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

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

Background and Summary of the Factual Basis for the Proposed Rules

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 (Section 185 requirements or Section 185, generally) require the SIP to include a requirement for the imposition of a Failure to Attain Fee (fee) for major stationary sources of volatile organic compounds (VOC) located in an ozone nonattainment area classified as severe or extreme if that area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. FCAA, §182(f) requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO_X). The Houston-Galveston-Brazoria (HGB) area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) was originally classified as severe for the one-hour ozone NAAQS of 0.12 parts per million and was required to attain this standard by November 15, 2007. The HGB area did not attain the one-hour ozone NAAQS by its attainment date, and, as of October 2012, is not demonstrating attainment at this time. EPA's finding that the HGB area did not attain the one-hour

ozone standard by its attainment date was published in the *Federal Register* on June 19, 2012, and was effective on July 19, 2012. The fee is required to be paid until the area is redesignated as an attainment area for ozone. Additionally, the SIP must include procedures for the assessment and collection of the penalty fee.

As stated in FCAA, §182(d)(3) and (e) and §185, the required penalty is $5,000 per ton, as adjusted by the consumer price index (CPI), of VOC, NO_X, or both (depending upon how a stationary source is determined to be a major source) emitted in excess of 80% of a major stationary source's baseline amount. A stationary source that is major for VOC is subject to fees on VOC; a stationary source that is major for NO_X is subject to fees on NO_X; and a stationary source that is major for both VOC and NO_X will be subject to the fee on both VOC and NO_X. The source's baseline amount is proposed to be calculated as the lower of the baseline emissions or authorized emissions from the baseline year, which is 2007. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA impose and collect the fee.

Although EPA has revoked the one-hour ozone NAAQS, FCAA, §185 requirements still apply for one-hour ozone nonattainment areas that were classified severe or extreme. EPA's implementation rule for the transition from the one-hour ozone standard to the 1997 eight-hour ozone standard originally provided that areas no longer were required to meet the requirements of FCAA, §185, but that rule was vacated by the D.C. Circuit

court in, *South Coast v. EPA*, 472 F.3d 882 (D.C. Cir. 2007), *decision clarified on reh'g by* 489 F.3d 1245 (D.C.Cir. 2007), *cert. denied by* 128 S.Ct. 1065 (U.S. 2008). Future EPA rulemaking may specify how the EPA interprets the applicability of the penalty fee requirement for future ozone standards.

The commission previously proposed FCAA, §185 rules under §101, Subchapter B, in November 2009 (34 TexReg 8644). The proposed rules reflected the explicit FCAA, §185 fee-based calculation and considered alternative approaches to meet this obligation. The commission did not pursue adopting the rules because in January 2010 the EPA issued a guidance memo, titled *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, (available at *http://www.epa.gov/glo/pdfs/20100105185guidance.pdf*) indicating that states could meet the one-hour ozone standard FCAA, §185 obligation through a SIP revision containing either the fee program or an equivalent alternative program. The memo further stated that an area showing attainment of the more stringent 1997 eight-hour ozone standard, based on permanent and enforceable reductions, would no longer be required to submit a fee program SIP revision to satisfy anti-backsliding requirements associated with the transition from the one-hour ozone standard to the 1997 eight-hour ozone standard. The commission submitted a request for termination of the fee program in May 2010 based on data showing attainment of the 1997 eight-hour standard.

However, the EPA's January 2010 guidance memo was challenged by environmental groups, and on July 5, 2011, the United States Court of Appeals District of Columbia Circuit issued an opinion in *Natural Resources Defense Council v. EPA, No. 10-1056 (D.C. Cir.)*, vacating the January 2010 guidance document. Previous to this ruling, on July 7, 2011, the EPA had taken final action on one termination determination request, from the State of Louisiana, for the Baton Rouge area. EPA had also proposed approval of a termination determination for the State of California, Sacramento Metro Area, but has not taken final action. On July 25, 2011, the EPA denied the commission's fee program termination request based on 2011 data that failed to show attainment of the 1997 eight-hour ozone standard and the July 5, 2011, appeals court decision. Additionally, preliminary 2011 data fail to show attainment of the one-hour standard in the HGB ozone nonattainment area. On August 30, 2011, EPA proposed redesignation of the Baton Rouge nonattainment area to attainment for the 1997 eight-hour ozone standard and further discussed its position regarding the application of the January 2010 guidance vacated by the D.C. Circuit. The EPA has stated that "{t}he Court's opinion does not preclude EPA from terminating the one-hour §185 anti-backsliding requirement for areas like Baton Rouge, that EPA has determined through notice and comment rulemaking, have attained the one-hour ozone standard due to permanent and enforceable emissions reductions. We believe that, for the purpose here of evaluating applicable requirements pertaining to redesignation, Louisiana's obligation to satisfy the

one-hour ozone anti-backsliding requirement for §185 fees has been terminated." (See, *Proposed Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Louisiana; Baton Rouge Ozone Nonattainment Area: Redesignation to Attainment for the 1997 eight-hour Ozone Standard* (*See* 76 FedReg 53853, 53863 (August 30, 2011).)

Since the HGB area is currently not attaining the one-hour ozone standard, the commission is re-proposing rules to implement the requirements of the FCAA, §182(d)(3) and (e) and §185. Given the lack of additional EPA guidance or rules regarding applicability and implementation of the penalty fee requirement and recent actions by the EPA, the commission is proposing several flexibility options combined with a fee-based program for comment and consideration at adoption. The TCEQ proposes a program under FCAA, §172(e) with flexibility aspects not directly described in the FCAA, §185 rule, including but not limited to, alternative revenue, baseline aggregation, and timing of fees. The TCEQ requests comments on the proposed approach including appropriateness and impacts if they are not adopted.

The EPA originally described some basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee obligation for severe or extreme ozone nonattainment areas. In a final rule published November 16, 2005, in the *Federal Register* (70 FedReg 69440) regarding the Maryland portion of the Washington, D.C.

severe one-hour ozone nonattainment area, the EPA noted in response to a comment that "Section 185 of the Act simply requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay 'a fee to the state as a penalty' for failure of that area to attain the ozone NAAQS by the area's attainment date. This penalty fee is based on the tons of volatile organic compound or nitrogen oxide emitted above a source-specific trigger level during the 'attainment year.' It {the fee} first comes due for emissions during the calendar year beginning after the attainment date and must be paid annually until the area is redesignated to attainment of the ozone NAAQS . . .. Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be assessed in calendar year 2006 for emissions that exceed 80% of the source's 2005 baseline emissions."(*See* 70 FedReg 69440, 69441.)

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

The EPA issued guidance (*Guidance on Establishing Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment*) on March 21, 2008 (available at *www.epa.gov/ttn/caaa/t1/memoranda/20080321_harnett_emissions_basline.pdf*), regarding establishing emission baseline amounts. The March 21, 2008, guidance memo discussed alternative methods for calculating the baseline amount, as permitted by FCAA, §185. The EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions because a source's emissions may be irregular, cyclical, or otherwise significantly varied from year to year. The EPA indicated in its guidance that relying on its regulations for Prevention of Significant Deterioration (PSD) of Air Quality, which are found in 40 Code of Federal Regulations (CFR) §52.21(b)(48), would be an acceptable alternative method for calculating the baseline amount. Under the PSD rules, sources may use emissions data from any period of 24 consecutive months within the previous ten years (a two-in-ten look back period) to calculate an average annual actual emissions rate, referred to as baseline emissions in these proposed rules. The EPA determined the two-in-ten look back period to be reasonable because it allows sources to consider an average emissions rate for a full business cycle.

The PSD rules modify this concept for electrical utility steam generating units to 24

consecutive months within the previous five years (a two-in-five look back period) due to a shorter business cycle for those units. The commission agrees that use of the two-in-ten and two-in-five look-back periods are reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission proposes to provide this flexibility in the same manner as provided for in the Texas New Source Review Program.

In its 2010 guidance (available at: *http://www.epa.gov/glo/pdfs/20100105185guidance.pdf*) and in a rule published in the January 12, 2012, *Federal Register* (77 FedReg 1895) for South Coast Air Quality Management District (SCAQMD), the EPA proposed allowing the use of equivalent programs to fulfill the FCAA, §185 fee program. The EPA approved this rule in September 2012, but the rule has not yet been published in the *Federal Register*. Under the SCAQMD rule, the EPA proposed to approve programs funded to reduce VOC and NO_X that are qualified programs, surplus to the one-hour ozone SIP, and designed to result in direct reductions or facilitate future reductions of VOC or NO_X emissions as consistent with the principles of the anti-backsliding principle of the FCAA §172(e). The EPA required an equivalent alternative program to achieve the same emissions reductions, raise the same amount of revenue and establish a process by which penalty funds would be used to pay for emission reductions that would further improve ozone air quality, or a combination of emissions reductions or revenue collection.

The EPA, in its January 2010 memo, states that it may allow alternative programs for which "the proceeds are spent to pay for emissions reductions of ozone-forming pollutants (NO_X and/or VOC) in the same geographic area subject to the §185 program." The EPA further states, "Under this concept, states could develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to §185, to other non-major sources of emissions, including owners/operators of mobile sources." From these statements, the TCEQ understands that the EPA supports equivalent alternative options to a fee-based program provided the option is "no-less stringent" than a strict fee-based program and generally meets the stated criteria. The EPA has also approved a San Joaquin Valley's (SJV) and proposed approval of SCAQMD's equivalent alternative programs pursuant to the 2010 guidance. The EPA's published approval on August 20, 2012, in the *Federal Register* (77 FedReg 50021) included an alternative fee revenue by assessing a fee on mobile sources. Revenue under SJV's FCAA, §185 fee program is used to offset any obligation due from major sources in the SJV nonattainment area.

On January 12, 2012, the EPA published proposed approval of SCAQMD Rule 317 as an equivalent alternative fee program (*See* 77 FedReg 1895). The SCAQMD Rule 317 establishes an equivalency account that is credited with expenditures from qualified programs that are in excess of that area's one-hour ozone SIP. No actual funding is

transferred from the approved programs to the equivalency account; it is an accounting of the funds. The EPA considered this option equivalent to the principles of FCAA, §172(e). The EPA in its proposed approval of the SCAQMD program has indicated that it will accept alternative programs, whether through the incentives created by a penalty fee levied on pollution sources, through other funding of pollution control projects, or through a combination of both.

Consistent with SCAQMD's and SJV's approach, the TCEQ proposes rules to allow funding collected for qualified programs that intend to directly reduce VOC or NO_X emissions in the HGB area to offset the FCAA, §185 fee obligation. As with SCAQMD's and SJV's approach, no actual funding is transferred to the equivalent alternative program. The TCEQ proposes to focus on providing incentives for programs that collect revenue in the HGB area to maintain a focus on achieving further emission reductions to further support the equivalent alternative being proposed.

Revenue for the Texas Emissions Reduction Plan (TERP) program provides funds for programs that provide incentives to reduce NO_X and other pollutants, including VOC. The TCEQ is proposing to use TERP revenue that was collected after the one-hour ozone attainment date for the HGB one-hour ozone nonattainment area to offset the FCAA, §185 fee obligation for that area. In the HGB area, on-road motor vehicle NO_X emissions are the single-largest category of emissions at 42% of the NO_X emissions

inventory in 2008. Revenue available for appropriation by the legislature and allocated to programs to reduce NO_X in this category is an effective method to reduce ozone in the area.

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

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

The objectives of TERP are specifically described in statute and are consistent with the objective described by the EPA for an equivalent program. TERP program objectives, listed in Texas Health and Safety Code (THSC), §386.052, address "achieving maximum reduction in oxides of nitrogen to demonstrate compliance with the state implementation plans" and "advancing new technologies that reduce oxides of nitrogen from facilities and other stationary sources." TERP, as described in THSC, §386.053, is restricted to having "safeguards that ensure that funded projects generate emissions reductions not otherwise required by state or federal law."

Another revenue source that has been identified with objectives associated with clean air activities are fees associated with the vehicle Inspection and Maintenance (I/M) program. Annually, approximately 3.3 million vehicles in the HGB area are subject to emissions inspections, and vehicles that meet the emissions standards established for the program are issued an inspection certificate. The Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Repair Program (LIRAP) is one of the programs administered with these fees. LIRAP provides financial assistance for qualified owners of vehicles to make repairs or purchase replacement vehicles when their vehicle cannot pass emissions standards inspections. The LIRAP reduces the VOC and NO_X emissions from mobile sources by repairing or, through replacements, accelerating the turnover rate of older, more polluting vehicles. In this proposal, the

TCEQ intends to credit the funding collected for I/M in the HGB area as an alternative to collecting a FCAA, §185 fee because the I/M program meets one of the three types of alternative programs that satisfies the FCAA, §185 fee requirement addressed in EPA's SCAQMD and SJV actions and 2010 guidance memo.

Under the proposed rules, the commission would be required to annually estimate the expected Failure to Attain Fee obligation and compare this estimation with the expected revenue from the proposed alternative program. The commission is proposing that funding associated with the programs after the attainment year would be accounted as revenue to meet the FCAA, §185 Failure to Attain Fee obligation. To obtain the estimated total FCAA, §185 fee obligation due from all major stationary sources, a baseline amount would be established for each of the major stationary sources (or group of sources, if aggregated per §101.107) in the HGB one-hour ozone nonattainment area. This baseline amount would be subtracted from each major stationary source's actual emissions and a Failure to Attain Fee would be applied. The resultant amount due from each major stationary source (or aggregated sources) would be summed to determine the HGB area FCAA, §185 obligation.

If revenue generated from TERP and I/M programs is insufficient to fully offset the HGB area FCAA, §185 obligation, then the remaining difference would be assessed as a fee on major stationary sources in the area on a prorated basis. The amount collected

from each major stationary source would be discounted based on the amount of revenue credited in the Fee Equivalency Account. In this manner, these proposed rules would "backstop" any equivalent alternative funding with fees directly assessed on major stationary sources to meet each year's fee obligation. The FCAA, §185 fee obligation would be fully met either through the demonstration utilizing the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees. This method of fee equivalency is no "less stringent" than a direct fee program required by FCAA, §185.

To determine a major stationary source's baseline amount and the Failure to Attain penalty fee that would apply to each major stationary source, the commission proposes to allow major stationary sources to aggregate emissions of VOC and NO_X in general, but also to aggregate those emissions across multiple major stationary sources under common control. In attachment C of the EPA's January 2010 memo, the EPA would ". . . allow for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." The EPA's 2010 memo further states that the EPA would allow aggregation of VOC with NO_X ". . .{p}rovided that the aggregation is not used to avoid a 'major source' applicability finding, and aggregation is consistent with the attainment demonstration. . . we believe states have a discretion to allow a major source to aggregate VOC and NO_X emissions." The TCEQ's proposed rules require a major stationary source to first determine its

major source applicability for both VOC and for NO_X. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 Failure to Attain Fee rule.

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

Emissions of VOC and NO_X do not impact ozone formation equally; therefore, the commission has employed a strategy of targeting those pollutants in a way that will allow ozone nonattainment areas to attain the standard as expeditiously as practicable. This targeting is a result of the knowledge gained from research and detailed modeling

of each particular nonattainment area, and states are required by the FCAA to assess and develop strategies for nonattainment areas as part of the SIP revision process to achieve attainment and maintenance of the NAAQS. The emissions reduction strategy for the HGB ozone nonattainment area has included targeted measures to reduce NO_X emissions in preference to VOC emission reductions as an effective way to reduce ozone formation in the area. Owners or operators of major stationary sources may have also chosen to significantly reduce one pollutant at one major stationary source as part of a cost-effective control strategy to reduce ozone. The commission's proposed flexibility option to allow aggregation of VOC and NO_X as well as major stationary source aggregation for both pollutants continues to support this approach and is particularly relevant for the HGB ozone nonattainment area, as discussed in detail in previous rulemaking actions involving individual control strategies applicable in the HGB ozone nonattainment area, and in revisions to the HGB ozone nonattainment area SIP. This proposed aggregation method links the multi-pollutant control strategies in the EPA-approved SIP for the HGB ozone nonattainment area to an aggregated baseline amount and Failure to Attain Fee calculations that will be applicable in the HGB ozone nonattainment area to appropriately encourage further emission reductions in the area, while continuing to support the control strategies that were determined through photochemical modeling to be most effective for the area.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the

imposition of a Failure to Attain Fee on major stationary sources of emissions of VOC in a severe or extreme ozone area that failed to attain the standard by its applicable due date. FCAA, §182(f) states that requirements "for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in §7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen." Thus, the requirement to assess a fee on major stationary sources of NO_X emissions is also required. This language in FCAA, §182(f) does not explicitly state that requirements for NO_X sources are to be held separate from those for VOC but are "also required" for sources of NO_X emissions. In fact, VOC control strategies, because the nature of the control equipment used to reduce VOC emissions differs from those needed to reduce NO_X emissions and their location at a site, may be addressed separately. However, both VOC and NO_X control strategies have a common goal: to reduce ozone-forming emissions. The stated objective of FCAA, §182(f) and §185 is to assess a fee for VOC and NO_X emissions on major stationary sources emitting above a certain baseline amount of emissions. The per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC or NO_X and thus, there is no reason to require that a fee be assessed separately for each pollutant. The commission is proposing to allow a major stationary source to combine these emissions for baseline amount determinations and fee assessments providing that specified criteria are met to ensure consistency.

Additionally, the commission notes that EPA guidance allows for NO_X substitution in its Reasonable Further Progress (RFP) SIP revisions as further support for allowing VOC and NO_X to be aggregated for both baseline amount determinations and fee assessments. In its December 1993 NO_X Substitution Guidance (available at *http://www.epa.gov/ttncaaa1/t1/memoranda/noxsubst.pdf*), the EPA states the "condition for demonstrating equivalency is that the State-proposed emission control strategies must be consistent with emission reductions required to demonstrate attainment of the ozone NAAQS for the designated year of attainment."

To ensure equitable treatment among all major stationary sources, maintain consistency within the fee program, and facilitate transparency for the public, the proposed rules require that baseline amounts and aggregation methods, once established, would remain fixed except as consistent with §101.109 throughout the applicability of the Failure to Attain Fee obligation. Additionally, the proposed rules require that calculation of fee obligations remain consistent with the baseline amount determination approach. Once a particular method for baseline amount calculation is chosen, the penalty fee calculation must remain consistent with that method. Therefore, if a major stationary source elected to aggregate pollutants under one of the options of this subchapter as the most appropriate choice for determining a baseline, all subsequent Failure to Attain Fee obligations must remain consistent with that selection.

The EPA used the March 21, 2008, memorandum to evaluate the SJV FCAA, §185 fee rule, as noted in its proposed limited approval and limited disapproval published August 19, 2009, in the *Federal Register* (74 FedReg 41826). In reviewing the SJV FCAA, §185 fee rule, the EPA noted that there were several provisions that conflicted with FCAA, §185, which prevented full approval of the submitted SIP revision including: a provision that exempts units that begin operation after the attainment year; a provision that exempts a clean emissions unit as a unit that is equipped with an emissions control technology that either has a minimum 95% control efficiency (or 85% for lean-burn internal combustion engines), or meets the requirements for achieved-in-practice Best Achievable Control Technology during the five years immediately prior to the end of the attainment year; a provision defining the baseline period as two consecutive years consisting of the attainment year and the year immediately prior to the attainment year; a provision allowing averaging over two to five years to establish baseline emissions; and a provision that defines "major source" by referring to a version of the definition that, although it correctly defines the major source threshold, is not SIP approved. The EPA noted, with regard to issue number two noted previously, that SJV did not request that the EPA review this option for acceptability as an equivalent alternative under FCAA, §172(e), and did not provide a demonstration that the program it submitted would ensure that controls are "not less stringent" than those required under FCAA, §172(e). The August 2009 notice provides some information regarding EPA's current position regarding the requirements of the FCAA, §185 fee program; however, the rule was not

finalized. The EPA also noted in the SJV proposal that "{t}he State must adopt and submit a rule to collect fees . . . from those units, or consistent with the Administrator's obligation under FCAA, §185(d), EPA will collect those fees." (*See* 74 FedReg 41826 and 41828.) In its January 2010 memo, the EPA stated that it is acceptable to exempt or reduce the FCAA, §185 fee obligation on well controlled sources and to assign the required fees to poorly controlled sources as an incentive for further reductions. No excess fees would be collected under the commission's proposed rules; therefore, the commission does not propose to exempt well controlled units from the fee obligation. The commission is seeking comment on alternatives to provide assistance with clean unit obligations.

Lastly, during the stakeholder process conducted for the development of this proposed FCAA, §185 Failure to Attain Fee program in 2009, some commenters raised concerns regarding whether it is appropriate (and legal) for the commission to adopt a rule that requires companies to pay a fee for emissions that occurred prior to rule adoption. The commission proposes to collect Failure to Attain Fees on the most currently available emissions inventory at the time of rule adoption to ensure appropriate timely implementation of the FCAA, §185 fee obligation. The commission solicits comment on the appropriateness of this approach.

The commission recognizes that the fee is due for the HGB one-hour ozone

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

Section by Section Discussion

§101.100, Definitions

Proposed new §101.100 contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 obligation, attainment date, attainment year, baseline amount, baseline emissions, electric utility steam generating unit, extension year, equivalency credits, major stationary source, and Section 185 Account. The *Area §185 Obligation* is proposed to be defined as the total amount of the *Failure to*

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

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

Baseline emissions are proposed to be defined to include emissions from normal operations and emissions associated with startups, shutdowns, and maintenance but would exclude emissions from emissions events during a baseline period. Emissions events would be excluded from the baseline amount calculations because they are not authorized and are not representative of routine operations. The exclusion of emissions from emissions events in a baseline emissions calculation in the proposed rule is consistent with the PSD definition of baseline actual emissions in 30 TAC §116.112 of this title and 40 CFR §52.21(b)(48) that does not include non-compliant emissions in a

baseline amount determination. For the purposes of this subchapter, baseline amount is the term referenced as "baseline amount" in the FCAA, §185 and would be the lower of baseline emissions or authorized emissions at a major stationary source as of the attainment year.

If the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the average baseline emissions would be calculated from a consecutive 24-month historical period. *Electrical utility steam generating units* are specifically defined for this rule because the historical time period allowed in determining an average based on 24 months for those units differs from other types of emissions generating units. The definition of *electric utility steam generating unit* is consistent with the definition used in 30 TAC §116.12.

The *Failure to Attain Fee* is defined as the fee due from each major stationary source or Section 185 Account based on actual emissions of VOC, NO_X, or both exceeding the baseline amount.

The definition for *major stationary source* uses the definition in §116.12 for determining a major source of VOC or NO_X.

Because major stationary sources under common control may opt to aggregate for

purposes of baseline amount determination and Failure to Attain Fee payment, a name for the group of one or major stationary sources is proposed to be defined as a *Section 185 Account*. A single identifying name will be used by the commission to track baseline amounts and Failure to Attain Fee obligations. Because each aggregation may have its own Section 185 Account, a major stationary source may be in one Section 185 Account for VOC aggregation and in a second Section 185 Account for NO_X aggregation. Thus, a single major stationary source could belong to two separate Section 185 Accounts. Conversely, a Section 185 Account may only have one major stationary source.

§101.101, Applicability

The FCAA, §185 requires areas classified as severe or extreme for ozone to include a requirement for fees on VOC emissions in excess of 80% of a baseline amount for major sources located in an area failing to attain the standard by the attainment date applicable to that area. FCAA, §182(f) further requires that all SIP requirements applying to VOC also apply for sources of NO_X. This section proposes to identify the provisions of this subchapter that apply to the HGB one-hour ozone nonattainment area, which failed to demonstrate attainment of the one-hour ozone standard by its attainment date, November 15, 2007.

§101.102, Equivalent Alternative Fee

This section proposes that the executive director establish a Fee Equivalency Account.

This account would be a listing of revenues available for appropriation by the legislature to programs with goals to reduce VOC or NO_X emissions in the HGB one-hour ozone nonattainment area. Specifically, the TCEQ proposes that the revenue collected for the TERP and the I/M programs be used to offset the HGB area FCAA, §185 Obligation. Only the revenue collected in the HGB one-hour ozone nonattainment area would be used in the Fee Equivalency Account. Both programs have been identified with stated goals to provide funding for programs that result in a reduction in VOC, NO_X, and other pollutant emissions into the atmosphere. The commission proposes to also restrict equivalent programs such as the proposed equivalent account to funding from the HGB one-hour ozone nonattainment area.

§101.104, Equivalent Alternative Fee Accounting

The Area §185 Obligation is based on actual emissions over a baseline amount and would be determined annually for the HGB one-hour ozone nonattainment area. An FCAA, §185 fee obligation (Failure to Attain Fee) is proposed to be calculated for each Section 185 Account. These resultant individual obligations would be summed to determine the overall Area §185 Obligation for the HGB one-hour ozone nonattainment area.

Funds, calculated on a dollar basis, associated with the Fee Equivalency Account would be credited from after the one-hour ozone standard attainment date. The funding

associated with the Fee Equivalency Account for a given year would be compared with the one-hour ozone Area §185 obligation for a given year. Any surplus amount in the Fee Equivalency Account could be used to offset any future obligation without being discounted over time. If the Fee Equivalency Account is not sufficiently funded to fully meet the Area §185 obligation, a backstop provision would be invoked and major stationary sources would be assessed a prorated Failure to Attain Fee to generate sufficient revenue to meet the Area §185 obligation. The prorated Failure to Attain Fee would be calculated based on the amount in the Fee Equivalency Account and the overall Area §185 obligation. The amount that the Section 185 Account was obligated based on the calculations in §101.113 will be reduced to the prorated amount.

§101.106, Baseline Amount Calculation

The method for a one-time determination of the baseline amount for VOC, NO_X, or both (depending upon how a stationary source is determined to be a major source) is outlined in this proposed section. A baseline amount is required to be determined for each pollutant (VOC and NO_X) for which the source is major. If a stationary source that is major for both VOC and NO_X, a baseline amount estimate will be determined for both VOC and NO_X. If the major stationary source is major for only VOC or NO_X, the baseline amount estimate is required for just that pollutant (VOC or NO_X). However, for aggregation purposes, a source may choose to determine a baseline amount for a pollutant for which it is not major. The baseline amount is defined as the lower of either

annual emissions, including maintenance, startup, and shutdown (MSS) emissions reported on the emissions inventory in the attainment year, or the emissions as allowed by the applicable Chapter 116 authorizations in effect for the major stationary source on the attainment date. Emissions from emissions events are not included in the baseline amount.

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

The FCAA, §185 does not address how to define a historical period; however, the EPA issued a March 21, 2008, guidance memo, referenced elsewhere in this preamble, stating that an acceptable alternative method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found in the EPA's PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008 guidance, the EPA uses these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission levels for each emissions unit. The guidance continues by stating, "{O}nce calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant

emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity utilized during a period of time may be referenced but not the non-compliant emissions levels if a historical 24-month period is selected. Legally enforceable emissions limits would include any state or federal requirements including Best Achievable Control Technology or Lowest Achievable Emissions Rate.

For the purposes of this proposed section, the target is the attainment year, 2007. The window used for the possible historical look-back period would be five years (2002 - 2006) for electric generating units (EGU) or 10 years (1997 - 2006) for non-EGU immediately preceding the attainment date of November 15 2007. The average consecutive 24-month period would be the basis for determining the baseline amount, in tons. All units at a major stationary source would be required to use the same 24-month period when calculating a baseline, but a separate 24-month period could be used for each pollutant. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions or authorized emissions to include emissions from an alternative method.

Emissions inventory data are collected annually by the commission, and after quality

assurance review, are loaded into the state's industrial emissions database. Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, modify emissions inventory data submitted for the current reporting year and for the year immediately prior. Revisions to historical inventory data outside of this time frame are done on a case-by-case basis usually as a result of an agency-directed emissions inventory improvement initiative or the agency's compliance and enforcement processes. The commission uses the annual emissions inventory data as the emissions baseline for air quality planning as detailed in SIP revisions. Although emissions determination methods improve over time, emissions inventory data represent emissions for a reporting year as accurately as possible. Since the commission relies upon emissions inventory data in SIP revisions for air quality planning purposes, revising historical emissions inventory emissions rates is not supported solely for purposes of adjusting the baseline amount calculation.

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

If control or ownership changed for emission units during the attainment year, then emissions from those emission units would be attributed to the major stationary source

with control or ownership of the emission unit on December 31st of the attainment year (2007).

The proposed rule would require the baseline amount calculation and supporting documentation to be submitted to the agency in a format approved by the executive director. The baseline amount calculation would be subject to approval by the executive director.

The FCAA, §185 fee is required on emissions exceeding 80% of a baseline amount determined for the attainment year until the Failure to Attain Fee no longer applies to the area. A baseline amount is determined by each major stationary source that is a major source of VOC, NO_X, or both based (depending on how the source is determined to be major) on representative emissions or authorized emissions. Thus, the baseline amount would be a fixed value and would not be changed without the approval of the executive director except as consistent with §101.109.

§101.107, Aggregated Baseline Amount

This proposed section would provide for the aggregation of either VOC or NO_X (or both) at multiple major stationary sources to align fee obligations with the EPA-approved attainment demonstration emissions reduction approach. The proposed rule would allow owners or operators of major stationary sources under common control to

aggregate baseline amounts of VOC emissions from multiple major stationary sources, to aggregate NO_X emissions from multiple major stationary sources, or both. Owners or operators may also choose to aggregate VOC with NO_X at a single major stationary source or VOC with NO_X across multiple major stationary sources under common control.

Baseline amounts would first be calculated separately for each major stationary source for VOC, NO_X, or for both, using the method outlined in proposed §101.106, prior to any baseline amount aggregation for multiple major stationary sources. If an owner or operator of a major stationary source chooses to include emissions from VOC or NO_X that is not a major source in an aggregated baseline amount determination, Failure to Attain Fees will remain due on that pollutant. This separate initial calculation of baseline amount is intended to provide transparency and consistency in baseline amount determinations with any subsequent aggregation.

The proposed rule would allow owners or operators of major stationary sources to aggregate VOC and NO_X baseline amounts at a major stationary source. Sources under common ownership and/or control could also opt to aggregate baseline amounts across multiple major stationary sources. The aggregation methodology must remain consistent throughout the baseline amount calculation and Failure to Attain Fee obligation calculation. A source opting to aggregate baseline amounts must also

aggregate emissions for Failure to Attain Fee calculations. The attainment year or same 24-month period would be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation. A separate 24-month period can be used for each pollutant if the pollutants are not aggregated.

§101.108, Alternative Baseline Amount

The proposed rule will allow owners or operators of major stationary sources to include in their baseline amount calculation the lower of either emissions that were authorized by December 31, 2007, or reported in either the 2007 emissions inventory or prior year emissions inventory, per §101.106(b), In lieu of using emissions rates authorized by December 31, 2007, in the baseline amount calculation, one or more of the following amounts may be substituted as discussed by: 1) the authorized emissions rates resulting from a permit application that was administratively complete by December 31, 2007, if final authorization had not been received by the attainment date; or 2) planned MSS permit applications submitted according to agency specified schedule. The alternative baseline amount determination is restricted to operators of major stationary sources who reported these emissions in the emissions inventory as required under §101.10. Under this proposed rule, operators of major stationary sources are not penalized for being compliant with TCEQ emissions reporting, permitting requirements, and procedures.

Some operators or operators of major stationary sources submitted administratively complete applications for authorizing previously unauthorized emissions prior to the close of the attainment year, 2007. To not penalize sources that were in the process of obtaining an authorization by the end of the attainment year, the commission is proposing to allow the emission limits established by permits that were administratively complete by the end of the attainment year, December 31, 2007, for determining the baseline amount.

Although some owners or operators from various industry sectors have obtained authorization for emissions from MSS activities for a number of years by use of a case-by-case new source review (NSR) permit or a permit by rule, many NSR permits have not included specific emissions limits for MSS activities. In 2005, the commission adopted amendments to §101.222 that added an affirmative defense for certain unauthorized emissions and enforcement discretion for certain periods of time that provided an incentive for owners and operators of both major and minor facilities in Texas to authorize emissions from MSS activities. Due to the large number of permittees expected to take advantage of this incentive, the commission established a schedule in §101.222(h) for various industry sectors to file applications for the period of 2007 to 2013. In 2011, Senate Bill (SB) 1134, 82nd Legislature, codified in Texas Health and Safety Code (THSC), §382.051962, extended the deadline in §101.222(h)(1)(E) for certain oil and gas facilities from 2012 to 2014. Authorization via an applicable permit

by rule as described in 30 TAC Chapter 106 was also available.

Although most owners and operators have submitted or will submit applications to authorize MSS emissions according to the schedule in §101.222(h), most owners and operators had not obtained an authorization for these emissions by the scheduled attainment date for the HGB one-hour ozone nonattainment area, November 15, 2007. However, as required in §101.10, owners or operators of sources in Texas were required to report annual emissions from MSS activities in the emissions inventory years prior to and including the attainment year. Because the FCAA, §185, requires the baseline to be the lower of the actual emissions or authorized emissions limits for the attainment year, some major stationary sources that were compliant with these commission rules regarding permitting of these activities could be restricted to using a lower permit allowable emissions level in their baseline amount determination than they otherwise would have been able to have authorized as a result of following the MSS permitting schedule.

The proposed approach aligns with the FCAA intent of comparing authorized with reported emissions to determine a baseline amount. This proposed rule would restrict the affected sources to use the first authorized emissions limits on permits issued after the attainment date for emissions units and MSS activities associated with applications filed prior to or in response to the schedule in §101.222 for determining their baseline

amounts for MSS emissions activities that had not previously been authorized. The language in this section is intended to clarify how owners and operators who have filed an application but have not yet been issued a permit or who have not filed an application consistent with the schedule in §101.22(h) or THSC, §382.051962 can account for the emissions limits ultimately authorized after the attainment year due to the permitting application administrative process. The rule would allow an owner or operator to establish an amount of emissions from MSS activities by requesting an amount based on MSS emissions reported in the emissions inventory for the purpose of establishing the baseline amount for the fees. Further, all of the emissions for the baseline amount must have been reported as MSS emissions in the emissions inventory per the requirements of §101.10. In this manner, major stationary sources are not penalized for being compliant with TCEQ MSS emissions reporting and permitting requirements and procedures. Upon issuance of the first permit including authorization of emissions from MSS activities, the baseline amount will be adjusted to reflect the first authorized limit of emissions associated with MSS activities.

The proposed approach requires sources to calculate their MSS emissions separately for emissions units and MSS activities that were authorized after the end of the attainment year, 2007, from the remaining portion of the reported or allowable emissions for the major stationary source, providing the owner or operator of the major stationary source met all the requirements of §101.10 and §101.222. For example, a major stationary

source reported 1,800 tons of emissions in the attainment year, of which 600 tons were reported in the emissions inventory as MSS emissions. As of the one-hour ozone nonattainment area's attainment date of November 15, 2007, the major stationary source had a permit for 1,250 tons, but MSS emissions were not included as part of that authorization. Per the schedule in §101.222, the major stationary source requested and received a permit authorizing 500 tons of MSS after the attainment date raising the total site-wide authorizations to 1,750 tons.

Under the proposed rule, emissions units and MSS activities must be directly compared. Reported emissions from MSS would be directly compared to the MSS authorization and, as required in FCAA, §185, the authorized emissions from the remaining emissions units would be directly compared with the reported emissions. In this example, the 500 tons allowable for MSS were lower than the 600 tons reported emissions from MSS, and the 500 tons were selected for a MSS baseline amount for those emissions units. For the remaining emissions units and routine emissions for the emissions units with a new MSS authorization, the 1,200 tons reported emissions are lower than the 1,250-ton authorization effective on the attainment date, and therefore, the 1,200 tons would be used for the baseline amount from these emissions units and MSS activities. These lower amounts would be combined, and the baseline amount would be 1,700 tons. The 1,700 tons baseline amount is lower than the 1,750 tons determined if actual and authorized emissions were totaled site-wide.

The calculation methodology included in this proposed rule allows consideration of the emissions limit established in response to emissions authorized in advance of the §101.222(h) schedule or in a timely application filed in accordance with the schedule in §101.222(h) for the baseline amount calculation for planned MSS if the owner or operator met the requirements of §101.10 and §101.222 and the emissions were not previously included in an authorization.

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

A baseline amount is determined by each major stationary source that is a major source of VOC, NO_X, or both (depending on how the source is determined to be major) based on representative emissions or authorized emissions. Thus, the baseline amount would be a fixed value and would not be changed without the approval of the executive director except as consistent with §101.109 or as described in this section.

§101.109, Adjustment of Baseline Amount

The proposed new section would specify the limited circumstances in which baseline

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

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

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

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

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

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

Under this proposed rule, the TCEQ is also allowing an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under 30 TAC Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction

and are built with emission limits that are the lowest achievable emissions rate. The commission is requesting comment on the appropriateness of including changes in a baseline amount as a result of expansions at a major stationary source for new emissions units authorized under a nonattainment permit.

The TCEQ is also requesting comment regarding the appropriateness of exempting new emissions units authorized under a nonattainment permit from a Section 185 fee, and if exempted, how this exemption should impact the fee obligation from the HGB area. The commission is requesting suggestions on sources of revenue that may be needed to offset revenue that would have been collected from these exempted sources and how a clean unit should be defined.

The EPA, in its January 12, 2012, notice of proposed approval of the California SIP revision (77 FedReg 1875), proposed allowing a major stationary source subject to the FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation. Similarly, the commission is proposing a rule that requires the source to make a determination on the lower of actual or allowable data available in its first year of operation as a major source.

Because data would not exist for newer sources at the time of the applicable

nonattainment area's attainment date, the commission proposes to allow those sources to use their first year of actual operation (12 consecutive months) to make the baseline determination.

Major stationary sources new to the nonattainment area may not have sufficient data as a major stationary source to determine if emissions at that major stationary source are irregular, cyclical, or otherwise vary significantly from year to year. The first submitted emissions inventory may have been based on a partial year of operation. The proposed provisions of this section are intended to allow major sources with less than 24 months of continual operation at the time of the applicable nonattainment area's attainment date some additional flexibility in establishing the emissions history at their major stationary sources. The major stationary source may request that the baseline amount be based on the average rate within the first 24 months of continuous operation. If these emissions are varied significantly during 24 months of operation, these major stationary sources may be considered irregular, cyclical, or otherwise varying significantly. Under the proposed rules, a major stationary source would be allowed to request a modification to their baseline amount within 60 calendar days of completing 24 months of operation. The agency's use of a 24-month historical look-back period is shorter than the time allowed by the EPA under its rules for a cyclic determination, which provide for a two-in-ten or two-in-five year look-back period. The EPA published approval for a similar approach for new sources for SCAQMD in August 2012.

§101.113, Failure to Attain Fee Obligation

This proposed section outlines the method used to determine the Failure to Attain Fee obligation for VOC, NO_X, or both. If the major stationary source were major for just one pollutant, the Failure to Attain Fee obligation would apply for just the one pollutant, VOC or NO_X, unless the pollutant were used in an aggregated baseline amount per §101.107. If the major stationary source were major for both VOC and NO_X, the fee obligation would apply for both pollutants.

This proposed section also provides for the calculation of the Failure to Attain Fee for owners and operators of major sources in a nonattainment area that opt to aggregate VOC, NO_X, or both. The aggregation of VOC with NO_X may occur at one major stationary source or across multiple major stationary sources under common control. Because both pollutants were in the baseline amount, the Failure to Attain Fee would be due on actual emissions of both VOC and NO_X even if the major stationary source was not a major source for one of the pollutants.

The commission proposes to maintain consistency between the baseline amount and the fee obligation determination with this approach. An owner or operator of multiple sources under common control who chose to combine a single pollutant from multiple major stationary sources in a baseline amount calculation must aggregate actual

emissions from that single pollutant in the fee payment. If an owner or operator opted to combine VOC with NO_X at a major stationary source, both VOC and NO_X must be aggregated for the fee payment. Similarly, owners or operators who chose to combine VOC and NO_X in a baseline amount calculation and to aggregate those pollutants across more than one major stationary source must combine actual VOC and NO_X emissions from all aggregated major stationary sources to determine the fee.

The total fee would be applicable to, and calculated for, each pollutant (VOC or NO_X) for which the major stationary source meets the requirements of §101.101. The fee obligation from VOC or NO_X emissions that are not qualified for baseline amount aggregation under §101.107 would remain separate and due from each major stationary source.

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

For example, if multiple major stationary sources were combined for determining the NO_X baseline amount, then the Failure to Attain Fee payment is based on all actual NO_X emissions from those combined major stationary sources. The fee payment for VOC

would be considered separately for these major stationary sources. Similarly, if owners or operators chose to combine multiple major stationary sources into one baseline amount for VOC and NO_X, then the payment would be due from the combined major stationary sources for both pollutants together.

Actual emissions include emissions from annual operations, MSS operations and other events not otherwise authorized (emissions events). Inclusion of emissions events in the fee obligation is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the year that the fee is owed.

The FCAA, §185 requires the annual fee to be adjusted by the CPI and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502 requires the fee to be adjusted annually per the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. Because the FCAA, §185 requires these fees to be assessed on a calendar-year basis and the inflation factor based on the CPI is applied in September, the calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January to August and one third of the fee associated with September through December). Thus, a calendar 2012 fee would require two thirds of the annual CPI ending in August 2012 and one third of the annual CPI ending in August 2013.

§101.116, Failure to Attain Fee Payment

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

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

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

Failure to Attain Fees would be due within 30 calendar days of the date on the invoice. That provision, along with others in this chapter, is consistent with the due date for invoices issued for other programs within the agency. Failure to Attain Fees would be due on actual emissions that exceed 80% of the established emission baseline amount.

§101.117, Compliance Schedule

This proposed section would require the submission of baseline amount emissions on a form prescribed by the executive director. For the HGB one-hour ozone nonattainment area, major sources would be required to submit their proposed baseline amount emissions to the executive director no later than 120 calendar days from rule adoption on forms or other media approved by the executive director. For sources that become major stationary sources after this rule is adopted, the TCEQ proposes rules to require owners or operators to submit a report on forms approved by the executive director establishing baseline amount emissions to the executive director no later than 90 days following the first full year (12 consecutive months) of operation as a major source.

A timely and accurate baseline amount is required from each applicable major stationary source to implement the required penalty fee program. If a major stationary source does not submit baseline amount data or does not submit the data in accordance with the rules of §§101.106, 101.107, or 101.018, the executive director may need to determine a baseline amount for that major stationary source. In accordance with the requirements of the FCAA, §185, authorized or baseline emissions data from the attainment year, 2007, will be used, if available, to establish a baseline amount. Emissions inventory data reported under §101.10 will be used. If no data are available, a baseline amount of 12.5 tons for VOC and 12.5 tons for NO_X will be used. The major stationary source threshold for an area classified severe for the one-hour ozone nonattainment area is 25 tons of potential emissions for VOC and 25 tons for NO_X. Potential emissions are typically higher than the annual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or potential, so the executive director will use half the potential as an average baseline amount for a source with no data reported in the emissions inventory. Additionally, the executive director, using the plain language of FCAA, §185, will not use any alternatives for calculating a baseline amount, such as aggregating VOC and NO_X or aggregation of pollutants across multiple major stationary sources, because the executive director will not have all information necessary to make these determinations. Loss of these options will provide an additional incentive for sources to comply with all reporting obligations.

§101.118, Cessation of Program

The EPA does not clearly define the mechanism to end the Failure to Attain Fee program in an area with a revoked standard. FCAA §185 requires the fee payment to be due until the area is redesignated to attainment; however, the EPA has indicated that it will no longer redesignate areas under the revoked one-hour ozone standard. To address this issue, the TCEQ proposes mechanisms to end the Failure to Attain Fee program for the HGB one-hour ozone nonattainment area. The proposed new section would end the applicability of the Failure to Attain Fee upon either redesignation of the nonattainment area to attainment for the one-hour ozone NAAQS or a finding of attainment by the EPA for the one-hour ozone nonattainment area.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the Failure to Attain Fee may be assessed but the fee collection may be placed in abeyance by the executive director if three years of quality-assured data resulting in a design value that did not exceed the NAAQS are submitted to the EPA.

§101.119, Exemption from Failure to Attain Fee Obligation

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

nonattainment area in a year.

§101.120, Eligibility for Equivalent Alternative Obligation

This section proposes to allow major stationary sources owing a Failure to Attain Fee payment to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements of this subchapter. If an equivalent alternative obligation does not fully meet a major stationary source or Section 185 Account's full obligation, the remaining portion of the Failure to Attain Fee remains due. If an alternative obligation under §101.121 is not approved and funded, exercised, or otherwise completed by the fee invoice date, the payment of the fee would be due in full. Because a Supplemental Environmental Project (SEP) may be a capital project requiring more than 30 days to complete, the proposed section requires SEPs to be approved and funded by the fee invoice date.

Within 15 days of the date of the letter of the fee invoice, an owner or operator of a Section 185 Account shall inform the commission on forms approved by the executive director if an equivalent option to the Failure to Attain Fee is being requested. All requests are subject to the executive director's approval.

§101.121, Equivalent Alternative Obligation

This section proposes to allow Section 185 Accounts to request to fulfill their Failure to

Attain Fee obligation by relinquishing an equivalent portion of emission reduction credits, discrete emission reduction credits, current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances, or current or banked Mass Emissions Cap and Trade (MECT) program allowances.

Emission credits submitted for fee reduction purposes, on a ton-for-ton basis, would only be allowed for use as an equivalent alternative for the pollutant (VOC or NO_X) specified on the credit. VOC or HRVOC credits would only be used as an alternative equivalent for VOC tons in excess of the baseline; NO_X credits would only be used as an alternative equivalent for NO_X tons. The proposed use of allowances would be similarly restricted, such that MECT allowances would only be used as an equivalent for NO_X tons. HECT allowances would only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for major stationary sources in Harris County. Significant digit rounding of the emissions reduction would correspond to the respective significant digit for emissions allowance in the emissions banking and trading program being used. For example, if the HECT allowance uses a significant digit of two places after the decimal point, then the emissions offset would be also limited to two digits after the decimal place. Removing these emissions, represented as allowances, on a ton-per-ton basis furthers the goals of reducing ozone-causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

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

This section proposes to allow Section 185 Accounts to request to fulfill all or part of their fee obligation by contributing to a SEP within the HGB one-hour ozone nonattainment area in either an amount equivalent to the tons on which the fee has been assessed or in an amount equivalent to the fee amount assessed. SEPs are projects that prevent or reduce pollution beyond existing regulatory requirements. Supporting a SEP guaranteeing emissions reductions in the nonattainment area would provide cost-effective opportunities that more directly benefits air quality in the affected area than the imposition of a fee. Under this proposed rule, contributing to a SEP would reduce a major stationary source or Section 185 Account's fee obligation on a dollar-per-dollar basis by decreasing the fee obligation by the same amount. The proposed rule also allows a major stationary source or Section 185 Account to use surplus SEP funds from year to year. The funding will not be discounted or depreciated over time.

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

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

The TCEQ is soliciting comments on whether additional requirements or restrictions should be placed on the use of SEP funds as an equivalent obligation under FCAA, §172(e).

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules would not have a significant fiscal impact on other state agencies since they do not typically engage in the type of activities that produce major emissions of VOC and NO_X. The proposed rules would not have a fiscal impact on units of local government that are major stationary sources of emissions in the HGB ozone nonattainment area if proposed credits offset the fee obligation.

The FCAA requires each SIP for ozone nonattainment areas classified as severe or extreme to include a requirement for the imposition of a penalty fee for major stationary sources of VOC located in an area if the area fails to attain the ozone NAAQS by the

applicable attainment date. The FCAA further requires all SIP requirements that apply for VOC to also apply for emissions of NO_X. The Failure to Attain Fee is required to be imposed for each calendar year until the area is redesignated as an attainment area for ozone. The proposed rules would impose a Failure to Attain Fee on major stationary sources of VOC and NO_X located in ozone nonattainment areas if the area has failed to attain the ozone NAAQS by the applicable attainment date. The EPA is also allowing, subject to its approval, equivalent alternative programs to replace penalty fee programs if certain conditions are met.

The HGB area is the only area of the state that is classified as a severe nonattainment area for the one-hour ozone NAAQS and has failed to attain the standard by its attainment date. States have the choice to implement a FCAA, §185 fee in lieu of EPA enforcement of the fee obligation. If a state does not implement the fee provision, the EPA is required to collect the fee and can also collect interest. The EPA would not be obligated to use any fee revenue or interest collected for the benefit of a state where such penalties are incurred. The fee would be $5,000 per ton (adjusted by the CPI to be $8,967 for calendar year 2010) on actual VOC or NO_X emitted in excess of 80% of a baseline amount, which is based upon the lower of total actual or authorized emissions at each major stationary source. This fiscal note assumes that EPA would allow the use of the proposed credits from the agency's TERP and the vehicle I/M programs to lower any assessed FCAA, §185 fee. For convenience, in separate paragraphs in each section

of the fiscal note, the agency is also providing an estimate of the fiscal impact of FCAA, §185 fees if credits are not utilized.

In addition to the proposed equivalent alternatives, major sources in the HGB area could offset FCAA, §185 fees by retiring emission credits from the HECT and MECT programs or by providing funding for the implementation of a SEP, and the proposed rules would allow for these alternatives also. However, the agency cannot predict how many, or if any owners or operators of major stationary sources, would use emission credits or elect to implement a SEP, and the fiscal impact of these alternatives is not estimated in any part of this fiscal note.

The proposed rules include requirements for source applicability determination, emissions baseline calculation methodology, determination of the Failure to Attain Fee obligation required, and due dates for fee payment. The proposed rules also include equivalent alternatives allowed under the anti-backsliding provisions of FCAA, §172(e). These provisions include alternative methods for determining a baseline amount at a major stationary source or group of major stationary sources and equivalent methods of fulfilling the fee obligation. The proposed rules also establish a Fee Equivalency Account that credits the FCAA, §185 fee obligation with revenue collected from the HGB area from the TERP and the I/M programs. Approximately $33.8 million was collected in Fiscal Year 2011 for TERP and $89.1 million for I/M from the HGB area, and these

amounts would be used to offset the FCAA, §185 fee obligation.

Impact to Agency Revenue

Currently, there are approximately 260 major stationary sources in the HGB ozone nonattainment area that are expected to be subject to the proposed rules. Assuming that the EPA allows the use of proposed credits for both TERP and I/M funds each year, no additional revenue would be collected under the proposed rules.

Impact to the Agency if TERP and I/M Credits are not Used

Agency Revenue

If any portion of HGB TERP or I/M funding is not approved as equivalent alternative fee revenue or if the amounts of TERP and I/M funding from the HGB area is insufficient, the remaining portion of the area's obligation will be met by assessing a fee on the major stationary sources. The fee will be prorated for each major stationary source, based on its annual actual emissions over its baseline amount. Revenue could increase by as much as $90 million per year as long as the area continues to be in nonattainment. This estimate assumes a fee level of $5,000 per ton, adjusted by the CPI (approximately $8,967 per ton) for 2010 emissions over a baseline amount. Under the proposed rules, the agency would collect and deposit penalty fee revenue into Account 151 - the Clean Air Account. The additional revenue would be unavailable for agency use unless it is appropriated by the legislature.

Agency Costs

The agency would use currently available resources to determine baseline amounts and assess and collect fees on an annual basis. As part of the agency's implementation of the proposed rules, an existing database would need to be enhanced and maintained to track baseline amounts and to determine the amount of the fee.

Impact to Local Government in the HGB Ozone Nonattainment Area:

If Credits Are Allowed

Examples of major stationary sources owned by local governments in the HGB one-hour ozone nonattainment area could include boilers at universities, sewerage facilities, landfills, and research facilities that have annual potential or actual emissions greater than the 25-ton per year threshold that defines a major source. At the current time, there are only two sewerage facilities owned by local government that exceed the 25-ton per year threshold. These facilities should experience no fiscal impacts under the proposed rules.

If Credits Are Disallowed

If credits for the TERP and I/M programs are not approved to offset the major source FCAA, §185 obligation, the agency estimates that one sewerage facility could be assessed a fee of $8,000 per year and the other could be assessed a fee of $115,000 per year.

(This estimate assumes a fee on calendar year 2010 emissions, which are the most current emissions available for this estimate.) The proposed FCAA, §185 fee would be an estimated $8,967 per ton of VOC or NO_X emitted in excess of 80% of a baseline amount.

Public Benefits and Costs

Nina Chamness has also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be in compliance with federal law and a possible incentive for reductions of ozone in the HGB one-hour ozone nonattainment area.

Impact to Individuals and Businesses in the HGB One-Hour Ozone Nonattainment Area:

If Credits Are Allowed

The proposed rules would not have a fiscal impact on individuals or businesses in the HGB one-hour ozone nonattainment area. The 2010 HGB revenue is estimated to be $30 million for TERP and $86 million for I/M. This revenue could be used to fully offset the area's fee obligation, and no fee would be assessed on major stationary sources for a particular calendar year. However, TERP and I/M revenue can fluctuate, and fully offsetting the fee obligation may not be typical.

If Credits Are Disallowed

Individuals in the HGB one-hour ozone nonattainment area could experience cost increases under the proposed rules if major sources of VOC and NO_X (large businesses and some governmental entities) pass through the cost of any penalties they may be assessed.

The proposed rules are expected to have significant fiscal implications for some large businesses in the HGB one-hour ozone nonattainment area if the proposed credits are not utilized or approved. There are approximately 260 major stationary sources in the HGB one-hour ozone nonattainment area impacted by the proposed rules, of which, 258 are thought to be owned by large businesses. Examples of these major sources are chemical plants, petroleum refineries, electric generating facilities, sewerage facilities, waste management facilities, and gas storage facilities. Using calendar year 2010 emissions as a basis for estimation, TCEQ staff estimate that a business could pay an average of $350,000 under the proposed rules if I/M and TERP revenue are not utilized. Under this scenario, staff estimates that the rate for one major stationary source could be as high as $7.4 million. If HGB TERP revenue, but not I/M revenue, are used as a credit against the FCAA, §185 Failure to Attain obligation, staff estimates that fees paid could average $186,000 per year for businesses with a high rate of $5.2 million for one business. If TERP revenue is not utilized and only the HGB I/M funds are used as a credit, Failure to Attain Fees are estimated to average $14,000 per year for

businesses with a high rate of $296,000 for one business.

Small Business and Micro-business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since no small business is listed as a major source of VOC or NO_X in the HGB one-hour ozone nonattainment area. If a small business becomes a major source of these emissions, then it would be subject to the same conditions as a large business in the HGB one-hour ozone nonattainment area.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules are intended to enable Texas to comply with the requirements of the FCAA, §182 and §185 for the HGB one-hour ozone nonattainment area. Fees are required to be collected for all major stationary sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may collect interest). The applicability of the fee may have a benefit in reducing emissions of ozone precursors in ozone nonattainment areas by incentivizing sources to reduce emissions further, but the proposed rules will not require emission reduction; and appear to have been designed primarily as a penalty for failure to attain the ozone standard.

The proposed rulemaking would implement requirements of the FCAA. Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter." The provisions of the FCAA recognize that states are in

the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under the FCAA, that must be included in their SIPs, such as the requirement of FCAA, §182 and §185, in order to avoid SIP disapproval or sanctions under the FCAA. The proposed rules would incorporate requirements to fulfill the requirements of FCAA, §182 and §185.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633

that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule is a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states have flexibility to develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP were considered a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory

impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. This proposed rulemaking will have no impact beyond the impact that is required by FCAA, §182 and §185. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*See Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).)

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

The proposed rulemaking does not exceed a standard set by federal law nor exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Finally, this proposed rulemaking was not developed solely under the general powers of the agency but is also authorized by THSC, §382.012. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet the definition of a "major environmental rule." Additionally, even if the rulemaking did meet the definition of a "major environmental rule" it does not meet any of the four applicability criteria for a major environmental rule.

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to implement the FCAA, §182 and §185 fee requirement in the HGB ozone nonattainment area. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Ozone is a criteria pollutant that is regulated under the FCAA to protect public health and welfare. Fees are required to be collected under FCAA, §182 and §185, for all major sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may

collect interest). The proposed rules will enable Texas to comply with the requirements of FCAA, §182 and §185 for the HGB one-hour ozone nonattainment area. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101, Subchapter B is not an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Houston in the Houston-Galveston Area Council at 3555 Timmons, Room A, on January 9, 2013, at 2:00 p.m. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Texas Register Team at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-009-101-AI. The comment period closes January 14, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Kathy Pendleton, P.E., Emissions Assessment Section, at (512) 239-1936.

SUBCHAPTER B: FAILURE TO ATTAIN FEE

§§101.100 - 101.102, 101.104, 101.106 - 101.110, 101.113, 101.116 - 101.122

Statutory Authority

The new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; TWC, §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning

Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7511a(d)(3), (e), and (f), regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d, regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

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

§101.100. Definitions.

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

(1) Actual emissions--The actual emissions are as defined in §101.10(b) of this title (relating to Emissions Inventory Requirements).

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

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

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

(5) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data submitted to and recorded by the commission, under §101.106 of this title (relating to Baseline Amount Calculation).

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

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

(B) For regulated entities with emissions that are irregular, cyclic, or have emissions that vary, the baseline emissions may be determined from an average of a consecutive 24-month period as allowed under §101.106(b)(2) of this title (relating to Baseline Amount Calculation).

(7) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce

electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(8) Emissions unit--An emissions unit as defined in §101.1 of this title (relating to Definitions).

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

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

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

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

§101.101. Applicability.

The provisions of this subchapter apply to all regulated entities that are major stationary sources of volatile organic compounds or nitrogen oxides that are located in the Houston-Galveston-Brazoria one-hour ozone nonattainment area by the applicable attainment date of November 15, 2007.

§101.102. Equivalent Alternative Fee.

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

(1) the Texas Emissions Reduction Plan program; and/or

(2) the Vehicle Inspection and Maintenance program.

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

nonattainment area.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account shall be collected from the calendar years subsequent to the scheduled attainment year.

§101.104. Equivalent Alternative Fee Accounting.

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

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

(c) Annual demonstration of equivalency. The executive director shall complete an equivalency demonstration to determine if adequate equivalency credits were available in the Fee Equivalency Account for the applicable calendar year to meet the Area §185 Obligation calculated under subsection (b) of this section.

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

Figure: 30 TAC §101.104(c)(1)

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

Definitions:
AreaObligation = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the §185 Fee Obligations from all major stationary sources in the Houston-Galveston-Brazoria nonattainment area for the calendar year being assessed.
FeeEquivAcct = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.102 of this title (relating to Equivalent Alternative Fee). This amount may contain any equivalency surplus from previous year's assessments.
FeeEquivBalance = The amount in the Fee Equivalency Account Balance after the Area §185 Obligation is met in a calendar year.

(2) If the Fee Equivalency balance is calculated to be greater than or equal to zero in paragraph (1) of this subsection, the executive director shall not assess a §185 Failure to Attain fee on Section 185 Accounts for the year being assessed.

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

Figure 30 TAC §101.104(c)(3)

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

Definitions:

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

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

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

ProratedFee = The reduced fee each major stationary source or Section 185 Account will be assessed if insufficient equivalency credits are allocated in the Fee Equivalency Account.

§101.106. Baseline Amount Calculation.

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

(1) total amount of baseline emissions; or

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

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

(1) the attainment year; or

(2) if the regulated entity's emissions are irregular, cyclical, or otherwise vary significantly from year to year, any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute an average baseline emissions amount (tons per year) for the major stationary source. If used, the historical period must be:

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

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

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

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

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

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

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

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

§101.107. Aggregated Baseline Amount.

(a) Aggregation. Notwithstanding the requirements of §101.106 of this title (relating to Baseline Amount Calculation), a major stationary source of emissions that meets the applicability requirements of §101.101 of this title (relating to Applicability) after calculating each pollutant's emission baseline amount in accordance with this subchapter may choose to combine:

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

(2) nitrogen oxides (NO_X) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources;

(3) emissions for both VOC and NO_X into a single aggregated pollutant

baseline amount for a single major stationary source; and/or

(4) emissions for both VOC and NO_X into a single aggregated pollutant baseline amount for multiple major stationary sources.

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

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

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

(c) Section 185 Account reporting. An owner and or operator opting to combine VOC with NO_X and/or combine major stationary sources into one baseline amount shall identify all major stationary sources being aggregated under this section.

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

§101.108. Alternative Baseline Amount.

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

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

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

(B) emissions allowed under authorization. If reported in the emissions inventory prior to or during the attainment year as required under §101.10 of this title (relating to Emissions Inventory Requirements), total authorized emissions may include:

(i) the resulting authorized emissions from permit applications in process by the attainment year. The permit application for these unauthorized emissions must have been administratively complete by December 31, 2007, and the permit issued by the adoption date of this section; and

(ii) emissions from planned maintenance, startup, and shutdown (MSS) activities submitted in accordance with the schedule in §101.222(h) of this title (relating to Demonstrations) or Texas Health and Safety Code, §382.051962. This includes emissions that were:

(I) authorized or an application was filed in a timely manner in accordance with the schedule in §101.222(h) of this title and a permit issued under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) or by claiming or registering under a permit by rule under Chapter 106 of this title (relating to Permits by Rule) by the applicable deadline. An owner or operator will establish an amount of emissions from MSS activities based on emissions limits from MSS activities in the permit for the purpose of establishing the baseline; or

(II) included in an application timely filed in response to the schedule in §101.222(h) of this title, which remains under review by the commission or are not authorized or included in an application because the schedule in §101.222(h) of this title or THSC, §382.051962 provides for a future date for submitting the application. An owner or operator shall establish an amount of emissions from planned MSS activities based on emissions from MSS activities reported in the emissions inventory as required under §101.10 of this title for the purpose of establishing the baseline.

(2) Additionally, only emissions from first authorized planned MSS activities may be used to adjust a baseline amount. The baseline amount will be adjusted to reflect the lower of the MSS emissions in the emissions inventory or the authorized limits for the MSS activities. This revised baseline amount will remain effective beginning with the year the permit was authorized.

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

(A) The baseline amount for the previously unauthorized emissions and emissions units for which emissions limits were authorized after the attainment year or any emissions limits from MSS activities will be the lower of the emissions reported in the emissions inventory for the emissions units or emissions authorized by permits for which the application was administratively complete by December 31, 2007 and applications filed prior to or in response to the schedule in accordance with §101.222(h) of this title or THSC, §382.051962 for the emissions units.

(B) The baseline amount for all other emissions units and any MSS activities not included in subparagraph (A) of this paragraph at the major stationary source will be the lower of the baseline emissions reported in the emissions inventory for these emissions units and the applicable emissions limits authorized prior to December 31, 2007.

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

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

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

(d) Except as allowed under §101.109 of this title (relating to Adjustment of

Baseline Amount) or as required by subsection (a)(2) of this section, the baseline amount will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

§101.109. Adjustment of Baseline Amount.

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

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

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

(b) Within 90 calendar days of the effective date of a change of ownership or control emissions units, the owner or operator of each Section 185 Account affected by the change in ownership or control of emissions units in an area meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report requesting its adjustment of the baseline amount on a form published by the executive director.

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

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

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

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

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

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

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

(2) emissions allowed under applicable authorizations.

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

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

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

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

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

§101.113. Failure to Attain Fee Obligation.

(a) Pollutant applicability. The total fee is applicable to and calculated for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO_X), or both, for which the major stationary source meets the requirements of §101.101 of this title (relating to Applicability). Actual VOC or NO_X emissions may be kept separate or aggregated together. A single pollutant may be aggregated across multiple major stationary sources, or both VOC and NO_X may be aggregated together across multiple major stationary sources. Aggregation is limited to emissions from:

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

(2) major stationary sources that aggregated NO_X baseline amounts under §101.107 of this title; or

(3) major stationary sources that aggregated VOC with NO_X baseline amounts under §101.107 of this title.

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

(c) Separate pollutant obligation. Fee obligation from VOC or NO_X emission major stationary sources not qualified or chosen for baseline aggregation under §101.107 of this title will remain separate and due from each major stationary source. The fee will be calculated by the method described in subsection (d) of this section.

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

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

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

(3) If VOC are aggregated with NO_X at one major stationary source under §101.107(a) of this title, VOC and NO_X emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC are aggregated with NO_X across multiple major stationary sources, VOC and NO_X emissions from each major stationary source in the Section 185 Account must be used for the aggregated actual and aggregated baseline emissions. The fee will be calculated for VOC, NO_X, or both, as follows.

Figure: 30 TAC §101.113(d)(3)

$$\S185Fee = \$5000\left[\left(\frac{2}{3} * \frac{CPIx}{122.15}\right) + \left(\frac{1}{3} * \frac{CPIy}{122.15}\right)\right] * (Actual - 0.8 * BA)$$

Definitions:

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

§185Fee = The fee amount due annually to the commission based on actual volatile organic compound (VOC), nitrogen oxide (NO_X) emissions, or both.

Actual = All quantifiable emissions of VOC, NO_X from the major stationary source or Section 185 Account; or if VOC is aggregated with NO_X, both VOC and NO_X together, reported in the annual emissions inventory including emissions from emissions events in units of tons for the regulated entities combined under §101.107 of this title (relating to Aggregated Baseline Amount), for the year being assessed.

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

CPIx = The average of the CPI for the 12 months that includes the fiscal year for the calendar year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982-84=100). This value represents the January through August portion of the annual CPI.

CPIy = The average of the CPI for the 12 months that includes the fiscal year following the calendar year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982-84=100). This value represents the September through December portion of the annual CPI.

§101.116. Failure to Attain Fee Payment.

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

(b) When Failure to Attain Fee begins. The first payment of the fee is due and is

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

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

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

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

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

(e) Late payments. The agency will impose interest and penalties on owners or operators of Section 185 Accounts who fail to make payment of emissions fees when due

in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.117. Compliance Schedule.

(a) Baseline amount determination. The owner or operator of each major stationary source meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director. The Baseline Amount Determination forms for the Houston-Galveston-Brazoria one-hour ozone nonattainment area are due no later than 120 calendar days after the adoptions date of this rule.

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

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

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

(2) The executive director shall not aggregate baseline amounts under §101.107 of this title (relating to Aggregated Baseline Amount) or consider maintenance, startup, or shutdown emissions as allowed under §101.108 of this title (relating to Alternative Baseline Amount) in determining a baseline amount under this subsection.

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

§101.118. Cessation of Program.

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

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

(2) finding of attainment by the EPA.

(b) Notwithstanding subsection (a) of this section, the Failure to Attain Fee will be calculated but not invoiced, and the fee collection may be placed in abeyance by the executive director if three consecutive years of quality-assured data resulting in a design value that did not exceed the National Ambient Air Quality Standard are submitted to the EPA. Fee collection will remain in abeyance until the EPA takes final action on its review of the certified monitoring data.

§101.119. Exemption from Failure to Attain Fee Obligation.

No owner or operator of a Section 185 Account shall be required to pay a fee during any year that has been determined by the United States Environmental Protection Agency to be an extension year under Federal Clean Air Act, §181(a)(5).

§101.120. Eligibility for Equivalent Alternative Obligation.

(a) Alternative option. Notwithstanding any requirement in this subchapter, the owner or operator of Section 185 Accounts obligated to pay a Failure to Attain Fee may submit a request to the executive director to partially or completely fulfill the Failure to Attain Fee obligation with an equivalent alternative obligation in compliance with the requirements with §101.121 and §101.122 of this title (relating to Equivalent Alternative Obligation and Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation, respectively).

(1) A Failure to Attain Fee obligation from volatile organic compounds (VOC) or nitrogen oxides (NO_X) emissions from Section 185 Accounts not fulfilled under this section will remain separate and due from each regulated entity.

(2) Fee obligation from VOC and/or NO_X emissions not fulfilled under this section will be calculated by the method described in §101.113 of this title (relating to Failure to Attain Fee Obligation).

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

(c) Notification Requirements. Upon receipt of notification from the executive director regarding the Failure to Attain Fee obligation calculated in accordance with §101.113 of this title, an owner or operator of a Section 185 Account shall inform the executive director of their selection for the payment if an equivalent alternative obligation will be used to partially or fully meet a Failure to Attain Fee obligation.

(1) The owner or operator of a Section 185 Account must inform the executive director if they are selecting an equivalent alternative obligation using forms approved by the executive director.

(2) The owner or operator of a Section 185 Account must submit a form selecting their equivalent alternative obligation that lists the tons of each pollutant that will meet the fee obligation with the alternative obligation.

(3) The form must be received by the executive director no later than 15 calendar days from the date on the letter the Failure to Attain Fee invoice was sent to the Section 185 Account regulated entity.

(4) No later than 30 calendar days from the date on the letter the Failure to Attain Fee invoice was sent to the Section 185 Account:

(A) All equivalent alternatives under §101.121 of this title must be approved, exercised, or otherwise completed.

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

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

§101.121. Equivalent Alternative Obligation.

(a) The owner or operator of a Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill its §185 Failure to Attain Fee obligation by substituting emission reductions, on a volatile organic compounds or nitrogen oxides specific basis, in an amount equivalent to the tons on which the Failure to Attain Fee has been assessed by relinquishing an equivalent amount of any combination of:

(1) emissions reduction credits;

(2) discrete emission reduction credits;

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

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

(b) The use of the provisions of this section to fulfill a Failure to Attain Fee obligation is subject to approval by the executive director.

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

(a) The owner and/or operator of a Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill its Failure to Attain Fee obligation by contributing to a Supplemental Environmental Project (SEP), on a volatile organic compounds (VOC) or nitrogen oxides (NO_X) specific basis by either:

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

(2) an amount equivalent to the Failure to Attain Fee amount assessed.

(b) The SEP must directly reduce the amount of VOC and/or NO_X emissions in the Houston-Galveston-Brazoria one-hour ozone nonattainment area.

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

(d) The use of a SEP to fulfill a Failure to Attain Fee obligation is subject to approval by the executive director.