

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §101.24, Inspection Fees, and §101.27, Emissions Fees *with changes* to the proposed text as published in the July 12, 2002 issue of the *Texas Register* (27 TexReg 6187).

The amendments 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

The commission collects annual inspection fees to cover a portion of the cost of air programs as required by Texas Health and Safety Code (THSC), Texas Clean Air Act, (TCAA), §382.062, Application, Permit, and Inspection Fees. The commission also collects annual fees from sources that are subject to the permitting requirements of Title IV or V of the Federal Clean Air Act Amendments of 1990 (Federal Clean Air Act (FCAA), Titles IV and V, hereinafter referred to as "Title V") as required by TCAA, §382.0621, Operating Permit Fee. The existing rule language in §101.24 and §101.27 structures the inspection fees and the emissions fees to be self-paid by the affected accounts. To maintain consistency with other commission fee programs and in response to the Sunset Advisory Commission recommendations, the commission will convert the inspection fees and emissions fees to a billed system.

The commission will adjust inspection fees for inflation and the emissions fees to meet the EPA presumptive minimum for the commission's Title V program. Additionally, the commission will assess a new fee on new permit by rule (PBR) registrations received on or after November 1, 2002 in a

concurrent 30 TAC Chapter 106 rulemaking as well as increase air permit, air permit renewal, and air permit amendment fees in a concurrent 30 TAC Chapter 116 rulemaking published in this issue of the *Texas Register*.

The Clean Air Fund 151 (Fund 151) is the source of funding for essentially all air program related activities of the commission. This fund supports a wide range of activities including permitting, inspections, enforcement, air quality planning, mobile source program, emissions inventory, and monitoring in addition to agency functions which support these activities. Revenues deposited to the fund are from several different fees collected from point sources and mobile sources as well as the general public. Over the last several years, the fund has carried a balance in the account which has allowed the agency to collect revenues below the annual budgeted expenditures. However, the fund balance is close to being depleted. Additionally, due to decreases in emissions, the revenue from fees which are assessed based upon emission levels has declined by an average of approximately 3% per year in recent years. The revenue estimates for Fund 151 reveal that there are insufficient funds to support the fiscal year (FY) 2003 appropriated level.

As part of its air program activities, the commission implements an approved Title V program. As part of that approval, the commission was required to demonstrate that the fees collected from Title V sources are sufficient to support the Title V program. Currently under state law, this fee must be dedicated for use only on Title V activities. This fee is commonly referred to as the air emissions fee and is currently set at \$26 per ton. However, the fee demonstration submitted to EPA in August 2001

showed that the fee would need to be increased beginning in FY 2003 to provide sufficient support for the Title V program.

Activities which are not considered to be Title V activities must be supported through the remaining fees that are to be used to safeguard the air resources of the state. Essentially, these fees generally include permit, renewal, and amendment fees; inspection fees; and a portion of the motor vehicle safety inspection fee (as set by statute, THSC, §382.0622).

Given the declining availability of funds in Fund 151, the commission reviewed the air fees which it has the authority to change. Most of the air permit, renewal, and amendment fees have not been increased since the early 1990s. The air emissions fee has not been increased since FY 1995 and the air inspection fee since FY 1992. The vehicle inspection maintenance fee has been set recently to cover the cost of that program. Several other funding sources are dedicated for specific uses. In an effort to match fee revenue collections more closely with related expenditures, the commission also reviewed potential sources for new fees. After a review of the commission's existing air program related activity fees, the commission will adopt revisions to the emissions fee, inspection fee, permit, renewal, and amendment fees, as well as assess a new fee for review of registrations for PBR.

The commission previously instructed agency staff to initiate a study of the use of Fund 151 fees, including their use for the Title V program. This study is ongoing and is expected to result in a report to the commission in January 2003. In addition, projections involving the revenues and expenditures of Fund 151 have changed since proposal of the air fee increases based upon additional information. The

revised projections currently indicate that the proposed fee increases are insufficient to cover projected expenditures through fiscal year 2005. For these reasons, the commission intends to review the air fee increases adopted in this package next year to determine the appropriate levels for each of the air fees.

#### SECTION BY SECTION DISCUSSION

There are several revisions which change the agency name from Texas Natural Resource Conservation Commission (TNRCC) to reflect the new name of TCEQ.

##### *Section 101.24*

Section 101.24(a), concerning applicability, will improve the readability of this subsection and correct an improper cross-reference. References to account numbers will be changed to identification numbers to reflect the commission's new Central Registry system.

Section 101.24(b), concerning self-report/billed information, will state that emissions/inspection fee information packets will be mailed to each affected account owner or operator. The emissions/inspection fee basis form will be required to be remitted within 60 days of the date on the emissions/inspection fee packet. All subsequent subsections will be relettered accordingly. This adopted amendment will also specifically state that the completed emissions/inspection fee basis form shall include, at least, the company name, mailing address, site name, all TCEQ identification numbers, the applicable Standard Industrial Classification (SIC) category, and the name and telephone number of a contact person. In the event that more than one SIC category is applicable at the account, the form should specify the applicable SIC category with the highest fee rate. The new language will also

include a requirement to include additional information necessary to assess the fee. For example, this will include information such as relative plant size when necessary to determine which fee rate will apply within the SIC category. The intent of this adopted amendment is to allow the review of the self-reported information prior to issuing a statement of the fee assessment to the account.

Section 101.24(b) is adopted with change to the proposed text to require that when the applicable SIC category is reported on the form, the SIC category shall be the one that has the highest associated fee as required in §101.24(a).

Section 101.24(c), concerning requesting a fee information packet, will provide a procedure for those account owners or operators who do not receive the fee information packet described in adopted subsection (b). It will set a date by which every account owner or operator should have received the packet and it requires notification to the commission by those account owners or operators which have not received the packet. The language also includes a provision for new account owners or operators who begin operation sometime during the FY. Those accounts will be required to request a packet within 30 days of beginning operation.

Section 101.24(c) is adopted with change to the proposed text to provide earlier dates for account owners or operators who do not receive the fee information to notify the commission. The changes acknowledge that the timing of the effective date of this rule will occur after October 1, and therefore alternative dates have been provided for FY 2003. Additionally, the commission has moved the notification date for all other years from the proposed October 1 to July 1. This additional time will

allow commission staff to have adequate time to prepare a packet and billing statement for these entities. The earlier date should still provide ample time for notification since the packets should be mailed in April.

Section 101.24(d), concerning payment, will be relettered from subsection (b) and currently states that the fee payment shall accompany a completed fee return form. The adopted amendment will add the payment options of certified check and electronic funds transfer. Additionally, this adopted amendment will change the collection of the inspection fee from a self report/self pay system to a self report/billed system. The completed fee basis form is discussed in adopted subsection (b); therefore, the reference to the completed fee return form in this subsection was deleted.

Section 101.24(e), concerning due date, will be relettered from §101.24(c) and currently states that the fee payment must be received or postmarked no later than November 1 of the FY in which the fee is assessed. This adopted amendment will state that the payment of the inspection fee is due within 30 days of the date the agency sends a statement of the assessment to the facility owner or operator. The intent of this adopted amendment is to change the due date to be consistent with a billed system.

Section 101.24(f), concerning inspection fee schedule, will be relettered from subsection (d).

Currently, the inspection fee rate has been unchanged since FY 1992. The adopted amendment will reformat the inspection fee schedule and include a step increase in the inspection fees to adjust for inflation. The initial increase raises the fee approximately 33.8%. For FYs following 2003, the adopted amendment will provide a mechanism to annually adjust the fee for inflation in accordance with

the consumer price index (CPI) (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100). The intent of this adopted amendment is to generate revenue to help fund, at appropriated levels, the commission's air program related activities.

Section 101.24(f) is adopted with change to the proposed text to more clearly explain the basis for the CPI adjustment each year.

Section 101.24(g), concerning nonpayment of fees, will be relettered from subsection (e) and currently states that the failure to remit the full inspection fee by the due date will result in an enforcement action. The adopted amendment will state that each inspection fee payment must be paid at the time and in the manner and amount provided in the section. The intent of this amendment is to establish language consistent with other program fees collected within the agency. This subsection has also been amended to reflect the correct citation for enforcement for failure to pay fees. The enforcement provisions previously cited have been consolidated with other enforcement requirements into Texas Water Code (TWC), Chapter 7.

Section 101.24(h), concerning late payments, will be relettered from subsection (f) and currently states that the owner or operator of an account failing to make payment of inspection fees when due are assessed late payment penalties and interest. The adopted amendment will state that the agency shall impose interest and penalties on owners or operators of an account who fail to make payment of

inspection fees when due in accordance with 30 TAC Chapter 12, Payment of Fees. The intent of this amendment is to establish language consistent with other program fees collected within the agency.

*Section 101.27*

Section 101.27(a), concerning applicability, will correct the relettering of subsections which are being referenced. This adopted amendment will also state that the account will trigger the emissions fee if it emits or if it has the potential to emit over the specified levels of air contaminants. The intent of this adopted amendment is to improve the readability of this subsection. References to account numbers will be changed to identification numbers to reflect the commission's new Central Registry system.

Section 101.27(b), concerning self-reported/billed information, will state that emissions/inspection fee information packets will be mailed to each affected account owner or operator. The emissions/inspection fee basis form will be required to be remitted within 60 days of the date on the emissions/inspection fee packet. All subsequent subsections will be relettered accordingly. This adopted amendment will also specifically state that the completed emissions/inspection fee basis form shall include, at least, the company name, mailing address, site name, all TCEQ identification numbers, the applicable SIC category, the emissions of all regulated air pollutants at the account for the reporting period and the name and telephone number of a contact person. The new language will also include a requirement to include additional information necessary to assess the fee. For example, this will include information such as capacity when necessary to determine which fee rate will apply within the SIC category. The intent of this adopted amendment is to allow the review of the self-reported information prior to issuing a statement of the fee assessment to the account.

Section 101.27(b) is adopted with change to the proposed text to clarify that when the applicable SIC category is reported on the form, the SIC category shall be the one that has the highest associated fee as required in §101.24(a).

Section 101.27(c), concerning requesting a fee information packet, will provide a procedure for those accounts which do not receive the fee information packet described in adopted subsection (b). It will set a date by which every account owner or operator should have received the packet and it requires notification to the commission by those account owners or operators which have not received the packet. The language also includes a provision for new account owners or operators which begin operation sometime during the FY. Those account owners or operators will be required to request a packet within 30 days of beginning operation.

Section 101.27(c) is adopted with change to the proposed text to provide more reasonable dates for account owners or operators who do not receive the fee information to notify the commission. The changes acknowledge that the timing of the effective date of this rule will occur after October 1, and therefore alternative dates have been provided for FY 2003. Additionally, the commission has moved the notification date for all other years from the proposed October 1 to July 1. This additional time will allow commission staff to have adequate time to prepare a packet and billing statement for these entities. The earlier date should still provide ample time for notification since the packets should be mailed in April.

Section 101.27(d), concerning payment, will be relettered from subsection (b) and currently states that the fee payment shall accompany a completed fee return form. The adopted amendment will add the payment option of certified check. The completed fee basis form is discussed in adopted subsection (b); therefore, the reference to the completed fee return form in this subsection was deleted. The intent of this adopted amendment is to change the collection of the emissions fee from a self-report/self-pay system to a self-report/billed system.

Section 101.27(e), concerning due date, currently states that the fee payment must be received or postmarked no later than November 1 of the FY in which the fee is assessed. This adopted amendment will state the payment of the emissions fee is due within 30 days of the date the agency sends a statement of the assessment to the facility owner or operator. The intent of this revision is to change the due date to be consistent with a billed system. In addition, the adopted amendment specifies that emissions fee will be due prior to commencement or resumption of operations if an account commences or resumes operation during the fiscal year in which the fee is assessed. Due to the relettering of the subsections, existing subsection (d) was deleted.

Section 101.27(f), concerning basis for fees, will increase the current per ton emissions fee from \$26 to a level equivalent with the EPA presumptive minimum for the commission's Title V program. The emissions fee rate will be adjusted each year by the CPI (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100). This increase is necessary to collect sufficient funding for the commission's Title V programs. Setting the per-ton emissions fee at the EPA presumptive minimum provides the presumption that the fee rate

meets the EPA's funding adequacy requirements. In addition, subsection (f) will be relettered from subsection (c). Subsection (f)(1) will be relettered from subsection (c)(1). Subsection (c)(2) is obsolete and will be deleted. Subsection(c)(3) will be relettered to subsection (f)(2). Subsection (c)(4) will be relettered to subsection (f)(3).

Section 101.27(f)(1) is adopted with change to the proposed text to reflect new terminology recently adopted by the commission in a separate rulemaking. The intent of this amended language is to include every type of emission in the basis for the emissions fee.

Section 101.27(g), concerning nonpayment of fees, will be relettered from subsection (c) and currently states that the failure to remit the full emissions fee by the due date will result in an enforcement action. The adopted amendment will state that each emissions fee payment must be paid at the time and in the manner and amount provided in the section. The intent of this amendment is to establish language consistent with other program fees collected within the agency. This subsection has also been amended to reflect the correct citation for enforcement for failure to pay fees. The enforcement provisions previously cited have been consolidated with other enforcement requirements into TWC, Chapter 7.

Section 101.27(h), concerning late payments, will be relettered from subsection (f) and currently states that the owner or operator of an account failing to make payment of emissions fees when due shall be assessed late payment penalties and interest. This adopted amendment will state that the agency shall impose interest and penalties on owners or operators of an account who fail to make payment of

emissions fees when due in accordance with Chapter 12. The intent of this adopted amendment is to establish language consistent with other program fees within the agency.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute.

“Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 101 are not, themselves, intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. Therefore, the commission finds that they are not major “environmental” rules. Additionally, the fees collected under the adopted revisions to Chapter 101 generally should not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. These revisions will be spread through most sectors of the economies of the state as they generally apply to most stationary sources of air pollution. When viewed in conjunction with the amounts of revenues flowing through the sectors, the incremental fee increase is not material.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by

state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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; adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a “major environmental rule.”

Specifically, the emissions fee, and to some extent inspection fee are required under federal law to be sufficient to support the permit program under Titles IV and V of the FCAA (42 United States Code (USC), §§7651 *et seq.* and §§7661 *et seq.*). The emissions fees are also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Titles IV and V programs. The inspection fee is required by state law to be sufficient to support a portion of commission activities related to the overall air quality program (TCAA, §382.062). This rulemaking does not exceed an express requirement of federal or state law. The rulemaking does not exceed a requirement of a delegation agreement, but revision to the emissions fee is specifically required by EPA’s approval of the Title IV and V programs to the commission. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed and authorized under TCAA, §§382.011, 382.017, 382.062, 382.0621, and 382.0622, and generally under TCAA, §§382.001 *et seq.*

Written comments on the draft regulatory impact analysis determination were solicited. No comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact evaluation for these rules in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to raise the emissions and inspection fees to maintain funding, at appropriated levels, sufficient to support the Titles IV and V programs and a portion of the overall air quality program.

Promulgation and enforcement of the rules will not burden private, real property because they are fee rules which support air quality programs of the commission. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, the increase in emissions fee does fulfill a federal mandate under 42 USC, §§7651 *et seq.* and §§7661 *et seq.* The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Titles IV and V programs. The inspection fee is required by state law to be sufficient to support a portion of commission activities related to the overall air quality program (TCAA, §382.062). Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal and state law. Therefore, this rulemaking action will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found it is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program or will affect an action/authorization identified in §505.11(a)(6),

and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with CMP goals and policies because the rulemaking is a fee rule which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking with the CMP were solicited. No comments were received on the consistency of this rulemaking with the CMP.

#### PUBLIC COMMENT

A public hearing was held on August 12, 2002, in Austin. The comment period closed on August 12, 2002. The commission received comments from Alliance for a Clean Texas (ACT); American Electric Power (AEP); Associated General Contractors of Texas (AGC); Austin Energy (AE); City Public Service of San Antonio (CPSSA); EPA, Region 6; Gull Industries Incorporated (GII); Harwood Industries, Inc. (HII); High Tech Finishing (HTF); Houston Sierra Club (HSC); Lubbock Power and Light (LP&L); Schumacher Company, Inc. (SCI); Texas Association of Business (TAB); Texas Chemical Council (TCC); Texas Independent Automobile Dealers Association (TIADA); Texas Oil and

Gas Association (TxOGA); Texas Poultry Federation (TPF); TXU Business Services (TXU); Xcel Energy (XCEL) and two individuals. Oral comments were received from ACT at the hearing. Of the 21 commenters for Chapter 101, two were generally in favor of fee increases while the remainder were generally and/or specifically against fee increases.

#### RESPONSE TO COMMENTS

Prior to September 1, 2002, the TCEQ was the TNRCC. Since the comments were received before September 1, 2002, the agency is sometimes referred to as the TNRCC.

#### **General**

##### *Comment*

ACT commented that it fully supports the need for the commission to have increased revenue in order to pay for the programs funded through the Clean Air Account.

#### **RESPONSE**

**The commission agrees that it is necessary to increase fees to pay for Clean Air Account programs and appreciates the comment.**

##### *Comment*

TxOGA commented that it commits to its ongoing efforts to ensure that the commission is adequately funded and retains delegation of vital environmental programs.

**RESPONSE**

**The commission appreciates TxOGA's support of the commission's delegation of environmental programs. The commission is also committed to ensure that it is adequately funded and retains all program delegations.**

*Comment*

AEP, TXU, and XCEL stated that they strongly support maintaining the delegation by EPA of the Title V permitting program to the TNRCC and recognized the statutory mandate that the TNRCC's Title V permitting program be adequately funded by revenues from Title V emissions fees.

**RESPONSE**

**The commission appreciates the support expressed for maintaining the delegation of the Title V program and the recognition that emissions fee revenue must be sufficient to adequately fund the commission's Title V program.**

*Comment*

TCC commented that it recognizes that the commission may be facing a shortfall in funding associated with the air permitting and inspection programs.

**RESPONSE**

**The commission appreciates TCC's recognition of the difficult funding issues faced by the commission.**

*Comment*

HSC commented that it supports the billing process and the fee increases for inspection and emissions fees.

**RESPONSE**

**The commission appreciates HSC's support.**

*Comment*

ACT generally supported basing fees on emissions to reward companies for pollution prevention.

**RESPONSE**

**The commission appreciates the comment. However, the purpose of the rulemaking is to increase fees to enable the commission to recover a portion of its operating costs and collect sufficient revenue to support appropriated funding levels, not necessarily to create incentives for pollution prevention.**

*Comment*

TIADA suggested designing new incentive programs, such as rebates, to encourage pollution control and compliance rather than more fees.

**RESPONSE**

**As a result of the 77th Legislature, the commission will be promoting compliance in new ways, by granting regulatory incentives for approved Environmental Management Systems, and using an entity's compliance history in order to make regulatory decisions about that entity. While financial incentives are difficult to grant, there is an existing program that approves pollution control equipment for property tax exemptions. The commission is seeking to encourage compliance using innovative and positive means. However, these incentive programs neither reduce air program workload nor generate funding for the air programs. Therefore, the commission finds that these fee increases are necessary to cover its operating costs.**

*Comment*

TIADA commented that it opposes any more fees and stated that their industry is over-regulated, citing examples of auto inspections, lawsuit costs regarding the constitutionality of a particular fee, the motor vehicle finance license, and Internal Revenue Service regulation of accounting methodology.

**RESPONSE**

**The commission acknowledges that many industries are subject to multiple fees and regulations from various governmental agencies. However, the commission cannot control regulations placed on the industry by other sources. The fee increases are necessary to provide sufficient funding for the commission's air programs.**

*Comment*

HSC does not believe the commission is doing all that it can to cover all its expenses.

**RESPONSE**

**The commission strives to balance its need for adequate program funding with the costs its fees represent for the regulated community. The commission estimates that the increases will provide sufficient revenue to fund air program activities through FY 2003. The commission intends to review the air fee increases adopted in this package next year to ensure that Fund 151 has adequate funding in subsequent fiscal years. The commission determined that it is taking sufficient action to cover its expenses and to ensure that Fund 151 has adequate funds through FY 2003.**

*Comment*

SCI stated that the large fee increases do not demonstrate sound fiscal responsibility or sound management of budgetary resources.

**RESPONSE**

**The commission strives to manage its fiscal resources in a sound and efficient manner. The commission has operated its air programs without increasing most of the fees since the early 1990's. The fee increases are not large when due consideration is given to the length of time in which fees were not increased.**

*Comment*

TPF suggested that the commission should not have as large of an ending balance. CPSSA, AE, and LP&L state that TNRCC has not explained why it needs an additional \$12 million in FY 2003.

**RESPONSE**

**The commission revised its proposal since the receipt of these comments during the stakeholder process. The commission is not projecting a \$12 million balance in any FY from 2003 to 2005 under the revised proposal. The adopted fees are expected to result in a fund balance of \$3.7 million in FY 03, and a negative fund balance in FY 04 and FY 05. The commission determined that some level of fund balance is necessary for effective operation of the air programs and to cover recurring monthly costs such as payroll. Since the revised version of the proposal accommodates these requests, no further changes to the rules were made in response to these comments.**

*Comment*

TPF suggested that fee notices should be staggered so that there is continuous funding without needing the huge increase as proposed.

**RESPONSE**

**The commission revised its proposal since the receipt of this comment. The commission is not projecting a \$12 million balance in any FY from 2003 to 2005 under the revised proposal. However, the commission notes that a small funding balance is necessary to ensure that sufficient**

**funds are collected to fund the commission's air programs and to meet recurring monthly expenses of the programs, such as payroll. Staggering fee notices will neither alleviate the need to maintain a small funding balance nor to collect sufficient fee revenue to adequately fund the commission's air programs. No further changes to the rule were made in response to this comment.**

*Comment*

AGC commented that the proposed fees will represent a significant and increased financial burden and that an increase in air fees or the creation of new fees is not justified. SCI commented that it is not convinced that the air related fees are justified.

**RESPONSE**

**The commission does not agree with these comments. The commission relies on fees for the majority of its funding. Many of the fees that support the commission's air programs have not been increased since the early 1990's. In the last several years, Fund 151 has carried a balance that has allowed the commission to collect revenues below the annual budgeted expenditures and appropriations. However, the revenue estimates for Fund 151 reveal that there are insufficient funds to support the FY 2003 appropriated levels at current fee rates. Consequently, fee increases are necessary to provide sufficient funding for the commission's air programs.**

*Comment*

TIADA commented that the fee increases would be passed along to consumers and would especially

impact the poor. XCEL noted that the burden of the emissions and inspection fees are passed along to the customers of industry.

**RESPONSE**

**The commission acknowledges that businesses typically pass along their costs when setting prices. However, the commission finds that these costs are necessary to adequately fund the air programs and to protect air quality.**

*Comment*

Considering the significant portion of air fees paid by its members, TCC urged the commission to continue to consider means to adequately fund the water program.

**RESPONSE**

**Addressing issues related to funding for water programs is beyond the scope of this rulemaking. The commission notes that the legislature determines the appropriations for all agency programs each biennium. No changes to the rule were made in response to this comment.**

*Comment*

AEP and TXU requested that the commission revise the proposed emissions fee rule to defer the applicability of the increase until FY 2004 to allow fee payers to adequately budget for these higher fees.

**RESPONSE**

**The commission projects that Fund 151 will incur a negative balance in FY 2003 unless the fee increases take effect in 2003, therefore delaying the fee increase until 2004 would not provide adequate funding for the Title V program. No changes to the rule were made in response to this comment.**

*Comment*

TAB commented that the emissions fee rulemaking should be delayed to gather and provide more information.

**RESPONSE**

**The commission disagrees that the rulemaking should be delayed to gather and provide more information. Because the revenue estimates for Fund 151 reveal that there are insufficient funds to support the FY 2003 appropriated levels at current fee rates, the fee increase cannot be delayed. The commission provided stakeholders as well as the public a variety of information regarding program costs and funding via stakeholder meetings, the web page, and upon request. Agency staff members have been directed to conduct a comprehensive study of the fee structure and will report back to the commission in January 2003.**

*Comment*

ACT commented that the EPA presumptive minimum does not guarantee that the Title V program is adequately funded which should be the underlying goal. ACT commented that EPA has identified

various deficiencies in the TNRCC Title V program that must be fixed and ACT stated that the current emissions fee proposal is not sufficient for the staff to meet that requirement. EPA found that, regardless of whether the proposed emissions rate is equivalent to the presumptive minimum, it is sufficient to meet the commitment made in the 2001 Texas fee demonstration.

#### **RESPONSE**

**The commission agrees that the EPA presumptive minimum does not guarantee that the Title V program will be adequately funded, however, at the present time the amount collected under the presumptive minimum provides a sufficient amount of funding needed, based upon the commission's estimates, for Title V direct and indirect costs through 2005. The commission considered all of the costs of the program, including those associated with maintaining federal approval of the program. The commission appreciates the EPA's comment that the emissions fee increase is consistent with the most recent fee demonstration. No changes to the rule were made in response to this comment.**

#### *Comment*

TxOGA contended that the proposed fee increases are "steep."

#### **RESPONSE**

**The commission disagrees that the fee increases are "steep." The commission has operated its air programs without increasing most of the fees since the early 1990's. The fee increases are not large when due consideration is given to the length of time in which fees were not increased.**

*Comment*

ACT commented that it supports the proposed increase in the per-ton fee for air emissions, but stated that the emissions fee should be a flat \$32/ton and could be adjusted for inflation beginning in FY 2004.

ACT commented that the commission has proposed to keep the current \$26 level and adjust it for inflation and stated the resulting fee of \$29.11 for FY 2003 is too low.

**RESPONSE**

**The commission disagrees that the adopted emissions fee rate is too low. The commission's proposal relies on an EPA formula to calculate an emissions fee rate that is intended to provide sufficient funding for the Title V program. In a letter dated August 12, 2002, the EPA commented that it "supports the State's efforts to increase rates annually by a percentage equal to the CPI" and that the emissions fee rates will provide "adequate funds to support its specified programs."**

**The commission disagrees with the characterization that the new rate is based on the existing rate of \$26. In fact, the proposed rate is based only upon the EPA presumptive minimum as adjusted for Texas, and has no connection to the current \$26 fee. No changes to the rule were made in response to this comment.**

*Comment*

ACT suggested that \$32/ton emissions fee would likely generate a small positive balance which could remain in the account for the future as emissions continue to drop and for tight budget situations.

**RESPONSE**

**The commission strives to balance its need for adequate program funding with the costs its fees represent for the regulated community. The increases are estimated to provide sufficient revenue to fund Title V activities through the FY 2004 - 2005 biennium at current appropriated levels. No benefit would accrue to the commission or the regulated community by generating a larger fund balance than is needed to properly administer the Title V program. No changes to the rule were made in response to this comment.**

*Comment*

CPSSA, AE, and LP&L requested a distinct breakdown of each program's projected cost increase in order to justify the proposed increase in emissions fees. TAB commented that it has made multiple requests for information regarding funding and fee issues and that without such information it cannot provide meaningful comments on the rulemaking. TAB commented that it has not seen documentation that supports the TNRCC's position that there will be a shortfall in Fund 151 or the Title V program, especially not an immediate shortfall.

**RESPONSE**

**The agency staff responded to stakeholder requests for information by providing the documentation requested, including program costs, revenues, and fund balances. Agency staff members have been directed to conduct a comprehensive study of the fee structure and will report back to the commission in January 2003.**

*Comment*

TxOGA commented that by raising emissions fees, the TNRCC is penalizing companies' environmental successes for reducing emissions. CPSSA, AE, and LP&L commented that the commission should consider implementing a strategy to develop some means other than emissions-based fees to maintain their budget to avoid discouraging emission reductions.

**RESPONSE**

**The commission acknowledges that decreasing emissions will pose a greater challenge in funding the Title V program as time passes. However, as noted by these commenters in their comment letters, the commission is currently bound by statutory provisions to support the Title V program with emission-based fees and has no legal authority to implement a strategy to develop another means of funding the program. The increase in the emissions fee is intended to generate sufficient revenue to support the Title V program, not to penalize companies that reduce emissions levels.**

*Comment*

ACT commented that achieving better funding and equity for the Title V program will require a legislative change in the fee structure which raises or eliminates the 4,000 ton-per-pollutant emissions fee cap as well as the \$75,000 permit and permit amendment fee caps.

**RESPONSE**

**The commission is currently bound by the statutory fee caps, however, if the legislature acts to**

**change those caps, the commission would likely review the fee rules to determine whether changes are appropriate.**

*Comment*

CPSSA, AE, and LP&L commented that the commission should consider allowing companies to distribute the additional emissions fees locally in the county where the permitted facility resides, citing examples of paying for monitoring stations, lawn mowing programs, energy conservation, and public education campaigns. If necessary, CPSSA, AE, and LP&L requested that the commission consider asking the legislature next year to allow companies to provide some of the extra fee money back to the local area to pay for local air quality management programs, pollution buy-back programs, and ambient monitoring stations.

**RESPONSE**

**The commission generally supports programs which ensure that a local area benefits from funding paid by local companies. However, in this case, local programs such as those listed by the commenters would not further the implementation of the Title V program and therefore would not reduce the amount of funding needed to support that program. As such, additional emissions fees would have to be collected to maintain federal approval of the Title V program. The commission opposes this option to the extent it would increase emissions fees more than necessary. As noted by the commenter, a legislative change would be necessary to allow emissions fees to be used for non-Title V activities. No changes to the rule were made in response to this comment.**

*Comment*

TCC suggested that language relating to an owner/operators's responsibility to notify the commission of fee applicability be removed and that this issue be handled instead through guidance.

**RESPONSE**

**This requirement is necessary to provide the commission notification if the emissions/inspection fee package is not received by an affected company. Having this requirement in a rule instead of a guidance document will allow the commission to initiate enforcement action against entities that do not comply. The requirement also gives the commission the ability to identify new accounts, verify the successful mailing of the fee packages to existing customers, and recognize which companies are delinquent in returning the completed forms. To insure the correct contact and fee basis information prior to invoicing, this clause must be added. No changes to the rule were made in response to this comment.**

**Small and Medium-Sized Businesses**

*Comment*

ACT stated that all of the proposed fees should be recalculated so that every entity in the regulated community pays its fair share and the current proposal puts too much of the financial burden on the small and medium-sized companies while both larger companies and grandfathered facilities have relatively low fees. HII and two individuals commented that they are opposed to any increases in air-related fees. HII stated the current fees are already excessive and burdensome for small businesses.

**RESPONSE**

**The commission does not agree that the fees put too much of the financial burden on small and medium-sized businesses. Total fee amounts are generally reflective of emissions levels and project capital costs, and therefore larger businesses tend to be assessed larger fees overall. The commission regards the fee amounts as reasonable. No changes were made to the rule in response to this comment.**

*Comment*

SCI commented that, as of April 2002, there had not been any meaningful participation from small businesses in the decision-making process.

**RESPONSE**

**The commission disagrees with this comment. The commission developed a balanced stakeholder list that included representatives from small businesses prior to initiating this rule project. All stakeholders were notified in March of 2002 of an April 2002 meeting. The commission solicited input from all stakeholders, including small business stakeholders, at this meeting. The commission notes that the stakeholder meeting was the first of several opportunities to participate in this rulemaking process.**

*Comment*

SCI questioned how the proposed fee increases would improve the environment as they threaten the viability of small businesses.

**RESPONSE**

**The environment will benefit significantly from an adequately funded air quality program. The commission disagrees that the fees will threaten the viability of small businesses. The commission operated its air programs without increasing most of the fees since the early 1990's. The fee increases are not large when due consideration is given to the length of time in which fees were not increased. Most small businesses will not be subject to the emissions fees due to their lower emissions, and therefore, may only be subject to the inspection fees in Chapter 101. The commission regards the fee amounts as reasonable for small businesses.**

**Disincentive**

*Comment*

GII, HTF, and SCI commented that the proposed fees will create a disincentive for businesses to comply with the commission's rules and to turn to the TNRCC for answers. TSC commented that an increase could be counterproductive and requested that the commission refrain from raising the fees for air permits.

**RESPONSE**

**The commission disagrees with GII's, HTF's, and SCI's comments that the fees will create a disincentive for businesses to comply with the commission's regulations. Regulated entities must be responsible for their own decisions to either comply with or disregard the law based upon a fee associated with compliance. The commission cannot control businesses' decisions to comply or not comply with regulations, but only can enforce regulations and provide disincentives for**

**noncompliance through the assessment of penalties. The commission will not refrain from assessing a fee solely because some regulated entities may disregard their obligation to comply with the law. The commission will continue to offer answers to any business that requests our assistance. No changes were made to the rule in response to these comments.**

*Comment*

GII, HTF, and SCI commented that fee increases would create an incentive to relocate outside Texas and would increase pollution elsewhere.

**RESPONSE**

**The commission disagrees with GII's, HTF's, and SCI's comments that the fees will create an incentive for businesses to relocate. The commission cannot control businesses' decisions to relocate outside of Texas. Further, increased pollution in areas outside the State of Texas is not in the scope of this rulemaking. No changes were made to the rule in response to this comment.**

**Streamlining**

*Comment*

SCI commented that the TNRCC needs to streamline its permit and registration review process to reduce the fees. TxOGA stated that streamlining and reducing program costs should be done before increasing fees. TPF suggested that the commission should cut costs.

**RESPONSE**

**The commission is always seeking methods to streamline the permitting process and reduce operating costs. However, the revenue estimates for Fund 151 reveal that there are insufficient funds to support the FY 2003 appropriated levels at current fee rates. Consequently, fee increases are necessary to provide sufficient funding for the commission's air programs.**

**Billing Process/Timing**

*Comment*

TCC commented that it wanted to insure that fees paid to the commission's budget actually pay for the targeted programs.

**RESPONSE**

**The commission uses dedicated fees to fund the intended programs in compliance with statutory requirements. No changes to the rule were made in response to this comment.**

*Comment*

TCC proposed that the commission add any fees for PBRs to the annual fee statement and allow an entity to write one check versus multiple checks during the year. TCC recommended that the commission bill on an annual basis for all fees incurred during the previous year for permits, renewals, and amendments as well as emissions and inspection fees.

**RESPONSE**

**The commission currently does not process air permits, amendments, or renewals until payment is received and adopts a similar process for PBRs. Because a change in this process would require substantial operational changes and involves many issues for which comments were not solicited, the commission determined that this issue could not be adequately and appropriately addressed in this rulemaking. However, agency staff members will continue to discuss this issue to determine if such a change would be appropriate in a future rulemaking. No changes to the rule were made in response to this comment.**

*Comment*

TCC appreciated the added alternative method of payment, but strongly encouraged the commission to add the ability to process credit cards.

**RESPONSE**

**The commission entered into a pilot program with Texas Online to accept credit card payments for two (non-air) fees, but the pilot program was terminated due to operational issues. Consequently, acceptance of credit cards may become an option in future years, but it is not something that can be made operational quickly. The commission notes that it can accept payment electronically by wire or automated clearing house, and suggests that payees contact the commission for instructions. No changes to the rule were made in response to this comment.**

*Comment*

TCC proposed that the commission codify fixed emissions and inspection rates for the next four years based on the CPI and then hold fees constant until a future budget evaluation suggests that additional income is truly necessary.

**RESPONSE**

**The commission will monitor projected revenue and expenditures to ensure that fee rates generate a sufficient and appropriate amount of revenue. If the new fee structure begins to collect more fees than are necessary, the commission can end the automatic CPI increase through rulemaking. The commission also notes that annually increasing the emissions fee by the CPI is a methodology used by many other states and one supported by the EPA. In a letter dated August 12, 2002, the EPA commented that it “supports the State’s efforts to increase rates annually by a percentage equal to the CPI” and that the emissions fee rates will provide “adequate funds to support its specified programs.” No changes to the rule were made in response to this comment.**

*Comment*

XCEL requested the commission provide information regarding the per-ton rate at least six months prior to the due date of the fee in order for fee payers to anticipate and prepare for these budgetary outlays. TXU commented that the CPI for a particular year will not be known until after the budgeting process has occurred, and therefore requested that the CPI not be used to calculate fees until the next FY.

**RESPONSE**

**The commission notes that this request is not possible to fulfill. The commission is required by THSC, §382.0621(c), to use the average of the monthly CPI figures for the 12 months prior to the start of each FY. Consequently, the commission cannot know the final rate for a given FY until September 15th of the FY, at the earliest. The commission suggests that regulated entities consult the information available from the Bureau of Labor Statistics web site when preparing budgets.**

*Comment*

XCEL commented that the timing of due dates for the inspection and emissions fees (30 days after filing date) is unrealistic due to the unpredictability of the due date, the final per-ton fee, total fee, and the corporate mail system. XCEL urged the commission to retain a predictable due date of November 1 of the FY in which the fees are due. AEP and TXU requested that the commission retain the annual due date of November 1, as it currently exists in the rules, because a 30-day billing period is too short. TCC requested that the 30-day billing cycle be increased to 45 days.

**RESPONSE**

**The commission cannot extend the billing period beyond 30 days. 30 TAC Chapter 12 requires all payments to be made within 30 days. The 30-day billing period is the result of moving from a self-report/self-pay system to a self-report/billed system for the annual air fees as recommended by the Sunset Advisory Commission in its last review of the agency fee systems. The billing for FY 2003 is expected to occur no earlier than November 1 due to the time line of the current rulemaking. This would result in the annual air fees being due by the end of November. In**

**subsequent years, the 30-day billing period should start around the first of October. This would result in the annual air fees being due toward the end of October or generally in the same time frame as it is currently. No changes to the rule were made in response to this comment.**

### **Inspection Fees**

#### *Comment*

ACT generally supported the proposed inspection fee.

### **RESPONSE**

**The commission appreciates ACT's support.**

### **CPI and Presumptive Minimum - Emissions Fees**

#### *Comment*

During the stakeholder process, CPSSA, AE, and LP&L commented that the fees should be gradually increased over several years. Subsequently, CPSSA noted the incorporation of stakeholder comments of this suggestion.

### **RESPONSE**

**The commission considered the comments raised during the stakeholder process about the emissions fee increase. The commission subsequently proposed a fee that provides for the gradual increase of emissions and inspection fees based upon the CPI.**

*Comment*

The EPA stated it supports the State's efforts to increase rates annually by a percentage equal to the CPI.

**RESPONSE**

**The commission appreciates the EPA's support.**

*Comment*

The EPA stated that it presumes that Texas uses 1995 as the base year for the CPI factor in calculating the emissions fees, and therefore it is not equivalent to the EPA presumptive minimum which is based on the year 1989.

**RESPONSE**

**The EPA was contacted to clarify that the value of 122.15 is the calculated average monthly CPI for the 12 months preceding September 1989 (FY 1989) which is the basis for the CPI adjustment of the Texas emissions fee. The calculation of the EPA presumptive minimum as of September 2001 using this basis is \$35.99 as opposed to the EPA's published number of \$36.03. Agency staff members spoke with the EPA staff members who indicated that the annual change in their presumptive minimum is calculated by using the percentage change in the CPI for that year. This differs slightly from the commission's calculation only because of the round off from year to year, and it is not substantively different from calculating directly back to September 1989. The EPA indicated that the method used by Texas is an acceptable method for calculating the presumptive**

**minimum. Their acceptance also included reducing the presumptive minimum for Texas to account for the commission collecting fees on carbon monoxide which is not a part of the EPA presumption. The formula for calculating the Texas presumptive minimum includes a reduction factor based on the percent of carbon monoxide emissions reported in the previous year's total fee basis. The presumptive minimum for Texas is \$28.63 for FY 2003. No changes were made to the rule in response to this comment.**

*Comment*

TxOGA commented that automatically increasing the fee each year without evidence that an increase is needed is neither necessary or good public policy.

**RESPONSE**

**Annually increasing the emissions fee by the CPI is a methodology used by many other states and one supported by the EPA. In a letter dated August 12, 2002, the EPA commented that it “supports the State’s efforts to increase rates annually by a percentage equal to the CPI” and that the emissions fee rates will provide “adequate funds to support its specified programs.” Moreover, fee increases are necessary because the commission estimates that insufficient funding will exist to support its air program activities, including Title V, unless current fee rates are increased. Based upon revenue and cost projections, the presumptive minimum will provide the appropriate level of funding through FY 05. However, if the new fee structure begins to collect more fees than are necessary, the commission can end the automatic CPI increase through rulemaking. No changes to the rule were made in response to this comment.**

*Comment*

CPSSA stated that it disagrees with using the CPI because it is not reflective of actual financial needs of the commission. CPSSA stated that TNRCC has stated that it needs \$35 million for the Title V program in 2002 and that can be collected at \$26/ton, therefore a CPI increase is not needed.

**RESPONSE**

**Due to decreasing emissions levels, in future years the current fee of \$26/ton will not generate the same amount of revenue as in the past or in an amount sufficient to fund the Title V program. Absent the increase, emissions fee revenue is projected to total \$34.2 million in FY 03 and to decline in each subsequent FY. Annually increasing the emissions fee by the CPI is a methodology used by many other states and one supported by the EPA. In a letter dated August 12, 2002, the EPA commented that it “supports the State’s efforts to increase rates annually by a percentage equal to the CPI” and that the emissions fee rates will provide “adequate funds to support its specified programs.” No changes to the rule were made in response to this comment.**

*Comment*

CPSSA expressed concern that an annual increase in the fee could create excess funds that could be used for non-Title V purposes.

**RESPONSE**

**The commission does not project that increasing emissions fees using the CPI will result in substantial excess funds. A small fund balance is necessary to ensure that sufficient funds are**

**collected to fund the Title V program and to meet recurring monthly expenses of the program, such as payroll. However, if the new fee structure begins to collect more fees than are necessary, the commission can end the automatic CPI increase through rulemaking. The commission uses dedicated fees to fund the intended programs in compliance with statutory requirements.**

#### **Title V Costs and the Commission's Accounting Process/System**

##### *Comment*

CPSSA commented that the Title V program is already well established so the budget should be stable.

##### **RESPONSE**

**The commission's Title V budget is relatively stable; it is neither increasing nor decreasing dramatically. Due to decreasing emissions levels, however, fee increases are needed to generate equivalent levels of revenue as collected in prior years.**

##### *Comment*

TAB noted that 75% of the Title V permits have already been issued, and therefore program costs should decline.

##### **RESPONSE**

**Initial issuance of Title V permits is only one component of the state's Title V program. Administration of a Title V program also involves monitoring, inspections, and other activities.**

**In addition, Title V permits are renewed every five years and will likely require permit revisions over the life of the permit. Therefore, the commission determined that Title V costs will not necessarily decline once all Title V permits have been issued.**

*Comment*

AEP and TXU noted that a report by the United States Office of the Inspector General entitled “EPA and State Progress in Issuing Title V Permits” dated March 29, 2002 indicates that Florida has a comparable number of Title V sources to Texas but that Texas spent 4-1/2 times as much on its Title V program in 2000. This report also indicated that Texas expenditures were 119% to 6% more than all other states in the report which indicated to AEP and TXU that Texas is using emissions fees for non-Title V activities. TAB commented that TNRCC is currently spending \$35 million annually, more than any other state recently surveyed by the EPA.

**RESPONSE**

**The commission notes that the states recently surveyed in the EPA Inspector General report only total six: Colorado, Florida, Massachusetts, Missouri, Pennsylvania, and Wisconsin. Texas has a larger Title V program than the six states surveyed, in part, because Texas has substantially more numerous and complex Title V sites than the other states. Further, Florida’s Title V program differs substantially from the Texas program. For example, Florida does not have any nonattainment areas, which means a less complicated regulatory system, as well as the absence of any SIP activities. Therefore, comparing the number of Florida’s sources is not an appropriate comparison. Agency staff members conducted a review of 38 states and found that emissions fee**

**rates ranged from \$6.10/ton to \$81.20/ton, with most comparable states averaging approximately \$31/ton. The commission determined that the adopted emissions fee rate is appropriate.**

*Comment*

CPSSA commented that it opposed the emissions fee increase. CPSSA stated that the Title V program is adequately funded. TxOGA opposed increasing the Title V emissions fees at this time because it stated that the Title V program has not been shown to have an inadequate funding base. TxOGA commented that the emissions fees should be raised only if the Title V program lacks funding. AEP and TXU commented that the commission should not adopt the proposed Title V emissions fees rate increase because the commission has not demonstrated that an increase is justified. AEP and TXU commented that the emissions fees should be raised only if the TNRCC is using the revenues only to cover reasonably the costs of the Title V program and if there are not enough revenues to cover such costs without the increase.

**RESPONSE**

**Fee increases are necessary because the commission estimates that insufficient funding will be generated in future years to support its Title V program unless emissions fee rates are increased. The commission currently estimates that the Title V program will cost approximately \$35.3 million annually for FY 03 through FY 05. Due to decreasing emissions levels, in future years the current fee of \$26/ton will not generate the same amount of revenue as in the past or in an amount sufficient to fund the Title V program. Absent the increase, emissions fee revenue is projected to total \$34.2 million in FY 03 and to decline in each subsequent FY. The adopted emissions fee rate**

**is projected to generate \$37.7 million in revenue in FY 03, \$36.6 million in FY 04, and \$35.8 million in FY 05. This level of funding is necessary to ensure that sufficient funds are collected to fund the Title V program and to meet recurring monthly expenses of the program, such as payroll. Moreover, failure to collect sufficient revenue to support the Title V program could result in the EPA withdrawing its delegation of the program to the state. No changes to the rule were made in response to this comment.**

*Comment*

TAB stated that if the amount of Title V emissions fee funding for administrative services were more in line with funding from other sources that there would be more funding available for strictly Title V expenses and, hence, no need for an increase in the emissions fee. TAB has not seen any support for the administrative expenditure of 29.62% for the Title V program found in the independent audit report and noted that the independent auditor suggested a 15% benchmark for commission administrative services. AEP and TXU comment that the independent auditor found that a disproportionate share of Title V emissions fees were used to fund TNRCC administrative costs and that using an appropriate portion would free up \$4.9 million of the Title V emissions fee revenue, enough to cover any projected shortfall.

**RESPONSE**

**The commission disagrees with the independent auditor's finding that the Fund 151 indirect administrative costs totaled 28% (the commission notes that the independent auditor found the Fund 151 indirect cost to be 28%, not 29.62% as suggested by the commenter). The commission**

**estimates its indirect cost rate for Fund 151 to be 24.5%. Agency staff members have been directed to conduct a comprehensive study of the fee structure and will report back to the commission in January, 2003.**

*Comment*

AEP and TXU requested that the commission establish and consistently follow an accounting system that is adequate to appropriately account for how it spends Title V emissions fee revenues on direct and indirect costs and that without such a system the TNRCC cannot demonstrate compliance with TCAA, §382.0622(c) and FCAA, §502(b)(3)(C)(iii). AEP and TXU commented that TNRCC does not use a financial system that is adequate to ensure fiscal integrity because it commingles the emissions fees with other fee revenues in Fund 151. CPSSA, AE, and LP&L commented that TNRCC provided a document at the stakeholder meeting that described many types of non-Title V activities funded from Fund 151 which is funded in part by emissions fees. AEP and TXU expressed concern that without an adequate accounting system, Fund 151 could become a slush fund used to fund various non-Title V TNRCC activities. AEP and TXU commented that they believe an appropriate accounting system would demonstrate that TNRCC currently spends Title V emissions fees on non-Title V activities. TAB stated that the commission lacks adequate documentation for its Title V program expenditures citing the state auditor and the independent audit report. TAB strongly encouraged the commission to significantly improve documentation in the Title V program. TCC stated that it wants to insure that fees paid to the commission's budget actually pay for the targeted programs.

## **RESPONSE**

**The commission tracks its Title V program expenditures to the full capability of its existing accounting system and resources. Accounting for program activity with even greater accuracy would require substantial monetary investment for upgrades to or replacement of the existing accounting system and additional resources, which would necessitate further fee increases. The commission uses dedicated fees to fund the intended programs in compliance with statutory requirements.**

### **Title V Legal Limitations**

#### *Comment*

CPSSA, AE, and LP&L commented that the commission is restricted by law as to how much it can charge for emissions fees because it can only be the amount that is necessary for the Title V program, citing the FCAA, §502(b)(3)(C)(i). TxOGA stated that both the state and federal statutes clearly state that the emissions fee is to be used solely for Title IV and V program, and therefore, collecting more than is needed for these program would effectively create an illegal tax. AEP and TXU contended that there is effectively a statutory limit on the amount of Title V emissions fees the TNRCC may collect, citing TCAA, §382.0622(c); FCAA, §502(b)(3)(C)(iii); and 40 Code of Federal Regulations (CFR) §70.9(a) and (d). AEP and TXU argued that since TCAA, §382.0622(c) specifically prohibits any excess Title V emissions fees from being used to cover any other TNRCC costs, there is no need to collect more Title V emissions fees than it needs to cover the costs of the Title V program. AEP and TXU argued that collecting more than is needed for the programs would effectively create an illegal tax. AEP and TXU commented that given these legal limits, the emissions fees are not to be used for

any other air quality or other media program and should not be viewed as penalty on sites with the highest emissions. ACT fully supported the regulated community's attempt to ensure that emissions fees are used only to cover costs of the Title V program and not for other air program or non-commission related programs. ACT noted that EPA Title V guidance does not limit a state's discretion to collect fees beyond the amount required for Title V.

## **RESPONSE**

**The commission disagrees with several of the legal conclusions contained in these comments. The federal law cited by CPSSA, AE, LP&L, AEP, and TXU, and alluded to by TxOGA does not apply to the use of *all* emissions fees collected by a state but rather it applies to all emissions fees collected which are “required to develop and administer the permit program requirements” of the Titles IV and V programs, specifically including the Small Business Stationary Source Technical and Environmental Compliance Assistance Program (FCAA, §502(b)(3)). The commission agrees with ACT that federal law does not limit the state's discretion to collect fees beyond those required by Title V as long as the Title V program is sufficiently funded and notes that the EPA clarified this point in the preamble to the adoption of the Federal Operating Permit Program rules (57 FR 32250, 32291 (July 21, 1992)). To the extent that the fees collected are over and above the funding required to support the Title V program, there are no federal restrictions on those additional fees. However, this rulemaking is not intended to collect emissions fees in excess of those required to operate the Title V program. It is intended to cover reasonably necessary, direct and indirect costs associated with the Title V program. The basis for the fee is, of necessity, based on estimated expenses and emission activity. The goal, however, is to ensure that**

**sufficient funds are collected to fund the Title V program and to meet recurring monthly expenses of the program, such as payroll.**

**The commission also disagrees with the comment that federal law legally restricts the use of state money. While federal law does detail whether a state is meeting the requirements to maintain federal approval of the Title V program, that federal law does not apply directly to bind state moneys. In other words, the EPA cannot legally require that fees collected be used a certain way, but it can take action to withdraw its approval of the Title V program if the state is not meeting the federal program requirements, including funding requirements.**

**Regarding state authority, it is important to note that this rulemaking does not address the use of the fees collected; that is governed by other law. While the commission does not agree with the interpretation of state law put forth by TXU and AEP, the commission does agree that the use of emissions fees is limited by state statute in TCAA, §382.0622(c), as it is read in conjunction with general funding provisions in TWC, Chapter 5, and in the General Appropriations Act. In particular, the General Appropriations Act provides a ceiling on the amount of emissions fees which may be spent by the commission during each FY and may also contain additional provisions regarding the use of the fees.**

**The commission disagrees with the comments that the commission is legally restricted by state law from collecting more fees than are necessary to fund the Title V program. The controlling state law regarding the collection of fees is TCAA, §382.0621, which states that the emissions fee “shall**

**be at least sufficient to cover all reasonably necessary direct and indirect costs of developing and administering” those programs (emphasis added). While the use is restricted as noted earlier in this response, the collection of the fees is legally restricted only by setting a minimum, not a maximum. The commission disagrees with the comments that the use restrictions create an effective limitation on the authority to collect or that any excess fees collected would be a “tax.” Excess fees would not be a tax because they would eventually be used for environmental programs which are reasonably related to the activity which is the basis of the fee. The commission notes, however, that it does not intend by this adoption to collect more than is anticipated to be required for the direct and indirect costs of the Titles V program.**

*Comment*

AEP and TXU disagreed with TNRCC staff statements indicating that minor new source review (NSR) permitting can be funded by Title V emissions fees because minor NSR is an applicable requirement of the Title V program, citing TCAA, §382.0621(b) and §382.0622(c). AEP and TXU contended that only the incremental costs associated with incorporating NSR into the Title V program can be funded by emissions fees, not the substantive review and processing of the NSR permit applications.

**RESPONSE**

**Minor NSR permitting is an applicable requirement of the Title V program. The EPA made clear through rulemaking, 40 CFR §70.9(b)(ii) that Title V fees must be sufficient to cover the costs of “the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal.” The EPA clarified further in a memo dated August 4, 1993 regarding**

**“Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permits Programs Under Title V,” that “Title V fees must cover the costs of implementing and enforcing not only Title V permits but of any other permits required under the Act, regardless of when issued.” Therefore, the implementation of the Texas minor NSR program is required to be funded through emissions fees.**

#### **Miscellaneous**

##### *Comment*

The EPA commented that the TNRCC should clarify in its final rulemaking whether it intends to include §101.24 and §116.1050 in its SIP submittal as those sections have not previously been submitted to the EPA.

#### **RESPONSE**

**The commission appreciates the EPA’s comment and wishes to maintain consistency with prior SIP submittals. The commission did submit §101.24 to the EPA in the Fall of 1985, with a most recent revision in November of 1997. Therefore the commission does intend to submit §101.24 of this package as a SIP revision. However, the EPA is correct that §116.1050 has not previously been submitted, so the commission is not now submitting that portion of the rulemaking as a SIP submittal.**

##### *Comment*

The EPA commented that §101.27(a) provides that for 40 CFR Part 70 sources, the fugitive emissions

shall be considered toward applicability only for those source categories listed in 40 CFR §51.166(b)(1)(iii) which is part of the definition for major source for purposes of prevention of significant deterioration and the EPA suggested changing the reference from 40 CFR §51.166(b)(1)(iii) to 40 CFR §70.2 or 30 TAC §122.10(14)(C).

#### **RESPONSE**

**The commission reviewed all three of the references and does not find there to be a significant difference between them. Given this finding, the commission does not find a need to make the change suggested in this comment. However, the commission will continue to discuss this issue with the EPA and could consider proposing this change in a future rulemaking.**

#### *Comment*

The EPA commented that §101.27(a) does not appear to include all the sources covered by 30 TAC §122.10(14) and that TNRCC should, if the difference is not intentional, revise §101.27(a)(1) to simply refer to "major sources" as the term is defined in 30 TAC §122.10(14).

#### **RESPONSE**

**The change suggested in this comment would not likely impact the amount of fees collected under this rule by a significant amount, however, it could expand the applicability of §101.27(a) to cover new sources, and as such, the change would have to be proposed in a rulemaking to allow comment by all affected parties. Since this change was not included in the proposal for this rulemaking, it cannot now be adopted. The commission may consider proposing this change in a**

**future rulemaking.**

## SUBCHAPTER A: GENERAL RULES

### §101.24, §101.27

#### STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.062, concerning Application, Permit, and Inspection Fees, which requires the commission to collect fees for inspections, applications for permit, permit amendment, and renewal, and authorizes the commission to collect fees for permits by rule; §382.0621, concerning Operating Permit Fee, which requires the commission to collect fees for sources subject to Titles IV or V of the FCAA; §382.0622, concerning Clean Air Act Fees, which restricts the use of Clean Air Act fees; and the entire TCAA (§§382.001 *et seq.*), which provides authority for all of the air quality programs which the fees are necessary to support.

#### **§101.24. Inspection Fees.**

(a) Applicability. The owner or operator of each account to which this rule applies shall remit to the commission an inspection fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year,

begins on the September 1 prior to that calendar year. An account subject to both an inspection fee and emissions fee, under §101.27 of this title (relating to Emissions Fees), is required to pay only the greater of the two fees. Each account will be assessed a separate inspection fee. The inspection fee shall apply to each account which contains one or more of the types of plants, facilities, and/or processes described in subsection (f) of this section, including permitted and non-permitted facilities. References for the industrial categories used are provided in the *Standard Industrial Classification (SIC) Manual* (Executive Office of the President, Office of Management and Budget, 1987). If more than one SIC category can apply to an account, the fee assessed shall be the highest fee listed for the applicable classifications in the fee schedule. Provisions of this section apply to all accounts, including accounts which have not been assigned specific commission identification numbers. The owner or operator of an account subject to an inspection fee is responsible for contacting the commission to obtain an identification number. The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year for which the fee is assessed, a full inspection fee is due. If the commission is notified in writing that the account is not and will not be in operation during that fiscal year, a fee will not be due.

(b) Self report/billed information. Emissions/inspection fee information packets will be mailed to each affected account prior to the fiscal year for which the fee is due. The completed emissions/inspection fee basis form shall be returned to the address specified on the emissions/inspection fees basis form within 60 days of the date the agency sends the emissions/inspection fee information packet. The completed emissions/inspection fee basis form shall include, at least, the company name, mailing address, site name, all Texas Commission on

Environmental Quality (TCEQ) identification numbers, the applicable SIC category, any additional information necessary to assess the fee, and the name and telephone number of the person to contact in case questions arise regarding the emissions/inspection fee basis form. If more than one SIC category can apply to an account, the category reported shall be that one with the highest associated fee. Subsequent to a review of the information submitted, a billing statement of the fee assessment will be sent to the account during the fiscal year in which the fee is due.

(c) Requesting fee information packet.

(1) For fiscal year 2003, if an account which is subject to the inspection fee in this section has not received the information packet described in subsection (b) of this section by November 1, 2002, the owner or operator of the account shall notify the commission by December 1, 2002. For accounts which begin operation after November 1, the owner or operator of the account shall request an information packet within 30 days of commencing operation.

(2) For subsequent fiscal years, if an account which is subject to the inspection fee in this section has not received the information packet described in subsection (b) of this section by June 1 prior to the fiscal year in which the fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year in which the fee is due. For accounts which begin operation after September 1, the owner or operator of the account shall request an information packet within 30 days of commencing operation.

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

(e) Due date. Payment of the inspection fee is due within 30 days of the date the agency sends a statement of the assessment to the facility owner or operator. If an account commences or resumes operation during the fiscal year in which the fee is assessed, the full inspection fee will be due prior to commencement or resumption of operations.

(f) Inspection fee schedule. The inspection fee schedule is as follows. For fiscal years after 2003, the fiscal year 2003 fee schedule shall apply as adjusted for inflation using the Consumer Price Index (CPI). The CPI adjustment factor shall be the average of the CPI for the 12 months preceding the fiscal year for which the fee is assessed as compared to the same calculation of the CPI for the previous fiscal year (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100).

**Figure: 30 TAC §101.24(f)**

SIC CODE - DESCRIPTION	FEE	
	Fiscal Year	Fiscal Year
	1992 - 2002	2003

**1311, 1321 - Natural Gas Processing**

Gas processing and treatment operations with a rated inlet capacity or highest average daily inlet volume for one of the last three years of at least 5 million standard cubic feet per day (scf/day), but less than 25 million scf/day

1311 - Natural Gas Sweetening	\$ 1,250.00	\$ 1,675.00
1321 - Natural Gas Liquids Processing	\$ 2,875.00	\$ 3,850.00
Gas processing and treatment operations with a rated inlet capacity or highest average daily inlet volume for one of the last three years of at least 25 million scf/day		
1311 - Natural Gas Sweetening	\$ 2,500.00	\$ 3,345.00
1321 - Natural Gas Liquids Processing	\$ 5,750.00	\$ 7,695.00
Compression with total horsepower (HP) of at least 10,000 HP from fossil fuel-fired engines	\$ 2,875.00	\$ 3,850.00
<b>1459 - Fuller's Earth Processing</b>		
Material processing capacity of at least 25 tons per hour (tph)	\$ 5,625.00	\$ 7,530.00
<b>1479 - Sulfur Mining</b>		
Material processing capacity of at least 1 ton per day (tpd), but less than 10 tpd	\$ 6,000.00	\$ 8,030.00
Material processing capacity of at least 10 tpd	\$ 12,000.00	\$ 16,060.00
<b>2061 - Cane Sugar Manufacturing</b>		
Processing capacity of at least 1,000 pounds per hour (lbs/hr)	\$ 6,875.00	\$ 9,200.00
<b>2074 - Cottonseed Oil Mills</b>		
Processing capacity equal to or greater than 100 tpd, but less than 425 tpd	\$ 1,250.00	\$ 1,674.00
Processing capacity equal to or greater than 425 tpd, but less than 850 tpd	\$ 1,875.00	\$ 2,510.00
Processing capacity equal to or greater than 850 tpd	\$ 4,000.00	\$ 5,355.00
<b>2082 - Malt Beverages</b>		
Capacity of at least 1 million barrels per year	\$ 3,375.00	\$ 4,520.00

**2435, 2436, 2493 - Veneer, Plywood, Particle board and Fiberboard**

Capacity equal to or greater than 50 million square feet per year (ft <sup>2</sup> /year), but less than 125 million ft <sup>2</sup> /year 3/8" basis	\$ 2,185.00	\$ 2,925.00
Capacity equal to or greater than 125 million ft <sup>2</sup> /year, but less than 350 million ft <sup>2</sup> /year 3/8" basis	\$ 4,375.00	\$ 5,855.00
Capacity equal to or greater than 350 million ft <sup>2</sup> /year 3/8" basis	\$ 8,750.00	\$ 11,710.00

**2611, 2621 - Pulp and Paper Mills**

Capacity of at least 100 lbs/hr , but less than 1,000 lbs/hr	\$ 7,875.00	\$ 10,540.00
Capacity of at least 1,000 lbs/hr	\$ 15,750.00	\$ 21,075.00

**2812 - Alkalies and Chlorine**

Capacity of at least 1 million pounds per year (lbs/yr), but less than 10 million lbs/yr	\$ 2,625.00	\$ 3,515.00
Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 5,250.00	\$ 7,025.00
Capacity of at least 100 million lbs/yr	\$ 10,500.00	\$ 14,050.00

**2813 - Industrial Gases**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr, and heat input capacity on-site of at least 250 million British thermal units (Btu) per hour	\$ 1,875.00	\$ 2,510.00
Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr, and heat input capacity on-site of at least 250 million Btu per hour	\$ 3,750.00	\$ 5,020.00
Capacity of at least 100 million lbs/yr, and heat input capacity on-site of at least 250 million Btu per hour	\$ 7,500.00	\$ 10,035.00

**2819 - Inorganic Chemicals**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 3,750.00	\$ 5,020.00
Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 7,500.00	\$ 10,035.00

Capacity of at least 100 million lbs/yr	\$ 15,000.00	\$ 20,070.00
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**2821 - Plastics, Minerals and Resins**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 3,500.00	\$ 4,685.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 7,000.00	\$ 9,370.00
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Capacity of at least 100 million lbs/yr	\$ 14,000.00	\$ 18,735.00
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**2822 - Synthetic Rubber**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 3,375.00	\$ 4,520.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 6,750.00	\$ 9,035.00
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Capacity of at least 100 million lbs/yr	\$ 13,500.00	\$ 18,065.00
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**2834 - Pharmaceutical Preparations**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 1,685.00	\$ 2,255.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 3,375.00	\$ 4,520.00
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Capacity of at least 100 million lbs/yr	\$ 6,750.00	\$ 9,035.00
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**2841 - Soap and Other Detergents**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 750.00	\$ 1,005.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 1,500.00	\$ 2,010.00
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Capacity of at least 100 million lbs/yr	\$ 3,000.00	\$ 4,015.00
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**2861 - Gum and Wood Chemicals**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 2,310.00	\$ 3,095.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 4,625.00	\$ 6,190.00
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Capacity of at least 100 million lbs/yr	\$ 9,250.00	\$ 12,380.00
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**2865 - Cyclic Crudes and Intermediates**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 3,625.00	\$ 4,855.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 7,250.00	\$ 9,705.00
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Capacity of at least 100 million lbs/yr	\$ 14,500.00	\$ 19,405.00
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**2869 - Organic Chemicals**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 3,750.00	\$ 5,020.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 7,500.00	\$ 10,035.00
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Capacity of at least 100 million lbs/yr	\$ 15,000.00	\$ 20,070.00
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**2873 - Nitrogenous Fertilizers**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 1,560.00	\$ 2,090.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 3,125.00	\$ 4,185.00
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Capacity of at least 100 million lbs/yr	\$ 6,250.00	\$ 8,365.00
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**2874 - Phosphatic Fertilizers**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 2,560.00	\$ 3,430.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 5,125.00	\$ 6,860.00
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Capacity of at least 100 million lbs/yr	\$ 10,250.00	\$ 13,715.00
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**2879 - Agricultural Chemicals**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 2,310.00	\$ 3,095.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 4,625.00	\$ 6,190.00
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Capacity of at least 100 million lbs/yr	\$ 9,250.00	\$ 12,380.00
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**2895 - Carbon Black**

Capacity of at least 6 million lbs/yr, but less than 50 million lbs/yr	\$ 7,750.00	\$ 10,370.00
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Capacity of at least 50 million lbs/yr	\$ 15,500.00	\$ 20,740.00
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**2899 - Chemical Preparations**

Capacity of at least 1 million lbs/yr, but less than 10 million lbs/yr	\$ 1,000.00	\$ 1,340.00
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Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 2,000.00	\$ 2,680.00
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Capacity of at least 100 million lbs/yr	\$ 4,000.00	\$ 5,355.00
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**2911 - Petroleum Refining**

Capacity of at least 10,000 barrels per day (bbl/day), but less than 100,000 bbl/day	\$ 9,375.00	\$ 12,545.00
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Capacity of at least 100,000 bbl/day	\$ 18,750.00	\$ 25,090.00
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<b>2951 - Asphalt Paving Mixtures</b>	\$ 875.00	\$ 1,175.00
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**2952 - Asphalt Felts and Coatings**

Capacity of at least 1 million lbs/yr, but less than 50 million lbs/yr	\$ 4,250.00	\$ 5,690.00
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Capacity of at least 50 million lbs/yr	\$ 8,500.00	\$ 11,375.00
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**2992 - Waste Oil Re-Refining**

Capacity of at least 200,000 gallons per year	\$ 3,750.00	\$ 5,020.00
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**2999 - Petroleum and Coal Products**

Capacity of at least 1 million lbs/yr, but less than 50 million lbs/yr	\$ 5,125.00	\$ 6,860.00
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Capacity of at least 50 million lbs/yr	\$ 10,250.00	\$ 13,715.00
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**3011 - Tires and Inner Tubes**

Capacity of at least 5 million lbs/yr, but less than 10 million lbs/yr	\$ 7,125.00	\$ 9,535.00
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Capacity of at least 10 million lbs/yr	\$ 14,250.00	\$ 19,070.00
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**3211 - Flat Glass**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 5,875.00	\$ 7,865.00
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Capacity of at least 200 million lbs/yr	\$ 11,750.00	\$ 15,725.00
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**3221 - Glass Containers**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 3,375.00	\$ 4,520.00
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Capacity of at least 200 million lbs/yr	\$ 6,750.00	\$ 9,035.00
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**3229 - Pressed and Blown Glass**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 6,750.00	\$ 9,035.00
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Capacity of at least 200 million lbs/yr	\$ 13,500.00	\$ 18,065.00
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**3241 - Cement, Hydraulic**

Capacity of at least 10 million lbs/yr, but less than 500 million lbs/yr	\$ 7,250.00	\$ 9,705.00
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Capacity of at least 500 million lbs/yr	\$ 14,500.00	\$ 19,405.00
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**3251 - Brick and Structural Clay Tile**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 2,375.00	\$ 3,180.00
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Capacity of at least 200 million lbs/yr	\$ 4,750.00	\$ 6,360.00
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**3259 - Structural Clay Products**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 6,250.00	\$ 8,365.00
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Capacity of at least 200 million lbs/yr	\$ 12,500.00	\$ 16,725.00
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**3261 - Vitreous Plumbing Fixtures**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 3,375.00	\$ 4,520.00
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Capacity of at least 200 million lbs/yr	\$ 6,750.00	\$ 9,035.00
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**3273 - Ready-Mixed Concrete**

Capacity to produce for delivery at least 10 cubic yards (yd <sup>3</sup> ) per hour (20,000 yd <sup>3</sup> per year)	\$ 625.00	\$ 840.00
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**3274 - Lime**

Capacity of at least 1 million lbs/yr, but less than 50 million lbs/yr	\$ 7,375.00	\$ 9,870.00
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Capacity of at least 50 million lbs/yr	\$ 14,750.00	\$ 19,740.00
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**3275 - Gypsum Products**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 3,875.00	\$ 5,185.00
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Capacity of at least 200 million lbs/yr	\$ 7,750.00	\$ 10,370.00
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**3292 - Asbestos Products**

Capacity of at least 10 million lbs/yr, but less than 200 million lbs/yr	\$ 1,250.00	\$ 1,675.00
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Capacity of at least 200 million lbs/yr	\$ 2,500.00	\$ 3,345.00
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**3295 - Minerals, Ground or Treated**

Capacity of at least 1 million lbs/yr, but less than 50 million lbs/yr	\$ 3,375.00	\$ 4,520.00
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Capacity of at least 50 million lbs/yr	\$ 6,750.00	\$ 9,035.00
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**3296 - Mineral Wool**

Capacity of at least 10,000 lbs/yr, but less than 1 million lbs/yr	\$ 7,375.00	\$ 9,870.00
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Capacity of at least 1 million lbs/yr	\$ 14,750.00	\$ 19,740.00
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**3312 - Blast Furnaces and Steel Mills**

Capacity of at least 50 million lbs/yr, but less than 1 billion lbs/yr	\$ 7,000.00	\$ 9,370.00
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Capacity of at least 1 billion lbs/yr	\$ 14,000.00	\$ 18,735.00
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**3321 - Gray Iron Foundries**

Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 3,125.00	\$ 4,185.00
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Capacity of at least 100 million lbs/yr	\$ 6,250.00	\$ 8,365.00
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**3331 - Primary Copper Smelting and Refining**

Smelting capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 9,375.00	\$ 12,545.00
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Smelting capacity of at least 100 million lbs/yr	\$ 18,750.00	\$ 25,090.00
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Refining capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 5,250.00	\$ 7,025.00
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Refining capacity of at least 100 million lbs/yr	\$ 10,500.00	\$ 14,050.00
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**3334 - Primary Aluminum**

Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 6,875.00	\$ 9,200.00
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Capacity of at least 100 million lbs/yr	\$ 13,750.00	\$ 18,400.00
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**3339 - Primary Nonferrous Metals**

Capacity of at least 10 million lbs/yr, but less than 100 million lbs/yr	\$ 3,625.00	\$ 4,855.00
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Capacity of at least 100 million lbs/yr	\$ 7,250.00	\$ 9,705.00
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**3341 - Secondary Nonferrous Metals**

Capacity of at least 1 million lbs/yr, but less than 20 million lbs/yr	\$ 6,625.00	\$ 8,865.00
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Capacity of at least 20 million lbs/yr	\$ 13,250.00	\$ 17,730.00
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**3354 - Aluminum Extruded Products**

Capacity of at least 500,000 lbs/yr, but less than 10 million lbs/yr	\$ 2,250.00	\$ 3,015.00
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Capacity of at least 10 million lbs/yr	\$ 4,500.00	\$ 6,025.00
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**3355 - Aluminum Rolling and Drawing**

Capacity of at least 500,000 lbs/yr, but less than 10 million lbs/yr	\$ 4,750.00	\$ 6,360.00
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Capacity of at least 10 million lbs/yr	\$ 9,500.00	\$ 12,715.00
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**3411 - Metal Cans**

Capacity of at least 10 million cans per year, but less than 50 million cans per year	\$ 5,875.00	\$ 7,865.00
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Capacity of at least 50 million cans per year	\$ 11,750.00	\$ 15,725.00
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**3585 - Refrigeration and Heating Equipment**

Accounts with more than 500 employees	\$ 6,875.00	\$ 9,200.00
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**3624 - Carbon and Graphite Products**

Accounts with more than 1,000 employees	\$ 5,125.00	\$ 6,860.00
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**3661 - Telephone and Telegraph Apparatus**

Accounts with more than 1,000 employees	\$ 4,250.00	\$ 5,690.00
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**3663, 3669 - Communications Equipment**

Accounts with more than 1,000 employees	\$ 5,625.00	\$ 7,530.00
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**3674 - Semiconductors and Related Devices**

Accounts with more than 1,000 employees	\$ 5,125.00	\$ 6,860.00
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**3711 - Motor Vehicles**

Capacity of at least 1,000 vehicles per year, but less than 10,000 vehicles per year	\$ 5,250.00	\$ 7,025.00
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Capacity of at least 10,000 vehicles per year	\$ 10,500.00	\$ 14,050.00
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**3721 - Aircraft Manufacturing Plants**

Accounts with at least 200 but less than 1,000 employees	\$ 1,875.00	\$ 2,510.00
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Accounts with at least 1,000 but less than 5,000 employees	\$ 5,625.00	\$ 7,530.00
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Accounts with at least 5,000 employees	\$ 11,250.00	\$ 15,055.00
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**3743 - Railroad Equipment**

Accounts with more than 25 employees	\$ 5,875.00	\$ 7,865.00
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**4226 - Storage and Terminal Facilities for Petroleum and Chemical Products**

Capacity of at least 50,000 gallons tankage and 20,000 gallons per day (gpd) throughput	\$ 7,250.00	\$ 9,705.00
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**4491 - Marine Cargo Handling**

Capacity of at least 25 tpd of product	\$ 4,500.00	\$ 6,025.00
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**4789 - Transportation Services**

Railcar repair, cleaning or painting accounts with at least 25 employees	\$ 2,875.00	\$ 3,850.00
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Truck cleaning and painting accounts with at least 25 employees	\$ 4,375.00	\$ 5,855.00
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Independent pipeline terminals with throughput of at least 20,000 gallons per day, but less than 200,000 gpd for all petroleum liquids except crude oil	\$ 3,625.00	\$ 4,855.00
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Independent pipeline terminals with throughput of at least 200,000 gpd for all petroleum liquids except crude oil	\$ 7,250.00	\$ 9,705.00
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**4911 - Electric Services**

Capacity of at least 25 megawatts, but less than 100 megawatts (includes cogeneration units)	\$ 5,000.00	\$ 6,690.00
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Capacity of at least 100 megawatts	\$ 10,000.00	\$ 13,380.00
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**4922, 4923, 4924, 4925 - Natural Gas Transmission/Distribution**

Capacity of at least 10,000 horsepower from fossil fuel-fired engines	\$ 2,875.00	\$ 3,850.00
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**4952 - Sludge Drying and Incineration**

Capacity of at least 5 tons per hour drying or 500 pounds per hour incineration (wet basis)	\$ 3,750.00	\$ 5,020.00
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**4961 - Steam Supply**

Capacity of at least 250 million Btu per hour	\$ 7,500.00	\$ 10,035.00
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**5093 - Scrap Metal Reclamation**

Capacity of at least 1 ton per day metal reclamation by incineration or melting	\$ 3,750.00	\$ 5,020.00
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Metal reclamation by shredding	\$ 625.00	\$ 840.00
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**5169 - Distribution of Chemicals and Allied Products**

Throughput of at least 20,000 gpd	\$ 3,375.00	\$ 4,520.00
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**5171 - Petroleum and Petroleum Product Bulk Stations and Terminals**

Throughput of at least 20,000 gpd, but less than 200,000 gpd for all petroleum liquids except crude oil. Crude oil facilities with tankage of at least 5,000 but less than 10,000 barrel capacity and no floating roof for control of emissions, or tankage of at least 100,000 but less than 200,000 barrel capacity with floating roof controls	\$ 3,625.00	\$ 4,855.00
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Throughput of at least 200,000 gpd for all petroleum liquids except crude oil. Crude oil facilities with tankage of at least 10,000 barrel capacity with no floating roof for control of emissions, or tankage of at least 200,000 barrel capacity with floating roof controls	\$ 7,250.00	\$ 9,705.00
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**9711 - Defense Plants and Military Bases**

Defense plants with at least 100 employees, or military bases with more than 1,000 employees	\$ 9,875.00	\$ 13,215.00
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(g) Nonpayment of fees. Each inspection fee payment must be paid at the time and in the manner and amount provided by this subchapter. Failure to remit the full inspection fee by the due date

shall result in enforcement action under Texas Water Code, §7.178. The provisions of this section, as first adopted and as amended thereafter, are and shall remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

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

**§101.27. Emissions Fees.**

(a) Applicability. The owner or operator of each account to which this rule applies shall remit to the commission an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. An account subject to both an emissions fee and an inspection fee, under §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. Each account will be assessed a separate emissions fee. Provisions of this section apply to all accounts, including accounts which have not been assigned specific commission identification numbers. The owner or operator of an account subject to an emissions fee requirement is responsible for contacting the commission to obtain an identification number. The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year for which the fee is assessed, a full emissions fee is due. If

the commission is notified in writing that the account is not and will not be in operation during that fiscal year, a fee will not be due. All regulated air pollutants, as defined in subsection (f)(3) of this section, including, but not limited to, those emissions from point and fugitive sources during normal operations with the exception of (for applicability purposes only) hydrogen, oxygen, carbon dioxide, water, nitrogen, methane, and ethane, are used to determine applicability of this section. In accordance with rules promulgated by EPA in 40 Code of Federal Regulations (CFR) Part 70, concerning the use of fugitive emissions in major source determinations, fugitive emissions shall be considered toward applicability of this section only for those source categories listed in 40 CFR §51.166(b)(1)(iii). For purposes of this section, an affected account shall have met one or more of the following conditions:

- (1) the account emits or has the potential to emit, at maximum operational or design capacity, 100 tons per year (tpy) or more of any single air pollutant;
- (2) the account emits or has the potential to emit, at maximum operational or design capacity, 50 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO<sub>x</sub>) and is located in any serious ozone nonattainment area listed in §101.1 of this title (relating to Definitions);
- (3) the account emits or has the potential to emit, at maximum operational or design capacity, 25 tpy or more of VOC or NO<sub>x</sub> and is located in any severe ozone nonattainment area listed in §101.1 of this title;
- (4) the account emits ten tpy or more of a single hazardous air pollutant, as defined in

FCAA, §112;

(5) the account emits an aggregate of 25 tpy or more of hazardous air pollutants, as defined in FCAA, §112;

(6) the account is subject to the National Emission Standards for Hazardous Air Pollutants (40 CFR Part 61) that apply to nontransitory sources;

(7) the account is subject to the control requirements or emissions limitations for New Source Performance Standards (40 CFR Part 60);

(8) the account is subject to the Prevention of Significant Deterioration (40 CFR Part 52) requirements; or

(9) the account is subject to the Acid Deposition provisions in the FCAA Amendments of 1990, Title IV.

(b) Self reported/billed information. Emissions/inspection fees information packets will be mailed to each affected account owner or operator prior to the fiscal year for which the fee is due. The completed emissions/inspection fees basis form shall be returned to the address specified on the emissions/inspection fees basis form within 60 days of the date the agency sends the emissions fees information packet. The completed emissions/inspection fees basis form shall include, at least, the

company name, mailing address, site name, all Texas Commission on Environmental Quality (TCEQ) identification numbers, applicable Standard Industrial Classification (SIC) category, the emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment. If more than one SIC category can apply to an account, the category reported shall be that one with the highest associated fee as listed in §101.24 of this title. Subsequent to a review of the information submitted, a billing statement of the fee assessment will be sent to the account owner or operator.

(c) Requesting fee information packet.

(1) For fiscal year 2003, if an account which is subject to the emissions fee in this section has not received the information packet described in subsection (b) of this section by November 1, 2002, the owner or operator of the account shall notify the commission by December 1, 2002. For accounts which begin operation after November 1, the owner or operator of the account shall request an information packet within 30 days of commencing operation.

(2) For subsequent fiscal years, if an account which is subject to the emissions fee in this section has not received the information packet described in subsection (b) of this section by June 1 prior to the fiscal year in which the fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year in which the fee is due. For accounts which begin operation after September 1, the owner or operator of the account shall request an information packet within 30 days of commencing operation.

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

(e) Due date. Payment of the emissions fee is due within 30 days of the date the agency sends a statement of the assessment to the facility owner or operator. If an account commences or resumes operation during the fiscal year in which the fee is assessed, the full emissions fee will be due prior to commencement or resumption of operations.

(f) Basis for fees.

(1) The fee shall be based on allowable levels and/or actual emissions at the account during the last full calendar year preceding the beginning of the fiscal year for which the fee is assessed. For purposes of this section, the term "allowable levels" are those limits as specified in an enforceable document such as a permit or Commission Order which are in effect on the date the fee is due. Under no circumstances shall the fee basis be less than the actual emissions at the account. The fee applies to the regulated pollutant emissions at the account, including those emissions from point and fugitive sources. The fee basis shall include emissions during all operational conditions. The basis for calculating fees for emissions from upset events and scheduled or unscheduled maintenance, startup, or shutdown activities shall include all such events and all quantities of emissions, whether reportable or recordable under rule in Chapter 101, Subchapter F of this title. Although certain fugitive emissions are excluded for applicability determination purposes under subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A

maximum of 4,000 tons of each regulated pollutant will be used for fee calculations. The fee for each fiscal year is set at the following rates.

**Figure: 30 TAC §101.27(f)(1)**

<b>Emissions Fee Schedule</b>		
<b>Fiscal Year</b>	<b>Rate Per Ton</b>	<b>Minimum Fee</b>
1992	\$3	
1993	\$5	\$25
1994	\$25	\$25
1995 - 2002	\$26	\$26

For fiscal year 2003 and subsequent years, the rate per ton shall be calculated using the following formula. The minimum fee shall be equal to the rate per ton.

$$\text{Rate per ton} = \$25.00 \times (1 - \text{CO}) \times (1 + \{(\text{CPI} - 122.15)/122.15\})$$

Where:

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

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

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

(A) Where there is an enforceable document, such as a permit or Commission Order, establishing allowable levels, actual emissions may be used only if a completed Emissions Inventory Questionnaire for the account is submitted with the fee payment. For stacks or vents, the inventory must include verifiable data based on continuous emission monitor measurements, other continuously monitored values, such as fuel usage and fuel analysis, or stack testing performed during normal operations using EPA-approved methods and quality-assured by the executive director. All measurements, monitored values, or testing must have been performed during the basis year as defined in paragraph (1) of this subsection or if not performed during the basis year, must be representative of the basis year as defined in paragraph (1) of this subsection. Actual emission rates may be based upon calculations for fugitive sources, flares, and storage tanks. Actual production, throughput, and measurement records must be submitted, along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and factors used in such calculations. If the actual emission rate submitted for fee purposes is less than 60% of the allowable emission rate, an explanation of the discrepancy must be submitted. Where inadequate or incomplete documentation is submitted, the executive director may direct that the fee be based on allowable levels. Where a complete and verifiable inventory is not submitted, allowable levels shall be used.

(B) Where there is not an enforceable document, such as a permit or a Commission Order, establishing allowable levels actual emissions shall be used. Actual production, throughput, or measurement records must be submitted along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and factors used in such calculations.

(3) For purposes of this section, the term "regulated pollutant" shall include any VOC, any pollutant subject to FCAA, §111, any pollutant listed as a hazardous air pollutant under FCAA, §112, each pollutant for which a national primary ambient air quality standard has been promulgated (including carbon monoxide), and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders.

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

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