Emission Reduction Credits, Discrete Emission Reduction Credits, HECT allowances, and MECT allowances as alternatives to direct payment of fees.

### **Response**

**The commission thanks the commenters for their support for a flexible, alternative program and concurs that the largest portion of NO<sub>x</sub> emissions are from on- and off-road mobile sources. These categories were 72% of the anthropogenic NO<sub>x</sub> emissions in 2011. The commission agrees programs that target emissions reductions in this mobile source sector are appropriate equivalent alternatives to the FCAA, \$185 fee. Relinquishing allowances and funding SEPs are also appropriate fee offset options because they are surplus to the one-hour ozone SIP revision and reduce emissions or fund activities targeting air quality improvement.**

Comment

The EPA stated that funds for the Fee Equivalency Account should start with the same year as that in which the \$185 fees will be collected.

**Response**

**The commission has made a change in the rule to require funds from the approved equivalent programs to credit the Fee Equivalency Account beginning in 2012, the same year as the fee assessment.**

Comment

The EPA commented the state should provide a detailed analysis and demonstration that the program is not less stringent. The TCEQ should provide an annual report to the public demonstrating that the program is no less stringent and equivalent to the otherwise applicable \$185 fee program. The EPA stated that for a program to be as stringent as a \$185 fee program, the alternative program must establish a process whereby the program revenues will be used to pay for emission reductions that will further improve ozone air quality in the HGB one-hour ozone nonattainment area.

**Response**

**As listed under §101.104, the commission intends to annually determine the**

**overall fee obligation, and to then determine both the amount of revenue that can be credited from approved alternative programs and will determine the amount of fee that is to be assessed on major stationary sources to fully meet the overall \$185 fee obligation for the HGB one-hour ozone nonattainment area. The report will describe the programs that are being used to credit the Fee Equivalency Account (TERP and LIRAP/LIP) and how they are required to implement or fund activities that improve the ozone air quality in the HGB one-hour ozone nonattainment area. This annual report will demonstrate that this program is equivalent to a straight \$185 fee program.**

**The commission will use a revenue-based approach and demonstrate the equivalency of the alternative revenue. Annually, the analysis will include a list of the revenue collected in the HGB one-hour ozone nonattainment area from TERP and LIRAP/LIP. If any revenue is expended in the HGB ozone nonattainment area on a program, the total collected revenue for the program will be used as a credit. This revenue will be used as credit only for years in which revenue is collected in the HGB one-hour ozone nonattainment area. The first year's credit will be 2012, the first year for assessing FCAA, \$185 fees on emissions. Funding was spent in 2012 for these programs in the HGB one-hour ozone nonattainment area for ozone**

**improvement projects, so the revenue collected will be considered eligible as a credit to offset the area's fee obligation.**

**The total HGB one-hour ozone nonattainment area 2012 fee obligation amount will be determined based on 2012 emissions and the baseline amounts for all major stationary sources of VOC or NO<sub>x</sub> in the area. The major stationary source's fee obligation still due after accounting for Fee Equivalency Account credits will be calculated. This amount will be due from each affected major stationary source. The commission's equivalent alternative program report will be published on the commission's Web site.**

#### Comment

The EPA stated that the equivalent alternative program funds should be expended, not just collected, for emissions reductions that reduce ozone formation in the HGB one-hour ozone nonattainment area.

#### Response

**The commission considers TERP and LIRAP/LIP revenue collected from the HGB one-hour ozone nonattainment area as an appropriate equivalent alternative to the \$185 fee if funds are also expended in the same year in the**

**area. The funds expended result in a direct benefit to the HGB one-hour ozone nonattainment area. Funds are collected annually statewide, including from the HGB one-hour ozone nonattainment area, and funds are annually expended in the HGB one-hour ozone nonattainment area for air quality improvement projects. Although it is noted that projects funded in areas outside the HGB area may also contribute to air quality improvement in the HGB one-hour ozone nonattainment area, only revenue collected from the HGB area will be included as credit in the Fee Equivalency Account if funds have been expended in the HGB area for the assessed year.**

**Historically funding has been generally allocated back to the area that generated the funds. Between 2008 and 2012, the amount of HGB area LIRAP and LIP revenue was \$84.8 million while \$92.7 million was expended through LIRAP and LIP in the HGB area. Between 2008 and 2012, the amount of TERP funds expended was \$155.8 million in the HGB area while the revenue collected was of \$172.0 million. The revenue expenditure approximate the collection for the two programs combined but the commission cannot commit the Texas Legislature to future action.**

**The commission has a Texas legislature-driven biennial cycle for funding**

**TERP and LIRAP/LIP. The first year of the biennium has historically been dedicated to modifying rules, grant review, and funding awards.**

**Consequently, a lower amount of expenditure is commonly associated with the first half of the biennium and funding is typically skewed to the second year of the biennium. If only expenditures were used for crediting the Fee Equivalency Account instead of revenue, this cyclic nature on the equivalency account would add additional unnecessary uncertainty to a major source's fiscal planning requirements. However, to respond to the EPA's comment, the rule has been changed to reflect the requirement that revenue will be credited only in years in which revenue was expended.**

#### Comment

The EPA stated that programs and funds from the sources that are to be used to reduce the \$185 fee obligation for major stationary sources must be surplus to the one-hour ozone SIP. The EPA and Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club commented that the vehicle I/M program is a one-hour ozone SIP revision requirement for the HGB one-hour ozone nonattainment area. EPA added that, as such, fees collected for the administration and implementation of the I/M program cannot be considered surplus and cannot be credited to the Fee Equivalency Account. Additionally, the Sierra Club commented that it did not support the use of I/M funding for an alternative program because the public is in compliance with its requirements by

getting their vehicles tested.

### **Response**

**The commission revised the rule to remove the I/M program as an equivalent alternative under this rulemaking; however, the LIRAP/LIP portion of the program will be credited to the Fee Equivalency Account because it is not a required element of the one-hour ozone SIP revision, and as discussed elsewhere in this preamble, LIRAP/LIP is surplus to the one-hour ozone SIP revision for the HGB one-hour ozone nonattainment area.**

### Comment

The EPA stated that funds from LIRAP could be approved to credit to the Fee Equivalency Account if the state can confirm that funds from LIRAP are surplus to the one-hour ozone SIP. A similar confirmation is required for TERP funds. Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club commented that TERP funds are not surplus to the one-hour ozone SIP.

### **Response**

**TERP and LIRAP/LIP are programs that fund projects that are surplus to**

**the one-hour ozone SIP revision. The TERP and LIRAP/LIP programs annually fund new activities such as vehicles replacements, school bus retrofits, or other discrete activities to improve air quality. Once completed, each activity represents a permanent emissions reduction. Each replacement or retrofit is a discrete project that is fulfilled under TERP or LIRAP/LIP requirements to incrementally and permanently reduce emissions.**

**Although TERP and LIRAP/LIP are addressed in the one-hour ozone SIP, they are programs under which individual emissions reduction projects are continually initiated. Projects that have been completed with funds appropriated since the HGB one-hour ozone nonattainment area's one-hour attainment date are new programs and are surplus to the one-hour ozone SIP.**

Comment

NRG, the Section 185 Working Group, BCCAAG, Printing Industries, and OCC supported the use of TERP and I/M funds to credit a Fee Equivalency Account and offset the \$185 penalty fee. The Section 185 Working Group and BCCAAG stated that point source emissions accounted for only 31% of the NO<sub>x</sub> and 26% of the VOC emitted

in the HGB one-hour ozone nonattainment area, and it is reasonable to focus the area's §185 equivalent alternative program, to the extent practical, on other source categories such as mobile sources. TAB supported TERP as an equivalent alternative in lieu of new assessment on stationary sources and stated that the use of TERP resources is consistent with state statute to provide incentives for further emission reductions in nonattainment areas, particularly from mobile sources. TAB further stated that stationary sources have made enormous financial investments in emission controls and emphasis on mobile sources is appropriate. NRG commented that a mobile source equivalent alternative program is appropriate because the mobile source sector is now the largest contributor to ozone precursor emissions in the HGB one-hour ozone nonattainment area. The Section 185 Working Group and BCCAAG added that a substantial amount of the fees paid into TERP and I/M are used to reduce emissions and improve air quality in Houston.

### **Response**

**The commission agrees that the mobile source sector is a major contributor of emissions in the HGB one-hour ozone nonattainment area. Additionally, the commission concurs that TERP and I/M support air quality initiatives. The commission concurs that revenue associated with both TERP and LIRAP/LIP are appropriate to offset the FCAA, §185 fee because these programs have air quality improvement objectives set in state statutes and**

**are surplus to the one-hour SIP revision. The EPA approved similar programs in the SCAQMD's \$185 fee program.**

Comment

An individual stated that TERP funds are not predictable because the state legislature ultimately decides how to use TERP revenue.

**Response**

**The commission concurs that the amount of funds available for TERP may not be completely predictable from year to year; however, the predictability of annual TERP funding is not an issue because an annual demonstration of fee equivalency is required using the amount of funds actually collected in the area. For example, 2012 revenue will be used on the fee assessed for 2012 emissions, and this calculation will occur in 2014. Thus, the actual amount that will be credited is known at the time of the annual demonstration.**

Comment

Two commenters stated that the existence of funds collected for air quality

improvement in the HGB one-hour ozone nonattainment area does not absolve violators under FCAA, §185 of paying their penalty fee. One individual commented that vehicle inspection fees and sales taxes are not paid by residents so that businesses can pollute without paying penalties.

### **Response**

**As discussed elsewhere in this preamble, the §185 fee is not an indication that major stationary sources are exceeding their authorized permit emissions limits. Major stationary sources are subject to the FCAA, §185 fee because the HGB one-hour ozone nonattainment area has not yet demonstrated attainment of the revoked one-hour ozone standard of 0.12 ppm, not because a source is in violation of any applicable rule or permit. The EPA, in its approval of the SCAQMD and SJV programs, indicated that approved alternative programs are acceptable as a means of offsetting the FCAA, §185 fee imposed on major stationary sources, whether through the incentives created by a penalty fee levied on pollution sources, through other funding of pollution control projects, or through a combination of both. Consistent with that indication and the fact that the majority of anthropogenic NO<sub>x</sub> emissions in the HGB area are associated with mobile emissions, this rule allows funding collected for qualified programs that intend to directly reduce VOC and/or NO<sub>x</sub> emissions in the HGB one-hour**

**ozone nonattainment area to offset the FCAA, \$185 fee obligation. No change was made in the rule as result of these comments.**

#### Comment

Several commenters who supported enforcing the full penalty fee cited economic reasons. One individual stated that waiving the penalty fee could further the state's and nation's financial woes, and another stated that if companies violate FCAA, \$185, then they should at least help pay for state expenditures. One individual suggested that the revenue from the penalty fee could be used to fund education in Texas, and another offered that surplus I/M revenues should be used to fund education instead of offsetting penalty fees. One individual suggested that if the state has extra money, then taxes should be lowered. Two commenters suggested that money collected from full enforcement of the penalty should be invested in renewable energy projects. Another individual suggested that in addition to the full penalty fee, violating companies should pay for air quality-related medical expenses for HGB-area residents.

#### Response

**Revenue collected under this program will be placed into the state Clean Air Fund and restricted to clean air activities, which may include clean energy projects. Specific fund appropriation or projects have not yet been**

**identified. Additionally, prior to spending funds, the commission will need specific legislative authorization to spend the money, and the projects will require authorization. The FCAA, §185 does not require that fees collected from major stationary sources be spent on air or on any projects, but only requires that they be collected. Any FCAA, §185 fees collected from major stationary sources that are not appropriated will remain in the state Clean Air Fund without violation of the FCAA.**

**This rulemaking is adopted to meet a requirement of the FCAA, §185 because the area did not attain the one-hour ozone NAAQS by its attainment date. Assessing companies any additional fees or penalties is beyond FCAA, §185 requirements and outside the scope of this rulemaking. No changes were made as a result of these comments.**

#### Comment

The EPA stated that it cannot approve an alternative program for obligations arising from the 1997 eight-hour and 2008 eight-hour ozone standards. Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that the proposed rule should not be limited to the one-hour standard.

## **Response**

**This rulemaking addresses the HGB one-hour ozone area and the revoked one-hour ozone standard only. Guidance has not been issued by the EPA for a \$185 fee program under a non-revoked standard. The commission may consider a \$185 rulemaking for the eight-hour ozone standard as appropriate. The HGB area is not severe for the eight-hour ozone standard and, thus, is not subject to a \$185 fee program for that standard. No changes were made as a result of these comments.**

## Comment

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that the proposed equivalency programs do not comply with FCAA, §185 requirements and should not be allowed. Additionally, FCAA, §172(e) does not provide authority for an equivalent alternative to the \$185 fee. Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club also stated that the proposed equivalent alternative program flouts the TCEQ's responsibility under the FCAA and defeats the purpose of the statute. Comments suggested that the proposed rules should be revised to fulfill the purpose of FCAA, §185.

## **Response**

**FCAA, §185 requires states to assess a fee on major stationary sources until the area is redesignated as attainment. However, the one-hour ozone standard was revoked and replaced with the more protective 1997 eight-hour ozone standard. The EPA indicated that it will not redesignate areas under the revoked one-hour standard.**

**FCAA, §172(e) is an anti-backsliding provision of the FCAA that requires regulations developed to ensure that controls are "not less stringent" than those applied prior to relaxing a standard where the EPA has revised a NAAQS. The EPA, in its 2010 guidance memo (available at <http://www.epa.gov/glo/pdfs/20100105185guidance.pdf>), stated that "although §172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply the same principle for the transition from the one-hour NAAQS to the 1997 eight-hour NAAQS. As part of applying the principle in FCAA, §172(e) for purposes of the transition from the one-hour standard to the 1997 eight-hour standard, EPA can either require states to retain programs that applied for purposes of the one-hour standard, or alternatively can allow states flexibility to adopt alternative programs, but only if such alternatives are "not less stringent" than the mandated program."**

**Programs or fees surplus to the one-hour SIP revision are considered by EPA guidance and in subsequent rulemaking to be equivalent to the \$185 fee. See the final published decisions for SCAQMD published in the December 14, 2012, issue of the *Federal Register* (77 FR 74372) and SJV published in the August 20, 2012, issue of the *Federal Register* (77 FR 50021). Based on the guidance and published determinations, this rulemaking establishes a program that credits funds from programs that are surplus to the one-hour SIP and that contribute to reductions in VOC and NO<sub>x</sub> emissions. Any portion of the area's \$185 fee obligation not covered by credits in the Fee Equivalency Account will be invoiced to subject major stationary sources. In this manner, the fee obligation from the HGB one-hour ozone nonattainment area will be fully met. No changes were made as a result of this comment.**

Comment

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club commented that the equivalent alternative program in this rulemaking does not qualify as "not less stringent" because it does not cause an incentive to reduce pollution. Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club added that the equivalent alternative program fails to establish new incentives to decrease ozone pollution.

### **Response**

**FCAA does not require that new incentives be established. The fee itself is not required to have an emission reduction component at all but the TCEQ has identified alternative revenue sources that do lead to air emissions reductions in the HGB area. As discussed elsewhere in this preamble, TERP and LIRAP/LIP continue to fund new projects to reduce ozone pollution in the HGB one-hour ozone nonattainment area. No changes were made as result of this comment.**

### Comment

TCC and TxOGA supported prorating a fee on affected major stationary sources based on the unpaid portion of the fee obligation from the Fee Equivalency Account. The Section 185 Working Group and BCCAAG noted that fees charged to affected major stationary sources are used as a backstop to this rule's equivalent alternative program.

### **Response**

**The commission concurs with this comment. Major stationary sources in the HGB area are responsible for paying the fee obligation not covered through the identified sources of alternative revenue ensure that the entire**

**obligation is met annually.**

Comment

The EPA commented that the rule should include annual deadline dates by which the state will conduct an equivalency demonstration showing that the adequate equivalency credits were available in the Fee Equivalency Account for the applicable calendar year to meet the area's §185 obligation.

**Response**

**The commission added a date in §101.104 for the completion of the equivalency demonstration to the rule. Emissions data for 2012, which will be used for the first fee assessment, are not available until after December 31, 2013, in compliance with the commission rules implementing EPA emissions inventory requirements. Thus, the first year a fee will be assessed is on 2012 emissions and an equivalency demonstration will be completed on 2012 revenue that was collected for TERP and LIRAP/LIP. The first demonstration that will provide the amount of revenue that is qualified to offset the fee obligation and the amount that is due from major stationary sources will be completed by December 2014 and annually thereafter until the rule no longer applies to the HGB one-hour ozone nonattainment area.**

Comment

The EPA stated that the formula for the surplus determination in the alternative fee account may result in a negative prorated fee in §101.104.

**Response**

**The commission thanks the EPA for noting this. Although the resulting prorated number could have been a negative value, its absolute value would be applied to an assessed fee. Although the EPA's suggested use of the mathematical absolute symbol would clarify the issue, the commission opts to adjust the language in the rule by reversing the order of the calculation as a simpler, more understandable correction. The language in the rule is changed to provide this clarification.**

*Baseline Amount*

Comment

NRG and GHP supported the flexible baseline calculations in the rule including using a historical period similar to the approach used for the NSR. However, Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club did not support the proposed language for a company to select its baseline amount based on a historical

perspective.

### **Response**

**The commission appreciates the comments. FCAA, §185(b)(2) specifically allows the determination of a baseline amount using a period of more than one calendar year if a source has emissions that are irregular, cyclical, or otherwise vary significantly from year to year. No changes were made as result of these comments.**

### **Comment**

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that the proposed rule allows sources to use allowables during an alternative period to calculate baseline amounts.

### **Response**

**The commission disagrees with this comment. The language in §101.106 requires the baseline amount to be computed as the lower of baseline emissions or total emissions allowed under authorizations applicable to the source in the attainment year. Thus, sources are restricted to using**

**allowables from all authorizations effective in the attainment year in the comparison to determine a baseline amount. Only baseline emissions, which are actual annual and planned MSS reported in the emissions inventory may use a historical period if the actual emissions are irregular or vary significantly. Thus, the rule language allows adjustments only to the baseline emissions. Allowable emissions applicable to the source in the attainment year are considered separately from and not part of the baseline emissions.**

**Further clarification on baseline emissions can be obtained from the definition in §101.100(6) that defines a baseline emissions as the emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.110. The definition adds that the adjustments allowed under §101.106(b)(2) are for the baseline emissions, not the baseline amount. No changes were made as a result of this comment.**

Comment

The TPA requested that the phrase "to compute an average baseline emissions amount (tons per year) for the major stationary source" be removed from §101.106(b)(2) for

clarity.

### **Response**

**The commission intends the baseline amount to be based on an annual (tons for a year) amount for VOC and/or NO<sub>x</sub> emissions for a major stationary source. The commission is concerned that a regulated entity that selects a 24-month period may question the baseline amount's units of measure. No changes were made as a result of this comment.**

### Comment

NRG, the Section 185 Working Group, BCCAAG, OCC, TCC and TxOGA, LyondellBasell, and Calpine supported the use of any 24-month period in ten years to determine a baseline amount. Calpine added that such a selection for an alternative baseline would not penalize sources for proactive installation of emission control equipment.

### **Response**

**The commission thanks the commenters for their support.**

### Comment

OCC requested additional guidance on how to calculate reductions for non-compliant emissions in a baseline amount because, due to staff turnover, making the appropriate adjustments for some historical periods may be difficult.

### **Response**

**Supplying guidance is not within the scope of this rulemaking; however, it is noted that if the data are not available to make a baseline amount determination for a historical time-period, a more recent time-period may be appropriate.**

### Comment

The EPA indicated that the baseline period selected for each source should apply to both VOC and NO<sub>x</sub> emissions from that source unless the VOC and NO<sub>x</sub> emissions result from independent operations that have separable normal source operation conditions.

The Section 185 Working Group and BCCAAG supported aggregated baseline amounts from multiple sites. The Section 185 Working Group, BCCAAG, and LyondellBasell commented that this rulemaking should allow different timelines for each company in an aggregated group. OCC and TCC and TxOGA recommended striking the phrase requiring the same time period for aggregating baseline amounts, adding that a

company choosing to aggregate would not choose a single 24-month period. The period of highest VOC emissions may differ from the period of highest NO<sub>x</sub> emissions.

The Section 185 Working Group and BCCAAG commented that the rule was unclear what baseline period would be required if an EGU were included in an aggregated group. The Section 185 Working Group and BCCAAG also requested that either the TCEQ delete the timeline requirement in aggregated groups or not restrict aggregating sources that include an EGU to a five-year historical period for baseline determination.

### **Response**

**If a group of major stationary sources chooses to aggregate their emissions to determine a baseline amount, that group of sources is doing so because their activities were combined as one overall project or goal to target and cost-effectively reduce emissions in the HGB one-hour ozone nonattainment area. NSR rules allow development of a common baseline period for a project. In complying with the intent of NSR, this rulemaking restricts a group of major stationary sources choosing to aggregate to a single 24-month or baseline year. That selected period is applicable to each of the major stationary sources in the aggregating group. If a major stationary source included in the group cannot use the same 24-month**

**period or baseline year for any reason (e.g., due to insufficient data or being an electric utility steam generating unit), that major stationary source may not aggregate with other major stationary sources. Alternately, the group of aggregating major stationary sources must select a different baseline period that applies to all major stationary sources in the aggregating group.**

**Allowing separate baseline amount periods for VOC and NO<sub>x</sub> is consistent with NSR review process of evaluating impacts on a pollutant-by-pollutant basis. No change was made as a result of these comments.**

#### Comment

Petrologistics requested clarification that its facility is eligible to use the flexibility of §101.106 for its baseline amount calculation because the site was not in operation for a period of time during the attainment year. Alternately, the company requested that language be added to this rulemaking to clarify that facilities temporarily idle in an attainment year qualify as "irregular, cyclical, or otherwise varying."

Magellan requested that language be added to specifically allow roof landing losses in the baseline amount because a permit may have been submitted prior to the attainment

date, but the permit may not have been issued until after the attainment date. The company added that including these emissions would be similar to allowing emissions from new sources or new units in a baseline amount because they were not permitted by the attainment date.

### **Response**

**Specific determination regarding the commenter's specific source applicability to this section is outside the scope of this rulemaking. A case-by-case determination will be necessary; however, the commission understands that there may be many reasons why a company may have emissions that vary significantly from year to year, including being temporarily idle for maintenance, retrofitting, or updating of equipment. Specifying just one type of situation that causes a source to have irregular, cyclic, or significantly varying emissions in a rule may imply exclusion of other situations, and this is not the commission's intent. Similarly, the commission declines to add language specific to one type of activity that generates emissions. Inclusion of just one type of activity may imply exclusion of other types, and this is not the commission's intent. No change was made as a result of these comments.**

Comment

The EPA stated that to be consistent with FCAA requirements, the emissions statement in §101.100(6)(B) should be revised to read: ". . . emissions that vary *significantly*."

**Response**

**The commission made this change in response to the comment.**

Comment

The Section 185 Working Group and BCCAAG requested adding the word "major" in the definition in §101.100(11) *Major Stationary Source* to add clarity in the definition.

**Response**

**The word "major" in the definition of major stationary source is unnecessary because the meaning of a major stationary source is defined in §116.12. The definition was, however, revised to remove the phrase "{A} source" for clarity and for consistency in format with other definitions.**

Comment

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that emissions used to determine an affected source's baseline must be adjusted downward to account for noncompliant emissions. The EPA commented that according to its guidance and for consistency with language in NSR rules, a baseline amount determined using emissions from a period before the area's attainment deadline must be adjusted downward to reflect any legally enforceable emissions limits that existed in the attainment year and that a baseline amount must be adjusted downward to account for any allowances held by a source in the attainment year. The HGB SIP relied on reducing HECT and MECT allowances to reduce ozone precursors in the HGB one-hour ozone nonattainment area. Those allowances were a requirement in the one-hour ozone SIP. For sources covered by cap and trade programs, a source's legally enforceable emission limits in the attainment year are determined by the allowance system. For sources covered by the trading programs, the baseline amount would be the lower of the actual emissions or the allowances held by the source in 2007.

### **Response**

**The commission concurs that baseline amount should be adjusted downward to adjust for noncompliant language and did include language requiring this in the proposed rule in §101.106(c)(2).**

**A downward adjustment for emissions that would have exceeded a legally enforceable permit emissions limit was addressed in the proposed preamble language; however, it was not included specifically in the proposed rule. Specific language was added to this rulemaking to include the requirement that baseline emissions must be adjusted downward to reflect any legally enforceable permit emissions limits that existed November 15, 2007.**

**However, the commission disagrees that the baseline should be adjusted downward to account for reductions in allowances. This downward adjustment would eliminate a site's ability to select a historical 24-month period. It would over-restrict a company's ability to compare actual emissions and authorized emissions because the area aggressively reduced emissions through support of a cap and trade program.**

**Many permit authorizations that were effective in 2007 were effective for a period of time preceding the attainment date. This authorization coverage spanning several years allows a company to select historical, actual emissions to compare with its allowable limits effective on the attainment date. This is the process allowed in EPA's 2008 and 2010 guidance memos**

**for sources that are cyclic, irregular, or have emissions that significantly vary from year to year. A ten-year historical period is allowed in the EPA's §185 guidance and in NSR rules for non-EGU. This period is limited to five years for EGU.**

**The HECT and MECT programs annually reduced the allowances for each company. The 2007 MECT allowances for the HGB one-hour ozone nonattainment area were approximately the amount of actual emissions from 2006. Thus, restricting a source to only the allowances allocated in 2007 would deny the source the ability to use a historical 24-month period to assess its emissions.**

**Additionally, because restricting or limiting a source to its 2007 allowances restricts that source to its actual emissions level from 2006, this additional downward adjustment for a baseline amount is, in essence, requiring an additional 20% emissions reduction post-attainment to avoid paying a fee. Under that condition, sources that reduced emissions the most are held to a higher standard than originally proposed under FCAA, §185, which allows sources to use a historical period for determining a baseline amount. Penalizing sources that have made the most emission reductions prior to**

**the attainment date is not consistent with the intent of the FCAA, \$185 penalty fee.**

**Additionally, to effectively manage allowances, some companies move allowances between sites. Limiting a site to the allowances held may over-restrict a site that has no excess allowances while another site may have overly-generous allowances (when compared with actual emissions).**

**Limiting a site to only the allowances held would again eliminate the ability of a site to use historical, actual emissions to establish a baseline amount. Because allowance shifting occurred prior to proposal of this rulemaking, companies were not able to take \$185 baseline amount calculations into consideration when making management decisions and may be unduly penalized for some of these transfers.**

**The commission's rule does require other downward adjustments in the emissions for non-compliant emissions that exceed the permit authorization or to reflect limitations with which the source was required to comply by November 15, 2007. No changes were made as a result of this comment.**

Comment

Magellan supported allowing a source to include emissions limits authorized by a permit issued for which the application was administratively complete by December 31, 2007, in its baseline amount determination.

**Response**

**The commission thanks Magellan for its support.**

Comment

LyondellBasell requested clarification concerning whether a site such as their storage facility, which falls under the list of sources in §116.12 that do not calculate fugitives in determining major source applicability, will be part of the TCEQ's §185 database and covered by the fee program.

**Response**

**The commission considers individual determinations regarding rule applicability during the rule adoption process to be outside the scope of this rulemaking. The commission uses the definition of a major stationary source in §116.12, and source categories listed in §116.12 are not required to**

**count fugitive emissions for determining major source applicability. No changes were made as a result of this comment.**

*Baseline Amount Aggregation*

Comment

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that the proposed rules allow companies to inflate their baseline amount and noted that site aggregation was not considered in FCAA, §185.

**Response**

**The commission agrees that site aggregation was not discussed in the plain language of FCAA, §185. However, the one-hour ozone standard was revoked, and the EPA issued guidance allowing states to propose and adopt equivalent alternative programs for areas with a revoked standard. This rulemaking allows companies to aggregate sites under common control because to control emissions under the SIP, companies may have targeted emissions reductions at one source to more cost-effectively reduce emissions. These commonly controlled major stationary sources were effectively combined under SIP actions, including banking and trading activities, to reduce ozone-forming emissions. This rulemaking continues to**

**allow that combination. No changes were made as a result of this comment.**

Comment

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club commented that FCAA, §182(f) requires that rules that apply to VOC must also apply to NO<sub>x</sub> and that the baseline amounts should thus be calculated separately.

**Response**

**The commission does not interpret FCAA, §182(f) to require that SIP rules apply *separately* to VOC and NO<sub>x</sub> but to apply to VOC and *also* NO<sub>x</sub>. Thus, there is no requirement to calculate the baseline amounts separately. The adopted rule requires major sources of NO<sub>x</sub> to also be subject to the fee program, and this requirement meets the provision of FCAA, §182(f). No change was made as a result of this comment.**

Comment

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that the penalty fee is targeted at major stationary sources only and that emissions from minor stationary sources may not be included in baseline amounts.

## **Response**

**Section 101.101 states that this rule applies to all major stationary sources of VOC and NO<sub>x</sub>. It is possible that a source that is major for one of the pollutants might not be major for the other pollutant and a \$185 fee could be due under some circumstances on the pollutant that does not meet the major source definition. This would be the case if the "non-major" pollutant were aggregated. For example, if VOC were aggregated with NO<sub>x</sub> at this major stationary source, a \$185 fee is due on both pollutants. Or, if this major stationary source were aggregated with other major stationary sources under common control for both pollutants, both VOC and NO<sub>x</sub> from all sources in the group must be included in the baseline amount. For this group, all actual VOC and NO<sub>x</sub> emissions from all major sources in the group will be included in the \$185 fee calculation. Thus, a major stationary source that is major for only one of the pollutants might include the "non-major" pollutant in its baseline amount.**

**The commission does not anticipate that minor sources (sources that are not major for either VOC or NO<sub>x</sub>) would be included in a baseline amount and then be subject to fees. No change was made as result of this comment.**

Comment

NRG, LyondellBasell, Magellan, and TPA supported allowing aggregation of multiple sites under common control and aggregation of VOC and NO<sub>x</sub> in determining the baseline under the \$185 fee program.

**Response**

**The commission thanks the commenters for their support.**

Comment

The Section 185 Working Group, BCCAAG, and Magellan suggested clarifying language in §101.107 to allow sources determining an alternative baseline under §101.108 to also combine their baseline amounts with other sources or to aggregate ozone precursors.

**Response**

**The commenters are correct that this is the commission's intent. The commission has revised §101.107 to specifically clarify that major stationary sources that use the provisions of §101.108 may aggregate VOC and/or NO<sub>x</sub> emissions with other major stationary sources under common control. The**

**commission changed the rule to reflect this clarification.**

Comment

The Section 185 Working Group and BCCAAG stated that through guidance in Attachment C: *Response to Clean Air Act Advisory Committee Taskforce Options*, of its 2010 guidance memo, the EPA has provided states the discretion to allow sources to use combined VOC and NO<sub>x</sub>.

**Response**

**The commission agrees that the EPA has provided guidance to allow flexibility for major stationary sources. In addition, in its December 12, 2012, approval of the SCAQMD's Rule 317, the EPA allowed aggregation of VOC with NO<sub>x</sub> in a baseline determination. EPA's guidance states that aggregation is allowed if the state relies on a definition of major stationary source "that is consistent with the CAA as interpreted in our {EPA's} existing rules." The commission is using a definition for major stationary sources that is consistent with the EPA's existing rules.**

Comment

The Section 185 Working Group and BCCAAG stated that California requires multiple sites to aggregate their baseline if the fee rule is assessed per SCAQMD Rule 317, Section (c) (6)(B).

**Response**

**The commission interprets the SCAQMD rule to state that sources may aggregate, but it is not required. Regardless, the EPA approved this rule and its provision is similar to the commission's rule.**

Comment

The Section 185 Working Group and BCCAAG stated that a multiple site baseline and combined VOC and NO<sub>x</sub> baseline would not require the involvement of TCEQ staff in generating, certifying, or managing trades of the various credits and allowances.

**Response**

**The commission will rely on existing banking and trading program staff to verify if any credits and allowances are available and used appropriately to offset the §185 fee obligations. The §185 program will not generate, certify, or manage trades as these functions are not required for this program. No**

**change was made as a result of this comment.**

Comment

Calpine and TPA supported allowing facilities under common control to calculate fees based on VOC and/or NO<sub>x</sub> emissions of all the facilities in the nonattainment area.

Calpine noted that this approach was consistent with the existing programs. OCC, TCC and TxOGA, and GHP supported aggregation of sites and ozone precursors, and GHP added that aggregation is consistent with EPA guidance and SIP-approved actions in other parts of the country.

**Response**

**The commission thanks the commenters for their support and agrees that the aggregating major stationary sources under common control for determining baseline amounts and fee obligation is consistent with the Texas SIP-approved cap and trade programs and SIPs.**

Comment

The TPA requested that additional language be added to §101.107(a) to clarify that aggregation is allowed for sources under common control in the HGB one-hour ozone

nonattainment area.

### **Response**

**The commission's intent is to allow major stationary sources under common control in the HGB one-hour ozone nonattainment area to be able to aggregate these sources for baseline amount determinations and subsequent fee obligations. To clarify this intent, the commission added the phrase "under common control" to paragraphs §101.107(a)(1), (2), and (4).**

### **Comment**

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club did not support aggregation of sites because they thought it would prevent proper accounting of a source's fee obligation.

### **Response**

**The commission disagrees with this comment and will conduct a proper accounting of each major stationary source's baseline amount and fee obligation. Each major stationary source's baseline amount will be calculated based on a comparison between its permit limits (allowables)**

**and emissions reported in the emissions inventory. If the major stationary source is grouped with additional major stationary sources, the aggregated amount will be determined based on the baseline amounts from those individual major stationary sources. All baseline amounts will be recorded and tracked by the commission.**

**Actual emissions from each major stationary source will be used to determine the applicable fee obligation. These actual emissions are submitted by the companies annually and recorded for each major stationary source in the state's inventory database. If a source is part of an aggregating group, each member's actual emissions will be added together and will be the basis of the group's fee obligation. No changes were made as a result of this comment.**

*Adjustment of Baseline Amounts*

Comment

The EPA noted that the MSS rule, §101.222(h), was disapproved in November 2011, and EPA indicated that it cannot approve a portion of a rule that relies on a portion of a rule that was disapproved.

## **Response**

**As a result of this comment, the commission removed this method to incorporate planned MSS emissions that were authorized after the attainment date from a baseline amount calculation. Planned MSS emissions that were authorized prior to the attainment date and were reported in the emissions inventory may still be included in the baseline amount determination. The rule was changed as a result of this comment.**

## Comment

The Section 185 Working Group, BCCAAG, TCC and TxOGA, and TPA supported including authorized MSS emissions in a baseline amount calculation. However, Oiltanking stated that the calculation for including MSS emissions in a baseline amount was overly complex, and the corporation suggested that the TCEQ delete the proposed §101.108(a) and instead allow the authorized MSS emissions and/or newly authorized emission limits to be added to the preexisting emissions limits to determine source-wide allowable emissions. Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club did not support including MSS emissions in a baseline amount because MSS emissions are unauthorized.

## **Response**

**The commission thanks the commenters for their comments and suggestions; however, the referenced section language relating to planned MSS emissions authorized after the attainment date has been removed from the rule.**

Comment

The EPA noted that the approach for developing baseline emissions for a new major stationary source or new construction at an existing major stationary source appears reasonable but added that new sources cannot be exempted altogether.

**Response**

**The commission thanks the EPA for its support and notes that the adopted rule does not allow new sources to be exempted.**

Comment

Calpine and OCC supported the proposed approach for including new sources in a baseline amount. Printing Industries, TCC and TxOGA, Calpine, and LyondellBasell suggested exempting these units from fees outright because they are already well controlled. OCC suggested that well-controlled sources should be exempted from the fee

program for a minimum of ten years following installation of BACT or LAER controls because the best potential control has been installed.

TCC and TxOGA added that industry has already offset their emissions at a ratio of 1.3 to 1, and there is no practical way to further reduce emissions. Printing Industries also noted that the approved SJV \$185 fee program provides such an exemption and, like SJV, the TCEQ should consider assessing a fee on mobile sources to cover the obligation.

### **Response**

**The commission recognizes that these sources are well controlled, and further reductions in emissions may not be achievable. However, the FCAA, §185 does not allow for excluding sources outright. The commission also does not elect to exclude these sources using provisions under FCAA, §172(e) because the fee from these major stationary sources would still be due and must still be collected.**

**The commission does not have the authority to assess a fee directly on mobile sources as is done in the SJV \$185 fee program. The commission is adopting rules that may offset the fee for all major stationary sources with**

**revenue from mobile sources through TERP and LIRAP/LIP. No change was made as a result of these comments.**

#### Comment

The TPA commented that sources that were not major sources or that became major sources as of the attainment year should be exempt from the rule.

#### Response

**Under a strict interpretation of the plain language of FCAA, §185, no exemption is allowed for new emissions units at existing major stationary sources after the attainment date. It is the commission's understanding that because FCAA, §185 requires a baseline amount to be based on the attainment year, these emissions units would have no baseline amount. Their fees would be due on the entirety of their emissions without benefit of the baseline amount offset allowed by the federal rule. Although guidance from the EPA allows states to exempt these new units or sources from the program, it also requires that the fee normally collected from these sources remains due and must be collected from other sources. Thus, this rulemaking allows these new sources to establish baseline amounts based on the first year of operation and to be subject to the fee program. No**

**change was made as a result of these comments.**

Comment

NRG supported providing a baseline for new or modified units based on the first full year of normal operations. TPA, TCC, and TxOGA commented that new sources were not fully operational during their first year and recommended that the TCEQ use the first year of data associated with only normal operations or after the first two years of actual operations for establishing a baseline amount. Shakedown emissions can last 180 days and can occur in stages for multiple units in a project. The Section 185 Working Group and BCCAAG supported the TCEQ's approach for new units but went on to suggest that a calendar-year baseline should be set using the first full year of representative operations following any applicable shakedown periods.

The Section 185 Working Group and BCCAAG recommended that the proposal be modified to ensure that baselines for new sources are calculated based on normal emissions, to accommodate nonattainment NSR-authorized changes to existing units, and to accommodate incremental construction and operation of new major sources.

The Section 185 Working Group and BCCAAG requested that the TCEQ clarify whether the baseline will be calculated based on the first 12 months of operation for a new source

or unit, or whether it will be calculated based on the first calendar year of operation.

### **Response**

**This rulemaking allows new sources to use the first 12 months of operation in their baseline calculations, but they are not restricted to a calendar year.**

**This approach is consistent with a source being allowed to use any historical 24-month period to determine a baseline amount, where the 24-month period does not need to coincide with a calendar year.**

**After 24 months of operation, a site may change its baseline amount by comparing more representative baseline emissions with the permit limits. Because this change is being allowed, the staged or non-routine nature of a shakedown period should be accommodated while allowing a timely baseline determination for the fee program. No change was made as a result of these comments.**

### **Comment**

The Section 185 Working Group, BCCAAG, TCC, and TxOGA requested that the TCEQ include the ability for sources to estimate a new baseline amount if existing equipment is modified for additional utilization as part of a new project.

## **Response**

**The commission is adopting a method to determine a baseline amount for emissions units authorized after the attainment date because these new units did not have authorized limits or actual emissions in 2007 to include in the major stationary sources baseline amount. Thus, under the plain language of the FCAA, §185, a major stationary source would set a baseline amount for these units at zero and would bear the burden of paying fees on all emissions from these units despite any offsets obtained or the use of maximum controls under LAER. Alternatively, emissions and authored limits from existing emissions units authorized prior to the attainment date have a baseline amount because they were included in the major stationary sources baseline amount determination. This baseline amount is used to offset the penalty fee obligation. No changes were made as a result of this comment.**

## **Comment**

TPA recommended that the baseline amount be subject to review under a Motion for Reconsideration under 30 TAC §55.201 no later than 30 days after the date on which the executive director has mailed a determination of the baseline amount to the owner or

operator.

### **Response**

**The commission does not support a review under a Motion for Reconsideration as necessary on the establishment of the baseline amount because each company will estimate the baseline amount and submit the estimate to the commission. The executive director will approve or disapprove the submitted baseline amount from each company. No change was made as a result of these comments.**

### *Baseline Amount Estimation Due Dates*

#### Comment

TPA requested the date for determining a baseline amount should be extended from 120 days after adoption of this rulemaking to 180 days.

### **Response**

**The commission will provide 120 days after adoption of this rulemaking during which affected sources will determine and submit their baseline amounts. This is sufficient time to provide a baseline estimate to the**

**agency. Additionally, affected sources had six months after proposal to begin collecting and analyzing data. No changes were made as a result of this comment.**

Comment

The OCC, TCC, and TxOGA requested that the TCEQ extend the time a site is given to change its baseline amount when equipment ownership transfers from one source to another. This rulemaking grants 90 days, and the commenters suggested 180 days.

**Response**

**The commission recognizes that a significant amount of activities occur when equipment changes ownership. However, the commission does not support extending the deadline because both sources need to have the baseline data available for fiscal planning of fee obligations, and the commission requires the data for obligation accounting as soon as possible. No changes were made as a result of this comment.**

*Fee Program Termination, Abeyance or Exemption*

Comment

The Section 185 Working Group and BCCAAG requested that the TCEQ include language to cease the \$185 fee program based on any EPA rulemaking to stop the fee obligation.

### **Response**

**Language was added to §101.118 to cease the fee program based on any action or rulemaking by the EPA to end the fee program.**

### Comment

The TPA supported cessation of the fee program, including abeyance of the fee, if future circumstances warrant because it is correct for the TCEQ to anticipate the possibility that the HGB one-hour ozone nonattainment area will meet the one-hour ozone standard while continuing to be burdened by FCAA, \$185 requirements. That continued burden, carried in whole or in part by major stationary sources, would be based solely on the EPA's failure to make redesignations under a revoked standard. NRG supported prompt termination of fees and abeyance of the fees once data suggests attainment has been reached. The Section 185 Working Group, BCCAAG, and LyondellBasell supported placing the fee in abeyance in the event the area is demonstrating attainment, including exceptional events and international emissions. TCC and TxOGA supported granting the executive director the authority to place the fee in abeyance.

## **Response**

**The commission thanks the commenters for their support of fee abeyance by the executive director if the area has quality-assured data indicating the area is attaining the one-hour ozone standard. The commission supports prompt termination of the fee and recognizes that there is no defined path for termination of the fee. Thus, the commission supports ending the program on any action by the EPA to terminate the program and placing the fee in abeyance when the area demonstrates attainment. The commission has added language clarifying that the executive director can hold the fee in abeyance if three years of quality-assured data, excluding days, demonstrate that the design value calculation did not exceed the one-hour ozone standard because of exceptional events. The rule is changed as a result of this comment.**

## Comment

The EPA stated that FCAA, §185 requires that fees be paid each year until the affected area is redesignated to attainment for ozone. Thus, cessation of fees is dependent on EPA action. The EPA went on to state: "Because we are no longer redesignating areas to attainment for the one-hour ozone standard we intend to take other action through

rulemaking to stop the fee obligation. Fees must be paid to the State until EPA, through rulemaking, suspends the fee obligation. Fee collection may not be 'placed in abeyance' as described in the section." The EPA added: "EPA and TCEQ should work together in developing an approach consistent with the Clean Air Act to determine that equivalent action to redesignation is taken for the area to terminate the program."

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that the conditions proposed for ending the fee rule are not consistent with FCAA, §185 and that abeyance of the fee is not supported by statute.

### **Response**

**The commission agrees that this rulemaking incorporates language not specifically included under FCAA, §185. This is because language in FCAA, §185 ends the program after the EPA redesignates the area to attainment for the ozone standard. The one-hour ozone standard, on which this rulemaking is based, has been revoked, and the EPA no longer redesignates areas under that standard. The EPA has not yet indicated how it may end a §185 fee for a revoked standard, therefore the commission included language in this rulemaking to promptly cease fee collection based on data demonstrating compliance with the applicable standard to minimize the**

**potential of fee collection for years prior to final action terminating the fee requirement.**

*Fee Calculation*

Comment

The EPA suggested that the TCEQ estimate the penalty fee following a procedure outlined in Attachment B: *Inflation Adjustment for Section 185 Fees* of the EPA's 2010 guidance memo.

**Response**

**The fee calculation was revised to reflect the 40 CFR Part 70 Presumptive Minimum Fee Basis described in Attachment B of the EPA's 2010 guidance memo. The 40 CFR Part 70 fee is the rate used to calculate emissions-based fees for 40 CFR Part 70 permit programs.**

**The adopted fee calculation is similar to the one proposed by the commission that annualizes the fee rate over two fiscal years. Rather than calculating the rate directly from the CPI, the adopted method uses the 40 CFR Part 70 fee rate published by the EPA. The 40 CFR Part 70 fee already has the CPI adjustment incorporated into it. The rule was changed as a**

**result of this comment.**

Comment

The Section 185 Working Group, BCCAAG, TCC, and TxOGA supported invoicing the first fee for calendar-year 2012 emissions.

**Response**

**The commission thanks the commenters for their support.**

Comment

Calpine requested that the timeline and processes for issuing penalty fee invoices be included in the rule language. The EPA also commented that the rule should include an annual major source fee invoice and collection schedule.

**Response**

**The commission does not include processes in its rule language. Fees will be estimated based on emissions data available to the commission, and the invoices will be issued in the same manner as other invoices issued by the agency.**

**For the first year's assessment, baseline amount information is due 120 days after adoption of the rule. This due date is anticipated to be October 2013. Sufficient time is required, after baseline amounts have been submitted to the agency in fall of 2013, for staff to review these data, perform the fee equivalency determination, and determine the fee amount prior to invoicing. The actual 2012 emissions data from the emissions inventory will be available in January 2014. The area's FCAA, \$185 fee will be calculated based on the baseline amounts from all the sites subject to the rule and the 2012 emissions inventory.**

**The first fee will be invoiced by the end of 2014 and will be due from companies 30 days after the invoice date as described in §101.117, Compliance Schedule.**

**To support the invoice date, a deadline of July 31st in a invoicing year was added for completion of all trades and submission of documentation relating to a site's requested use of an equivalent alternative obligation under §101.120. The first invoice will be sent in December 2014 for 2012 emissions so the first deadline for completion of trades relating to the \$185**

**fee program is July 31, 2014. The rule has been changed to include the invoice date and the deadline for completing trades or funding SEPs.**

Comment

OCC requested that the time allowed for a source to pay be extended from 30 to 60 days, and TAP requested the time be extended to 90 days.

**Response**

**Thirty days is consistent with other fees assessed by the commission. No changes were made as a result of this comment.**

*Fee Retroactivity*

Comment

NRG supported prospective collection of the fee starting with 2012 emissions. The Section 185 Working Group, BCCAAG, and TPA commented that collecting fees on any past year would be retroactive rulemaking. The Section 185 Working Group and BCCAAG went on to state that retroactive fee collection would be impermissible under federal and state law. OCC supported no retroactivity for assessing a fee. TCC referenced that a fee was not required from Baltimore after 2008 and prior to its designation as

attainment.

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club commented that the retroactivity concern is misplaced and that FCAA, §185 has an express conveyance of power to assess the fee from the year after the attainment year. Fees, the groups commented, can be collected for 2008 through 2011 even after rule adoption because federal law says the fees are due "for" not "in" each calendar year.

### **Response**

**In its June 12, 2012 determination that Baltimore failed to attain the one-hour ozone NAAQS, EPA stated: "While it is true that the Clean Air Act provides that both reclassification and penalty fees are consequences of failure to attain the ozone standard, the D.C. Circuit in *{Sierra Club v Whitman, 285 F.3d 63}* recognized that these weighty consequences are not triggered until EPA makes a determination, after notice and comment rulemaking, of failure to attain. In that case, the Court also rejected the view that adverse consequences from the determination should be imposed retroactively, especially if it would, as here, subject the states to additional burdens caused by retroactive requirements that they were not given notice of prior to conclusion of the rulemaking process." (77 FR 34810 and 34815)**

**Like the situation in Baltimore and the Sierra Club case, several events occurred that show Texas and industry did not have adequate notice that a penalty fee program would be imposed until as late as 2012. The background section of this present rulemaking describes the uncertainty of FCAA, §185 applicability resulting from the *South Coast* decision. The commission withdrew a previous penalty rule in 2010 after the EPA issued its "termination determination" memo in January of that year. That memo was subsequently overturned by the D.C. Circuit Court in 2011, but only after TCEQ submitted a request to the EPA to terminate the fee obligation. The actual trigger for the penalty fee - a finding of failure to attain the standard - was not finalized by the EPA for the Houston area until June 19, 2012. As the EPA further clarified in that action, the finding was for the "strictly limited purpose of effectuating specific 1-hour ozone anti-backsliding requirements." {e.g., the §185 penalty fee}. (77 FR 36400 and 36402) The commission agrees with the D.C. Circuit Court, and EPA's previous determinations that the burdensome consequences of the penalty fee should not be imposed retroactively but only after proper notice has been given. Because the 2012 finding triggered the penalty program obligation, it is reasonable for the commission to impose the fee beginning in that year and not earlier. The commission agrees that the most recent**

**quality-assured emission inventory year is the appropriate year to begin assessing fees. No changes were made as a result of this comment.**

Comment

The EPA stated that because the area did not qualify for an exemption for the attainment year as described in §101.119, Exemption from Failure to Attain Fee Obligation, the extension year provision is no longer available for the one-hour standard and the provision should be removed for clarity.

**Response**

**The commission thanks the EPA for the clarification and removed §101.119.**

*Offsetting a Fee with Equivalent Alternative Obligation*

Comment

NRG supported the use of fee alternatives, including the retirement of emissions credits and allowances. The TPA supported using SEPs to offset the \$185 fee obligation. However, the EPA stated that money spent on SEPs used to offset enforcement penalties may not be used to offset the FCAA, \$185 fee obligation. The EPA added that it could approve the use of SEPs that do not offset enforcement penalties.

## **Response**

**The commission thanks the commenter for its support. As a result of the EPA's comment, the commission has revised the rule to reflect that the portion of a SEP that is used for offsetting an administrative penalty may not be used to offset a \$185 fee.**

## **Comment**

Air Alliance Houston, Environmental Integrity Project, EDF, and Sierra Club stated that SEP funds should not be rolled over because it defeats the incentive to reduce emissions.

## **Response**

**EPA guidance allows alternative programs to be used to offset an area's \$185 penalty fee. A major stationary source is only obligated to pay the fee due and is not obligated to pay more than the required fee in any year. It is possible that a company may opt for funding a SEP project that requires funds in excess of its \$185 fee obligation for a given year. Therefore, a program that allows funds a company pays for a SEP to roll over provides an incentive for companies to fund larger projects that improve air quality. Not allowing a rollover could induce a company to select a smaller project**

**that is limited to only the amount of fee that is due. This approach is intended to increase incentives and options to reduce emissions.**

#### Comment

The EPA requested clarification on what it means to "relinquish" credits or allowances. The EPA interpreted this to mean that the credits or allowances cannot be used for other purposes, such as permit offset requirements or compliance with the MECT or HECT programs.

#### Response

**The EPA's interpretation is correct. Relinquishing credits or allowances means that a company must retire unused credits or allowances so they cannot be used for any other purpose. A company would retire these credits or allowances by submitting the appropriate trade form listing the buyer as the TCEQ, after which the credits or allowances listed in the form would be transferred to the TCEQ retirement account and would no longer be available for use. Only sites applicable to a cap and trade program are able to retire corresponding allowances to partially or completely fulfill their FCAA, §185 fee obligation.**

**Once credits or allowances are retired, those credits or allowances can never be used. Therefore, no credits or allowances will be returned.**

**Retirement of a stream of allowances are a permanent transfer of ownership and may not be used for any other purposes.**

Comment

The EPA requested clarification on how relinquishing Emissions Reduction Credits (ERCs) would be credited toward a \$185 fee obligation.

**Response**

**ERCs are certified permanent emission reductions, expressed in units of tons per year. A site subject to the \$185 fee obligation, in anticipation of exceeding 80% of the pollutant baseline amount during a year in which the fee obligation is in effect, could retire an amount of ERCs to partially or fully offset that exceedance given that amount of ERCs is available to the site. The amount of ERCs retired would be available as a credit against the \$185 fee obligation for each year the obligation exists.**

**All ERCs being transferred to the TCEQ to satisfy a \$185 fee obligation would undergo a creditability review to ensure that the ERCs are still**

**surplus to all applicable local, state, and federal requirements.**

Comment

The TPA supported the use of HECT and MECT to offset the fee obligation. Calpine stated that the retirement of fungible emissions commodities such as HECT and MECT allowances under §101.121 have a comparable impact to a fee. Additionally, it has the benefit of reducing actual emissions from within programs specific to the nonattainment area.

**Response**

**The commission appreciates the support and agrees that actual emission reductions could result in the HGB area.**

*Other*

Comment

An individual commented that the Houston area should be given constitutional and legal authority to regulate emissions from other states, other countries, and other parts of the state.

### **Response**

**The FCAA does not confer power to the states or local governments to directly regulate international emissions or emissions from other states. It is also not within the commission's authority to grant this constitutional or legal authority to Houston area governmental entities to control emissions from other states or countries. The commission notes that regulations and programs have been developed by the agency to reduce air emissions in other parts of the state, and these reductions can impact Houston air quality.**

### Comment

One commenter stated that Texas has a reputation for "flying in the face of science" concerning the effects of industry on the state and planet.

### **Response**

**The objective of this rule is to assess a \$185 fee because the area was classified as severe nonattainment and did not attain the one-hour ozone standard by its attainment date of November 15, 2007. A scientific analysis of the effects of industry on the environment was not within the scope of this rulemaking.**



**SUBCHAPTER B: FAILURE TO ATTAIN FEE**

**§§101.100 - 101.102, 101.104, 101.106 - 101.110, 101.113, 101.116 - 101.118,  
101.120 - 101.122**

**Statutory Authority**

The new sections are adopted under 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 adopted 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 adopted 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 adopted 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-- As defined in §101.10(b) of this title (relating to Emissions Inventory Requirements).

(2) Area §185 Obligation --The total annual amount of §185 fee due from all applicable major stationary sources in a severe or extreme ozone nonattainment area that failed to attain the one-hour ozone National Ambient Air Quality Standard by its applicable attainment date of November 15, 2007.

(3) Attainment date--The date an area is scheduled to attain the National Ambient Air Quality Standard for one-hour ozone, as documented in the state implementation plan. For the Houston-Galveston-Brazoria one-hour ozone nonattainment area, this is November 15, 2007.

(4) Attainment year--For the Houston-Galveston-Brazoria one-hour ozone standard, the attainment year is calendar year 2007.

(5) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data

submitted to and recorded by the commission, under §101.106 of this title (relating to Baseline Amount Calculation).

(6) Baseline emissions-- Emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title () adjusted as follows.

(A) The baseline emissions must include all annual emissions associated with authorized normal operations, startups, shutdowns, and maintenance activities and excludes emissions from emissions events reported.

(B) For regulated entities with emissions that are irregular, cyclic, or have emissions that vary significantly, the baseline emissions may be determined from an average of a consecutive 24-month period as allowed under §101.106(b)(2) 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) Emissions unit--As defined in §101.1 of this title (relating to Definitions).

(9) Equivalency credits--An amount equivalent to the revenue collected in accordance with §101.102 of this title (relating to Equivalent Alternative Fee) for accumulation in the Fee Equivalency Account.

(10) Major stationary source--As defined under §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

(11) Section 185 Account--The name of a group of one or more major stationary sources, under common control in the Houston Galveston-Brazoria one-hour ozone standard nonattainment area.

**§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 the Houston-Galveston-Brazoria one-hour ozone nonattainment area.

**§101.102. Equivalent Alternative Fee.**

(a) Fee Equivalency Account. The executive director shall establish and maintain a Fee Equivalency Account to document fees collected and available for use in demonstrating equivalency with the Area §185 Obligation. No actual money will be deposited into the Fee Equivalency Account. Instead, the Fee Equivalency Account will reflect equivalency credits based upon revenue collected for or under authority of :

(1) the Texas Emissions Reduction Plan program;

(2) the Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Repair Program; and/or .

(3) the Local Initiative Project.

(b) Revenue eligibility. The revenue eligible for credits to the Fee Equivalency Account must be from the Houston-Galveston-Brazoria (HGB) one-hour ozone standard nonattainment area.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account shall be credited for the years funding is expended in HGB beginning with the calendar year prior to the adoption of this rule.

**§101.104. Equivalent Alternative Fee Accounting.**

(a) Fee Equivalency Account credits. Equivalency Credits will be on a dollar-for-dollar basis and will not be discounted due to the passage of time. Equivalency Credits can be accumulated in the Fee Equivalency Account from year to year if a surplus exists in any given year and used to offset the calculated Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area §185 Obligation as needed.

(b) Area Section 185 obligation determination. Annually, the executive director shall calculate the applicable Failure to Attain Fee Obligation for all major stationary sources in the HGB one-hour ozone standard nonattainment area. The Failure to Attain Fee Obligation for each Section 185 Account will be summed. The resultant amount will represent the calendar year Area §185 Obligation for the HGB one-hour ozone standard nonattainment area. A calendar year's Area §185 Obligation will be calculated using actual emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) from the previous calendar year.

(c) Annual demonstration of equivalency. By no later than December 2014 and annually thereafter until the HGB one-hour ozone nonattainment area is no longer subject to the fee by the EPA or the fee is placed into abeyance, the executive director shall complete an equivalency demonstration to determine if adequate equivalency credits were available in the Fee Equivalency Account for the applicable calendar year to meet the Area §185 Obligation calculated under subsection (b) of this section.

(1) The annual determination of equivalency will be made as follows.

Figure: 30 TAC §101.104(c)(1)

$$\text{FeeBalance} = \text{AreaObligation} - \text{FeeEquivAcct}$$

**Definitions:**

**AreaObligation** = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the §185 Fee Obligations from all major stationary sources in the Houston-Galveston-Brazoria nonattainment area for the calendar year being assessed.

**FeeEquivAcct** = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.102 of this title (relating to Equivalent Alternative Fee). This amount may contain any equivalency surplus from previous year's assessments.

**FeeBalance** = The amount in the Fee Equivalency Account Balance after the Area §185 Obligation is met in a calendar year.

(2) If the Fee Equivalency Account balance is calculated to be less than or equal to zero in paragraph (1) of this subsection, sufficient equivalency credits were available to offset the fee obligation. The executive director shall not assess a §185 Failure to Attain fee on Section 185 Accounts for the year being assessed.

(3) If the Fee Equivalency Account balance is calculated to be greater than zero in paragraph (1) of this subsection, insufficient equivalency credits were available to offset the fee obligation. The executive director shall assess a sufficient §185 Failure to Attain fee to fulfill the Area §185 Obligation. The amount due from each Section 185 Account will be prorated to generate sufficient revenue to meet the Area §185 Obligation. The proration will be calculated as follows.

Figure 30 TAC §101.104(c)(3)

$$\text{ProratedFee} = \left( \frac{\text{FeeBalance}}{\text{AreaObligation}} \right) \text{§185Fee}$$

**Definitions:**

**§185Fee** = The fee obligation for each major stationary source or Section 185 Account calculated by the executive director based on actual emissions reported in the inventory under §101.10 of this title (relating to Emissions Inventory Requirements).

**AreaObligation** = The Area §185 Obligation calculated under this subsection for the Houston-Galveston-Brazoria one-hour ozone standard nonattainment area for the calendar year being assessed.

**FeeBalance** = The amount in the Fee Equivalency Account after the §185 Obligation is met in a calendar year.

**ProratedFee** = The reduced fee each major stationary source or Section 185

Account will be assessed if insufficient equivalency credits are allocated in the Fee Equivalency Account.

**§101.106. Baseline Amount Calculation.**

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

(1) total amount of baseline emissions; or

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

(b) For the purposes of this subchapter, the baseline emissions must be from:

(1) the attainment year; or

(2) if the regulated entity's emissions are irregular, cyclical, or otherwise vary significantly from year to year, any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute

an average baseline emissions amount (tons per year) for the major stationary source. If used, the historical period must be:

(A) ten years for non-electric utility steam generating units; or

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

(c) If a major stationary source uses a historical consecutive period as defined in subsection (b)(2) of this section, the baseline amount estimation will:

(1) use adequate data for calculating the baseline emissions units;

(2) be adjusted downward to exclude any noncompliant emission that occurred while the source was operating above an emissions limitation that was legally enforceable during the consecutive 24-month period; and

(3) be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the source had to comply by November 15, 2007, had such a major stationary source been required to comply with such limitations during the consecutive 24-month period.

(d) When control or ownership of emission units changes during the attainment

year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on December 31st of the attainment year.

(e) 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).

(f) 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 except as allowed under §101.109 of this title (relating to Adjustment of Baseline Amount) until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

**§101.107. Aggregated Baseline Amount.**

(a) Aggregation. Notwithstanding the requirements of §101.106 and §101.108 of this title (relating to Baseline Amount Calculation and Alternative Baseline Amount), a major stationary source of emissions that meets the applicability requirements of §101.101 of this title (relating to Applicability) after calculating each pollutant's emission

baseline amount in accordance with this subchapter may choose to combine:

(1) volatile organic compounds (VOC) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(2) nitrogen oxides (NO<sub>x</sub>) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(3) emissions for both VOC and NO<sub>x</sub> into a single aggregated pollutant baseline amount for a single major stationary source; and/or

(4) emissions for both VOC and NO<sub>x</sub> into a single aggregated pollutant baseline amount for multiple major stationary sources under common control .

(b) Pollutants aggregation. Pollutants in an aggregated amount must have:

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

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

(c) Section 185 Account reporting. An owner and or operator opting to combine VOC with NO<sub>x</sub> and/or combine major stationary sources into one baseline amount shall identify all major stationary sources being aggregated under this section.

(d) Failure to Attain Fee obligation requirement. The fee obligation must be calculated in the same manner that an owner or operator elects to aggregate under this section.

**§101.108. Alternative Baseline Amount.**

(a) Alternative to setting a baseline amount under §101.106 of this title (relating to Baseline Amount Calculation), an owner or operator of a major stationary source, if qualified, may choose to set an alternative baseline amount under this section.

(1) For purposes of this subchapter, the alternative baseline amount is computed as the lower of the following:

(A) total amount of baseline emissions as calculated under §101.106(b) of this title reported in the emissions inventory; or

(B) emissions allowed under authorization. If reported in the

emissions inventory prior to or during the attainment year as required under §101.10 of this title (relating to Emissions Inventory Requirements), total authorized emissions may include the resulting authorized emissions from permit applications in process by the attainment year. The permit application for these unauthorized emissions must have been administratively complete by December 31, 2007, and the permit issued by the adoption date of this section.

(2) The baseline amount for the major stationary source is determined by selecting the emissions limits on permits issued after the attainment year for the previously unauthorized emissions units separately from the remaining units at the regulated entity's major stationary source as follows.

(A) The baseline amount for the previously unauthorized emissions and emissions units for which emissions limits were authorized after the attainment year will be the lower of the emissions reported in the emissions inventory for the emissions units or emissions authorized by permits for which the application was administratively complete by December 31, 2007.

(B) The baseline amount for all other emissions units not included in subparagraph (A) of this paragraph at the major stationary source will be the lower of the baseline emissions reported in the emissions inventory for these emissions units and

the applicable emissions limits authorized prior to December 31, 2007.

(C) The baseline amount for the major stationary source will be determined by combining the lower amounts determined in accordance with subparagraphs (A) and (B) of this paragraph.

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

(c) When control or ownership of emissions units changes during the attainment year, the emissions from those emissions units will be attributed to the owner or operator of the major stationary source who has control or ownership of the emission unit on December 31st of the attainment year.

(d) Except as allowed under §101.109 of this title (relating to Adjustment of Baseline Amount) or as required by subsection (a)(2) of this section, 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 as described under §101.118 of this title (relating to Cessation of Program).

**§101.109. Adjustment of Baseline Amount.**

(a) The owner or operator of a Section 185 Account may request adjustment of their baseline amount if ownership and operation of emissions units is no longer under common ownership or control. Adjustments to the baseline amount are limited as follows:

(1) The baseline amount, as calculated and reported for all equipment no longer under common ownership or control will be transferred from the original reporting Section 185 Account to the new Section 185 Account without modification to the reported amount; and

(2) Baseline amounts for remaining equipment at a Section 185 Account will not be adjusted based on a change of ownership or control of emissions units to or from a Section 185 Account.

(b) Within 90 calendar days of the effective date of a change of ownership or control emissions units, the owner or operator of each Section 185 Account affected by the change in ownership or control of emissions units in an area meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the

executive director a report requesting its adjustment of the baseline amount on a form published by the executive director.

(c) The baseline amount adjustment request is subject to approval by the executive director. After approval, it will be fixed and not change except as allowed under this section without the approval of the executive director until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

**§101.110. Baseline Amount for New Major Stationary Sources, New Construction at a Major Stationary Source, or Major Stationary Sources with Less Than 24 Months of Operation.**

(a) Baseline amount. A baseline amount may be established for major stationary sources after the attainment date as follows.

(1) If a major stationary source did not meet the applicability requirements in §101.101 of this title (relating to Applicability) on the attainment date of November 15, 2007, a major stationary source may establish a baseline amount based on the first full year of operation in accordance with the requirements of this subchapter.

(2) A major stationary source may include emissions limits from new emissions units authorized after the attainment date in its baseline amount determination if those emissions units were authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(b) Baseline amount reporting. Within 90 calendar days of completing one full calendar year of operation, the owner or operator of each major stationary source in an area meeting the requirements of §101.101 of this title shall submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amount is the lower of:

(1) the first full year of baseline emissions; or

(2) emissions allowed under applicable authorizations.

(c) For purposes of this subchapter, the emissions considered for the baseline amount for a new unit or units are restricted to the emissions units without a previously established baseline amount.

(d) Adjustment. The baseline amount as established under subsection (b) of this section may be adjusted for major stationary sources meeting the applicability requirements in §101.101 of this title if the major stationary source or emissions units at the major stationary source experienced less than 24 months of consecutive operation by the area's attainment date or later. The adjusted baseline amount must be reported on a form published by the executive director within 90 calendar days of completing 24 months of operation. The adjusted baseline amount must be computed for the applicable emissions units and major stationary source as allowed under subsection (b) of this section as the lower of the following:

(1) total average amount of baseline emissions for the 24-month period; or

(2) emissions allowed under authorizations applicable to the major stationary source.

(e) Approval. The adjusted baseline amount calculation is subject to approval by the executive director. Baseline amounts will be fixed and not change except as allowed under §101.109 of this title (relating to Adjustment of Baseline Amount) without the approval of the executive director until the Failure to Attain Fee no longer applies for the area as described under §101.118 of this title (relating to Cessation of Program).

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

(a) Pollutant applicability. The total fee obligation must be met for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO<sub>x</sub>), or both, for which the Section 185 Account meets the requirements of §101.101 of this title (relating to Applicability) for any year or partial year that the Section 185 Account operated as a major stationary source. Actual VOC or NO<sub>x</sub> emissions may be kept separate or aggregated together. A single pollutant may be aggregated across multiple major stationary sources, or both VOC and NO<sub>x</sub> may be aggregated together across multiple major stationary sources. Aggregation is limited to emissions from:

(1) major stationary sources that aggregated VOC baseline amounts under §101.107 of this title (relating to Aggregated Baseline Amount);

(2) major stationary sources that aggregated NO<sub>x</sub> baseline amounts under §101.107 of this title; or

(3) major stationary sources that aggregated VOC with NO<sub>x</sub> baseline amounts under §101.107 of this title.

(b) **Obligation.** The owner or operator of each major stationary source 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 must be paid in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on actual emissions that exceed 80% of the pollutant baseline amount. The fee is due until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

(c) **Separate pollutant obligation.** Fee obligation from VOC or NO<sub>x</sub> emission major stationary sources not qualified or chosen for baseline aggregation under §101.107 of this title will remain separate and due from each major stationary source. The fee will be calculated by the method described in subsection (d) of this section.

(d) **Calculation of fee for emissions.** The fee will be calculated in accordance with the method used for a baseline amount determination.

(1) If VOC are aggregated under §101.107(a) of this title, VOC emissions from all major stationary sources in the Section 185 Account must be used for aggregated actual emissions and the aggregated baseline emissions.

(2) If NO<sub>x</sub> are aggregated under §101.107(a) of this title, NO<sub>x</sub> emissions from all major stationary sources in the Section 185 Account must be used for the aggregated actual and aggregated baseline emissions.

(3) If VOC are aggregated with NO<sub>x</sub> at one major stationary source under §101.107(a) of this title, VOC and NO<sub>x</sub> emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC are aggregated with NO<sub>x</sub> across multiple major stationary sources, VOC and NO<sub>x</sub> emissions from each major stationary source in the Section 185 Account must be used for the aggregated actual and aggregated baseline emissions. The fee will be calculated for VOC, NO<sub>x</sub>, or both, as follows.

Figure: 30 TAC §101.113(d)(3)

$$\text{\$185Fee} = \$200 \left[ \left( \frac{2}{3} * \text{Part70x} \right) + \left( \frac{1}{3} * \text{Part70y} \right) \right] * (\text{Actual} - 0.8 * \text{BA})$$

**Definitions:**

**\\$185Fee** = The fee amount due annually to the commission based on actual volatile organic compound (VOC), nitrogen oxide (NO<sub>x</sub>) emissions, or both.

**Actual** = All quantifiable emissions of VOC, NO<sub>x</sub> from the major stationary source or Section 185 Account; or if VOC is aggregated with NO<sub>x</sub>, both VOC and NO<sub>x</sub> together, reported in the annual emissions inventory including emissions from emissions events in units of tons for the regulated entities combined under §101.107 of this title (relating to Aggregated Baseline Amount), for the year being assessed.

**BA** = Baseline amount in tons per year from Section 185 Account as calculated under this subchapter.

Part70x = The Code of Federal Regulations (CFR) Part 70 fee published by the EPA for the 12 months that includes the fiscal year for the calendar year that a fee is being assessed. This value represents the base value for January through August portion of the annual fee.

Part70y = The CFR Part 70 fee published by the EPA for the 12 months that includes the fiscal year following the calendar year that a fee is being assessed. This value represents the base value for September through December portion of the annual fee.

**§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 is calculated using the actual emissions from the emissions inventory for the calendar year preceding the adoption date of this section.

(c) First payment date for sources that were not major on the attainment date. The first payment of the fee is due and is calculated using the actual emissions from the emissions inventory for the later of:

(1) the first calendar year the source becomes a major source; or

(2) the calendar year preceding the adoption date of this section.

(d) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subsection. 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.

(e) Late payments. The agency will impose interest and penalties on owners or operators of Section 185 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 major stationary source meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director. The Baseline Amount

Determination forms for the Houston-Galveston-Brazoria one-hour ozone nonattainment area are due no later than 120 calendar days after the adoption date of this rule.

(b) New major source baseline amount reporting. No later than 90 calendar days following the first full year of operation as a major source, the owner and/or operator of a major stationary source that meets the requirements of §101.101 of this title shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director.

(c) The executive director shall determine a baseline amount for any major stationary source subject to §101.101 of this title that fails to submit an approvable baseline amount by the due date requested by the commission.

(1) The executive director-determined baseline amount shall be 12.5 tons for volatile organic compounds and 12.5 tons for nitrogen oxides, or, if available, the lower of the baseline emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) or authorized for the major stationary source for 2007.

(2) The executive director shall not aggregate baseline amounts under

§101.107 of this title (relating to Aggregated Baseline Amount) in determining a baseline amount under this subsection.

(d) Payment due date. The fee payment is due no later than 30 calendar days after the invoice date. The first invoice will be issued by the end of the year following the effective date of this rule. If a Section 185 Account commences or resumes operation , the full Failure to Attain Fee payment will be due prior to commencement or resumption of operations.

**§101.118. Cessation of Program.**

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

(1) redesignation of the Houston-Galveston-Brazoria one-hour ozone nonattainment area by the United States Environmental Protection Agency (EPA) to attainment;

(2) finding of attainment by the EPA; or

(3) any action or rulemaking by the EPA to end the Failure to Attain fee.

(b) Notwithstanding subsection (a) of this section, the Failure to Attain Fee will be calculated but not invoiced, and the fee collection may be placed in abeyance by the executive director if three consecutive years of quality-assured data resulting in a design value that did not exceed the one-hour ozone National Ambient Air Quality Standard (NAAQS), or a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States, are submitted to the EPA. The design value may exclude days submitted to the EPA by the executive director that exceeded the NAAQS because of exceptional events. Fee collection will remain in abeyance until the EPA takes final action on its review of the certified monitoring data and any demonstration(s).

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

(a) Alternative option. Notwithstanding any requirement in this subchapter, the owner or operator of Section 185 Accounts obligated to pay a Failure to Attain Fee may submit a request to the executive director to partially or completely fulfill the Failure to Attain Fee obligation with an equivalent alternative obligation in compliance with the requirements 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, respectively).

(1) A Failure to Attain Fee obligation from volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) emissions from Section 185 Accounts not fulfilled under this section will remain separate and due from each regulated entity.

(2) Fee obligation from VOC and/or NO<sub>x</sub> emissions not fulfilled under this section will be calculated by the method described in §101.113 of this title (relating to Failure to Attain Fee Obligation).

(b) Failure to Attain Obligation. The entire Failure to Attain Fee obligation is due in accordance with §101.117 of this title (relating to Compliance Schedule) for all Section 185 Accounts not meeting the requirements of §101.121 and §101.122 of this title.

(c) The owner or operator of a Section 185 Account must inform the executive director if they are selecting an equivalent alternative obligation using forms approved by the executive director. The owner or operator of a Section 185 Account must submit a form selecting their equivalent alternative obligation that lists the tons of each pollutant or amount of payment that will meet the fee obligation with the alternative obligation as described in §101.121 and §101.122 of this title.

(d) No later than July 31 in the year following the rule adoption and annually

thereafter:

(1) all equivalent alternatives under §101.121 of this title must be approved, exercised, or otherwise completed; and

(2) all Supplemental Environmental Projects under §101.122 of this title must be approved and funded.

(e) 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 under the provisions of §101.116 of this title (relating to Failure to Attain Fee Payment).

**§101.121. Equivalent Alternative Obligation.**

(a) The owner or operator of a Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill its §185 Failure to Attain Fee obligation by substituting emission reductions, on a volatile organic compounds or nitrogen oxides 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 any

combination of:

(1) emissions reduction credits;

(2) discrete emission reduction credits;

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

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

(b) The use of the provisions of this section to fulfill a Failure to Attain Fee obligation 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 Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill its Failure to Attain Fee obligation by contributing to a Supplemental Environmental Project (SEP), on a volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) 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 Failure to Attain Fee amount assessed.

(b) The SEP must directly reduce the amount of VOC and/or NO<sub>x</sub> emissions in the Houston-Galveston-Brazoria one-hour ozone nonattainment area.

(c) The SEP must be enforceable through an Agreed Order or other enforceable document.

(d) The use of SEP funds must be on a dollar-for-dollar basis and shall not be discounted due to the passage of time. Credit from SEP funds may be accumulated from year to year, and if a surplus exists in any given year, the funds may be used to offset the calculated Failure to Attain Fee as needed.

(e) Funds in a SEP used to offset an administrative penalty cannot be used to offset a Failure to Attain Fee obligation.

(f) The use of a SEP to fulfill a Failure to Attain Fee obligation is subject to

approval by the executive director.