

The commission adopts amendments to §101.24 and §101.27, concerning the collection of inspection and emissions fees from stationary sources, without changes to the proposed text as published in the April 30, 1996, issue of the *Texas Register* (21 TexReg 3685).

The adopted changes to §101.24, Inspection Fees, replace the schedule of multiple due dates of November 1, November 15, and December 1 with one due date of November 1 for the fiscal year. Also, a provision is added incorporating late payment penalties as required by Water Code, §5.235, which would assess a penalty of 5.0% of the amount due, and if the fees are not paid within 30 days after the day on which the fees are due, an additional 5.0% penalty would be imposed. An annual interest rate of 12.0% would be imposed on delinquent fees beginning 60 days from the date on which the fee is due.

The adopted changes to §101.27, Emissions Fees, set the fee at \$26 per ton of emissions for Fiscal Year (FY) 1997. This is the same rate per ton charged in the current fiscal year. That rate will remain at \$26 per ton for future fiscal years until amended. The emissions fee payment schedule with multiple due dates of November 1, November 15, and December 1 is being replaced with one due date of November 1 for the fiscal year. Also, a provision is added incorporating late payment penalties as required by Water Code, §5.235, which would assess a penalty of 5.0% of the amount due, and if the fees are not paid within 30 days after the day on which the fees are due, an additional 5.0% penalty would be imposed. An annual interest rate of 12.0% would be imposed on delinquent fees beginning 60 days from the date on which the fee is due.

Minor administrative changes are also made to both sections to make more explicit those parts of the agency that have specific responsibilities regarding these rules.

The agency has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purposes of this adopted rule amendment are: to establish the emissions fee rate in §101.27 for FY 97 and future years until amended; to simplify the payment schedules for §101.24 and §101.27 to one due date of November 1; and to add penalties for late payment of fees as required by statute. The rules will substantially advance these specific purposes by establishing the emissions fee rate at \$26 per ton, replacing the fee payment schedule, and establishing penalty and interest rates for late payment of fees. Promulgation and enforcement of these emissions fee and inspection fee rule amendments do not address and will not affect private real property.

A public hearing was held on May 23, 1996, in Austin. No public testimony was offered at the public hearing. The public comment period closed on May 30, 1996. The commission received three written comments on the proposal from the following: Exxon Company, U.S.A., Texas Mid-Continent Oil & Gas Association, and Texas Utilities Services.

All commenters addressed the issue of balances available in the Clean Air Fund. One commenter recommended that the commission adopt an alternative emissions fee rate of \$10 per ton rather than the proposed \$26 per ton rate. Another commenter did not recommend specific alternative rates, but did generally support the concept of a lower fee than the rate proposed based on the understanding that

maintaining the fee rate at \$26 per ton will result in a significant balance in the Clean Air Fund. Another commenter supported the commission's proposal, but requested the agency consider a lower fee for FY 1998 in order to avoid further increases in fund balances and to increase revenues available to businesses for both environmental and economic improvements. Commenters generally acknowledged that the federally-authorized emissions fees be utilized for operation of the Federal Operating Permit Program authorized by Title V of the federal Clean Air Act Amendments and requested that the commission ensure that adequate funds are available for this program.

While maintaining the fee rate at \$26 per ton will not eliminate the entire fund balance, a significant reduction of the balance will be realized each year that the fee remains at the current rate. Although the current rate is below the United States Environmental Protection Agency's presumptive norm (which includes annual inflation adjustments) to fund the Title V Operating Permits program, the existence of a fund balance allows the agency to avoid raising the rate to the presumptive level.

It should also be noted that the fund balance is a result of the collection and expense of a number of sources of revenues over a period of time, including permit and inspection fees and mobile source (vehicle safety inspection) fees, in addition to the emissions fee. It should also be recognized that some balance must remain in the fund at the end of each year in order to maintain cash flow for the agency pending the receipt of new payments after the start of each new fiscal year, and to fund the agency's costs for employee benefits and related expenses that are appropriated to the Employees Retirement System and must be available from the fund in addition to amounts appropriated to the commission. In addition, while a significant fund balance will result, current trends clearly indicate that the rates of

emissions have been declining each year and that revenues to the Clean Air Fund and related fund balances will naturally decrease as a result, if fee rates remain constant. Lowering the fee rate would accelerate this trend. To lower the fee rate dramatically at this time, however, to a level which would eliminate the projected fund balance, would actually require a significant increase in the fee the following year. To eliminate the fund balance prior to the 1998-1999 biennium would also eliminate any additional resources in the Clean Air Fund that might be considered by the 75th Legislature in its evaluation and recommendation of funding levels for the Title V Operating Permit Program or related air quality initiatives.

The commission acknowledges that businesses and industry make substantial financial contributions to the state's air quality efforts through emission fees, and that currently a fund balance in excess of immediate legislative spending authority exists. It is the commission's opinion that until the next legislature evaluates the financial needs of the state air quality initiatives for the 1998-1999 biennium, dramatic reductions in fee rates would be inappropriate and potentially disruptive to long range financial planning. The agency does intend to evaluate funding for FY 1998, and will consider these issues in conjunction with actions taken by the 75th Legislature in the appropriation of Clean Air Fund fees.

The amendments are adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

GENERAL RULES

§101.24 and §101.27

§101.24. Inspection Fees.

(a) Applicability. The owner or operator of each account to which this rule applies, as defined in this subsection, shall remit to the Texas Natural Resource Conservation Commission (TNRCC) an inspection fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. An account subject to both an inspection fee and an emissions fee, pursuant to §101.27 of this title (relating to Emissions Fees), is required to pay only the greater of the two fees. For purposes of this section, an account shall be defined as all of the facilities located at a property, including those that are permitted, non-permitted, exempted, and grandfathered. Properties under common ownership, but containing separate operations, or managed independently, or carried on the records of this agency under separate account numbers, will be charged a separate fee for each such account, even if the properties are contiguous or are contiguous except for intervening roads, railroads, rights-of-way, waterways, and the like. The inspection fee shall apply to each account which contains one or more of the types of plants, facilities, and/or processes described in subsection (d) of this section. References for the industrial categories used are provided in the *Standard Industrial Classification (SIC) Manual* (Executive Office of the President, Office of Management and Budget, 1987). If more than one SIC category can apply to an account, the fee assessed shall be the highest fee listed for the applicable classifications in the fee schedule. Provisions of the section apply to all accounts, including accounts

which have not been assigned specific TNRCC Office of Air Quality (OAQ) account numbers. The owner or operator of an account subject to an inspection fee requirement is responsible for contacting the appropriate TNRCC regional office to obtain an account number. The OAQ will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year for which the fee is assessed, a full inspection fee is due. If OAQ is notified in writing that the plant is not and will not be in operation during that fiscal year, a fee will not be due.

(b) Payment. Fees shall be remitted by check or money order made payable to the TNRCC and sent to the TNRCC address printed on the fee return form. A completed fee return form shall accompany fees remitted. The fee return form shall include, at least, the company name, mailing address, site name, OAQ account number, the SIC category on which the fee was determined, and the name and telephone number of the person to contact in case questions arise regarding the fee payment.

(c) Due date. Fee payments shall be made annually and must be received by the TNRCC or postmarked no later than November 1 of the fiscal year in which the fee is assessed. If an account commences or resumes operation after November 1 of the fiscal year in which the fee is assessed, the full inspection fee will be due prior to commencement or resumption of operations.

(d) - (e) (No change.)

(f) Late payment penalties. The owner or operator of an account failing to make payment of inspection fees when due will be assessed late payment penalties and interest equal to the rates established for delinquent taxes under Texas Tax Code, §111.060(a) and (b) and §111.061.

§101.27. Emissions Fees.

(a) Applicability. The owner or operator of each account to which this rule applies, as defined in this subsection, shall remit to the Texas Natural Resource Conservation Commission (TNRCC) an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. An account subject to both an emissions fee and an inspection fee, pursuant to §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. For purposes of this section, an account shall be defined as all of the facilities located at a property including those that are permitted, non-permitted, exempted, and grandfathered. Properties under common ownership, but containing separate operations, or managed independently, or carried on the records of this agency under separate account numbers, will be charged a separate fee for each such account, even if the properties are contiguous or are contiguous except for intervening roads, railroads, rights-of-way, waterways, and the like. Provisions of the section apply to all accounts, including accounts which have not been assigned specific TNRCC Office of Air Quality (OAQ) account numbers. The owner or operator of an account subject to an emissions fee requirement is responsible for contacting the appropriate TNRCC regional office to obtain an account number. The OAQ will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at

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

(1) - (9) (No change.)

(b) Payment. Fees shall be remitted by check or money order made payable to the TNRCC and sent to the TNRCC address printed on the fee return form. A completed fee return form shall accompany fees remitted. The fee return form shall include, at least, the company name, mailing address, site name, OAQ account number, Standard Industrial Classification (SIC) category, the allowable levels and/or actual emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment.

(c) Basis for fees.

(1) The emissions fee shall be based on allowable levels and/or actual emissions at the account during the last full calendar year preceding the beginning of the fiscal year for which the fee is assessed. For purposes of this section, the term "allowable levels" are those limits as specified in an enforceable document such as a permit or Commission Order which are in effect on the date the fee is due. The fee applies to the tonnage of regulated pollutants at the account, including those emissions from point and fugitive sources during normal operations. Although certain fugitive emissions are excluded for applicability determination purposes pursuant to subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A maximum of 4,000 tons of each regulated pollutant will be used for fee calculations. The fee for each fiscal year is set at the following rates:

<u>Fiscal Year</u>	<u>Rate Per Ton</u>	<u>Minimum Fee</u>
1992	\$ 3	
1993	\$ 5	\$25
1994	\$25	\$25
1995	\$26	\$26
1996	\$26	\$26
1997	\$26	\$26

The rate of \$26 per ton will remain effective for future fiscal years until amended. If the fee is applicable, the company responsible for the account shall pay the calculated emissions fee or the minimum fee, whichever is greater.

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

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

(B) (No change.)

(3) (No change.)

(d) Due date. Fee payments shall be made annually and must be received by the TNRCC or postmarked no later than November 1 of the fiscal year in which the fee is assessed. If an account commences or resumes operation after November 1 of the fiscal year in which the fee is assessed, the full emissions fee will be due prior to commencement or resumption of operations.

(e) (No change.)

(f) Late payment penalties. The owner or operator of an account failing to make payment of emissions fees when due will be assessed late payment penalties and interest equal to the rates established for delinquent taxes under Texas Tax Code, §111.060(a) and (b) and §111.061.

This agency hereby certifies that the sections as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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