Revised Backup Material for October 22, 2025 Agenda

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** October 6, 2025

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Executive Director

From: Richard C. Chism, Director *RCC*
Office of Air

Subject: Docket No. 2023-1061-RUL / Rule Project No. 2023-131-101-AI
Commission Approval for Proposed Rulemaking
Chapter 101, General Air Quality Rules
Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard
Highlight Version of the Adoption Preamble for 30 TAC Chapter 101

In the revised back-up package filed for Rule Project No. 2023-131-101-AI / Section 185 Fee for the 2008 Ozone NAAQS, the Texas Commission of Environmental Quality is correcting the following inadvertent errors:

- A Response to Comment on page 94, the fifth paragraph, of the adoption preamble.
    - The original sentence states: "Therefore, in the adopted version of this rule, the term "equipment" was updated to "emissions units" in §101.710(a)(1)(2) rule language; similar updates were made to the preamble Section by Section Discussion for §101.710."
    - This is being corrected to: "Therefore, in the adopted version of this rule, the term "equipment" was updated to "emissions units" in §101.710(a)(1) and (2) rule language; similar updates were made to the preamble Section by Section Discussion for §101.710."
- A Response to Comment response on page 97, the third paragraph, of the adoption preamble.
    - The original sentence states: "The Section 185 fee program would increase VOC emissions as it does not and cannot alter requirements for emissions authorizations under the TCAA."
    - This is being corrected to: "The Section 185 fee program would not increase VOC emissions as it does not and cannot alter requirements for emissions authorizations under the TCAA."
- A Response to Comment on page 102, the second paragraph, and page 103, the first paragraph, of the adoption preamble.
    - The original sentence states: "Since EPA strengthened the 2008 eight-hour ozone standard of 75 parts per million (ppm) with the promulgation of the 2015 eight-hour ozone standard to 70 ppm, then FCAA, §172(e) can be applied to the 2008 eight-hour ozone standard."
    - This is being corrected to: "Since EPA strengthened the 2008 eight-hour ozone standard of 75 parts per billion (ppb) with the promulgation of the 2015 eight-hour ozone standard to 70 ppb, then FCAA, §172(e) can be applied to the 2008 eight-hour ozone standard."

Re: Docket No. 2023-1229-RUL

- A Response to Comment on page 138, fourth paragraph, of the adoption preamble.
    - The original paragraph states: “For EGUs, the specific historic look-back period is limited to a representative 24-month period within the last 10 years prior to the baseline year and for non-EGUs the historic look-back periods is the last 5 years prior to the baseline year”
    - This is being corrected to: “For EGUs, the specific historic look-back period is limited to a representative 24-month period within the last 5 years prior to the baseline year and for non-EGUs the historic look-back period is the last 10 years prior to the baseline year.”

Original back-up materials for this rulemaking project were filed on October 3, 2025.

Attachments:
Adoption Preamble

cc: Chief Clerk, 2 copies
Executive Director's Office
Patrick Lopez
Jessie Powell
Aubrey Pawelka Carlton
Office of General Counsel
Danielle Nesvacil
Jill Dickey-Hull
Terry Salem
Gwen Ricco
Jamie Zech

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§101.700 - 101.718

New §§101.704, 101.709, 101.711, 101.714, and 101.716 are adopted without changes to the proposed text. New §§101.700, 101.701, 101.702, 101.703, 101.705, 101.706, 101.707, 101.708, 101.710, 101.712, 101.713, 101.715, 101.717, and 101.718 are adopted with changes to the proposed text as published in the May 16, 2025, issue of the *Texas Register* (50 TexReg 2925) and, therefore, will be republished.

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

Background and Summary of the Factual Basis for the Adopted Rules

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 (Section 185, generally) require the SIP to include a rule that implements a penalty fee (Section 185 fee, Failure to Attain Fee, fee) for major stationary sources (major 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) 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 (NO_x)." This FCAA requirement extends the Section 185 fee assessment to major stationary sources of NO_x emissions. The SIP must also include procedures for the assessment and collection of the penalty fee. If the state does not impose and collect the fee, then FCAA, §185(d) requires that EPA impose and collect the fee with interest, and the revenue is not returned to the state.

For the 2008 eight-hour ozone standard of 0.075 parts per million, on October 7, 2022, EPA published a final notice that reclassified the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) 2008 eight-hour ozone nonattainment areas from serious to severe effective November 7, 2022 (87 *Federal Register* (FR) 60926). The DFW severe nonattainment area consists of 10 counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise. The HGB severe nonattainment area consists of eight counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The DFW and HGB severe nonattainment areas are required to attain the 2008 eight-hour ozone standard by July 20, 2027. If a severe or extreme ozone nonattainment area does not attain by the attainment date, the area will be subject to the penalty fee requirements upon EPA issuing a finding of failure to attain for the area. For fee assessment purposes, the 2027 calendar year from January 1, 2027, through December 31, 2027, is anticipated to be the baseline year for these severe nonattainment areas since it is the year that contains the attainment date. The penalty fee is required to be paid until EPA redesignates the area as attainment for the 2008 eight-hour ozone standard or EPA takes action that results in termination of the fee.

As stated in FCAA, §182(d)(3) and (e) and §185, the required penalty is $5,000 per ton, as adjusted for inflation by the consumer price index (CPI), of VOC and/or NO_x emissions emitted in excess of 80% of a major stationary source's baseline amount. A baseline amount will be determined for each pollutant, VOC and/or NO_x, for which the source meets the major source applicability requirements. A source that is major for VOC emissions will be subject to the fee on VOC emissions; a source that is major for NO_x emissions will be subject to the fee on NO_x emissions; and a source that is major for both VOC and NO_x emissions will be subject to the fee on both VOC and NO_x emissions.

The major stationary source's fixed baseline amount is calculated as the lower of the baseline

emissions or total annual authorized emissions during the baseline year; the baseline amount must be adjusted downward to account for unauthorized emissions and/or emissions limitations in effect as of December 31 of the baseline year or timeframe used to determine the baseline amount. The major stationary source's baseline emissions are defined as the annual routine emissions reported to the TCEQ point source emissions inventory (emissions inventory) according to 30 TAC §101.10, excluding emissions not authorized by permit or rule, such as emissions from emissions events and scheduled or unscheduled maintenance, startup, and shutdown (MSS) activities. The major stationary source's authorized emissions include emissions allowed under any EPA or TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

The rule allows for a baseline amount determination with flexibilities such as aggregating pollutants (VOC and NO_x emissions) and aggregating sites under common ownership and control into a single baseline. The rule also allows for baseline amount determinations when a period other than the baseline year may be required, such as new major stationary sources that began operating after the baseline year or major stationary sources with emissions that are irregular, cyclic, or vary significantly from year to year. Under specific circumstances, major stationary sources may request adjustments to the fixed baseline amount. The estimated Section 185 fee, based on a conventional fee program, without baseline amount flexibilities and fee offsets for both the HGB and DFW severe ozone nonattainment areas is over $200 million per year.

TCEQ adopts an equivalent fee program (Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard, Failure to Attain Fee program, Section 185 fee program) under FCAA, §172(e) with flexibility aspects not directly described in FCAA, §185, including but not limited to other mechanisms to offset the fee on major stationary sources and baseline aggregation. Although

EPA has not issued specific guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, in its 2010 guidance (available at: *https://www.epa.gov/sites/default/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf),* multiple approvals of similar equivalent alternative programs in California and New York, and in a final rule published in the February 14, 2020, *Federal Register* (85 *FR* 8411) for the Section 185 Fee Program in the HGB nonattainment area under the one-hour ozone standard (HGB Failure to Attain Fee), EPA approved the use of programs that are not less stringent (equivalent) alternative programs to fulfill the FCAA, §185 fee requirement. Although the 2010 guidance was vacated by the D.C. Circuit Court of Appeals on procedural grounds, *NRDC v. EPA*, 643 F.3d 311, EPA continued to utilize the principles outlined in the guidance as support for its approvals of equivalent alternative programs, as "not less stringent than" the requirements specified in FCAA, §185, based on its interpretation of the requirements of FCAA, §172(e), as upheld by *NRDC v. EPA*, 779 F.3d 1119 (9th Circuit 2015) and *Medical Advocates for Healthy Air v. EPA*, 607 Fed. Appx 759 (9th Cir. 2015). Notably, the court in *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. July 2011) did not prohibit equivalent alternative programs, instead stating that "neither the statute nor our case law obviously precludes that alternative." In the absence of formal EPA guidance for Section 185 fee programs under the 2008 eight-hour ozone standard, this rulemaking relies on the 2010 guidance and the court decisions holding that FCAA, §172(e) applies also when EPA strengthens a NAAQS to develop Texas' fee program. In the HGB Failure to Attain Fee final approval, EPA approved fee programs funded to reduce VOC and NO_x emissions 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, which is consistent with the principles of the anti-backsliding principle of the FCAA §172(e). EPA's 2010 guidance requires 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.

EPA states in its 2010 guidance that it may allow equivalent 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." 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 and EPA's final approval of the HGB Failure to Attain Fee, located in 30 Texas Administrative Code (TAC) 101 Subchapter B, 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 for the (now revoked) one-hour ozone standard. EPA approved other equivalent alternative programs pursuant to the 2010 guidance for the one-hour ozone standard including San Joaquin Valley (77 FR 50021), *South Coast Air Quality Management District*, (77 FR 74372), and the New York portion of the New York-Northern New Jersey-Long Island nonattainment area (84 FR 12511). EPA's approvals of these Section 185 fee programs under the one-hour ozone standard included equivalent fee revenue by assessing a fee on mobile sources. The revenue was used to offset the fee due from major stationary sources in the nonattainment areas. EPA's prior approvals were based on its interpretation that FCAA, §172(e) allows equivalent alternative fee programs for revoked ozone standards. As noted above, FCAA, §172(e) provides that if EPA relaxes a NAAQS, EPA must provide for controls that are "not less stringent than the [applicable] controls". While FCAA, §172(e) clearly applies to future standards that are less stringent, EPA argued, and the D.C. Circuit upheld, that FCAA, §172(e) also applies to standards that are more stringent, requiring that specific obligations (anti-backsliding obligations) continue to apply for revoked NAAQS and current

NAAQS (*South Coast Air Quality Management District v. EPA*, 472 F.3d. 882, 900 (2006)). Interpreting the FCAA to allow for equivalent alternative fee programs for current NAAQS promotes consistency, particularly given that FCAA, §185 fee programs are a required anti-backsliding measure for both revoked and current NAAQS. Since nothing in FCAA, §185 requires emission reductions, only the payment of fees, allowing the offset of fees by funds that are spent to obtain emission reductions is equivalent or better than the payment of fees. Additionally, nothing in FCAA, §172(e) prohibits equivalent alternative fee programs for active ozone standards, and courts have upheld the applicability of FCAA, §172(e) for both relaxed and strengthened NAAQS. Therefore, the commission adopts an equivalent alternative fee program in this rule.

The TCEQ's HGB Failure to Attain Fee Rule adopted in 2013 and approved by EPA in 2020, allowed revenue collected from the HGB one-hour ozone standard nonattainment area for qualified programs that directly reduced VOC or NO_x emissions to offset the FCAA, §185 fee. No actual revenue or funding was transferred to the Section 185 fee program; funds were calculated, recorded, and assessed to ensure a sufficient amount was collected to offset the required Section 185 fee amount. The same approach is used for this rulemaking.

Although EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, EPA originally described certain basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee for severe or extreme ozone nonattainment areas under the one-hour ozone standard. In a final rule published November 16, 2005, in the *Federal Register* (70 FR 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, 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" (70 FR 69440, 69441). The same rationale is used to establish the anticipated baseline year of 2027 for the DFW and HGB severe nonattainment areas under the 2008 eight-hour ozone standard.

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" *(*70 FR 69440, 69441 - 69442). Major stationary sources may elect to reduce their emissions to reduce the fee owed, or they may elect to pay the fee without reducing their emissions.

EPA also previously 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: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20080321_harnett_emissions_basline_185.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. EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions because a source's emissions may be irregular, cyclic, or otherwise vary significantly from year to year. This concept will be applicable regardless of the fee program implemented or the ozone standard requiring the fee program.

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. 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 is reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission adopts this option in the same manner as provided for in the Texas New Source Review Program. Since the PSD guidance is specific to sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, the averaging option is not available for sources with steady-state operations.

A variability analysis on sites reporting to the TCEQ point source emissions inventory was performed to determine if VOC and NO_x emissions were variable over the twelve-year period between 2011 (the base year for the 2008 ozone standard) through 2022 (the most recent

complete point source emissions inventory at the time this analysis was performed) for the DFW and HGB severe nonattainment areas. Data for the DFW and HGB variability analysis were analyzed separately for VOC and NO_x emissions. Sites that reported 2011 through 2022 mean emissions greater than 20 tons per year in the TCEQ emissions inventory were included in this analysis.

A site's emissions were determined to be variable if the following formula was true, where x = VOC or NO_x emissions and σ = one standard deviation of the data set:

Figure 1: Formula for Emissions Variability Determination

$$\overline{x}_{lookback\ period} > \overline{x}_{2011-2022} + \sigma_{2011-2022}$$

Variability of reported NO_x and VOC emissions ranged from 3% to 128% in the HGB area and from 0.1% to 265% in the DFW area over the twelve years examined. Fifty-nine percent or 162 of the 274 NO_x and/or VOC emissions sources in the HGB area were variable as defined by the above formula. Forty-eight percent or 115 of the 238 NO_x and/or VOC emissions sources in the DFW area were variable as defined by the above formula.

The variability analysis shows that a high level of source-level emissions variability occurred between 2011 and 2022 in the DFW and HGB severe nonattainment areas; therefore, it is appropriate to use a 24-month period during the previous ten years (or five years if the source is an electric utility steam generating unit) to establish a baseline for the FCAA, §185 fee program.

Based on the analysis above, the commission adopts EPA's baseline guidance and EPA's long-

standing PSD regulations for sources with emissions that are irregular, cyclic, or otherwise vary significantly to offer an option for these source types to establish a baseline amount. Since FCAA, §185 states that the baseline amounts may be adjusted for these types of sources if the EPA Administrator issues guidance, the commission adopts these provisions based on these EPA guidance documents.

Like the HGB Failure to Attain Fee Rule, the commission adopts a fee program that credits the Texas Emissions Reduction Plan (TERP) funds collected from fees and surcharges related to the sale and use of vehicles and heavy-duty equipment (TERP revenue) from each area after the 2008 eight-hour ozone attainment (baseline) year as discussed below to offset the Area §185 Obligation. The Area §185 Obligation is the total amount of the Failure to Attain Fee due for an entire 2008 eight-hour ozone nonattainment area based on summing the Failure to Attain Fee due from each major stationary source or Section 185 Account for a fee assessment year.

The objectives of TERP are specifically described in statute and are consistent with EPA's objective for an equivalent FCAA, §185 fee 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."

TCEQ implements TERP to reduce NO_x emissions, a precursor to ozone pollution. TERP grant programs provide financial incentives to individuals, state and local governments, corporations, and other legal entities to upgrade or replace their older, higher emitting vehicles and equipment with newer, cleaner vehicles and equipment. TERP programs also encourage the use

of alternative fuels for transportation in Texas, and the implementation of new technologies that reduce emissions from stationary sources and oil and gas operations.

In the DFW severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 65%. In the HGB severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 55%. Since the federal government regulates mobile sources under FCAA, Title II, states cannot develop mobile source emissions standards and have limited authority to directly regulate emissions from mobile sources. TERP is a state-specific program used primarily to obtain voluntary mobile source emissions reductions since the state has limited regulatory authority.

The emissions reduction grant programs that TERP funds decrease ozone precursor emissions more directly than a penalty fee assessed on major stationary sources. FCAA, §185 provides major stationary sources with a choice to either reduce ozone precursor emissions to below 80% of their baseline amount or pay a fee. An economic incentive to reduce emissions is not the same as a requirement to reduce emissions, therefore the FCAA, §185 may or may not result in emissions reductions. However, the imposition of a conventional fee would likely result in an economic burden to the state and potentially the country, due to the large economic impact of the DFW and HGB nonattainment areas. As the fifth largest Metropolitan Statistical Area (MSA) in the county, Houston in particular accounts for significant portions of the country's and Texas' economy and as of 2021, accounted for 44% of the country's base petrochemical capacity with many of the top employers in the energy, petrochemical, or refinery related fields. Therefore, the commission adopts an equivalent fee program as proposed and adopts rules to credit the TERP revenue because TERP meets one of the three types of alternative programs that satisfy the requirements addressed in EPA's 2010 guidance memo and adopts other flexibilities as discussed elsewhere in this preamble. The grant programs funded through TERP are the

same (or similar to) programs that EPA previously approved as meeting the requirements for FCAA, §185 fee program equivalency under the HGB Failure to Attain Fee Rule. Fees and surcharges related to the sale and use of vehicles and heavy-duty equipment in Texas fund the TERP programs. The revenue collected for the TERP program will be used to offset each 2008 eight-hour ozone nonattainment area's Area §185 Obligation when any TERP grant funds are also expended within the same area; this revenue is referred to as "TERP revenue collected and expended" throughout this subchapter. TCEQ will identify and track TERP revenue from the DFW severe nonattainment area and the HGB severe nonattainment area in two separate Fee Equivalency Accounts to demonstrate equivalency of the area-specific TERP revenue to the penalty fee owed by major stationary sources located in that area.

The commission will be required to annually determine the expected Area §185 Obligation and compare this estimation with the expected TERP revenue. TERP revenue collected and expended after the attainment year (baseline year) and statutorily available for TERP programs will be credited towards meeting the Area §185 Obligation. For the DFW and HGB 2008 eight-hour ozone nonattainment areas, 2027 is the attainment year (baseline year) contained in the July 20, 2027, attainment date. Barring any extension to the attainment date, any TERP revenue from the nonattainment area starting with 2028 that is statutorily available for TERP programs could be credited to meet the Area §185 Obligation for DFW and HGB 2008 eight-hour ozone nonattainment areas. In addition to providing grants, TERP revenue will provide equivalency credits for the purposes of offsetting the Failure to Attain Fee. These equivalency credits will be credited to the Failure to Attain Fee program to document the amount of revenue available in a Fee Equivalency Account. This documentation does not involve money exchanged or being transferred from TERP to the Fee Equivalency Account. Revenue from future grant programs as discussed in §101.703 would also provide equivalency credits for the purpose of offsetting the Failure to Attain Fee.

Since the amount of available TERP revenue is recorded in the TCEQ's Section 185 fee database as a credit to offset the Area §185 Obligation, this Failure to Attain Fee program does not impact or change how the TERP program operates. Any TERP revenue available in the TERP Trust will continue to be used to provide grants.

To determine the estimated total FCAA, §185 fee due from all major stationary sources, a baseline amount will be established for each major stationary source (or group of sources under a Section 185 Account, if aggregated as discussed later in this preamble) within the DFW 2008 eight-hour ozone nonattainment area or located within the HGB 2008 eight-hour ozone nonattainment area. The two nonattainment areas are assessed separately, resulting in two Area §185 Obligations, one for DFW and one for HGB. Each major stationary source's or Section 185 Account's reported baseline amount(s) and actual emissions as reported in the point source emissions inventory will be used to calculate a Failure to Attain Fee. The resulting amount due from each major stationary source or Section 185 Account for aggregated sources will be summed by location to determine the overall DFW and HGB 2008 eight-hour ozone nonattainment area's Area §185 Obligations.

If TERP revenue is insufficient to fully offset the Area §185 Obligation (as an equivalency credit in the Fee Equivalency Account) for the DFW 2008 eight-hour ozone nonattainment area or HGB 2008 eight-hour ozone nonattainment area, then the remaining difference will be assessed as a Failure to Attain Fee on a major stationary source or Section 185 Account for the area on a prorated basis. The fee assessed and amount collected from each major stationary source or Section 185 Account will be discounted based on the amount of revenue credited to the Fee Equivalency Account. In this manner, these rules "backstop" the TERP revenue that is credited as an offset with fees directly assessed on major stationary sources as necessary to meet each

year's Area §185 Obligation. The Area §185 Obligation will be fully met either through the demonstration from the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees on major stationary sources or Section 185 Accounts. Since the same amount of Failure to Attain Fees will be assessed then 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 Fee that will apply to each major stationary source, major stationary sources are provided a choice to individually determine baselines for VOC and NO_x emissions, aggregate VOC and NO_x emissions into one baseline if the source is major for both pollutants, or aggregate those emissions across multiple major stationary sources under common control. In Attachment C of EPA's 2010 guidance memo, EPA states it would ". . . allow for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." EPA's 2010 memo further states that EPA would allow aggregation of VOC with NO_x emissions, ". . . provided 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 rulemaking will require a major stationary source to first determine its major source applicability for both VOC and NO_x emissions. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 fee rule. If the major stationary source chooses to aggregate baselines by pollutant or site or both, it will be required to provide to TCEQ the individual, unaggregated pollutant and site baselines for each pollutant(s) that determines major source status. This will ensure that staff can accurately enter aggregated baseline amounts into the TCEQ's Section 185 fee database.

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 FR 59878, September 11, 1980), 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)). EPA generally continues to assess common control based on the general principles outlined above and has periodically issued additional guidance for specific topics such as how to assess contiguous or adjacent properties, industrial grouping, etc. The commission will also use other criteria to determine common control consistent with participation in local area banking programs, such as the Mass Emissions Cap and Trade or the Highly-Reactive Volatile Organic Compound Cap and Trade programs. A group of major stationary sources choosing to aggregate under common control as a single customer will be identified with a single common customer identifier used by the commission, the customer number (CN). A group of major stationary sources under common control will be assigned a single Section 185 Account number by TCEQ.

Since VOC and NO_x emissions reductions are both effective at lowering ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas, major sources should be allowed to aggregate both NO_x and VOC emissions into one baseline amount. The commission adopted a strategy of targeting those pollutants in a way that allows ozone nonattainment areas to attain the standard as expeditiously as practicable in previously adopted applicable attainment demonstration SIPs. 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 standard, and this approach is a result of the knowledge gained from research and detailed photochemical modeling of each nonattainment area. The flexibility option to allow aggregation of VOC and NO_X as well as major stationary source aggregation for both pollutants continues to support the strategies outlined in the attainment demonstration SIPs. This aggregation method compliments the multi-pollutant control strategies incorporated into the SIP for the DFW and HGB ozone nonattainment areas.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the imposition of a penalty 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. Both VOC and NO_X control strategies have a common goal: to reduce ozone-forming emissions. However, the effectiveness of VOC and NO_X emissions reductions often varies between, or even within, nonattainment areas due to the complex nature of ozone formation. Ozone is formed through a series of chemical reactions between precursors (VOC and NO_X), in proportions determined by their molecular properties and based upon multiple factors including meteorology, background ozone, presence of precursors and emissions. As a result of these complexities, VOC and NO_X emissions are considered equal for the purposes of fee assessment. Even though the Section 185 fee program cannot require emissions reductions, if a major source chooses to reduce emissions to lower its Section 185 fee burden, any reduction in ozone precursors may contribute towards the common goal of ozone reduction.

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 Section 185 per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC or NO_x. A major stationary source may 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 emissions to be aggregated for both baseline amount determinations and fee assessments. In its December 1993, NO_x Substitution Guidance (available at: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2_old/19931201_oaqps_nox_substitution_guidance.pdf),* 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 rules require that baseline amounts and aggregation methods, once established, will remain fixed as long as the rule remains applicable except as consistent with the adopted sections that allow adjustments under specific circumstances. Additionally, the rules will require that calculation of the Failure to Attain Fee remains consistent with the baseline amount determination approach. Once a particular method for a baseline amount calculation is chosen, the Failure to Attain 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 adopted rulemaking as the

most appropriate choice for determining a baseline amount, all subsequent assessments, and payments of the Failure to Attain Fee must remain consistent with that selection.

Compliance schedules for determining baseline amounts for each applicable baseline amount scenario are included in the adopted rule. Since the Failure to Attain Fee cannot be implemented until EPA finalizes a failure to attain notice that determines that a severe or extreme nonattainment area under the 2008 eight-hour ozone standard did not attain by the applicable due date, the due dates for major stationary sources operating during the baseline year are structured to account for issuance of this notice. New major stationary sources that begin operating during or after the baseline year will have a fixed amount of time to self-report the baseline amounts to TCEQ. The compliance schedules will ensure timely assessment of the fee.

Invoice and fee payments are required in accordance with current state statute and regulations. Once the program is implemented, fee payments will be due each year until the Failure to Attain fee is terminated.

Any Section 185 fee revenue collected by TCEQ will be deposited into the Clean Air Account according to THSC §382.0622. Since spending potential Section 185 fee revenue depends on Texas' collection of the Section 185 fee as well as future Legislative actions, this rulemaking does not include options for how any potential collected Section 185 fee revenue would be spent.

The rules ensure stability of the Clean Air Account and any potential future programs that could be developed using the Failure to Attain Fee revenue by preventing adjustments to previously invoiced baseline amounts for instances in which baselines are adjusted according to

§§101.708 - 101.711. No matter the baseline amount adjustment scenario used, the adjusted baseline amount would apply starting with the next fee assessment year.

Section by Section Discussion

§101.700, Definitions

This adopted new section contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 Obligation, attainment date, baseline amount, baseline emissions, baseline year, electric utility steam generating unit, emissions unit, equivalency credits, extension year, Failure to Attain Fee, fee assessment year, fee collection year, major stationary source, and Section 185 Account.

The term *actual emissions* uses the definition currently used in 30 TAC §101.10; this ensures that the VOC and/or NO_x emissions assessed for the *Failure to Attain Fee* include all emissions emitted from the major stationary source for the calendar year being assessed, whether authorized or unauthorized emissions.

The *Area §185 Obligation* is defined as the total annual amount of *Failure to Attain Fees* due from all applicable major stationary sources or Section 185 Accounts in a severe or extreme ozone nonattainment area that failed to attain the 2008 eight-hour ozone National Ambient Air Quality Standard by its applicable attainment date. The *Area §185 Obligation* is determined for an entire 2008 eight-hour ozone nonattainment area by summing the *Failure to Attain Fee* due from each major stationary source or Section 185 Account for a fee assessment year. For the 2008 eight-hour ozone standard, the 10-county DFW and eight-county HGB nonattainment areas will have separate *Area §185 Obligations*. 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 ozone standard. The *Area §185*

Obligation is the basis for making an equivalency demonstration for the commission's adopted program. The *equivalency credits* are defined as revenue collected, as long as any revenue is also expended in a calendar year, from TERP or future grant programs to offset the *Area §185 Obligation*. A rule language update was made at adoption to align the definition of equivalency credits with proposed rule language in §101.703(a) and (c) to indicate that it is revenue collected, as long as any revenue is also expended within a nonattainment area. If there are insufficient funds to offset the entire *Area §185 Obligation,* then *Failure to Attain Fee* will be prorated and the prorated fee amount assessed directly on major stationary sources or Section 185 Accounts to meet the entire *Area §185 Obligation.*

Attainment date is defined as the EPA-specified date an area is required to attain the 2008 eight-hour ozone standard under the FCAA.

The attainment year is the entire calendar year that contains the *attainment date.* For purposes of this rulemaking, the *baseline year* is defined as January 1 through December 31 of the attainment year. At the time of the rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW nonattainment area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). The severe classification attainment date for these areas is July 20, 2027; therefore, the 2027 calendar year from January 1, 2027, through December 31, 2027, will determine both the attainment year and *baseline year* of 2027, unless EPA approved an attainment date extension under FCAA, §181(a)(5).

Consistent with FCAA, §185, *baseline amount* is the lower of baseline emissions (actual emissions as described in §101.705) or total annual authorized or pending authorization

emissions at a major stationary source as of December 31 of the baseline year if the major stationary source operated the entire baseline year. For major stationary sources that began operating during or after the baseline year, the first full year (12 consecutive months) operating as a major source will be used to determine the baseline emissions. If the major stationary source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are averaged from any single consecutive 24-month period within a historical period, as outlined in the definition of *baseline emissions*.

For purposes of this rulemaking, the term *baseline emissions* represents the "actual emissions" referenced in FCAA, §185(b)(2) and excludes unauthorized emissions. The baseline emissions are reported in the annual point source emissions inventory according to the Emissions Inventory Requirements of 30 TAC §101.10. The baseline emissions include reported annual emissions that are authorized by permit or rule from routine operations, which includes authorized MSS activities during the baseline year or another time period as allowed by this rule but excludes unauthorized emissions. Emissions from emissions events and MSS activities not authorized by permit or rule must be excluded from the baseline emissions calculations because they are not authorized or representative of routine operations. The exclusion of unauthorized emissions from the baseline emissions calculation is consistent with the PSD definition of baseline actual emissions in §116.12 and 40 CFR §52.21(b)(48) that does not include unauthorized emissions in a baseline amount determination.

This definition of *baseline emissions* differs from the definition of *actual emissions* in 30 TAC §101.10, which includes all emissions emitted, whether authorized or unauthorized, reported in the emissions inventory. The definition of *baseline emissions* represents only the emissions from authorized routine operations reported in the emissions inventory.

If the major stationary source's emissions reported in the emissions inventory are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are averaged from any single consecutive 24-month period within a historical period. The historical period allowed depends on the type of emissions units, following PSD guidance. *Electrical utility steam generating units* are included in this rule because they may use a five-year historic look-back period. The definition of *electric utility steam generating units* is consistent with the definition used in §116.12. Other *emissions units*, as defined in §101.1, may use a ten-year historic look-back period.

Extension year is defined as a year that meets the requirements of FCAA, §181(a)(5). It is unknown whether the 10-county DFW or the eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard may qualify for an extension, and an extension year may be applicable to future areas designated as severe or extreme nonattainment under the 2008 eight-hour ozone standard.

The *Failure to Attain Fee* is defined as the fee assessed and due from each major stationary source or Section 185 Account based on actual emissions, whether authorized or unauthorized, of VOC, NO_x, or both exceeding 80% of the *baseline amount*.

The *fee assessment year* is defined as the calendar year the actual emissions were emitted and reported to the emissions inventory and used to calculate the assessed fee amount. The actual emissions include all authorized and unauthorized emissions, such as routine, MSS, and emissions events (EE) reported in the emissions inventory, as discussed in §101.713. For the 10-county DFW and eight-county HGB severe classification nonattainment areas under 2008 eight-hour ozone standard, the fee could be assessed as early as calendar year 2028 should the areas not attain by July 20, 2027. The *fee collection year* is defined as the calendar year the fee is

invoiced by TCEQ.

The definition for *major stationary source* is consistent with the definition in §116.12 for determining a major source of VOC or NO_x emissions. Because major stationary sources under common control may opt to aggregate pollutants and/or sites for purposes of *baseline amount* determination and *Failure to Attain Fee* payment, a *Section 185 Account* represents either a major stationary source (if not choosing to aggregate) or a group of two or more major stationary sources (if aggregating). A single identifying Section 185 Account number will be assigned by TCEQ to track the option chosen for *baseline amounts* and *Failure to Attain Fee* assessments in the TCEQ Section 185 database. Because major stationary sources can be aggregated on a pollutant basis, 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. A single major stationary source could belong to two separate Section 185 Accounts, or a Section 185 Account may only have one major stationary source. All major stationary sources of VOC and/or NO_x emissions located in a severe or extreme 2008 eight-hour ozone nonattainment area that did not attain by the attainment date are subject to this rule. Even if a major stationary source did not comply and, as a result, did not receive a Section 185 Account from TCEQ, that source will still be subject to this adopted rule and will still owe a Section 185 fee.

Regarding Supplemental Environmental Projects (SEPs), the *SEP Offset Amount* is defined as the portion of an enforcement case's assessed administrative penalty approved for use in the performance of, or contribution to a SEP, instead of being paid to the commission as a penalty. As discussed in §101.717, eligible major stationary sources may use the excess amounts to the *SEP Offset Amount* to partially or completely fulfill their Failure to Attain Fee. Additionally, the entire amount spent on a SEP may also be used to partially or completely fulfill the Failure to Attain Fee if the total amount paid to the SEP is at least 110% or more of the *SEP Offset Amount*.

§101.701, Applicability

This new section adopts the applicability requirements for the FCAA, §185 fee (Failure to Attain Fee). FCAA, §185 requires areas designated nonattainment and 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 stationary sources located in an area failing to attain the standard by the attainment date applicable to that area. A rule language update to §101.701(a) was made at adoption to clarify that the severe or extreme nonattainment area is first designated nonattainment and then classified as severe or extreme. FCAA, §182(f) further requires that all SIP requirements applying to VOC emissions sources also apply for NO_x emissions sources. §101.701 identifies the provisions that apply to any 2008 eight-hour ozone nonattainment area classified as severe or extreme that fails to demonstrate attainment of the 2008 eight-hour ozone standard by its attainment date.

The rule is applicable to all major stationary sources in a 2008 eight-hour ozone nonattainment area each year that the penalty fee is applicable as required by FCAA, §185. At the time of the rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). In the future, should EPA designate other areas of Texas as severe or extreme nonattainment under the 2008 eight-hour ozone standard, then this rulemaking will be applicable to those severe or extreme nonattainment areas.

The executive director will implement this rule upon EPA determining that the area failed to attain the severe or extreme 2008 eight-hour ozone standard. This determination will be the

effective date of EPA's finding of failure to attain notice for severe or extreme areas under the 2008 eight-hour ozone standard published in the *Federal Register*. There are no obligations for major stationary sources until the rule is implemented. As part of its outreach efforts, TCEQ will endeavor to electronically distribute courtesy notifications to regulated entities that sign up for the TCEQ Section 185 email and text distribution lists once the Section 185 fee has been implemented. Electronic notification, as allowed under 30 TAC §19.30, will include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee)*, subscribers of the *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* email and text list (available at: *https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

The *Failure to Attain Fee* will start being assessed for the calendar year following the missed attainment date. The rule defines the attainment year as the entire calendar year that contains the attainment date. For purposes of this rulemaking, the term baseline year is defined as January 1 through December 31 of the attainment year. For the 10-county DFW and eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard, which have a July 20, 2027, attainment date, the attainment year and baseline year are anticipated to be 2027. The fee will start being assessed for calendar year 2028 (first fee assessment year), unless EPA approved an attainment date extension under FCAA, §181(a)(5).

§101.702, Exemption

This new section adopts that no Failure to Attain fee payment is due for a year determined by EPA to be an extension year under FCAA, §181(a)(5) for the 2008 eight-hour ozone standard. 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. It is unknown whether the 10-county DFW area or the eight-county HGB severe nonattainment area under the 2008 eight-hour ozone standard may qualify for an extension. Additionally, an extension year may be applicable if EPA designates future areas as severe or extreme nonattainment under the 2008 eight-hour ozone standard and grants those areas an extension year. For any area granted an extension, the fee will be applicable if the severe or extreme nonattainment area did not attain by the extension attainment date specified by EPA. A rule language update was made at adoption to §101.702 by adding missing "major stationary" in front of "source" to clarify that the source must be a major stationary source.

§101.703, Fee Equivalency Account

This new section adopts that the executive director establishes a Fee Equivalency Account. This account will be a listing of revenues from designated programs that reduce VOC or NO_x emissions in 2008 eight-hour ozone nonattainment areas. Only the revenue collected within each 2008 eight-hour ozone nonattainment area will be credited and available to offset the Area §185 Obligation in the Fee Equivalency Account. Revenue collected in the 10-county DFW 2008 eight-hour ozone nonattainment area will be credited only within that nonattainment area. Revenue collected in the eight-county HGB 2008 eight-hour ozone nonattainment area will be credited only within that nonattainment area. Specifically, revenue collected for the TERP program will be used to offset each 2008 eight-hour ozone nonattainment area's Area §185 Obligation for the area when any TERP grant funds are also expended within each area; this revenue is referred to as "TERP revenue collected and expended" throughout this subchapter. This will result in potential benefits directly to the nonattainment area from revenue collected as TERP's stated goals and statutory restrictions provide funding for programs or activities that are designed to result in reductions in VOC, NO_x, and other pollutant emissions into the atmosphere.

No transfer of revenue would occur between TERP and the Fee Equivalency Account. The Fee Equivalency Account is a documentation mechanism to verify the amount of revenue collected in the 2008 eight-hour ozone nonattainment area available to offset the fee on major stationary sources located in that area.

If other emissions reduction grant programs become available those will be considered for inclusion in the Fee Equivalency Account for use in offsetting the Failure to Attain Fee. A rule language update was made at adoption to simplify the rule language by using the defined term "equivalency credit" instead of repeating the definition of equivalency credit.

§101.704, Fee Equivalency Accounting

This new section adopts that the Area §185 Obligation will be the total FCAA, §185 fee determined annually for each 2008 eight-hour ozone nonattainment area. The FCAA, §185 fee (Failure to Attain Fee) is calculated for each major stationary source or Section 185 Account by TCEQ staff using the approved baseline amounts and emissions inventory data for the fee assessment year. These resultant individual Failure to Attain Fees will be summed to determine the overall Area §185 Obligation within the same 2008 eight-hour ozone nonattainment area.

Revenue, calculated on a dollar basis, associated with the Fee Equivalency Account will be credited starting with the first fee assessment year and continuing annually. The funding associated with the Fee Equivalency Account for a given fee assessment year will be compared with the Area §185 Obligation for a given fee assessment year.

If the Fee Equivalency Account does not have enough funds to fully meet the Area §185 Obligation, a backstop provision will be invoked under which major stationary sources or

Section 185 Accounts will be assessed a prorated Failure to Attain Fee to generate sufficient funds to meet the Area §185 Obligation. The prorated Failure to Attain Fee will be calculated based on the amount in the Fee Equivalency Account and the overall Area §185 Obligation. The Failure to Attain Fee amount that the major stationary source or Section 185 Account will be required to pay reduces the prorated Failure to Attain Fee amount based on the calculations in this rulemaking. This process will be documented and made publicly available each year.

For example, a hypothetical Area §185 Obligation for HGB for the 2028 fee assessment year is calculated by TCEQ staff as $154 million. The HGB area Fee Equivalency Account for calendar year 2028 has $45 million available from TERP revenue. The HGB area balance owed for the 2028 fee assessment year is $109 million ($154 million less $45 million) and that amount must be paid by major stationary sources located in HGB that are subject to the Failure to Attain Fee. For the 2028 fee assessment year, the Fee Equivalency Account covers 29.22% ($45 million divided by $154 million, with the quotient multiplied by 100) of the Area §185 Obligation for HGB and each major stationary source's or Section 185 Account's fee would be reduced by 29.22%. Applying this example further, TCEQ staff calculates that the Failure to Attain Fee for one hypothetical Section 185 Account located in HGB is $50,000 for the 2028 fee assessment year. The prorated Failure to Attain Fee for that hypothetical Section 185 Account would be calculated by reducing the $50,000 fee by 29.22%, resulting in that hypothetical Section 185 Account owing $35,389.61 as its prorated Failure to Attain Fee. This process would be repeated so that each major stationary source or Section 185 Account located in the nonattainment area receives a fee rate reduced by 29.22%.

The timing of the demonstration to determine whether the equivalency credits in the Fee Equivalency Account can offset all or a portion of the Area §185 Obligation will likely occur in December and then annually afterward, except for the first year the program is implemented.

The date that TCEQ performs this evaluation for the first year of program implementation depends on the dates of future federal or state actions that are not currently scheduled (e.g., effective date in the *Federal Register* of EPA's finding of failure to attain).

§101.705, Baseline Amount

This new section adopts the requirements for determining a baseline amount. FCAA, §185 requires a fee on emissions exceeding 80% of a baseline amount determined for the attainment year (referenced as baseline year in this rulemaking) until the Section 185 fee (referred to as Failure to Attain Fee in this rulemaking) no longer applies to the area. Unless the major stationary source or Section 185 Account qualifies for an adjustment to the baseline amount, as outlined in the various adjustment sections of this adopted rulemaking, the method for a fixed, one-time calculation of the baseline amount is provided in this section.

A baseline amount will be required for each ozone precursor pollutant, VOC and/or NO_x, for which the source is major. If a stationary source is major for both VOC and NO_x emissions, a baseline amount will be required separately for VOC and NO_x emissions. If the major stationary source is major for only VOC or NO_x emissions, the baseline amount will be required for just that pollutant, VOC or NO_x.

The baseline amount is defined as the lower of either: the *baseline emissions* defined as the total annual routine emissions reported in the emissions inventory, including reported MSS emissions that are authorized by permit or rule, as described in 30 TAC §101.10 for the baseline year or timeframe otherwise specified in this adopted rule; or the total annual emissions allowed by the applicable authorizations or pending authorizations in effect for the major stationary source during the baseline year or timeframe otherwise specified in this adopted rule. MSS emissions reported in the emissions inventory that are authorized by permit

or rule are considered routine and must be included in baseline emissions. The major stationary source's authorized or pending authorization emissions include emissions allowed under any TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year or timeframe otherwise specified may be included in the total annual emissions allowed under authorizations. Some owners or operators of major stationary sources may submit administratively complete applications for authorizing previously unauthorized emissions prior to December 31 of the baseline year or other approved baseline timeframe. To not penalize sources in the process of obtaining an authorization, the commission allows the emission limits established by permits that were administratively complete to adjust the baseline amount by adding these amounts to the total annual authorized emissions. This approach aligns with the FCAA intent of comparing authorized emissions with reported actual emissions to determine a baseline amount.

A timeframe chosen other than the baseline year to determine a baseline amount depends on whether the major stationary source began operating during or after the baseline year or if the major stationary source's emissions qualify to be averaged over a 24-month consecutive period. Other applicable baseline timeframes for baseline amounts are outlined in this rulemaking.

Unauthorized emissions, such as from EE and MSS activities not authorized by permit or rule, are not included in the baseline amount. Exclusion of unauthorized emissions from a baseline amount is consistent with these emissions not being representative of normal, routine operations and with the PSD definition of baseline actual emissions in §116.12 and 40 CFR §52.21(b)(48). For example, an oil and gas major stationary source for both VOC and NO_x

emissions experienced VOC emissions from tank flashing that exceeded an authorized permit limit. Tank flashing is a routine operation so the unauthorized VOC emissions resulting from the tank flashing that exceeded the permit limit are required to be reported in the emissions inventory as annual routine emissions. The unauthorized but routine VOC emissions from the tank flashing would be excluded from the baseline emissions calculations used to determine baseline amount.

If the major stationary source has reported emissions in the emissions inventory that are irregular, cyclical, or otherwise vary significantly from year to year, an alternate method to determine baseline emissions will be allowed. Whether a source qualifies as irregular, cyclical, or otherwise varying significantly is determined on a case-by-case basis. For these major stationary sources, any single consecutive 24-month period within a specified historical period could be averaged for the baseline emissions. Major stationary sources that qualify to establish an alternate baseline amount in this manner will calculate the baseline emissions using historical annual routine emissions, as recorded in the emissions inventory, which includes authorized emissions from MSS activities. A rule language update was made at adoption to remove the outdated term “equivalent alternative baseline emissions” and correct to “baseline emissions” in §101.705(c)(1).

The FCAA, §185 does not address how to define a historical period; however, EPA issued a March 21, 2008, guidance memo, referenced elsewhere in this preamble, stating that an acceptable alternate method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found in EPA’s PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008, guidance, EPA used these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission

levels for each emissions unit. The guidance continues by stating: "Once calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity may be used during the historical 24-month period selected, but emissions that do not comply with legally enforceable limits would have to be excluded. Legally enforceable emissions limits would include any state or federal requirements, including Best Achievable Control Technology or Lowest Achievable Emissions Rate.

According to PSD guidance, the timeframe for the historical look-back period for emissions units other than electric steam generating units is any single consecutive 24-month period within the ten-year period immediately preceding the date a complete permit application was submitted. For electric steam generating units the timeframe for the historical look-back period is any single consecutive 24-month period within the five-year period immediately preceding the date a complete permit application was submitted. The historical look-back period for the baseline amount determination will start the calendar year immediately preceding the baseline year. All emissions units at a major stationary source or Section 185 Account will be required to use the same 24-month period when calculating baseline amounts for aggregated pollutants or sites under common control or ownership. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions (actual emissions from the emissions inventory as defined in §101.701) or emissions allowed under authorizations (e.g., permitted emissions) to include emissions from this alternate method.

At the time of this rulemaking, the baseline year is anticipated to be 2027 for the 10-county

DFW and eight-county HGB 2008 eight-hour ozone standard severe nonattainment areas. The window used for the possible historical look-back period will be five years (2022 - 2026) for electric generating units (EGUs) or 10 years (2017 - 2026) for non-EGUs immediately preceding January 1, 2027. The average emissions during the single consecutive 24-month period will be the basis for determining the baseline emissions, in tons.

If there are rules or regulations that take effect by December 31 of the baseline year used for baseline amount determination that specify emission limitations or standards, then the baseline emissions and total annual authorized emissions must be adjusted downward to exclude the amount of emissions that would have exceeded those emission limitations with a legally enforceable emissions limitation requirement (e.g. from a permit, rule, regulation, commission order, or court order) during the baseline year.

For sources that qualify for a consecutive 24-month baseline timeframe, the same downward adjustment is required for rules or regulations in effect during the selected 24-month baseline timeframe, in addition to rules or regulations that take effect by December 31 of the baseline year. The major stationary source will not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented during the baseline year and/or 24-month consecutive period used to calculate the baseline amount. A rule language update for §101.705(c)(3) and (d) was made at adoption to clarify that the emissions limitation is “legally enforceable” as already stated in this paragraph and for §101.705(c)(3) to align with the “in effect by December 31 of the baseline year” phrasing in §101.705(d).

For example, a major stationary source of VOC emissions started operating prior to the 2027 baseline year, and the baseline amount was established from the baseline emissions during the 2027 baseline year. On March 1, 2027, a hypothetical federal rule takes effect that limits

emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's emissions limits would be adjusted downward from January 1, 2027, through February 28, 2027, to account for the new limit. In another example, a major source of VOC emissions establishes a baseline amount using the 24-month consecutive period from July 12, 2022, through July 12, 2024. During calendar year 2027, a hypothetical federal rule takes effect that limits emissions from coatings emissions units located at the major source during the 24-month consecutive period chosen for the baseline amount. The baseline emissions for coatings emissions units impacted by the 2027 federal rules' emissions limits would be adjusted downward during the July 12, 2022, through July 12, 2024, period chosen for the baseline amount.

Fugitive emissions will be required to be included for the purposes of the baseline emissions calculations and fee assessments. This is similar to the Title V Emissions Fees described in 30 TAC §101.27, which requires all fugitive emissions to be included in fee calculations after applicability of the fee has been established. Per 40 CFR §70.2, fugitive emissions of VOC or NO_x belonging to one of the categories listed in paragraph 2 of the definition of major sources may be excluded from counting toward major source applicability. Once the source meets the major stationary source applicability requirements of 30 TAC §116.12, fugitive emissions are required to be reported in the emissions inventory, and the fugitive emissions must be used for both baseline emissions calculations and fee assessments.

As allowed under the Emissions Inventory Requirements described in 30 TAC §101.10, a regulated entity that meets the applicability requirements to submit an emissions inventory, which includes major stationary sources, may submit a certifying letter instead of reporting updated emissions in the emissions inventory. The certifying letter option is allowed for any regulated entity (identified by the nine-digit regulated entity reference number (RN) and a

seven-character alphanumeric TCEQ account number) that experienced an insignificant change in operating conditions compared to the most recently submitted emissions inventory. An insignificant change in emissions is defined as including start-ups, permanent shut-downs of individual units, or process changes that result in at least a 5.0% or 5 tpy, whichever is greater, increase or reduction in total annual emissions of VOC, NO_x, carbon monoxide, sulfur dioxide, lead, particulate matter (PM) less than or equal to 10 microns in diameter, or PM less than or equal to 2.5 microns in diameter. If a regulated entity submits a certifying insignificant change notification letter instead of updating the emissions, then the emissions reported in the most recently submitted emissions inventory are copied over to the current emissions inventory reporting year. For example, if a regulated entity submits an insignificant change notification letter for the 2027 emissions inventory reporting year and TCEQ staff verified that the requirements of the insignificant change notification letter were met, then the 2026 emissions are copied over to also represent the 2027 emissions. Major sources are cautioned to consider the impacts of choosing to submit an insignificant change letter instead of updating emissions in the emissions inventory because of the implications for baseline amount determinations and fee assessments.

Emissions inventory data are collected annually by the commission and, after quality assurance review, are loaded into the state's air emissions inventory database, the State of Texas Air Reporting System (STARS). Since Texas' emissions inventory program submits data to EPA's National Emissions Inventory (NEI), the quality assurance of emissions inventory data is subject to a federally mandated Quality Management Plan (QMP) that annually documents and describes the emissions inventory organization arrangements, processes, procedures, and requirements. As part of the QMP, the emissions inventory program annually submits a Quality Assurance Project Plan (QAPP) documenting the emissions inventory quality assurance process for EPA's review and approval. The QAPP includes information on how TCEQ staff perform

annual detailed technical reviews of point source emissions inventories, correct issues, and document the outcome of the review. Actual emissions reported in the emissions inventory that are subject to the detailed quality assurance process include: all emissions resulting from routine operations, including emissions from authorized MSS activities; all unscheduled MSS activities (reportable and non-reportable); and all emissions events (reportable and non-reportable). Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, revise emissions submitted for the current reporting year and for the reporting year immediately prior. Revisions to historical inventory data outside of this timeframe are done on a case-by-case basis usually as a result of a TCEQ-directed emissions inventory improvement initiative or TCEQ's compliance and enforcement processes. The commission uses emissions inventory data 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 solely for purposes of adjusting the baseline amounts and related calculations is not supported. Similar to emissions inventories, air permits are reviewed to ensure accuracy of emissions.

A baseline amount would account for all emissions units located at the major stationary source as of December 31 of the baseline year. Any ownership transfer of emissions units that occurred by December 31 of the baseline year will also need to be included in the baseline amount calculation. If a 24-month consecutive period is chosen for a major source that operated the entire baseline year, then all emissions units located at the major stationary source as of December 31 of the baseline year must be included, regardless of whether they were located at the major stationary source during the period chosen. An owner or operator of a major stationary source or Section 185 Account may not exclude new emissions units added

by the baseline year from the 24-month consecutive historical period.

For example, a qualified major stationary source chooses March 19, 2022, through March 19, 2024, as the 24-month consecutive period for the baseline emissions. An emissions unit was purchased, and ownership transferred to the source on September 1, 2026; therefore, those emissions must be averaged and added to the 24-month period chosen. The major stationary source that sold the emissions units may not include the sold emissions units in their baseline amount to avoid double-counting of the same emissions units in different baseline amounts.

The rule requires that the baseline amount calculation and supporting documentation be submitted to TCEQ in a format specified by the executive director. Documentation will include either a list of all emission units by their corresponding path-level emissions reported in the point source emissions inventory or all applicable air permits by Emissions Point Identification Number (EPN) (depending on which one is required for the baseline amount determination). If a major source uses path-level emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported by a combination of Facility Identification Number (FIN) and corresponding EPN that match the most recent point source emissions inventory. If a major stationary source uses permitted allowable emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported at the EPN level. Sample calculations will be required for each path-level (emissions inventory) or EPN level (air permits) used for baseline amount determination.

A major stationary source may choose to establish a baseline amount from baseline emissions for sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year. Sufficient supporting documentation would be required to verify that the major stationary source's emissions qualify as irregular, cyclical, or otherwise vary significantly from year to

year. Additionally, details on why and how the 24-month consecutive period chosen accurately represents the major source's emissions will be required.

There is no list of sites that meet the definition of a major stationary source as defined in 30 TAC §116.12. TCEQ would use established programs to assist with notifying major sources of NO_x and/or VOC emissions subject to the fee to provide baseline amounts by the due dates in this rulemaking. Although TCEQ will attempt to notify all applicable major stationary sources by using the Title V permitting and air emissions inventory programs as surrogate data for major sources, compliance with this rulemaking is required even if TCEQ does not specifically notify the major stationary source. Compliance with the Section 185 fee program is a requirement of FCAA, §185, and a major stationary source that does not provide a baseline amount by the specified due date will be subject to the executive director establishing the baseline amounts as described in this rulemaking so that TCEQ can assess the required fee.

For major stationary sources operating prior to January 1 of the baseline year or that operated the entire baseline year, the regulated entity will complete the baseline amount form and supporting documentation. A specific due date for initial baseline amount cannot be provided since the implementation of the Failure to Atain Fee depends on the timing of two future actions: the severe nonattainment areas failing to attain by July 20, 2027, based on 2024, 2025, and 2026 ambient air monitoring data (or by the date established by any extension year granted by EPA); and the effective date in the *Federal Register* of EPA's finding of failure to attain. Regulated entities will submit baseline forms either on the emissions inventory due date specified under the Emissions Inventory Requirements in 30 TAC §101.10 for the fee assessment year or 120 days from the effective date of EPA's failure to attain notice. Providing no less than 120 days for regulated entities to prepare baseline amounts allows flexibility for the executive director to initially implement the final Failure to Attain Fee rule and initiate

related business processes. For the 10-county DFW and eight-county HGB severe 2008 eight-hour ozone nonattainment areas at the time of this rulemaking, the baseline amount based on a 2027 baseline year may be due March 31, 2028 (barring any future updates to the Air Emissions Inventory Reporting Rule), or 120 days from the effective date of EPA's failure to attain notice.

As part of its outreach efforts, TCEQ will endeavor to electronically distribute courtesy notifications to regulated entities that sign up for TCEQ email and text distribution lists related to the Section 185 fee. Electronic notification, as allowed under 30 TAC §19.30, will include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee)*, subscribers to *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* will receive email and/or text notifications (sign-up available at: *https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

Once finalized, the baseline amount will be fixed and will not be changed except as consistent with the adjustments in §§101.708 – 101.711.

§101.706, Baseline Amount for New Major Stationary Sources

The requirements of §101.705 are also applicable to new major stationary sources and these additional provisions outlined in §101.706 provide baseline amount determination, baseline timeframe, and compliance schedules specific to new major stationary sources. States are required to assess the Section 185 fee on all major sources of VOC and/or NO_x emissions located in a severe or extreme ozone nonattainment area that fails to attain by its attainment date. This will include major stationary sources that began operating as a major source or transitioned to a major source status during or after the baseline year. Since FCAA, §185 does

not provide baseline amount determinations for these scenarios, this new section determines a baseline amount for these new major stationary sources.

These new major stationary sources will use their first full year (12 consecutive months) operating as a major stationary source to determine the baseline amount or aggregated baseline amount. The baseline amount must be the lower of the baseline emissions during the first full year of operation as a major source or the total annual authorized emissions during the first full year of operation as a major source.

EPA, in its December 14, 2012, notice of final approval of the South Coast Air Quality Management District (SCAQMD) SIP revision (77 FR 74372), allowed a major stationary source subject to FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation to set a baseline amount. EPA, in its February 14, 2020, notice of final approval of the HGB Failure to Attain Fee (85 FR 8411), allowed major stationary sources to determine the baseline amounts on the lower of actual or allowable data available in their first year of operation as a major stationary source.

If rules or regulations take effect during the first full year operating as a major source, then the baseline emissions and total annual authorized emissions must be adjusted downward to reflect those emissions limitations in effect during that timeframe. For example, a major stationary source of VOC emissions started operating January 10, 2027, and the baseline amount was established from the baseline emissions during the first full year of operation, from January 10, 2027, to January 10, 2028. On March 1, 2027, a hypothetical federal rule takes effect that limit emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's

emissions limits would be adjusted downward for the entire baseline period (January 10, 2027, through January 10, 2028) to account for the new limit. The major source would not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented or in effect during the calendar year used to calculate baseline emissions.

A baseline amount at a new major stationary source will account for all emissions units located at the major stationary source as of the last calendar day of the first full year operating as a major source. For example, a major stationary source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using the February 4, 2028, through February 4, 2029, timeframe. In this example, the major stationary source would include all emissions units, including any ownership transferred emissions units as of February 4, 2029, in the baseline amount.

For major stationary sources that begin operating between January 1 and December 31 of the baseline year or after December 31 of the baseline year, regulated entities will have 90 days from the last calendar day of the first full year operating as a major source to submit the baseline amount form. Since initial Section 185 fee program implementation has already occurred, a 90-day timeframe is an appropriate length of time for form submission and is consistent with emissions inventory reporting timeframes. For example, a major source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using February 4, 2028, through February 4, 2029. In this example, the regulated entity would have 90 days from February 4, 2029, to submit the baseline amounts and supporting documentation.

§101.707, Aggregated Baseline Amount

This adopted new section provides for the aggregation of either VOC or NO_x emissions (or both) at multiple major stationary sources to align fee obligations with attainment demonstration emissions reduction approaches. A rule language update was made at adoption to remove the outdated term “aggregated equivalent alternative baseline amount” and correct to “aggregated baseline amount” in §101.707(e)(1). Owners or operators of major stationary sources under common control may choose 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 emissions at a single major stationary source or VOC with NO_x emissions across multiple major stationary sources under common control, provided that the stationary sources are major for both pollutants. Once an owner or operator chooses aggregation, then the baseline amount will remain aggregated, and the fees will be assessed in the same manner as the aggregation until the Failure to Attain Fee no longer applies to the area.

Baseline amounts will first be calculated separately for each individual major stationary source for VOC or NO_x emissions, or for both, using the method described in §101.705 or §101.706. The separate initial baseline amounts for each pollutant at an individual major stationary source must also be submitted in a format specified by the executive director with supporting documentation. Providing the separate initial calculations of baseline amounts is intended to provide transparency and consistency and to assist with quality assurance of baseline amount determinations with any subsequent aggregation. After establishing separate baseline amounts, then the baseline amount could be aggregated by multiple pollutants, multiple stationary sources under common control, or both.

Owners or operators of major stationary sources may aggregate VOC and NO_x baseline amounts at a major stationary source. Sources under common ownership and/or control may also opt to

aggregate baseline amounts across multiple major stationary sources. Only major stationary sources under common control may be included in the aggregate group. The aggregation methodology must remain consistent throughout the baseline amount calculation and fee assessment of the Failure to Attain Fee. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for Failure to Attain Fee assessment. The baseline year, same 24-month consecutive period, or other timeframe used to establish baseline amounts will be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation.

Like the baseline amount compliance schedule, major stationary sources that choose to aggregate will submit the required forms and supporting documentation either on the emissions inventory due date of the fee assessment year, as specified under Emissions Inventory Requirements in 30 TAC §101.10, or 120 days from the effective date of EPA's failure to attain notice, whichever is later. Providing no less than 120 days for regulated entities to prepare aggregated baseline amounts allows flexibility for the executive director to implement the final Failure to Attain Fee rule and initiate related business processes. For aggregation, a list of all sites under common control by RN aggregated under a baseline amount must be provided in addition to the supporting documentation provided for individual baseline amounts described under Baseline Amounts. If sites under common control chose to aggregate, then those sites must share the same Customer Reference Number (CN) in TCEQ's Central Registry database. Sites under common control are determined by TCEQ. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the Failure to Attain Fee, as addressed under circumvention requirements of 30 TAC §101.3.

§101.708, Adjustment of Baseline Amount for Major Sources with Less than 24 Months of

Operation

Major stationary sources with less than 24 months of consecutive operation as of December 31 of the baseline year or that began operation after the baseline year would not have sufficient data to initially determine if emissions are irregular, cyclical, or otherwise vary significantly from year to year to establish baseline emissions. This adjustment option provides a major source with less than 24 months of consecutive operation an opportunity to adjust the established baseline amount after establishing the emissions and operation history. If the emissions qualify as irregular, cyclical, or otherwise varying significantly from year to year, after completing 24 months of consecutive operations, the major stationary source may request that the baseline amount be adjusted using the average rate during the first 24 months of consecutive operation for the baseline emissions. If the total annual authorizations used to calculate the initial baseline amount were still lower than the adjusted baseline emissions, then an adjustment may not be requested. If emissions varied significantly during the 24 months of consecutive operation, the emissions may be considered as irregular, cyclical, or otherwise varying significantly. A major stationary source will be allowed to request an adjustment to its established baseline amount within 90 calendar days of completing 24 months of consecutive operation. EPA published approval for a similar approach for new major stationary sources for the HGB Failure to Attain Fee in February 2020. A rule language update was made at adoption to clarify and improve readability by splitting §101.708(a) into §101.708(a)(1) and (2).

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.709, Adjustment of Baseline Amount for New Construction

This adopted new section would allow an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction and comply with emissions limits that achieve the lowest achievable emissions rate. The newly constructed emissions units would not have been included in the previously established baseline amount. A major stationary source may request an adjustment to its established baseline amount within 90 calendar days of completed construction of the new emissions units.

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.710, Adjustment of Baseline Amount for Ownership Transfers

This adopted new section outlines when an established baseline amount may be adjusted because of ownership transfers. Emissions units may not always be under the same common ownership or control. Owners or operators of major stationary sources, as part of normal business, may transfer ownership of some or all emissions units at a major stationary source or Section 185 Account to another major stationary source or Section 185 Account. The commission recognizes that a change in ownership or control of emissions units could change

the Failure to Attain Fee owed for both major stationary sources or Section 185 Accounts. The change in control of emissions units does not change the historical operation, reported emissions of the emissions units, or previously invoiced amounts before the ownership transfer occurred. The ownership transfer must first be approved by and/or reported to the TCEQ Air Permits Division before adjustments of the baseline amounts may be requested.

A change in control or ownership, such as with an emissions unit transfer, does not affect the already established time period or baseline amounts on the remaining emissions units not impacted by the ownership transfer at either major stationary source or Section 185 Account. The already established baseline amounts are transferred from one major stationary source or Section 185 Account to the other major stationary source or Section 185 Account.

In a manner similar to transferring other obligations such as emissions authorizations, the affected major stationary sources or Section 185 Accounts may transfer the baseline amounts and Failure to Attain Fee associated with each emissions unit having a change in control. There is no change for the calculated baseline amounts for the transferred emissions units or remaining emissions units.

Major stationary sources that transfer ownership of an emissions unit from one major source or Section 185 Account to a minor source(s) will not have their baseline amounts adjusted to prevent circumvention of the Failure to Attain Fee, as addressed under 30 TAC §101.3. As a result of a comment received, the commission updated the term “equipment” to “emissions unit” in the context of ownership transfers in this Section by Section and in rule language for §101.710.

To qualify for an ownership transfer baseline amount adjustment, the ownership transfer must

occur between major stationary sources or Section 185 Accounts of the same pollutant, or aggregated pollutants, located within the same nonattainment area. For example, if an ownership transfer occurred between a major source located in the 10-county DFW nonattainment area under the 2008 eight-hour ozone standard and the eight-hour HGB nonattainment area under the 2008 eight-hour ozone standard, then the baseline amounts could not be adjusted.

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

Once finalized, the recipient major stationary source or Section 185 Account that received the ownership-transferred emissions units adds the unaltered baseline amounts from those units to their existing major stationary source or Section 185 Account baseline amount. There is no baseline amount adjustment for the remaining emissions units that were not ownership transferred at the originating or recipient major source. The originating major stationary source or Section 185 Account that transferred the emissions units subtracts the transferred emissions units' baseline amounts from their major stationary source or Section 185 Account baseline amount. While baseline amounts may increase or decrease at a major stationary source or Section 185 Account resulting from ownership transfers, the overall number of emissions units subject to fee assessment within the nonattainment area does not change.

To transfer the baseline and the Failure to Attain Fee, the new owner or operator of each major

stationary source or Section 185 Account affected by the change in common control will be required to submit a request to the executive director within 90 days of the ownership change for the executive director's approval.

§101.711, Adjustment of Baseline Amount for Final Emissions Inventory Data

This adopted new section addresses the situation when baseline emissions may need to be adjusted upon the availability of final quality assured and TCEQ-approved emissions inventory data as allowed under the Emissions Inventory Guidelines. The Failure to Attain Fee will be implemented upon the effective date of EPA's finding of failure to attain notice published in the *Federal Register* for a severe or extreme ozone nonattainment area under the 2008 eight-hour ozone standard that fails to attain by the attainment date. It is unknown when EPA will issue the finding of failure to attain; therefore, the specific dates to establish an initial baseline amount are unknown. Because of implementation timing, final quality assured and TCEQ-approved emissions inventory data could occur after the baseline amount is established. If a major stationary source used emissions inventory data to establish the baseline amount, then TCEQ may request adjustments based on the final quality assured emissions inventory data.

Additionally, major stationary sources may initiate emissions inventory revisions that require baseline amount adjustments. Due to limited staff resources, approval of regulated entity-initiated requests would be based on the revisions guidance in the Emissions Inventory Guidelines published annually and posted on the Point Source Emissions Inventory webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/psei.html).* Emissions inventory data are used extensively for air quality planning purposes, such as SIP revisions and rule development, submitting to required federal programs, such as the NEI, and assessment of other applicable fees such as the Title V fees. For these reasons, emissions inventory revisions are allowed for specific circumstances. Emissions inventory revisions submitted solely for the

purpose of adjusting a baseline amount will not be accepted.

Regulated entities, including major sources, are provided an opportunity to review and if necessary, revise emissions data submitted for the current emissions inventory reporting year and for one year immediately prior. Major stationary sources will have 90 days or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, to submit adjusted baseline amount requests due to final, quality-assured emissions data. Revisions to historical emissions inventory data outside of this timeframe are evaluated on a case-by-case basis, usually as the result of a TCEQ-directed emissions inventory improvement project or TCEQ's compliance and enforcement process.

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with final emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.712, Failure to Establish a Baseline Amount

This adopted new section outlines the procedures for the executive director to establish a baseline amount. Timely and accurate baseline amounts are required from each applicable major stationary source to implement the FCAA-required Section 185 fee program. If a major stationary source does not submit an approvable baseline amount by the due date specified by the executive director, then the executive director will determine baseline amount(s) for that major stationary source. In accordance with the requirements of FCAA, §185, the lower of actual emissions (reported in the emissions inventory as described in §101.705) or allowable

emissions (permits or authorizations) from the attainment year (referenced as baseline year in this rulemaking), will be used, if both were available, to determine separate baseline amounts for each pollutant that determined major source applicability. Since the executive director would not have sufficient information, aggregation by pollutant or sites under common control and any adjustments allowed under this adopted rulemaking will not be used.

If available, emissions inventory data reported under 30 TAC §101.10 will be used for determining the baseline emissions. However, if only permit allowable data are available, a baseline amount will be established as 12.5 tons for VOC and/or 12.5 tons for NO_x (depending on the pollutant(s) that determined major source applicability) until the major stationary source submitted an approvable baseline amount. Allowable (permits or authorizations) emissions are typically higher than the actual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or allowable emissions, so the executive director will establish the baseline emissions from the unavailable emissions inventory as 12.5 tons, which represents one-half of the major stationary source threshold of 25 tons. If the executive director used the allowable emissions from the permit to establish the baseline amount, then the non-compliant major stationary source would gain the advantage of a higher baseline amount by not reporting their actual emissions.

If the executive director establishes the baseline amounts, then those baseline amounts will be applicable until the major stationary source submits a verifiable and complete emissions inventory according to the Emissions Inventory Requirements of §101.10 and baseline amount. The proposed rule language was missing the proposal preamble provision that the executive director established baseline amount is applicable until the major stationary source submits a verifiable and complete emissions inventory. To correctly reflect this proposal preamble provision in rule language, updates were made at adoption by adding §101.712(6)(A). After the

major stationary source submits a baseline amount and the executive director reviews the baseline amount to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division, the final baseline amount will apply starting with the next fee assessment year. Adjustments to previous fee invoices based on baseline amounts established by the executive director would not be allowed.

§101.713, Failure to Attain Fee Assessment

The adopted new section outlines the method used to assess the Failure to Attain Fee (total fee) for VOC or NO_x emissions, or both. If the stationary source is major for just one pollutant, the total fee will be assessed for just the one pollutant, VOC or NO_x. If the stationary source is major for both VOC and NO_x emissions, the total fee will be based on an assessment of both pollutants.

This adopted new section also provides for the total fee assessment for owners or operators of major stationary sources or Section 185 Accounts. Fee assessments must follow the same method chosen for the baseline amount determination. The total fee from VOC and/or NO_x emissions from a major stationary source that is major for one pollutant and does not have multiple sites under common control, does not choose to aggregate baseline amounts, or does not comply with the provisions of §101.707 will remain separate and due from each major stationary source or Section 185 Account. The total fee for owners or operators of major stationary sources that choose to aggregate VOC and/or NO_x emissions will also be due according to the provisions of this section. The aggregation of VOC with NO_x emissions may occur at one major stationary source or across multiple major stationary sources under common control. Because both pollutants were used to aggregate a baseline amount, the total fee will be due on actual emissions of both VOC and NO_x emissions. Consistency between the baseline amount determination and the total fee assessment would be maintained with this

approach. An owner or operator of multiple sources under common control who chooses to aggregate a single pollutant from multiple major stationary sources in a baseline amount must aggregate actual emissions of that single pollutant in the total fee payment. If an owner or operator opted to aggregate VOC with NO_x emissions at a major stationary source, both VOC and NO_x emissions must be aggregated for the total fee payment. Similarly, owners or operators who choose to aggregate VOC and NO_x emissions in a baseline amount and to aggregate those pollutants across more than one major stationary source must aggregate actual VOC and NO_x emissions from all aggregated major stationary sources to determine the total fee. For example, if five major stationary sources of both VOC and NO_x emissions elect to aggregate into one Section 185 fee account to determine the NO_x baseline amount, then the total NO_x portion of the fee payment would be based on all actual reported NO_x emissions from those five major stationary sources. Since the five major stationary sources did not elect to aggregate VOC emissions into one baseline amount, then the total fee payment for VOC emissions would be assessed separately for the five different Section 185 fee accounts using actual reported VOC emissions for these major stationary sources. Similarly, if owners or operators choose to aggregate multiple major stationary sources into one baseline amount for VOC and NO_x emissions, then the total fee payment will be due from the aggregated major stationary sources for both pollutants together. A rule language update was made at adoption to align with this preamble Section by Section by adding the missing phrase “must be conducted” and missing word “and” to §101.713(b).

The total fee will be applicable to and calculated for each pollutant (VOC or NO_x) for which the major source meets the applicability requirements of this rulemaking from the actual emissions reported in the emissions inventory for each fee assessment year. The fee amount assessed, calculated, and invoiced will be based on the actual emissions from the fee assessment year’s emissions inventory that exceeded 80% of the baseline amount, rounded up to the nearest

whole number. If the actual emissions reported in the emissions inventory are less than 80% of the baseline amount, then the fee will be assessed at $0.00 dollars and no fee payment will be due from that major stationary source or Section 185 Account for that fee assessment year for that pollutant. For future fee assessment years, the fee will be due if the actual emissions reported in the emissions inventory exceeded 80% of the baseline amount.

Rounding up to the nearest whole number is standard practice for fee assessment since assessing fees on fractional amounts creates fee amounts with several decimal places that can cause errors in the fee invoice data systems, which accept only two decimal places. An example of rounding up to the nearest whole number would be the fee assessment amount calculated as 10.0319 tons, rounding up to the nearest whole number, the fee would be assessed and invoiced on 11 tons.

The total fee for a pollutant aggregated under multiple major stationary sources for a baseline amount will be calculated based on the aggregated actual emissions from all the affected major stationary sources minus 80% of the aggregated baseline amounts for all major stationary sources, rounded up to the nearest whole number.

While baseline amounts exclude unauthorized emissions, fee assessments will be based on actual emissions, as defined in 30 TAC §101.10, which includes emissions from annual routine operations, MSS operations, and other events not otherwise authorized (emissions from emissions events or MSS activities). The inclusion of unauthorized emissions in fee assessment is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the fee assessment year. Inclusion of unauthorized emissions in fee assessment is also required in TCEQ's emissions fee rule in 30 TAC §101.27, which requires all MSS and emissions event emissions to be included in fee calculations.

FCAA, §185 requires the annual fee to be adjusted by the consumer price index (CPI) and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502 requires the fee to be adjusted annually per the CPI for all-urban consumers published by the United States Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. FCAA, §185 requires these fees to be assessed on a calendar-year basis, and the inflation factor based on the CPI is applied in September for the fiscal year (based on the previous September through August data). Therefore, the calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January through August and one third of the fee associated with September through December). For example, a 2028 calendar-year fee would span the 2027 fiscal year and the 2028 fiscal year. Thus, a calendar-year 2028 fee requires two thirds of the annual CPI ending in August 2027 and one third of the annual CPI ending in August 2028. This methodology is used to calculate the fee from EPA's guidance memo (Page 10, available at: *https://www.epa.gov/sites/default/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf*). The fee calculation uses the 40 CFR Part 70 Presumptive Minimum fee basis from EPA's guidance memo. The Part 70 fee rate is published annually by EPA on the Title V webpage (available at: *https://www.epa.gov/title-v-operating-permits/permit-fees*). The Part 70 fee is the rate used to calculate emissions-based fees for Part 70 permit programs. Rather than calculating the rate directly from the CPI, this method uses the Part 70 fee rate published by EPA. The Part 70 fee already has the required CPI adjustment incorporated into it.

The timing of the fee assessment depends on the effective date of EPA's finding of failure to attain. For the 10-county DFW and eight-county HGB 2008 eight-hour ozone nonattainment areas, 2028 is the first year after the attainment date of July 20, 2027. Since the 2027 emissions

inventories would be due in 2028, TCEQ staff would have until the end of 2028 to complete the quality assurance reviews of the 2027 annual emissions inventories that would be used to determine the baseline amount. Major sources would require time to establish the baseline amounts based on final emissions reported in the 2027 emissions inventory. TCEQ staff would require time to quality assure the baseline amounts submitted by each major source. To establish and quality assure the baseline amounts, the fee collection year would generally be adopted as two calendar years following the fee assessment year. A potential scenario could include regulated entities submitting the 2027 emissions inventories by the March 31, 2028, due date, and TCEQ staff completing the quality assurance reviews of the 2027 emissions inventories by the end of calendar year 2028. If the area(s) fail to attain the 2008 eight-hour ozone standard, and EPA finalizes a failure to attain notice in October 2027, then, following EPA's effective date of the failure to attain notice, TCEQ could provide a courtesy electronic notification to regulated entities that major sources must submit their baseline amount to TCEQ by March 31, 2028. TCEQ staff would quality assure the 2027 baseline amounts during calendar year 2028. The 2028 emissions inventories are due by April 2, 2029 (since March 31, 2029, falls on a Saturday), and TCEQ staff would complete the quality assurance process for the 2028 emissions inventories by the end of calendar year 2029. TCEQ would implement the calendar-year 2028 Section 185 fee rate once EPA publishes it, typically by the end of October each year. Assuming EPA publishes the 2028 Section 185 fee rate in October 2028, TCEQ would then assess the calendar-year 2028 fees in late 2029 and prepare and send invoices in early calendar-year 2030. As a result, calendar year 2030 becomes the first fee collection year for the first fee assessment year of 2028, based on the actual emissions reported in the 2028 emissions inventory.

A major stationary source subject to the requirements of this adopted rulemaking will also be required to submit an annual emissions inventory according to §101.10. The annual fee

assessment requires the submission of the emissions inventory by the due date to invoice the source on actual emissions of VOC, NO_x, or both for that fee assessment year. Regulated entities subject to the Section 185 fee that do not submit an emissions inventory by the due date will be subject to enforcement.

§101.714, Failure to Attain Fee Payment

The fee is due for each pollutant for which the source is major beginning with the calendar year following the baseline year until the nonattainment area is no longer subject to the fee as provided by §101.718. If the major stationary source chose to aggregate by pollutant, then the fee is due based on that aggregation. This adopted new section also stipulates that payment of the Failure to Attain Fee must be made by check, certified check, electronic funds transfer, or money order made payable to TCEQ. Payment must be sent to the TCEQ address provided on the billing statement by the date specified on the invoice. Generally, sites will have a minimum of 30 days to pay the invoice.

This rule would impose interest and penalties in accordance with 30 TAC Chapter 12 to owners or operators of major stationary sources subject to the applicability provisions of this subchapter who fail to make full payment of the Failure to Attain Fees by the due date.

§101.715, Eligibility for Other Failure to Attain Fee Fulfillment Options

This adopted new section allows major stationary sources or Section 185 Accounts required to pay a Failure to Attain Fee to partially or completely fulfill the fee owed by relinquishing emissions credits or by participating in the SEP program instead of issuing full payment. These other fulfillment options could be considered individual fee offsets for major stationary sources or Section 185 Accounts. If relinquishing emissions credits or participating in the SEP program does not completely fulfill the entire fee owed by a major stationary source or Section

185 Account, the remaining portion of the Failure to Attain Fee remains due according to §101.713 and §101.714 of this rulemaking.

A rule language clarification was made at adoption to §101.715(c) by adding “dollar-for-dollar” to the list of required information on the form that a major stationary source or Section 185 Account must submit to the agency to request one of the other fulfillment options. This update was necessary to align with the SEP program practice of tracking funds and not the tons of emissions reductions generated by a SEP. If a SEP is requested to be a fulfillment option for all or a portion of the Failure to Attain Fee, then the dollar-for-dollar amount must be provided on the request form.

As explained previously in this preamble, the implementation of the Section 185 fee program depends on several future factors, including the effective date of EPA’s finding of failure to attain action. According to §101.714, the invoice due date will be provided by the executive director after the program is implemented. The commission must be timely informed if other options will be requested to fulfill the Failure to Attain Fee. Rule language updates were made at adoption to §101.715(d) to change the due date for a major stationary source or Section 185 Account to provide notification of intent to use alternative Failure to Attain Fee fulfillment option(s) as described in §101.716 and §101.717. Specifically, the due date for these notifications was changed from the emissions inventory due date (typically March 31) of the first fee assessment year to 90 days after the executive director requests this information to be submitted. Changing the due date for a major stationary source or Section 185 Account to submit other fee fulfillment notifications allows more time and flexibility to complete required actions to participate in a SEP or generate an emissions reduction credit.

A rule language update was made at adoption to §101.715(d)(1) and (2) to specify that other Failure to Attain Fee fulfillment options must be completed during or after the baseline year to be considered for partial or complete fulfillment of the Failure to Attain Fee. Using January 1 of the baseline year as the starting point for other fulfillment options is appropriate because the baseline year is the starting point that fee assessments will be based upon, making it a logical starting point for other fulfillment options. Any emission reductions during or after the baseline year would assist in achieving attainment, even if they do not actually result in attainment. It also allows sufficient time to complete the necessary actions required by the other fulfillment options. Providing a specific date was not possible, as the implementation date of the fee program is not known, as discussed elsewhere in this preamble. Also discussed elsewhere in this preamble, while the plain language of FCAA, §185 does not require emissions reductions, emissions reductions that are achieved as a result of the Section 185 Fee program would further improve air quality, consistent with EPA's 2010 guidance.

If other fulfillment options under §101.716 (relating to emissions credits) are not approved and funded, exercised, or completed during or after the baseline year, these other fulfillment options will not be eligible to be applied to the Failure to Attain Fee. If the other fulfillment option under §101.717 (relating to SEPs) is not approved and completed during or after the baseline year, then this other fulfillment option will not be eligible to be applied to the Failure to Attain Fee. A rule language update was made at adoption to §101.715(d)(2) to align with the SEP program and clarify that to be eligible to partially or completely fulfill the Failure to Attain Fee, the SEP must be "completed" instead of "funded." For the purposes of this rulemaking, a SEP that has been "approved and completed" means it has gone through the required SEP processes, been approved by the Commission, and the enforcement respondent has completed all its required actions under the SEP. All requests to use a SEP as an option to fulfill the Failure to Attain Fee will be subject to the executive director's approval.

§101.716, Relinquishing Credits to Fulfill a Failure to Attain Fee

This adopted new section allows major stationary sources or Section 185 Accounts to request to fulfill all or a portion of their Failure to Attain Fee (total fee) 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 total fee reduction purposes, on a ton-for-ton basis, will only be allowed for use as a fulfillment option for the pollutant (VOC or NO_x) specified on the credit. VOC credits or HECT allowances must only be used as a fulfillment option for VOC tons in excess of the baseline; NO_x credits must only be used as a fulfillment option for NO_x tons. The use of allowances will be similarly restricted such that MECT allowances will only be used as an equivalent for NO_x tons. HECT allowances will only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for major stationary sources or Section 185 Accounts located in the 2008 eight-hour ozone nonattainment area. Significant digit rounding of the emissions reduction must be limited to one-tenth of a ton. Removing these emissions, represented as allowances, on a ton-per-ton basis furthers the goals of reducing ozone-causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

§101.717, Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee

This adopted new section allows major stationary sources or Section 185 Accounts to request to fulfill all or part of their Failure to Attain Fee by participating in the SEP program within the 2008 eight-hour ozone nonattainment area where the major stationary source or Section 185 Account is located. A major stationary source subject to enforcement that also chooses to participate in the SEP program may choose to partially or completely fulfill their Failure to

Attain Fee according to the provisions of this new section. A rule language update was made at adoption to clarify this concept by updating "contributing to a SEP" to "participating in the SEP program" in §101.717(a). A rule language update was made at adoption to align with the SEP program's process of tracking funds and not the tons of emissions reduced by a SEP. The references to VOC and NO_x emissions were removed from §101.717(a), and §101.717(a)(1) and (2) were removed from the rule language as they were unnecessary.

SEPs are environmentally beneficial projects that a respondent agrees to undertake in settlement of an enforcement action. Since SEPs are projects designed to prevent or reduce pollution by meeting or exceeding regulatory requirements, performing or contributing to a SEP that directly reduces VOC and/or NO_x emissions in the nonattainment area will provide cost-effective opportunities for emissions reductions. These opportunities, as opposed to the imposition of a fee, will more directly benefit air quality in the affected area. Only SEPs that achieve VOC and/or NO_x emissions reductions implemented within the same 2008 eight-hour ozone nonattainment area are allowed to partially or completely fulfill the Failure to Attain Fee.

The SEP must be enforceable through an Agreed Order or other enforceable document to ensure compliance with the SEP program's objectives.

After further consideration of the SEP program and to correct conflicting and outdated language and clarify intent as well as in response to comments received, §101.717(d) and (e) were added at adoption to specify how SEP program participation may be used to partially or completely fulfill the Failure to Attain Fee. The SEP Offset Amount is the portion of an enforcement case's assessed administrative penalty approved for use in the performance of, or contribution to, a SEP, instead of being paid to the commission as a penalty. For the purposes of this remaining section by section discussion references to "performance of, or contribution

to, a SEP" has been shortened to "contribution to a SEP."

Section 101.717(d) was added at adoption to clarify the proposal's intent that any amount paid in excess to the SEP Offset Amount may be used to partially or completely fulfill the Failure to Attain Fee. For example, a major stationary source located in the HGB nonattainment area must pay a Failure to Attain Fee, is also a respondent in an enforcement case, and chooses to participate in the SEP program. For purposes of the enforcement case, the total required cost of participation in the SEP that reduces VOC emissions in the HGB nonattainment area is $100,000. If the major stationary source respondent contributes $105,000 to that SEP, then the $5,000 in excess of the required $100,000 could be used to fulfill their Failure to Attain Fee. If the assessed Failure to Attain Fee is $200,000, then the Failure to Attain Fee is reduced to $195,000.

After further consideration of the SEP program and in response to comments received, §101.717(e) was added at adoption to allow the total amount paid to the SEP (both the SEP Offset Amount and the excess to the SEP Offset Amount) to partially or completely fulfill the Failure to Attain Fee if the total payment to the SEP is greater than or equal to 110% of the SEP Offset Amount. Allowing the crediting of the SEP Offset Amount in this circumstance should incentivize larger compliance projects (or larger amounts paid to third-party pre-approved SEPs) with ozone precursor emissions reductions that directly benefit the nonattainment area. A major stationary source respondent is required to pay at least 110% or more of the SEP Offset Amount to use the total payment to the SEP to partially or completely fulfill the Failure to Attain Fee. In the example above, the major stationary source respondent could not credit the $100,000 contributed to the SEP toward their Failure to Attain Fee since the total amount paid to the SEP was below 110%. For that same major stationary source respondent to credit the entire SEP Offset Amount of $100,000, they would be required to contribute at least $110,000

toward the SEP. In this refined example, the major stationary source respondent may credit a total of $110,000 (SEP Offset Amount of $100,000 and the excess amount of $10,000) toward their Failure to Attain Fee. If the assessed Failure to Attain Fee was $200,000, then the Failure to Attain Fee is reduced to $90,000.

A rule language update was made at adoption to the re-lettered §101.717(f) to remove unnecessary repeated language and instead refer to the appropriate subsections (c) and (d), while specifying that amounts must be credited on a dollar-for-dollar basis. The rule would also allow a major stationary source or Section 185 Account to use surplus credits from the use of SEPs from year to year. The credits would not be discounted or depreciated over time. The credits cannot be used more than once to partially or completely fulfill the Failure to Attain Fee. Once the approved credits from the use of SEPs have been applied toward a Failure to Attain Fee in a given assessment year, they may not be used in subsequent fee assessment years.

Re-lettered §101.717(g) was changed at adoption to remove the conflict with newly added subsection (d) since crediting of the SEP Offset Amount is allowed if the criteria of subsection (d) are met. Section 101.717(g)(1) and (2) were added at adoption to specify that no amount of an enforcement administrative penalty paid to the commission and no amount of an expedited settlement deferral for early acceptance of an enforcement action settlement may be used to partially or completely fulfill the Failure to Attain Fee. This ensures that only amounts paid to SEPs are creditable to offset the Section 185 fee.

The use of a SEP to partially or completely fulfill the Failure to Attain fee is subject to the approval by the executive director.

§101.718, Cessation of Program

This adopted new section outlines the circumstances that will end the Failure to Attain Fee for an applicable nonattainment area. FCAA, §185 requires the penalty fee to be collected until redesignation of the nonattainment area to attainment by EPA. After EPA redesignates an area to attainment and publishes the final approval of the attainment redesignation in the *Federal Register*, the Failure to Attain Fee is no longer applicable to that ozone nonattainment area as of the effective date specified in the *Federal Register*. In addition to this, any final action or final rulemaking by EPA to end the Failure to Attain Fee requirement, or a finding of attainment by EPA could also end the fee program. A rule language update in §101.718(a)(2) was made at adoption by adding "requirement" to clarify if EPA ended the Failure to Attain Fee requirement TCEQ's fee program could also end. Rule language was added at adoption to clarify that FCAA, §179(B) provides relief from Section 185 fees for ozone nonattainment areas that are impacted by international emissions. New §101.718(a)(4) was added to align with §101.718(b) and FCAA, §179(B), which states that an area is not subject to the provisions of FCAA, §185 if the nonattainment area would have attained the ozone standard but for emissions emanating from outside the United States.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the Failure to Attain Fee will be assessed, but the fee collection will 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 2008 eight-hour ozone standard are submitted to EPA. In determining the design value, days that exceeded the 2008 eight-hour ozone standard because of exceptional events from within or outside the United States (exceptional event days submitted to EPA) may be excluded.

Final Regulatory Impact Analysis

The commission reviewed the adopted rulemaking considering the regulatory impact analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted

rulemaking does not meet the definition of a “Major environmental rule” as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. 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 adopted 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 specific intent of the adopted rules is to comply with the requirements of 42 U.S.C. §7511a and §7511d (FCAA, §182 and §185) for the DFW and HGB 2008 ozone nonattainment areas, as discussed further elsewhere in this preamble. Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. 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 42 U.S.C. §7511d(d) (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 adopted rules will not require emission reduction.

States are required to adopt State Implementation Plans (SIPs) with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. As discussed in the FISCAL NOTE portion of the proposed rule, the adopted rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is necessary to comply with federal law on 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. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410 (FCAA, §110(c)).

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely adopts and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule adopted by the commission to meet a federal requirement was a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis contemplated by SB 633. Requiring a full regulatory impact analysis for all federally required rules 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 that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the adopted rules do not impose burdens greater than required to comply with federal law, as discussed elsewhere in this preamble. For these reasons, the adopted rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, 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." (*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 applying the standard of "substantial compliance" specified in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard.

As presented in this analysis and elsewhere in this preamble, the evidence supports the conclusion that the commission has substantially complied with the requirements of Texas Government Code, §2001.0225. The adopted rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble. The adopted rules were determined to be necessary to comply with federal law and will not exceed any standard set by state or federal law. These adopted rules are not an express requirement of state law. The adopted rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the adopted rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The adopted rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017. Therefore, this adopted rulemaking action is not subject to the regulatory analysis

provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period, but no comments were received.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission completed a takings impact analysis for the adopted rulemaking action under the Texas Government Code, §2007.043.

The primary purpose of this adopted rulemaking action, as discussed elsewhere in this preamble, is to meet federal requirements for the inclusion of penalty fee programs for major stationary sources in State Implementation Plans (SIPs) as mandated by 42 United States Code (USC), §§7410, 7511a, and 7511d (Federal Clean Air Act (FCAA), §§110, 182 and 185). Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. 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 42 U.S.C. §7511d(d) (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 adopted rules will not require emission reduction.

States are required to adopt SIPs with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410(c) (FCAA, §110(c)).

The adopted rules will not create any additional burden on private real property beyond what is required under federal law, as the adopted rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The adopted rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adoption also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the commission concludes that the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

The commission invited public comment regarding the consistency with the CMP during the public comment period, but no comments were received.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101, Subchapter K will not require revisions to existing Federal Operating Permits under 30 TAC §122, Federal Operating Permits Program.

Public Comment

The commission held a virtual public hearing on June 12, 2025 at 2:00 p.m. The comment period closed on June 18, 2025. The commission received comments from the following: Air Alliance Houston; Ash Grove Cement Company, a CRH Company (Ash Grove); CEMEX; Earthjustice on behalf of Air Alliance Houston and Downwinders at Risk (Earthjustice Group One); Earthjustice on behalf of Air Alliance Houston, Downwinders at Risk, and Lone Star Chapter of Sierra Club (Earthjustice Group Two); a group including Earthworks, Environment Texas, Environmental Defense Fund, Liveable Arlington, and Public Citizen (Environmental Groups); Fenceline Watch; GREEN Environmental Consulting, Inc. (Green Consulting); Harris

County Attorney Christian D. Menefee (Harris County Attorney's Office); Holcim (US) Inc. (Holcim); Lone Star Legal Aid on behalf of Better Brazoria – Clean Air & Clean Water (Better Brazoria); North Central Texas Council of Governments (NCTCOG); Public Citizen; Smith Jolin on behalf of Gerdau Ameristeel, US Inc. (Gerdau), and Texas Lime Company (Texas Lime); Summitt Next Gen LLC (Summitt); a group including Texas Chemical Council, Texas Oil and Gas Association, and Texas Pipeline Association (Industry Groups); the Honorable Brian Harrison, District 10, Texas House of Representatives (Hon. Brian Harrison); and 47 individuals.

Ten commenters expressed support for the proposed rule, and 67 commenters expressed opposition for the proposed rule. Generally, the majority of commenters who opposed the proposed rule requested that TCEQ implement a fee program that directly follows the language of FCAA, §185 without flexible alternatives. Commenters requested rule language changes related to baseline amounts, baseline amounts for new major sources, adjustment of baseline amounts for new construction at existing major sources, and the type of TERP funding available to offset the fee on major stationary sources.

Response to Comments

Health Effects and Environmental Impacts

Comment

Better Brazoria, Earthjustice Group Two, Public Citizen, and two individuals commented that the rule proposal does not protect public health. Earthjustice Group Two, Environmental Groups, and Air Alliance Houston provided HGB health-related statistics from the American Lung Association's 2025 "State of the Air" report. Earthjustice Group Two, Environmental Groups, and five individuals commented on the adverse health impacts from pollution, including industrial pollution, on residents of severe ozone nonattainment areas, listing respiratory impacts on children and other vulnerable populations, cancer, chronic obstructive

pulmonary disease, heart disease, and other life-altering medical conditions. Better Brazoria listed various and numerous health impacts on environmental justice areas located in Brazoria County (in the HGB nonattainment area) and included a list of Brazoria County stationary point sources with their recently reported VOC and NO_x emissions and air toxics emissions of some sites with their contribution to increased cancer rates. In addition to adverse health impacts, four individuals commented on how living in severe ozone nonattainment areas impact their daily lives, including poor air quality alerts that limit outdoor activities for adults and children, and that Dallas Fort-Worth (DFW) communities have suffered enough under industries. Fenceline Watch stated that the fee program fails to address harm done to human health and the environment because it does not directly impact the industry violators. Public Citizen asserted Texans are suffering from real-world air quality and public health problems while the TCEQ proposes imaginary solutions on paper.

Response

The purpose of this rulemaking is to develop a Failure to Attain Fee program (referred to as fee program or Section 185 fee program in this response to comment section) as required by FCAA, §182(d)(3) and (e) and §185 for 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment areas in Texas with a severe or extreme classification (currently, the HGB and DFW nonattainment areas) in the event that EPA issues a finding of failure to attain the 2008 ozone standard by the attainment date. Comments regarding health and environmental impacts of ozone precursor emissions are outside the scope of this rulemaking.

No changes were made in response to these comments.

Comment

An individual commented that low-income and minority populations in DFW communities are disproportionately impacted from the air pollution the area continues to experience. Fenceline Watch and an individual stated that the fee program does not properly protect those most impacted communities from industry. Better Brazoria commented that an alternative program leaves Brazoria County, an already vulnerable area, subject to dangerous ongoing pollution. Earthjustice Group Two commented that a conventional fee program could improve air quality quickly by transferring the social burdens of ozone pollution onto the major ozone creators.

Response

No federal or state statute, regulation, or guidance provides a process for evaluating or considering the socioeconomic or racial status of communities within an ozone nonattainment area. In its proposed approval of a TCEQ submittal for El Paso County, which did not include an environmental justice evaluation, EPA stated that the FCAA "and applicable implementing regulations neither prohibit nor require such an evaluation" (88 *Federal Register* (*FR)* 14103). Further, TCEQ's jurisdiction is limited by statute; for example, it may not consider location, land use, or zoning when permitting facilities. TCEQ continues to be committed to protecting Texas' environment and the health of its citizens regardless of location.

TCEQ provided the public with equal access in accordance with Title VI. This rulemaking was developed in compliance with the policies and guidance delineated in TCEQ's Language Access Plan (LAP) (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/language-access-plan-gi-608.pdf*) and TCEQ's Public Participation Plan (PPP) (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/public-participation-plan-gi-607.pdf*). The LAP helps ensure individuals with limited English proficiency may

meaningfully access TCEQ programs, activities, and services in a timely and effective manner; and the PPP identifies the methods by which TCEQ interacts with the public, provides guidance and best practices for ensuring meaningful public participation in TCEQ activities, and highlights opportunities for enhancing public involvement in TCEQ activities and programs.

TCEQ translates the Plain Language Summaries, GovDelivery notices, and newspaper publications into Spanish for all projects. Additionally, a Spanish interpreter was available at the virtual public hearing to verbally provide hearing instructions, and the notices included a statement that Spanish translation of hearing instructions would be available at the hearing.

No changes were made in response to these comments.

Comment

Fenceline Watch commented that various recent extreme weather events around Texas that are caused by industrial pollution, the sinking of the Houston area, and the phase out of the Federal Emergency Management Agency all add more disaster response responsibility to local and state governments. An individual commented industry should not be able to dodge responsibility for carbon dioxide pollution and provided a link to a greenhouse gas study.

Response

The Section 185 fee program is applicable to major stationary sources of ozone precursor emissions (volatile organic compounds (VOC) and oxides of nitrogen (NO_x)), not carbon dioxide, which is a greenhouse gas. Comments regarding disaster response, climate change, greenhouse gases, and the administration of federal agencies are outside the scope of this

rulemaking.

No changes were made in response to these comments.

General Comments

Comment

Air Alliance Houston, Environmental Groups, Public Citizen and two individuals commented that TCEQ is not fulfilling its mission and adhering to its responsibility by proposing an alternative fee that prioritizes industry and private interests over protection of human health and the environment to ensure clean air. Ten individuals also commented that DFW residents deserve clean air. Five individuals requested that TCEQ follow its mission to protect the environment and air quality. Three individuals commented that TCEQ should be better at enforcing laws and fees and holding polluters accountable. An individual commented that TCEQ is just a prop that does not do anything substantial.

Response

The commission takes its commitment to protect the environment and public health seriously. The commission prepares and implements air quality plans and administers and enforces rules in accordance with both state and federal law.

The purpose of this rulemaking is to develop a Section 185 fee program as required by FCAA, §182(d)(3) and (e) and §185 for 2008 eight-hour ozone standard nonattainment areas with a severe or extreme classification. If adopted, TCEQ will have the authority to enforce these rule provisions if EPA determines the severe ozone nonattainment areas fail to attain

the 2008 eight-hour ozone standard by their attainment dates.

The commission followed all relevant federal and state statutes, regulations, and guidance in the development of this rule and evaluated all appropriate information and measures necessary to establish this rulemaking. The commission interprets the FCAA, §172(e) to allow states to adopt equivalent fee programs to fulfill the requirements of FCAA §182(d)(3) and (e) and §185.

No changes were made in response to these comments.

Comment

Fenceline Watch stated that this rule did not adequately address any of the community concerns from the informal comment period.

Response

TCEQ solicited informal comment during the August 2024 stakeholder meetings on all aspects of the rulemaking and received comments from seven organizations or industry representatives. TCEQ reviewed these informal comments in detail, posted these comments on its public webpage, and referred to these comments during its rule development. The received comments encompassed all aspects of the rulemaking and expressed opposing views on various aspects of the Section 185 fee program, such as whether TCEQ should incorporate flexibilities within its fee program, including fee offsets and baseline aggregation by pollutant and/or site. Ultimately, the rulemaking could not simultaneously include and prohibit program flexibilities, and the commission chose to develop the rule as adopted for reasons discussed throughout this preamble.

No changes were made in response to this comment.

Comment

Public Citizen noted that for the duration of the public hearing conducted on June 12, 2025, TCEQ displayed the incorrect date in Spanish for the end of the public comment period and should do more to comply with Title VI requirements on providing accurate and timely access on public comment opportunities.

Response

The commission met all Title VI requirements for this rulemaking and disagrees that the incorrect date was displayed for the duration of the public hearing. The public hearing officially started at 2:00 p.m. and concluded at approximately 2:30 p.m. on June 12, 2025. After the conclusion of the public hearing portion, a second opportunity for informal questions began, and the slide indicating June 31, 2025, as the end of the public comment period in Spanish (the same slide provided the correct date in English) appeared on screen for less than 3 minutes before TCEQ staff noted the error. Once noted, the Spanish date was immediately corrected and the corrected slide displayed until the hearing concluded. This informational slide was never posted on TCEQ's webpage, either before or after the public hearing. The instructions for the public hearing were verbally translated into Spanish and the correct Spanish date was verbally stated at the start and conclusion of the public hearing. There were two GovDelivery notifications regarding the public hearing and public comment period sent on May 6, 2025, and May 22, 2025, that both included Spanish translation with the correct end date of the public comment period in Spanish.

The Section 185 Stakeholder webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee*) contains a link that

automatically translates the page, including the proposed rule's comment deadline, into Spanish. Additionally, this webpage includes a link to a Spanish-language rulemaking summary that contains the correct end date for the public comment period. A public involvement plan accompanies the rule package and is also posted on this webpage.

This rulemaking was developed in compliance with the policies and guidance delineated in TCEQ's LAP (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/language-access-plan-gi-608.pdf*) and TCEQ's PPP (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/public-participation-plan-gi-607.pdf*). The LAP helps ensure individuals with limited English proficiency may meaningfully access TCEQ programs, activities, and services in a timely and effective manner; and the PPP identifies the methods by which TCEQ interacts with the public, provides guidance and best practices for ensuring meaningful public participation in TCEQ activities, and highlights opportunities for enhancing public involvement in TCEQ activities and programs.

In accordance with the PPP, U.S. Census data was used to conduct a preliminary analysis of the population in the DFW and HGB nonattainment areas, which was then used to plan public engagement efforts for this rulemaking. Specifically, TCEQ translated the Plain Language Summaries, all GovDelivery notices, public hearing notices, and State Implementation Plan (SIP) Hot Topics notices into Spanish for all projects. Newspaper publications were also in Spanish.

Additionally, stakeholder meetings held in August 2024 included simultaneous Spanish interpretation provided the opportunity for informal comment in addition to virtual public

hearing on June 12, 2025.

No changes were made in response to these comments.

Comment
Better Brazoria commented that the rule failed to comply with the FCAA public participation requirements (and citing specifically the federal rules for Prevention of Significant Deterioration permitting) since primarily virtual options were offered and affected areas of Brazoria County (located in the HGB nonattainment area) may have been unable to access information or participate in the rulemaking due to low rates of internet access.

Response

The commission disagrees that public participation requirements were not met for this rulemaking and notes that commenters citations to federal rules concerning Prevention of Significant Deterioration permitting are inapplicable. Federal requirements for public participation for SIPs are found in 40 CFR §51.102, which requires notice, an opportunity to submit written comments, and allow the public to request a hearing amongst other requirements, which were met or exceeded in this rulemaking. The commission encourages public participation in the rule development process and makes every effort to hold hearings in locations and at times that are accessible and convenient to the public. In addition to providing the opportunity to comment at a virtual public hearing, TCEQ also provides the public with the option to submit written comments by mail, fax, or electronically through TCEQ's Public Comment system. Instructions for the submittal of written comments were provided in the proposed rulemaking documents and public notices.

The commission strives to give all citizens of Texas appropriate prior notification and

opportunity to comment on proposed rules. This rule was filed with the TCEQ Chief Clerk's Office and made available to the public on the TCEQ website on April 22, 2025. Listserv subscribers received an e-mail notification on May 6, 2025, notifying the public that the commission had approved publication of, and hearing on, the proposal. These notices also directed the public to the TCEQ's website, where all rulemaking documents and the hearing notice were posted. A hearing notice for this rulemaking was published in English in the *Houston Chronicle* on May 6, 2025, and in Spanish in *La Voz* on May 14, 2025. A hearing notice for rulemaking was published in English in the *Dallas Morning News* and in Spanish in *Al Dia* on May 7, 2025. The hearing noticed was published in English in the *Texas Register* on May 16, 2023 (50 *Texas Register (TR)* 2925). This detailed public hearing participation information was also published on the commission's publicly available events calendar webpage at least 30 days prior to the hearing date.

The public comment period was open from May 6, 2025 through June 18, 2025, providing an additional 14 days beyond the required 30-day comment period. During this time, the public had the opportunity to provide both written and oral comment regarding this rulemaking to TCEQ. A virtual public hearing was offered on June 12, 2025, and a Spanish interpreter attended to ensure public hearing access for attendees with limited English proficiency.

No changes were made in response to these comments.

Comment

Better Brazoria stated that for the fee program to be approvable, the mobile source fee design must be specifically explained in a public-facing rulemaking process.

Response

The commission disagrees that the mobile source aspects of the Section 185 fee program relating to TERP were not explained in its public rulemaking process. The Section 185 fee program uses grants provided by TERP, administered through the TERP Trust, as a credit mechanism to offset an area's entire Section 185 fee obligation. Since the Section 185 fee program does not change how the TERP program operates, an explanation of TERP operation is outside the scope of this rulemaking.

A public explanation on how TERP revenue relates to this specific rulemaking is detailed in this preamble. TERP revenue that is collected and expended in a nonattainment area is documented in a Fee Equivalency Account for each nonattainment area. The Fee Equivalency Account documents the availability of TERP revenue used to offset the Section 185 fee for each fee assessment year. There is no exchange of money between the TERP and the Fee Equivalency Account. Annually, TCEQ staff determines a nonattainment area's total fee obligation by summing the Section 185 fee due from each major stationary source (Area §185 Obligation) for a fee assessment year and if the TERP revenue in the Fee Equivalency Account exceeds an Area §185 Obligation, then major stationary sources are assessed but do not pay a fee. If the TERP revenue in the Fee Equivalency Account is less than the Area §185 Obligation, then major stationary sources are assessed and pay a prorated fee to ensure the full Area §185 Obligation is annually met.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification.

Comment

Better Brazoria requested continued public participation for rule development.

Response

The commission agrees that public participation is required for TCEQ rulemaking and provides multiple avenues for stakeholders to become involved in its decision-making process. An overview of TCEQ rules and rulemaking process is provided on the Rules and Rulemaking webpage (available at: *https://www.tceq.texas.gov/rules/rules_rulemaking.html*). A general overview of participating in TCEQ's decision-making processes is available on the Public Participation in TCEQ Decision-Making webpage (available at: *https://www.tceq.texas.gov/agency/decisions/participation*). However, this rulemaking is concluded with the commission's adoption, so no further public participation will be available for this rulemaking project.

No changes were made in response to this comment.

Comment

Two individuals commented that industries are not complying with environmental regulations. One individual commented that industries refuse to reduce emissions unless subject to enforcement or bankruptcy and stressed that industry should comply with the FCAA and pay penalties or shut down.

Response

The commenters provided no information to support their generalized allegation about the "non-compliant" industries. The commission notes that the FCAA, §185 does not single out individual major stationary sources or types of industry and it does not address the compliance status of major stationary sources.

No changes were made in response to these comments.

Comment

Earthjustice Group Two commented on the stagnant nature of the ozone design values in the Houston-Galveston-Brazoria (HGB) 2008 eight-hour ozone NAAQS nonattainment area and the recent increase in ozone design values in the DFW 2008 eight-hour ozone NAAQS area that led both areas to the severe nonattainment classification. An individual commented that DFW has not attained the ozone NAAQS.

Response

The commission acknowledges that the DFW and HGB areas have been reclassified to severe nonattainment for the 2008 eight-hour ozone standard, which is the reason for this Section 185 fee rulemaking as detailed in this preamble.

As shown on TCEQ's Air Quality Success webpage, (available at: *https://www.tceq.texas.gov/airquality/airsuccess/airsuccessmetro*), both the one-hour and eight-hour ozone design values have decreased in the DFW and HGB areas over the past 23 years despite rapid economic growth. From 2000 through 2023, the HGB population increased by 59%, while the eight-hour ozone design value decreased by 26%. Similarly, from 2000 through 2023, the DFW population increased by 56%, while the eight-hour ozone design value decreased by 21%. The DFW and HGB areas have monitored attainment of the 1997 eight-hour ozone standard of 84 ppb since 2014. Existing control strategies implemented to address the 1979 one-hour, 1997 eight-hour, and 2008 eight-hour ozone standards are expected to continue to reduce emissions of ozone precursors in these areas and positively impact progress toward attainment of the ozone standard.

Since 1991, air quality in the DFW and HGB areas has improved dramatically due to state, local, and federal air pollution control measures, such as federal emissions standards for mobile source engines, TCEQ Chapter 117 rules pertaining to control of NO_x emissions, and TCEQ Chapter 115 rules pertaining to control of VOCs. TCEQ remains committed to working with area stakeholders to attain the 2008 eight-hour ozone standard as expeditiously as practicable and in accordance with EPA rules and guidance under the FCAA.

No changes were made in response to these comments.

Comment

The Harris County Attorney's Office commented that the HGB area is designated a severe nonattainment area under the 2008 eight-hour ozone NAAQS and faces potential reclassification which would trigger Section 185 fee requirements.

Response

The HGB area is currently classified as a severe nonattainment area under the 2008 eight-hour ozone standard and therefore the state is required to develop and adopt a Section 185 fee program per EPA's final notice reclassifying the HGB area to severe nonattainment for the 2008 eight-hour ozone standard, effective November 7, 2022 (87 *FR* 60926). If the HGB nonattainment area fails to attain the 2008 eight-hour ozone standard by July 20, 2027, and EPA issues notice that HGB failed to attain by the attainment date, the FCAA, §185 requires TCEQ to implement its Section 185 fee program. However, the HGB nonattainment area would not automatically be reclassified as an extreme nonattainment area in the event of failure to attain the 2008 eight-hour ozone standard by its severe nonattainment deadline, since the FCAA, §181(b)(2)(A) expressly prevents reclassification by operation of law for such areas.

No changes were made in response to this comment.

Comment

Earthjustice Group Two stated that the previous Section 185 fee program for HGB under the one-hour ozone standard failed to bring Houston into attainment which directly led to this required rulemaking for the 2008 eight-hour ozone NAAQS.

Response

The commission disagrees with this comment. EPA determined that the HGB nonattainment area attained the one-hour ozone standard in a final rule published in the February 14, 2020, *Federal Register* (85 *FR* 8411). The one-hour ozone standard has no bearing on the HGB nonattainment area's reclassification to severe under the 2008 eight-hour ozone standard, which is the reason this Section 185 fee program is required for the HGB nonattainment area.

No changes were made in response to this comment.

Comment

NCTCOG offered their assistance in the event the proposed rule does not proceed to credit grant revenue from TERP offsets and begins assessing fees on major sources.

Response

The commission appreciates the offer to assist.

No changes were made in response to this comment.

Comment

An individual commented that industry is polluting the air and water, and that Texas is listed as the number one polluted state. Better Brazoria stated that major stationary sources are the largest contributors to NAAQS violations.

Response

The commission disagrees that major stationary sources are the largest contributors to ozone NAAQS violations. Mobile sources account for 65% of 2023 NO_x emissions in the DFW 2008 ozone standard nonattainment area and 55% of 2023 NO_x emissions in the HGB 2008 ozone standard nonattainment area.

The commission also disagrees that Texas is the most polluted state. In terms of ozone pollution, while Texas does have multiple ozone nonattainment areas, California also has multiple ozone nonattainment areas, some of which are classified as "extreme" with higher ozone concentrations. According to EPA's Greenbook for the 2008 eight-hour ozone NAAQS (available at: *https://www.epa.gov/green-book/green-book-8-hour-ozone-2008-area-information*), California has the most polluted counties for ozone.

No changes were made in response to these comments.

Comment

An individual commented that engine manufacturers need to meet better standards. An individual noted Texans bear the financial brunt of natural gas operators that lack weatherization after past winter storms and those operators should have accepted responsibility for their lack of action.

Response

TCEQ does not have the authority to regulate engine standards or plant weatherization for winter storms. Additionally, these comments are outside the scope of this rulemaking.

No changes were made in response to these comments.

Comment

Eight individuals commented that Arlington residents and about a million Tarrant County residents have their homes, employment, and schools near fracking locations that have VOC and NO_x pollution. An individual commented that they hold mineral rights in Arlington and if they had the ability, they would trade their royalties to prevent industrial fracking on their land.

Response

Comments on fracking, including concerns about pollution from fracking, are outside the scope of this rulemaking.

No changes were made in response to these comments.

Applicability and Definitions

Comment

Fenceline Watch commented that the FCAA is clear that all major sources are subject to the fee program.

Response

The commission agrees with this comment. As discussed in this preamble, all major

stationary sources of ozone precursor emissions located in an area designated as nonattainment and classified severe or extreme under the 2008 eight-hour ozone standard nonattainment that failed to attain by its attainment date are subject to the Section 185 fee program upon the effective date of EPA's failure to attain notice in the *Federal Register*.

No changes were made in response to these comments.

Comment

Fenceline Watch commented that the fee should be implemented expeditiously.

Response

The fee program will become applicable upon the effective date of EPA's failure to attain notice in the *Federal Register* as discussed in this preamble.

No changes were made in response to these comments.

Comment

Better Brazoria commented that major stationary sources should not be exempt from fees even if they are required to implement Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER).

Response

The commission agrees with this comment and notes that these sources are not exempt from the fee program.

No changes were made in response to this comment.

Comment

One individual requested a list of businesses applicable to the rule and the amount of fees those businesses will be required to pay.

Response

A definitive list of major stationary sources to which this fee program would apply cannot be determined until program implementation and may change with each year of program implementation.

A fee estimate for each major source cannot be provided since it is predicated on several unknown factors such as how industry will choose to exercise the baseline amount flexibilities, the future fee rate adjusted for inflation annually by EPA, and the amount of TERP or future grant program's revenue available to offset the fee on major stationary sources.

No changes were made in response to these comments.

Comment

Green Consulting requested that an Inapplicability Notification Letter submitted to TCEQ's point source emissions inventory certifying that the site-level emissions of NO_x and VOC are below 10 tons per year (tpy) be included with annual routine emissions reported to the TCEQ point source emissions inventory. Green Consulting noted that this would allow sites to use their actual certified emissions as the baseline instead of having to rely on the total emissions authorized by permits or APD-CERT.

Response

The commission disagrees with this comment. As provided by FCAA, §185, the penalty fee applies to major stationary sources of ozone precursor emissions. Major stationary sources cannot submit the Inapplicability Notification Letter to the point source emissions inventory because §101.10 requires all major stationary sources (as defined in §116.12) to submit either a full point source emissions inventory update, or for qualifying sites, an Insignificant Change Notification Letter.

No changes were made in response to this comment.

Comment

Better Brazoria commented that the attainment date should be defined as the EPA-approved date by which the area must meet the NAAQS so that proper fees are assessed for the appropriate periods of time.

Response

The commission agrees with this comment and defines the attainment date as the EPA-specified date an area is required to attain the 2008 eight-hour ozone standard under the FCAA. The baseline year is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in the rulemaking (e.g. for new major sources after the baseline year).

The severe classification attainment date for the DFW and HGB nonattainment areas under the 2008 eight-hour ozone standard is July 20, 2027; therefore, the 2027 calendar year from January 1, 2027, through December 31, 2027, determines both the attainment year and baseline year of 2027, unless EPA approves an attainment date extension under FCAA,

§181(a)(5).

No changes were made in response to this comment.

Comment

Better Brazoria commented that Texas should not be afforded additional extension years under FCAA, §181(a)(5) and if an extension year is provided by EPA, it must meet the qualifications of and be approved under FCAA, §181(a)(5).

Response

The commission disagrees that Texas should not be afforded an extension of the attainment date under FCAA, §181(a)(5) if the DFW and/or HGB nonattainment areas qualify. Whether the DFW and/or HGB nonattainment areas qualify for an extension to the 2008 eight-hour ozone standard severe classification attainment date under FCAA, §181(a)(5) and future hypothetical EPA actions for extension date requests cannot be predicted.

The commission agrees that an extension of the attainment date is only applicable to this rulemaking if EPA approves such requests. As discussed in this preamble, no fee payment is due for a year determined by EPA to be an extension year under FCAA, §181(a)(5) for the 2008 eight-hour ozone standard. For any area granted an extension, the fee will be applicable if the severe or extreme nonattainment area does not attain by the extension attainment date specified by EPA based on the effective date of EPA's finding of failure to attain notice in the *Federal Register*.

No changes were made in response to these comments.

Comment
Better Brazoria requested the broadest definition of actual and allowable emissions to determine baseline amounts and baseline amount exceedances for annual fee assessment, including combinations of permitted emissions, regulated emissions, fugitive emissions, unregulated emissions, and/or maintenance, startup, and shutdown (MSS) emissions. Better Brazoria stated that for a source that only operated a portion of either the baseline year or another time period as allowed by this rule, the actual and permitted emissions should be extrapolated using the most recently available representative data for the relevant period.

Response

The commission includes the broadest definition of actual and allowable emissions in this adopted rulemaking and clarifies that there are necessary differences between actual and allowable emissions used for baseline amount determination and the annual fee assessment as described below.

As discussed in this preamble, for baseline amount determination, FCAA, §185(b)(2) requires that the "lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source". For this rulemaking baseline emissions represents the "actual emissions" referenced in FCAA, §185(b)(2) and excludes unauthorized emissions. Baseline emissions are reported in the annual point source emissions inventory and include reported annual emissions that are authorized by permit or rule from routine operations. This includes authorized MSS activities during the baseline year or another time period as allowed by this rule. For baseline emissions, unauthorized emissions are excluded. This includes emissions events and MSS activities not authorized by permit or rule because they are not authorized or representative of routine operations.

As discussed in this preamble, for a baseline amount determination, the major stationary source's authorized emissions or emissions pending authorization include emissions allowed under any TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders. Fugitive emissions are required to be included for the purposes of the baseline emissions calculations and fee assessments. As provided by 40 CFR §70.2, fugitive emissions of VOC or NO_x for major stationary sources belonging to one of the categories listed in paragraph 2 of the definition of major sources may be excluded from counting toward major source applicability. However, once the source meets the major stationary source applicability requirements of §116.12, fugitive emissions are required to be reported in the emissions inventory, and the fugitive emissions must be used for both baseline emissions calculations and fee assessments for Section 185 fee purposes.

As discussed in this preamble, annual fee assessments are based on actual emissions, as defined in §101.10, which includes emissions from annual routine operations, MSS operations, and emissions from emissions events or MSS activities.

The commission disagrees that actual or permitted emissions should be extrapolated for partial years. Emissions extrapolation for a partial year is not as accurate or representative as using the reported baseline emissions or permitted emissions during a consecutive 12-month timeframe, regardless of whether the 12 months constitutes a calendar year.

As discussed in this preamble, partial calendar years may be applicable for baseline amount determination of sources that qualify as irregular, cyclic, or otherwise varying significantly from year-to-year to select a 24-month consecutive period to average the baseline emissions from a specified historic look-back period. Also, new major stationary sources may use their

first year (12 consecutive months) operating as a major stationary source to determine the baseline amount. The baseline amount must be the lower of the baseline emissions during the first year of operation as a major source or the total annual authorized emissions during the first year of operation as a major source, which is consistent with FCAA, §185 requirements.

No changes were made in response to these comments.

Comment

Better Brazoria requested that TCEQ provide explicit definitions for facility, emissions units, and equipment because of differences between the terms for federal, Texas Clean Air Act (TCAA), and TCEQ guidance to ensure major stationary sources do not benefit from interchanging terms to obscure emissions data.

Response

The commission disagrees that further definitions are necessary and notes that definitions needed for this rulemaking were appropriately included. Emissions units are consistent with the definition in §101.1. The definition of facility is consistent with what EPA has approved in the SIP. Additionally, the term facility is not necessary to be specifically defined in this rulemaking because the definition of a major stationary source is consistent with the §116.12 and that definition appropriately reflects the term facility. The term equipment is appropriately used in the preamble in the context of mobile sources in the TERP program.

However, the commission agrees that emissions unit is the appropriate term when used to describe specific equipment at a major stationary source. Therefore, in the adopted version of this rule, the term "equipment" was updated to "emissions units" in §101.710(a)(1) and (2)

rule language; similar updates were made to the preamble Section by Section Discussion for §101.710.

Intention of FCAA, §185

Comment

Air Alliance Houston and Public Citizen commented that the NAAQS were established by Congress to protect human health and improve air quality, and the proposed fee program fails to accomplish both objectives. Better Brazoria commented that the TCAA mandates TCEQ to attain and maintain NAAQS in ways that are consistent with the FCAA. Since the TCEQ Section 185 fee program offsets the direct fees on major sources using TERP revenue, this conflicts with the TCAA's requirement (consistent with the FCAA) to attain and maintain NAAQS to protect human health. An individual commented that this rule delays progress toward meeting the 2008 eight-hour ozone NAAQS. Air Alliance Houston, Public Citizen, Earthjustice Group One and Earthjustice Group Two, and NCTCOG asserted the goal of FCAA, §185 is to bring severe and extreme nonattainment areas into attainment which this fee program fails to accomplish. Better Brazoria echoed Public Citizen's statements and added that the FCAA, §185 is also designed to penalize major offenders that do not reduce emissions in areas with repeated failures to comply with the NAAQS. Two individuals commented that the rule doesn't meet the spirit or intent of the FCAA to hold polluters accountable. Public Citizen and Environmental Groups noted that an alternative fee program provides no real-world benefits to the nonattainment areas. Better Brazoria, Earthjustice Group One, Earthjustice Group Two, Environmental Groups, Harris County Attorney's Office, Public Citizen, and twenty individuals commented that the fee program will not improve air quality in DFW or HGB because the use of TERP to offset the fees on major stationary sources shields major stationary sources from penalties, does not reduce emissions, removes the economic incentive to reduce emissions, and removes the incentive to invest in meaningful operational changes, including installing

advanced control strategies. Better Brazoria, Earthjustice Group One, and Earthjustice Group Two commented that the use of TERP to offset fees undermines and violates the FCAA goals since emissions are not directly reduced from major sources. Air Alliance Houston stated that TERP funds will be converted as credit to pay the fees ("fines") for industry that contributes significantly to ozone formation, especially around fenceline communities. An individual commented that the rule does not reduce pollution but increases VOC emissions. Harris County Attorney's Office expressed concern that the fee program will prolong the region's nonattainment status by removing the pressure to drive improvement. Ash Grove and Holcim stated that reductions in NO_x emissions from point sources would have little impact on achieving attainment and argued that the mandated fee imposed on a single category source does not guarantee that ozone precursor emissions will automatically decrease.

Response

The commission agrees that the overall intent of both the FCAA and TCAA is to attain and maintain the NAAQS. However, the commission disagrees that FCAA, §185 requires a fee program that achieves emissions reductions or operational improvements sufficient to bring a nonattainment area into attainment.

While the FCAA, §185 may incentivize major stationary sources to reduce emissions, an incentive is not the same as a requirement. FCAA, §185 does not require emissions reductions by major stationary sources and the commission agrees with the comment that the Section 185 fee program cannot guarantee that emissions reductions will occur. A major stationary source subject to this rule could choose to pay the assessed fee for each fee assessment year, resulting in no emissions reductions in the nonattainment area, or the source may choose to reduce emissions based on economic considerations and the site's ability to further control emissions. Since this rule does not require ozone precursor

emissions reductions, the attainment of the 2008 eight-hour ozone standard cannot be guaranteed due to this rule alone. If this rule is adopted and EPA approves this rule, it will become part of the Texas SIP, which includes multiple economic incentive programs and control strategies designed to bring areas into attainment. FCAA, §185 contains no language regarding the use of penalty fees by States.

The commission also disagrees that the Section 185 fee program does not hold major stationary sources accountable since these sources are assessed a penalty fee. The Section 185 fee program assesses a fee on each major stationary source in a nonattainment area, and the total of those fees constitutes the nonattainment area's total fee obligation (Area §185 Obligation). If TERP revenue or revenue from a future grant program does not cover the entire Area §185 Obligation, major stationary sources will owe a prorated fee.

The Section 185 fee program would not increase VOC emissions as it does not and cannot alter requirements for emissions authorizations under the TCAA.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Environmental Groups commented that the penalty fee may not result in emissions reductions from point sources, as those emitters may choose to pay the fee instead of investing in emissions reduction measures.

Response

The commission agrees with this comment. The purpose of this rulemaking is to establish a program for the 2008 eight-hour ozone standard to implement FCAA, §185, which does not require emissions reductions.

No changes were made in response to this comment.

Comment

The Harris County Attorney's Office asserted that the FCAA has a graduated regulatory design, in which more stringent compliance mechanisms are levied the longer an area remains in nonattainment and that allowing TERP to offset major sources' penalty fees is inconsistent with this regulatory design.

Response

The commission agrees that the FCAA increases regulatory requirements over time for the ozone NAAQS, as an area that fails to attain the ozone NAAQS is reclassified into more stringent classifications. However, as discussed in this preamble, the commission disagrees that allowing the use of TERP to offset penalty fees as provided in this rulemaking is inconsistent with the FCAA.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Public Citizen and Harris County Attorney's Office commented that since TERP on its own has not brought the areas into attainment, then it cannot be proposed as an alternative to a penalty

fee charged directly on major sources.

Response

As discussed elsewhere in this Response to Comments, the commission disagrees that Section 185 fee programs are intended to bring areas into attainment and further disagrees that TERP was required to bring the areas into attainment to be an alternative to a penalty fee.

No changes were made in response to these comments.

Comment

Earthjustice Group Two, Harris County Attorney's Office, Public Citizen, and fourteen individuals commented that Section 185 fee program revenue could create new funding for air quality improvement programs and projects. Four individuals commented that the state can reinvest Section 185 fee revenue into administration of the FCAA, with one individual indicating that the fee revenue could exceed $200 million. Another individual asked TCEQ to adopt a Section 185 fee program that reinvests funds into air quality improvement projects. Better Brazoria, commented that these reinvested funds should focus on projects that would improve air monitoring, expand or create public health initiatives, and create pollution mitigation projects in environmental justice areas. Fenceline Watch commented that the funds could be used for preventive health programs and to create programs to make Texas more resilient to disaster by improving infrastructure. Another individual commented that if there are groups of people with severe health problems in polluted areas (air, water, etc.), then Section 185 fees ("fines") can help protect the public or help adversely impacted individuals with their healthcare costs. Better Brazoria and Public Citizen also commented that revenue lost from EPA's potential disapproval of TCEQ's Section 185 fee program could have gone toward the

benefit of communities impacted by poor air quality. Environmental Groups stated that since Texas is not attaining the ozone standard, more money is needed for clean air programs, which can be obtained through collecting penalty fees from point sources. Environmental Groups commented that a fee collected from major stationary point sources which could generate more than $200 million annually, could be used to fund additional TERP grants, which would further reduce emissions from mobile sources. An individual commented that the fees ("fines") from industry can help protect the public. Fenceline Watch stated that a Section 185 fee program must provide material resources to the community forced to endure health, environmental, and safety concerns imposed by industry. Harris County Attorney's Office also noted that new supplemental programs are needed to build on existing air quality improvement efforts. Ash Grove, Cemex, and Holcim supported using the annually collected Section 185 fees for mobile source emissions reductions in DFW and HGB nonattainment areas. Ash Grove stated Section 185 fees will go to the Texas Clean Air Fund that TCEQ administers to safeguard air resources in Texas, and the collected Section 185 fees under the draft rule will be used to improve air quality in the state.

Response

The scope of this rulemaking is the establishment, assessment, collection, and termination of the Section 185 fee for the 2008 eight-hour ozone standard. The authority to allocate funds from any Section 185 fee program revenue to TCEQ falls under the authority of the Texas Legislature. Additionally, FCAA, §185 does not identify any purpose for penalty fee revenue. Therefore, the creation of new air quality programs funded by Section 185 fee revenue or how such revenue could be spent is outside the scope of this rulemaking.

The Legislature establishes the funding structure for TERP, and comments regarding the additional funding for TERP is outside the scope of this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that to ensure long term compliance and emissions reductions, the Section 185 fee program should include ongoing evaluations of the fee program's effectiveness, including periodic assessments of emission reductions and health improvements and increasing fees for repeated non-compliance.

Response

The purpose of this rulemaking is to develop a Section 185 fee program as required under FCAA, §185. FCAA, §185 does not require an evaluation such as specified by the commenter. As discussed elsewhere in this Response to Comments, while the FCAA, §185 may incentivize major stationary sources to reduce emissions, an incentive is not the same as a requirement and emissions reductions are not guaranteed because of this fee program. Health improvements are not required by FCAA, §185 and are outside the scope of this rulemaking. As specified under FCAA, §185(b)(1) and (3), EPA sets the annual sets the fee by adjusting for inflation. An increase in fees for repeated non-compliance is not provided for in FCAA, §185.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Offsetting Failure to Attain Fee Area Obligation

Comment
Twenty individuals expressed opposition to the alternative fee provisions of the rule. Air Alliance Houston, Better Brazoria, Earthjustice Group One, Earthjustice Group Two, Environmental Groups, Harris County Attorney General's Office, Public Citizen, and an individual stated that instead of an alternative fee program, the agency must implement a fee program that follows the plain language and specific directives of the FCAA as Congress intended to directly assess and collect an annual fee on major stationary sources on a per-ton basis of each ozone precursor pollutant without any alternative options. Better Brazoria commented that TCEQ cannot place fees on mobile sources to satisfy Section 185 fee program requirements. Earthjustice Group Two further stated FCAA, §185 does not provide alternative methods to calculate, impose, or collect fees, or the ability to replace fees on individual sources with on-paper credits from another funding source. Better Brazoria and two individuals commented that targeting mobile sources deviates from FCAA, 185 as Congress intended a direct fee on major stationary sources. Two individuals commented that TCEQ must adopt a fee program that directly assesses fees to hold polluters accountable, improve air quality, and protect public health.

Response

The commission disagrees that the Section 185 fee program does not follow FCAA requirements. FCAA, §172(e) provides that if EPA relaxes a standard, EPA should promulgate requirements that are not less stringent than the controls applicable before the relaxation. EPA has interpreted FCAA, §172(e) to also apply when a NAAQS is strengthened, which has been upheld by federal courts as discussed in this preamble, in the Background and Summary of Factual Basis for the Adopted Rules. Since EPA strengthened the 2008 eight-hour ozone standard of 75 parts per billion (ppb) ~~million (ppm)~~ with the promulgation

of the 2015 eight-hour ozone standard to 70 ppb ~~ppm~~, then FCAA, §172(e) can be applied to the 2008 eight-hour ozone standard. TCEQ interprets FCAA, §172(e) to allow an equivalent or better Section 185 fee program to implement FCAA, §185 requirements when a NAAQS is strengthened.

EPA has not provided states with Section 185 fee program development guidance under the 2008 eight-hour ozone standard. Therefore, to develop this Section 185 fee program, TCEQ relied on EPA's 2010 guidance memo that was vacated on procedural grounds for Section 185 fee programs under the one-hour ozone standard and EPA's approval of Section 185 fee program for HGB nonattainment area under the one-hour ozone standard. Relying on EPA's 2010 guidance memo continues to be appropriate for the 2008 eight-hour hour ozone standard since EPA proposed approval of an equivalent alternative fee program under the one-hour ozone standard for Antelope Valley and Mojave Desert on April 22, 2024 (89 *FR* 29277) which relied on the principles identified in EPA's 2010 guidance memo. As part of the Section 185 fee program, the fee on major stationary sources is offset based on TERP revenue or future grant program's revenue collected and expended in the nonattainment area. Using TERP to offset the fee on major stationary sources is equivalent or better than a conventional fee program since TERP programs are targeted to obtain NO_x emissions reductions primarily from mobile sources, which are the largest source of NO_x emissions in the DFW and HGB nonattainment areas.

The commission disagrees that the Section 185 fee program will not collect any direct fees on major stationary sources. As proposed, TCEQ would assess the full Section 185 fee due from each major stationary source and then sum all assessed fees to determine the entire fee obligation for the nonattainment area (Area §185 Obligation). If there is not enough TERP revenue or revenue from a future grant program to cover the entire Area §185

Obligation for a nonattainment area, then major stationary sources will be assessed a prorated fee to ensure the entire Area §185 Obligation for a fee assessment year is collected in full.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria and Environmental Groups commented that alternative fee programs, including the use of mobile sources to offset a direct fee on major stationary sources cannot be used for an active ozone NAAQS. Better Brazoria and Environmental Groups further stated that an alternative program under revoked standards may be appropriate since they concentrate on anti-backsliding and because of a reduced regulatory priority have been replaced with more stringent and updated standards. Better Brazoria noted that the EPA's previous support for alternative options to a fee-based program were limited to the revoked one-hour ozone standard and none of the approvals cited by the TCEQ apply to an active standard. Better Brazoria commented that FCAA, §172(e) does not create a loophole to avoid penalties assessed against major stationary sources of ozone precursors in active ozone standard severe nonattainment areas.

Response

The commission disagrees that an equivalent alternative fee program may not apply to active ozone NAAQS. As discussed elsewhere in this Response to Comments, TCEQ interprets FCAA, §172(e) to allow an equivalent program when a NAAQS is strengthened.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that FCAA, §172(e) cannot be relied upon for the alternative fee program because it does not identify how a regulating body would provide alternative options, waivers, or equivalency to statutory requirements. Better Brazoria commented that FCAA, §172(e) focuses on preservation of otherwise required controls and according to the D.C. Circuit Court of Appeals that the penalty provision of FCAA, §185(a) are "controls" that FCAA, §172(e) "requires to be retained."

Response

The commission acknowledges that the D. C. Circuit Court held that FCAA, §185 penalty fee programs were an anti-backsliding "control" required to continue to apply for revoked NAAQS; however, the plain language of FCAA, §185 does not require fee programs to result in emissions reductions. As discussed elsewhere in this Response to Comments, EPA has approved equivalent alternative fee programs under the one-hour ozone standard citing FCAA, §172(e). There is no statutory language that would exclude equivalent alternative programs for currently active and effective strengthened ozone standards and allowing such programs for currently active strengthened ozone standards promotes consistency.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that TCEQ's fee program may indirectly interfere with emissions reductions required under the FCAA, §172(c)(2) rate of (*sic*) further progress (RFP) mandate since the fee program may disincentivize major sources from reducing emissions and this may impede RFP requirements, create more RFP requirements, and prolong nonattainment. Better Brazoria stated that if TCEQ prioritizes its alternative fee program over strengthening mobile source controls in RFP SIP revisions, it may limit the effectiveness and scope of the RFP reductions. Diverting focus to a future fee program may delay or weaken more proactive mobile source controls which would impede RFP compliance and violate the FCAA. Better Brazoria also stated that an alternative fee program must reduce emissions in such a way that indicates compliance and progress toward attainment ("RFP"). Better Brazoria stated that if the alternative fee program relies on measures already credited in the RFP SIP revision contingency plans, it may reduce the effectiveness of those measures. Better Brazoria explained that EPA prohibits emissions reductions from being used more than once and each SIP requirement (e.g. RFP, attainment, contingency, and penalty programs) relies on distinct and enforceable reductions that cannot be reused for other FCAA obligations such as the Section 185 alternative fee program.

Response

The commission disagrees that FCAA, §185 requires a fee program that achieves emissions reductions in the same manner as FCAA-required RFP SIP revisions. The purpose of this rulemaking is to develop a penalty fee program as required under FCAA, §185 which is separate from the FCAA, §182(b) RFP SIP requirements. Since these are separate, distinct, and unrelated requirements, the commission disagrees that this Section 185 fee program is required to be implemented in a manner that would assist in compliance with the RFP requirement; nor does it impede the commission's ability to meet RFP in any way.

The commenter incorrectly indicates emissions reductions from TERP programs are used more than once in Texas SIP revisions. Mobile source control measures that have been used to demonstrate RFP are the federally required engine and fuel standards measures, which are not related to TERP or this fee program. If the Section 185 fee program is adopted and implemented due to failure to attain, TCEQ will take appropriate action regarding the use of TERP emissions reductions in other SIP-related activities.

The commission also disagrees that using TERP revenue to offset the fee on major stationary sources weakens mobile source control measures in the RFP SIP or will inhibit RFP compliance. States have limited authority to regulate mobile source emissions under Title II of the FCAA and cannot develop engine standards. The TERP program is an innovative state-specific measure used to obtain voluntary mobile source emission reductions since the state has limited authority.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Fenceline Watch commented that TCEQ's position on its equivalent Section 185 fee program is contradictory: an equivalent fee is necessary to not excessively penalize industrial emissions, yet the program would assess major stationary sources a prorated fee if the TERP credit could not cover the area's entire fee obligation. Fenceline Watch contended that TCEQ cannot state that a conventional fee is not the proper tool and then still include a direct fee option in the rule.

Response

The commenter misunderstands the commission's position regarding the adoption of an equivalent fee program. The commission disagrees that an equivalent Section 185 fee program is contradictory or prohibits fee assessment. As discussed elsewhere in this Response to Comments, the commission's position is that an equivalent fee program is allowed by the FCAA, §172(e). The Section 185 fee program uses TERP grant revenue that funds primarily mobile source emissions reductions since mobile sources are the largest contributors to NO_x emissions in the DFW and HGB nonattainment areas.

Additionally, a conventional fee program would cause significant economic cost burden by impacting the nonattainment areas and the rest of the country. Such costs would likely be passed on to consumers in the form of higher prices and would likely have ripple effects throughout the country due to the concentration of energy, petrochemical, and refining companies in the HGB 2008 ozone NAAQS nonattainment area. According to the Greater Houston Partnership, in 2021 the Houston Metropolitan Statistical Area (MSA) accounts for 44% of the nation's base petrochemical capacity with many of the top employers in the energy, petrochemical, or refinery related fields (available at: ***https://d9.houston.org/sites/default/files/2021-05/16H%20W001%20Chemical%20Industry%20Overview%20.pdf*** **and** ***https://hcoed.harriscountytx.gov/docs/largest_100_employers.pdf*****). The Greater Houston Community Foundation stated that as of 2023, the Houston MSA's gross domestic product (GDP) was the seventh highest in the country and 26% of the GDP for Texas (available at:** ***https://www.understandinghouston.org/blog/houstons-economic-paradox/*****). In the U.S. Census Bureau Metropolitan and Micropolitan Statistical Areas Population Totals: 2020-2024, the Houston MSA is the fifth largest in the county as of 2024 (available at:** ***https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-metro-and-micro-***

***statistical-areas.html*).**

The same amount of fees will be assessed, regardless of whether TERP revenue collected and expended in a nonattainment area can cover the total fee obligation (Area §185 Obligation) for a nonattainment area. To ensure that the fee program is equivalent for fee assessments, it is appropriate to assess a prorated fee on major stationary sources in case TERP revenue is not sufficient to cover the Area §185 Obligation. This prorated fee ensures the entire Area §185 Obligation is collected each year the fee is applicable.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that previous non-attainment fee programs have considered placing fees on mobile sources in mistaken attempts to pursue Section 185's objectives.

Response

The commission disagrees that a fee is being placed on mobile sources for Section 185 fee program purposes. TERP revenue that is already collected (as long as any revenue is expended) in a nonattainment area is used to offset the fee on major stationary sources. There is no exchange of money between TERP and the Fee Equivalency Account for a nonattainment area. The Section 185 fee program does not change how the TERP program operates.

No rule changes were made in response to these comments, but additional information was

added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented TCEQ cannot use mobile source fees to satisfy the requirements of a Section 185 fee because the TERP program only reduces NO_x emissions and cannot serve as a surrogate to reduce major source's VOC emissions as required by FCAA, §185. Since FCAA, §182(f) extends the requirement to NO_x emissions, then a Section 185 Fee Program must equally penalize both ozone precursor emissions. Better Brazoria supported this comment by stating that stationary sources dominate emissions in the HGB nonattainment area and account for 84% of the VOC emissions. Better Brazoria noted that EPA predicts that stationary sources will continue to contribute more VOC emissions as mobile source emissions decline.

Response

The commission disagrees that the TERP program revenue cannot be used as part of the Section 185 fee program since it does not primarily reduce VOC emissions. While not the primary focus of TERP grants, VOC emissions reductions can occur when upgrading or replacing equipment using TERP grants. As discussed elsewhere in this Response to Comment, FCAA, §185 may incentivize, but does not require emissions reductions. This rulemaking meets the requirements of FCAA, §185 and FCAA, §182(f) by assessing a fee on major stationary sources of both VOC and NO_x emissions. Since mobile sources are the largest category of NO_x emissions in the HGB nonattainment area then the use of TERP to offset the fee on major stationary sources has an additional benefit of reducing NO_x emissions from the most significant source of NO_x emissions in the area.

The commission also disagrees with the commenter's characterization of the amount of

stationary source VOC emissions. The commenter combines the 68% contribution from area stationary sources VOC emissions with the 16% point source stationary source contribution to arrive at an 84% total VOC emissions contribution for "stationary sources" in the HGB nonattainment area for the 2020 reporting year, which incorrectly implies major stationary sources are responsible for the 84% contribution. The 2020 emissions inventory pie charts are provided on the Texas Emissions Sources: Graphics webpage (available at: *https://www.tceq.texas.gov/airquality/areasource/emissions-sources-charts*). At 16%, point sources, which include the major stationary sources referenced by the commenter, are not the most significant source of VOC emissions in the HGB nonattainment area. Instead, area stationary sources are the largest contributor to VOC emissions in the HGB nonattainment area at 68%. Area stationary sources are minor sources and not subject to this fee program. The point stationary source category contains major stationary sources and is the only relevant statistic when discussing major stationary source's contribution to VOC in the HGB nonattainment area.

The referenced EPA emissions predictions for point and area sources and are not relevant for this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Fenceline Watch commented that the state legislature currently mandates TCEQ to transfer 35% of TERP funds to the Texas Department of Transportation (TxDOT) for congestion and mitigation (CMAQ) in air quality improvement projects located in nonattainment areas.

Fenceline Watch noted that this transfer occurs without regard as to whether mobile sources are the primary contribution to ozone precursors in the nonattainment areas.

Response

The commission acknowledges that currently, Texas Health and Safety Code §386.252, requires that 35% of TERP funds be transferred to TxDOT for CMAQ purposes and that this transfer occurs without consideration of mobile sources' contribution to ozone precursor emissions in nonattainment areas.

If this fee program is required to be implemented, then TCEQ will do so in accordance with TERP's funding structure and revenue disbursement.

No changes were made in response to this comment.

Comment

Fenceline Watch commented that the TERP credit used for the fee program creates a "self-dealing" problem since TERP provides grants to industries like trucking, farming, and construction to replace old machinery and upgrade to cleaner technology. Fenceline Watch stated this process gives industry bad actors that exceed their regulatory limits a credit into a fund to reinvest back into their non-compliant facilities and infrastructure.

Response

The commission disagrees that the Section 185 fee program poses a conflict of interest or is "self-dealing." Trucking, farming, and construction industries are not major stationary sources and are not subject to this fee program; similarly, mobile source equipment at stationary sources are not subject to Section 185 fees. Additionally, TERP funds upgrades to

mobile source equipment that meets or exceeds federal emissions requirements, so funding of non-compliant infrastructure does not occur.

The commission also disagrees that the penalty fee program allows any major stationary source to exceed regulatory limits, as the penalty fee program does not, and cannot, alter requirements for emission authorizations under the TCAA.

The commenter provided no information to support its generalized allegation about the "non-compliant" facilities and infrastructure of major stationary sources, and the commission disagrees that the penalty fee program implies that this is true. FCAA, §185 requires a penalty fee for emissions that exceed 80% of a major stationary source's baseline amount, regardless of whether those emissions were authorized or not. The commenter incorrectly assumes that such emissions are not authorized.

No changes were made in response to these comments.

Comment

Earthjustice Group One and Earthjustice Group Two stated that the fee program appears to follow the FCAA by assessing the fee but will not result in the collection of a fee from any major stationary sources. Similarly, Fenceline Watch stated that not one major stationary source of VOC emissions will pay a penalty fee to the state under this fee program.

Response

The commission disagrees that the Section 185 fee program will not lead to the collection of fees. The Section 185 fee program assesses a fee on each major stationary source in a nonattainment area, and the sum of those fees constitutes the nonattainment area's total fee

obligation (Area §185 Obligation). If TERP revenue or revenue from a future grant program does not cover the entire Area §185 Obligation, major stationary sources owe a prorated fee to ensure the entire Area 185 Obligation is collected for each fee assessment year.

No changes were made in response to these comments.

Comment

Better Brazoria commented that EPA emphasized that the program must result in "enforceable" emissions reductions to comply with the FCAA and that TCEQ's fee program is not an equivalent alternative because it does not require any new enforceable measures. Better Brazoria also commented that the 2010 EPA guidance contemplates that mobile sources should only be assessed fees where major sources have "well controlled" emissions. They stated that an area classified in severe nonattainment, which indicates perpetual NAAQS compliance problems, does not have "well controlled" emissions.

Response

The commission disagrees that FCAA, §185 requires a fee program that achieves enforceable emissions reductions. Additionally, EPA's 2010 Guidance memo is clear that Section 185 fee program equivalency is demonstrated through quantification of fee assessments and/or emissions reductions, not through demonstrating the enforceability of any emissions reductions.

The commission also disagrees that the major stationary sources in the DFW and HGB nonattainment areas are not well controlled. Major stationary sources of ozone precursor emissions located in a severe ozone nonattainment area are subject to the highest level of regulation including 1:1.3 emissions offsets and LAER control technology required for major

modifications at, or new construction of, major stationary sources. EPA's 2010 guidance memo stated "EPA recognizes that section 185 is not strategic in imposing emissions fees on all major stationary sources, including already well-controlled sources that have few, if any, options for avoiding fees by achieving additional reductions. States can be more strategic by crafting alternative programs that exempt or reduce the fee obligation on well-controlled sources ...."

The commission further does not agree that a severe classification implies the area's major sources are not well-controlled. As stated above, these sources are subject to more stringent permitting offset requirements and the requirement to install LAER. Furthermore, as discussed in this preamble, mobile sources make up a larger proportion of NO_x emissions in the DFW and HGB nonattainment areas. Additionally, area stationary sources are the largest portion of VOC emissions in the DFW and HGB nonattainment areas. Thus, it does not follow that a severe classification is a result of major stationary sources not being well-controlled.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Earthjustice Group One commented that TERP must be equivalent to FCAA, §185 to be lawfully used in an equivalent alternative fee program. Earthjustice Group One contended that since FCAA, §185 requires a direct penalty and incentive program and TERP is indirect by offering grants money to replace older equipment, TCEQ's Section 185 fee program is not equivalent to a conventional fee program and TERP cannot be used to offset the fee on major stationary sources. Harris County Attorney General's Office stated that the Section 185 fee is a direct

regulatory penalty imposed on major stationary sources as a source-specific economic consequence for emissions. Since the TERP program is an indirect incentive program for voluntary emission reduction projects, not a direct penalty for non-compliance or economic incentive for source-specific emission modifications, then TERP should not serve as a legal substitute for the Section 185 penalty fee. Better Brazoria stated that even if an equivalent alternative fee program was allowed, TCEQ's fee program does not follow EPA's 2010 guidance requirement for an alternative program to be equivalent, since the TCEQ Section 185 fee program must result in the same amount of emissions reductions and/or fee revenue collected from a conventional Section 185 fee program. More specifically, Better Brazoria stated that TERP revenue cannot be used to offset the fee on major stationary sources because the emissions reductions from TERP were not quantified and demonstrated to provide equivalent or better emissions reductions when compared to a conventional fee program. Since emissions reductions are required by FCAA, §185, TCEQ has not demonstrated its program is equivalent without directly assessing a fee on major sources. Earthjustice Group Two stated that TCEQ's fee program is not an equivalent alternative program.

Response

The commission disagrees that the fee program is not an equivalent to the FCAA, §185 requirements. The commission developed its Section 185 fee program to meet the requirements of the FCAA, §185 and EPA guidance. EPA's 2010 guidance memo provides options for equivalent Section 185 fee programs and stated that it is appropriate for states to focus on achieving similar fee revenue. Therefore, this rulemaking focuses on achieving the same amount of fee assessments to fulfill the equivalency requirement. Additionally, the commission disagrees that emissions reductions are required under a conventional or equivalent Section 185 fee program; emissions reductions are not guaranteed under FCAA, §185.

The adopted Section 185 fee program is designed to be an equivalent fee program using the fee assessment option. As described in this preamble, TERP revenue that is collected and expended in a nonattainment area is documented in a Fee Equivalency Account for each nonattainment area. The Fee Equivalency Account documents the amount of TERP revenue available to offset the fee for each fee assessment year. There is no exchange of money between the TERP and the Fee Equivalency Account. Annually, TCEQ staff determines a nonattainment area's total fee obligation (Area §185 Obligation) and if the TERP revenue in the Fee Equivalency Account exceeds the Area §185 Obligation, then major stationary sources are assessed but do not pay a fee. If the TERP revenue in the Fee Equivalency Account is less than the Area §185 Obligation, then major stationary sources are assessed and pay a prorated fee to ensure the entire Area §185 Obligation is annually met. The TCEQ's process of calculating the annual Area §185 Obligation, applying the credit from applicable TERP revenue, and determining whether assessing a prorated fee on major stationary sources is necessary to meet the annual Area §185 Obligation guarantees assessment of equivalent revenue each fee assessment year.

Since the commission is adopting a Section 185 fee program that is equivalent based on fee assessments, TERP emissions reductions are not quantified. However, the commission disagrees that TERP represents an indirect emissions reduction. The TERP grants result in actual emissions reductions of ozone precursor emissions. These reductions are quantified and reported to the Legislature biennially in reports available on the TERP webpage (*https://www.tceq.texas.gov/airquality/terp/leg.html*).

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the

intent of this rulemaking.

Comment
Better Brazoria, Earthjustice Group Two, Environmental Groups, and Public Citizen commented that since the proposed fee program violates the FCAA, an EPA disapproval means the state is at risk for losing delegation of the program to EPA and the millions of dollars in revenue it could create. Environmental Groups stated that the fee program's risk of EPA disapproval would prolong meaningful action in these severe nonattainment areas. Earthjustice Group Two stated that the FCAA is unambiguous and plain and does not contain language that provides EPA with authority to approve alternative fee programs, and that EPA Region 6 confirmed its lack of authority to approve nonconforming plans in public meetings. Similarly, Better Brazoria stated that EPA indicated that an alternative program with flexibilities would potentially not be allowed for the 2008 eight-hour ozone standard. Earthjustice Group Two also stated that EPA did not provide guidance for fee program development under the 2008 eight-hour ozone standard, so TCEQ inaccurately relied on inapplicable guidance for the revoked one-hour ozone standard. Earthjustice Group Two further commented that TCEQ's inappropriate reliance on the inapplicable EPA 2010 guidance document and EPA approvals of other similar programs for the revoked one-hour ozone standard do not provide TCEQ with the authority to propose or EPA the authority to approve an alternative fee program for the 2008 eight-hour ozone standard. Earthjustice Group Two stated that EPA's requested remand of its approval of TCEQ's similar HGB Section 185 fee program for the revoked one-hour ozone standard as further evidence on lack of authority. Earthjustice Group Two asserted that EPA recognized that the baseline amount flexibilities in the HGB one-hour fee program may not be lawful in its requested remand. Environmental Groups commented that EPA indicated that components of the HGB one-hour fee program may not be approvable for the 2008 eight-hour ozone NAAQS, such as the use of TERP.

Response

The commission acknowledges that if the state does not submit a fee program to EPA or if EPA does not approve a state's fee program, FCAA, §185(d) requires EPA implementation of the Section 185 fee program with federal collection of the revenue, with interest, and that the revenue is not returned to the state. However, the commission does not agree that the Section 185 fee program violates FCAA, §185. As discussed elsewhere in this Response to Comments, TCEQ interprets FCAA, §172(e), to allow equivalent Section 185 fee programs when a NAAQS is strengthened. The commission disagrees that reliance on the EPA's 2010 guidance memo and approval of one-hour ozone standard Section 185 fee programs is inappropriate because EPA did not provide states with Section 185 fee program development guidance for the 2008 eight-hour ozone standard. Based on the FCAA, §172(e) interpretation in EPA's 2010 guidance memo, this Section 185 fee program is similar to the equivalent alternative fee programs developed for the one-hour ozone standard and therefore the commission is relying on the same guidance and approvals. Additionally, EPA recently proposed approval of an equivalent alternative fee program under the one-hour ozone standard for Antelope Valley and Mojave Desert (89 *FR* 29277) which relied on the principles identified in EPA's 2010 guidance memo.

The commission also disagrees that TCEQ does not have the authority to propose (or adopt) or that EPA does not have the authority to approve the fee program. The commission has the authority to adopt rules as well as authority to adopt and implement required air quality control plans for the proper control of the state's air. Furthermore, the commission does not agree with the assertion that EPA's voluntary remand of the Section 185 fee program under the one-hour ozone standard approval is evidence that the FCAA does not allow states to adopt an alternative fee program. Instead, EPA's recent proposed approval for Antelope Valley and Mojave Desert (discussed elsewhere in this Response to Comments) supports

TCEQ's adoption of an alternative fee program.

Regarding EPA's potential action on this rulemaking, informal statements during stakeholder meetings are not official responses or actions on behalf of EPA decision-makers. The commission expects that EPA's determination regarding the approvability of an equivalent alternative program for the 2008 eight-hour ozone standard will be determined through federal Administrative Procedure Act rulemaking.

Lastly, the commission disagrees that the risk of an EPA disapproval would prolong meaningful action in these nonattainment areas, since the Section 185 fee program would be implemented upon an EPA determination of failure to attain, which, if necessary, would likely occur while EPA action on this rule was pending. Additionally, as discussed elsewhere in this Response to Comments and in this preamble, FCAA, §185 does not require emission reductions.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Fenceline Watch commented that for TCEQ to submit an alternative fee program, EPA regulatory oversight is needed because of the various court battles that occurred for alternative fee programs under the one-hour ozone standard.

Response

The commission notes that EPA has regulatory oversight for all FCAA programs, including

this Section 185 fee program. EPA is also required to review and take action on all revisions to the SIP.

No changes were made in response to this comment.

Comment

Twelve individuals commented that TCEQ's proposal shows favoritism towards industry and funds should come from companies and not the public. Three individuals similarly noted that industry should not escape consequences for polluting. An individual commented that if there are not any fees ("fines"), the industry pollution will become worse. Two individuals commented that industry makes money from activities that produce pollution so they should pay Section 185 fees instead of the public. Two individuals added that these large polluters have ample money to pay their fees. Better Brazoria and an individual commented that the use of the mobile sources fees which shifts the financial burden from major polluters to taxpayers. An individual stated they expect industry to accept responsibility and not add to individual Texan's economic burdens. Better Brazoria and two individuals stated that by transferring fees between mobile sources and major stationary sources the burden is improperly placed on the broader population. Three individuals added that this transfer of fees allows industry to get away with causing damage and rewards corporate negligence and urged TCEQ to make industry pay their fees. An individual stated that this rule is a transfer of wealth from taxpayers to corporations and allows private corporations to pollute without paying fees ("fines") they already ignore. Environmental Groups further stated that funds deposited into the General Revenue-Dedicated TERP Account No. 5071 are not derived from any fees from point-source polluters, noting that it is fundamentally unfair that fees collected from mobile sources would "forgive" fees on industrial pollution. Air Alliance Houston and one individual questioned how paying or offsetting the fee ("fines") to subsidize industry using citizen's taxes involves the

prevention and reduction of pollution. Seven individuals opposed having Texas drivers and taxpayers pay annual vehicle registration fees that would offset fees that industry is responsible for and want the fees collected from industry. Public Citizen and Environmental Groups noted that using publicly funded TERP money to offset or prorate penalties of private industry is a paper game. Harris County Attorney's Office stated that the use of TERP funds shifts the ongoing costs of nonattainment from private entities to public funding. Eleven individuals commented that the intention of the TERP program is to decrease vehicle emissions and not subsidize industrial emissions. An individual opposed TERP funds paying for federal penalties. Nine individuals commented that industry not paying the fee means that the financial burden shifts to taxpayers and this amounts to taxpayers providing subsidies for major polluters. Better Brazoria commented that the cost-shifting imposes fees on one group, drivers, to finance exemptions for another group—polluters. Two individuals stated that TCEQ protects private interest over public interests. The individual further stated that the proposed rule protects industry polluters. Two individuals stated that it does not reflect the interests of the public or the environment. One individual stated TCEQ's proposed rule weakened federal regulations in favor of industries. Ten individuals commented that TCEQ's proposal excuses polluters from FCAA requirements. Air Alliance Houston and two individuals questioned why large industry were not being held responsible for their contribution to ozone pollution.

Response

The commission disagrees that using TERP revenue expended and collected in a nonattainment area to offset the fee on major stationary sources constitutes a tax or fee on the public, improperly shifts the TERP fee from private companies to citizens or creates any public economic burden. The Section 185 fee program does not change how TERP operates. The same amount of TERP revenue is available to fund projects in the nonattainment area.

There is no exchange of money or conversion of money between TERP and the Fee Equivalency Account for a nonattainment area. The amount of TERP revenue for a severe or extreme ozone nonattainment area for a given year is recorded as a credit in a TCEQ database. This credit is used to offset the fee assessed on major stationary sources as allowed by the Section 185 fee program.

TERP revenue is funded from fees and surcharges on obtaining a certificate of vehicle title for all vehicles, the purchase or lease of heavy-duty vehicles and equipment, and registration and inspection of commercial vehicles. The primary purpose of TERP is to obtain emissions reductions from mobile sources, which constitutes the largest portion of NO_x emissions in the DFW and HGB nonattainment areas, and the reduction of emissions does not change because of the Section 185 fee program. As discussed elsewhere in this Response to Comments, the economic burden of a conventional fee could be significant to both the nonattainment area and the country.

The commission has no information regarding the ability of major stationary sources to pay the Section 185 fee.

The commission disagrees that the fee program does not collect fees from major stationary sources and therefore subsidizes industry's fees. Annually, TCEQ will assess the full Section 185 fee due for each major stationary source and sum all of the major stationary sources' fee to determine the entire fee for the nonattainment area (Area §185 Obligation). If there is not enough TERP revenue or revenue from a future grant program to cover the entire Area §185 Obligation for a nonattainment area, then major stationary sources will pay a prorated fee to ensure the entire required fee assessment amount for a given fee assessment year is collected in full.

Using TERP to offset the fee on major stationary sources is equivalent or better than a conventional fee program since emissions reductions by major stationary sources are incentivized but are not required by FCAA, §185. TERP results primarily in NO_x emissions reductions from mobile sources, which are the largest source of NO_x emissions in the DFW and HGB nonattainment areas, but could also result in VOC emissions, depending on the emission reduction project.

The commission does not agree that if major stationary sources do not pay the fee that pollution will worsen. Ozone concentrations are affected by numerous factors that drive ozone formation: meteorology, background ozone, presence of precursors, and emissions.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Earthjustice Group One stated that the fee program cannot lawfully use public funds to avoid imposing fees on private industry since it constitutes a gift from the State to industry which is unconstitutional under the Texas State Constitution's gift clause. The Texas Constitution's gift clause does not allow the State to cover a private liability and by statute the Texas Emissions Reduction Plan's funding comes from Texas residents' titling and purchasing fees on motor vehicles. Earthjustice Group Two stated that TCEQ would aggregate the TERP funds and use them to pay for the Section 185 penalties and then use the Section 185 penalties to fund TERP grants. Harris County Attorney's Office asserted that by using publicly funded TERP resources to offset Section 185 fee obligations, TCEQ's proposed program was effectively converting

public environmental funds into subsidies for private regulatory penalties, which may be an unconstitutional use of public funds. One individual commented that using TERP funds for federal penalties may not be legal, as those taxpayer funds are not intended to be used to pay for federal penalties. Air Alliance Houston stated that it was unprecedented for a regulatory body to pay fines or credit on behalf of a regulated entity.

Response

The commission disagrees that the Section 185 fee program's offset mechanism constitutes a gift to industry or that TCEQ uses the fees paid by Texas residents to pay for the Section 185 fee because actual funds are not transferred from TERP to the Section 185 fee program.

The Section 185 fee program does not change how TERP program operates. There is no exchange of money or conversion of money between TERP and the Section 185 Fee Equivalency Account for a nonattainment area. The amount of TERP revenue for a severe or extreme ozone nonattainment area for a given year is recorded as a credit in a TCEQ database. Specifically, this accounting mechanism is called the Section 185 Fee Equivalency Account and is a documentation mechanism to verify the amount of TERP revenue collected in the 2008 eight-hour ozone nonattainment area available to offset the total Section 185 fee obligation from all major stationary sources located in that area. A gift clause violation requires an expenditure or transfer of public funds to a private entity. As stated above, TERP funds are not expended, transferred, or appropriated to a private entity to cover the penalty fee obligation. Additionally, even if there were an expenditure, as discussed in this preamble, the commission has determined that the offsetting of the penalty fee provides public benefits and achieves a legitimate public purpose (environmental benefits from further incentivizing emission reductions as well as limiting potential economic burden). Therefore, the fee program is not in violation of the Texas Constitution's gift clause.

The commission disagrees that Section 185 fee revenue is used to pay for TERP grants and projects. There are no proposed changes to how TERP operates because of the Section 185 fee program. The same amount of TERP revenue will be available for TERP grants used to reduce NO_x emissions in the nonattainment area. TERP related fees paid by the public are deposited toward the intended use to fund the TERP program. The TERP revenue collected and expended in a nonattainment area funds TERP projects in the nonattainment area.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

An individual suggested a tax on natural gas as another funding source to pay this fee. Another individual commented that if it is for the public good that taxpayers pay for the pollution as well as pay for their health, then have it be fair and tax all industry products and not just gasoline.

Response

The commission appreciates the additional fee revenue options to offset the fee; however, the commission does not have the authority to propose new taxes.

No changes were made in response to these comments.

Comment

The Hon. Brian Harrison supported the DFW and HGB 2008 eight-hour ozone nonattainment area's Section 185 fee obligation to be partially satisfied by crediting TERP revenue spent on

point source projects. Similarly, Ash Grove, Cemex, and Holcim supported the use of TERP funds to satisfy the Section 185 fee since mobile sources are the single largest combined contributor of NO_x emissions in Texas. The Hon. Brian Harrison requested any effort to meet the federal requirements without unnecessary regulations, taxes, or fees on his already overtaxed constituents.

Response

The commission appreciates the support. To clarify, the TERP program provides grants intended to reduce primarily NO_x (an ozone precursor) emissions primarily from mobile sources, for example replacing older equipment with newer cleaner equipment.

No changes were made in response to these comments.

Comment

Ash Grove and Holcim supported the use of TERP and recommended additional offsets through TERP-funded mobile source reductions and offsets that target area sources. Ash Grove and Holcim argued that this approach directly benefits regional air quality by addressing a larger share of the emissions inventory compared to point sources alone, and referenced a presentation given on June 10, 2025, by NCTCOG. Ash Grove and Holcim highlighted the 2006-2026 projections for NO_x emissions from area sources compared to those of point sources within the DFW area from the presentation and stated that area sources and population growth are the main drivers of emissions increases and non-attainment in the DFW area. Ash Grove also stated that mobile sources are projected to be a significant contributor to 2026 emissions in the DFW nonattainment area.

Response

The commission appreciates the support. The commission clarifies that currently there are no additional grant programs for mobile sources or grant programs that target area stationary sources, but as discussed in this preamble, future TCEQ-administered grant programs that reduce one or more ozone precursor emissions in the applicable nonattainment area could be evaluated for fee offsets. As discussed elsewhere in this Response to Comments, there are no changes to how TERP operates because of this rulemaking. Comments regarding area sources and population growth's future impact on the DFW area's emissions are outside the scope of this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Ash Grove provided the following understandings that the DFW and HGB nonattainment areas Section 185 fee obligation could be partially satisfied from TERP or future TERP grants, and that credits applied toward each area's fee obligation would only be equal to TERP grants for reducing emissions in the non-attainment areas. Ash Grove also commented that the fee program would not result in an increase to TERP fees already levied.

Response

The commission clarifies that TERP revenue collected and expended in a nonattainment area is used to offset or credit the fee on major stationary sources, not the specific TERP grants. The TERP revenue may fully or partially offset the total area's fee obligation (Area §185 Obligation) for a fee assessment year. If TERP revenue as documented in the Fee Equivalency Account could not offset the entire Area §185 Obligation, then major stationary

sources would be assessed a prorated fee for that fee assessment year.

The commission notes that nothing in this rulemaking directly regulates TERP fees or surcharges. Several different state agencies are responsible for assessing the fees and surcharges that fund TERP, and speculation on whether these fees will increase is outside of the control of TCEQ and outside of the scope of this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Industry Groups supported the crediting of TERP funds to satisfy Section 185 fees in order to facilitate mobile source emissions reductions due to TCEQ's limited ability to regulate mobile source emissions which are the largest source of NO_x in Texas. Gerdau and Texas Lime also favored the use of TERP revenue noting that a significant portion of TERP funding comes from surcharges on heavy-duty diesel equipment purchased by industries subject to Section 185.

Response

The commission appreciates the support and agrees that mobile sources are the primary driver of NO_x emissions in the DFW and HGB nonattainment areas. Although emissions reductions are not required by, and are therefore not the intent of FCAA, §185, based TCEQ's interpretation of FCAA, §172(e), the use of TERP provides an equivalent or better program. TERP is designed to reduce NO_x emissions from a source category in the nonattainment areas for which the commission has limited authority to otherwise regulate under Title II of the FCAA.

TERP's funding mechanisms have no bearing on this Section 185 fee program because TERP's operations do not change because of this Section 185 fee program. There is no exchange of money between TERP and the Fee Equivalency Account for a nonattainment area.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

While NCTCOG supported the use of TERP to offset the 185 Fee obligation, they disapproved of the offsets coming from the TERP Trust which is currently being fully expended to fund emissions-reducing projects in the region. Instead, they suggested that additional money should be withdrawn from the TERP Fund Balance, so that existing and future projects will continue to be funded in addition to the 185 fee offsets and therefore achieve air quality improvements.

Response

This rulemaking did not propose any changes to TERP and any changes to TERP are beyond the scope of this rulemaking. TERP is funded from revenue deposited to the TERP Trust established under THSC Section 386.250 as an account outside the state treasury. Use of the revenue deposited to the TERP Trust is authorized by the Texas Legislature and must be utilized as prescribed.

No changes were made in response to this comment.

Comment

Gerdau and Texas Lime requested that TCEQ work with the Texas Legislature to increase TERP revenues to ensure a full offset of the Section 185 fee obligation in the DFW area due to the significant contribution of ozone precursor emissions from mobile sources. NCTCOG also requested that TCEQ work with the Texas Legislature to award additional TERP funds to the DFW area, specifying the amount should be no less than the area's Section 185 fee obligation.

Response

The commission remains neutral on legislative matters as state government agencies may not legally engage in lobbying activities.

No changes were made in response to these comments.

Comment

Industry Groups commented that they understand FCAA, §172(e) anti-backsliding requirements to allow equivalent alternative programs for the Section 185 fee program under revoked ozone standards and that there is no authority excluding equivalent alternative programs for strengthened ozone standards. Industry Groups noted that EPA has interpreted FCAA, 172(e) to apply when an ozone standard is strengthened and cited several legal cases.

Response

The commission appreciates the support and agrees that FCAA, §172(e) allows equivalent Section 185 fee programs when an ozone standard has been strengthened.

No changes were made in response to this comment.

Baseline Amount

Comment

Fenceline Watch commented that TCEQ is incorrect that FCAA, §185 does not address baseline emissions for major stationary sources permitted after the attainment date and listed three options for setting the emission baseline: using the lower of: the actual emissions, allowable emissions under the permit, or allowable emissions under the SIP. Fenceline Watch stated that TCEQ must set an initial baseline as the major source permit allowable for minor sources that existed on the attainment date but later became major sources.

Response

The commission disagrees that the baseline amount must be the permit allowable for minor sources that transitioned to major source status after the attainment year (referenced as baseline year in this rulemaking). As discussed in this preamble, new major stationary sources that started operating during or after the baseline year, which includes minor sources that transitioned to major source status, choose between the lower of their baseline emissions (actual emissions in the emissions inventory) or permit allowable emissions during the first 12 consecutive months operating as a major stationary source. The choice of the lower of actual emissions and allowable emissions follows FCAA, §185(b)(2). The requirement of the first 12 consecutive months as the baseline timeframe is necessary since these new major stationary sources did not operate during the baseline year or only operated for a portion of the baseline year.

No changes were made in response to these comments.

Comment

Better Brazoria commented that new major sources after the attainment date that were

permitted but not operational and delay operations until after the attainment year must not be exempt from the fee. For new major sources that were recently permitted, Better Brazoria suggested baseline amount approaches that depend on when the source became major. Better Brazoria's proposed categories would all be subject to allowable emissions from permits, plans, applicable rules, and/or implementation plans, and for actual emissions, an extrapolation of emissions over the first year operating as a major source was suggested. Better Brazoria commented that for an existing minor source that transitioned to a major source after the attainment year, the baseline emissions could be calculated as the lower of either: (1) emissions allowable by permits, or rules, for the source, extrapolated over a year from the first operational period as a major source; or (2) actual emissions for the source extrapolated over a year from the first operation period as a major source.

Response

The commission agrees that new major stationary sources permitted as a major source but were not operational until after the attainment year (referenced as baseline year in this rulemaking) are not exempt from the fee.

While this rulemaking did not categorize new major stationary sources in the same manner as suggested by the commenter or include an emissions extrapolation option, §101.706 includes baseline amount determination for new major stationary sources during or after the baseline year, which includes minor sources that transitioned to major source status during or after the baseline year. These major stationary sources use the first full year (12 consecutive months) operating as a major source and choose the lower of the actual emissions or the permitted emissions during that timeframe to set the baseline amount. The use of actual emissions during the first 12 months after the start of operation is more accurate than either relying on permits, plans, rules, implementation plans, or an

extrapolation of a few months of emissions data to 12 months.

No changes were made in response to these comments.

Comment

Better Brazoria commented that a major stationary source must have a Title V permit per §§182(d), 182(e), 182(f) and 185 and pending or untimely Title V permits renewals should not be exempt from the fee. The fee for these pending or late Title V permits should be based on previous years' actual emissions or extrapolated for recent operational periods, if necessary.

Response

The commission agrees that major stationary sources with a pending Title V permit or late Title V renewal are subject to this rulemaking. This rulemaking uses the definition of a major stationary source as defined §116.12. A Title V permit is one indicator of a major stationary source; however, regardless of whether a major stationary source has a Title V permit, a pending Title V permit, or did not renew its Title V permit in a timely manner, it is still subject to this rule.

The commissions disagrees that a different baseline amount determination is needed for the provided Title V permit scenarios. Any major stationary source with a late or untimely Title V permit will follow the provisions of this rulemaking to set the appropriate baseline amount.

No changes were made in response to these comments.

Comment

Green Consulting approved of sources that become major (either by increased emissions or by classification change) to use their actual emissions or total authorized emissions as the baseline.

Response

The commission appreciates the support. The commission notes that new major stationary sources may choose the *lower of* their baseline emissions during the first year (12 consecutive months) of operation as a major or the total annual authorized emissions during the first year (12 consecutive months) of operation as major source.

No changes were made in response to this comment.

Comment

Summitt requested a rule language update to allow for different timelines to establish baseline emissions for new major sources constructed after the attainment date due. For new sources, during startup and shakedown periods, emissions units are not typically operating at full load; therefore, using the first 12 consecutive months of operation to set the baseline amount would lead to artificially low baseline emissions. Summitt mentioned that permit conditions historically allowed for up to 180 days before requiring testing so that a unit can reach full operating levels. To be more comparable with existing sources, Summitt recommended three alternative timelines to determine baseline emissions for new major sources including (i) any consecutive 12 month period within the first 24 months of operations, (ii) a 12 month period beginning after the unit has achieved 90% of designed operating levels averaged over 30 days, or (iii) the 12 month period after one year of operating as a new major source. Summitt contended that since the adjustment of baseline emissions for new major sources with less than 24 months operation is limited to the first consecutive 24 months of operations, it does

not address their concerns about including unrepresentative emissions from startup or shakedown periods in the baseline emissions.

Response

The commission disagrees that the current rule language does not allow flexibility to exclude initial startup and shakedown periods from the baseline amount. §101.705 allows a new major stationary source that started operating during or after the baseline year to use the first 12 consecutive months operating as a major source as the timeframe to determine the baseline amount. Federal regulations such as 40 Code of Federal Regulations §72.2 typically define "start of operation" for EGUs as the date when the unit begins supplying power for sale or use (i.e., to the grid or for industrial site use). This rule language provides flexibility that these initial startup and shakedown periods are not included in the first 12 consecutive months of operation as a major stationary source since the source typically has not begun its regular operations until the completion of this initial startup and shakedown period.

Additionally, these sources could request adjustment of baseline emissions once 24 months of consecutive operation has occurred. The start of the 24 months of consecutive operation as a major source could begin after the completion of the initial startup and shakedown periods providing this is consistent with federal and/or state regulations.

No changes were made in response to these comments.

Comment

Summitt requested an exemption for new major stationary sources that have installed the LAER controls which limit the ability to generate more emissions reductions and that have offset

their emissions from the retirement of emissions reduction credit which means that contributions of greater than 20% net emissions reductions have already been made in the nonattainment area. They suggested that including these sources in the Section 185 fee program establishes long-term costs for not meeting unattainable goals for sources that have already contributed to attainment. Summitt also recommended excluding individual emissions units that have been fully offset by emissions reductions credits from the calculations of baseline emissions and actual emissions.

Response

The commission recognizes that these sources are well controlled and that all major stationary sources in nonattainment areas are subject to LAER and emission offset requirements for major modifications and/or new construction. However, the FCAA, §185 does not allow for the exclusion of any major stationary source from the Section 185 fee program or individual emissions units located at a major stationary source from baseline amount determinations.

No changes were made in response to these comments.

Comment

Ash Grove provided specific details and estimated future contributions of NO_x emissions from its plant based on the photochemical modeling performed in DFW Severe Area Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone Standard. Ash Grove stated that this Section 185 rule does not allow it to use the baseline NO_x emissions level from the conservative maximum emissions assumption in the photochemical modeling which included emissions prior to their 2014 modernization.

Response

The commission disagrees that an additional baseline emissions option is needed to account for the photochemical modeling timeframe used in the DFW Severe Area Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone Standard. The requirements of photochemical modeling for attainment demonstration SIP revisions are outside the scope of this rulemaking. Additionally, the FCAA, as well as EPA guidance, does not allow major stationary sources to establish baseline emissions in this manner for the purposes of the Section 185 fee program.

No changes were made in response to these comments.

Comment

Industry Groups, Gerdau, and Texas Lime supported the use of EPA's PSD guidelines to calculate baseline emissions for major sources that are irregular, cyclic, or otherwise vary significantly from year to year using an average calculated over more than one calendar year.

Response

The commission appreciates the support and notes that for sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year, PSD guidelines allow for a source to choose a representative 24-consecutive month period within a specific historic look-back period to calculate average emissions for baseline determination. For EGUs, the specific historic look-back period is limited to a representative 24-month period within the last 5 ~~10~~ years prior to the baseline year and for non-EGUs the historic look-back period ~~periods~~ is the last 10 ~~5~~ years prior to the baseline year

No changes were made in response to these comments.

Comment

Ash Grove, Cemex, and Holcim commented that the fee program allows the use of baseline emissions established using data from a 10-year period for all existing major sources of NO_X and VOCs. They argued that cement producers who invested in emission reductions prior to this baseline window are penalized for taking early action to lower their emissions and this rule creates an inequitable system for facilities that made these early air quality improvement investments compared to those that delayed improvements. As a result of this limited baseline window, the cement facilities would owe significant additional fees as compared to using a baseline window that extends further than 10 years to account for plant improvements that reduced emissions. They urged TCEQ to allow facilities to credit reductions achieved prior to the 10-year baseline window or allow additionally flexibility to determine baseline emission levels. Ash Grove also requested a baseline amount determination option as the highest annualized average emission since 2008, the promulgation year for the 2008 eight-hour ozone standard.

Response

The commission clarifies that not every existing major stationary source is allowed to use a historic 10-year look-back period to establish the baseline amount. This option is only available to sources with emissions that qualify as irregular, cyclic, or otherwise significantly varying. If a major stationary source meets those criteria, then a 24-month consecutive period within a specific historic look-back period may be chosen to average the baseline emissions. The historic look-back period for non-EGUs is the last 10 years prior to the baseline year. For the DFW and HGB nonattainment areas the PSD allowed look-back period for a non-EGU stationary source would be 2017-2026 provided the attainment date does not change.

The commission disagrees that additional years for look-back periods are allowed either under PSD guidance. The commenters provided no regulatory or legal basis to allow additional timeframes to account for higher emissions in the baseline amount. If the sites qualify as sources with irregular, cyclic, or otherwise significantly varying emissions, then a 10-year historic look-back period would be allowed. There are no other statutory provisions or guidance that allow for either additional look-back years or the highest average annualized emissions rate to account for the higher emissions that occurred before the installation of control equipment or plant modernization. Doing so would artificially inflate the baseline amount so that future fee assessment years are more likely to be 20% or more below the baseline amount which would violate circumvention requirements in requirements of §101.3.

No changes were made in response to these comments.

Comment

Better Brazoria commented that a major stationary source with emissions demonstrated as irregular, highly variable, or cyclical is allowed to choose a different timeframe from the attainment year to set the baseline amount. Since the purpose of this flexibility is to allow representative emissions in the baseline amount, documentation on process variability must be provided for approval, qualifying major stationary sources must not be allowed to cherry-pick the timeframe for their benefit, and this option must not be extended to all major stationary sources.

Response

The commission agrees with these comments. As discussed in this preamble, if the major

stationary source has emissions that qualify as irregular, cyclical, or otherwise vary significantly from year to year, an alternate method following PSD guidance may be used to determine baseline emissions. The same baseline determination option is also provided for in the Texas New Source Review Program.

The PSD guidance requires sources to provide documentation on the variability of their operations for the selected 24-month period to qualify for this alternate baseline amount so that representative data is selected. TCEQ will evaluate this documentation to ensure the source qualifies for the alternate baseline amount. Additionally, for the selected 24-month period the emissions must be adjusted downward to account for all legally enforceable emissions limitations, so a qualifying source is not allowed to choose a look back period with the highest emissions. EPA's PSD regulations also prevent artificial inflation. If the baseline emissions from the selected 24-month timeframe are higher than the sources' allowable emissions during the baseline year, then the allowable emissions must set the baseline amount.

Since the PSD guidance is specific to sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year, the averaging option is not available for sources with steady-state operations.

No changes were made in response to this comment.

Baseline Amount Aggregation

Comment

Public Citizen, Environmental Groups, and an individual opposed baseline amount aggregation by ozone precursor emissions ("by pollutant") since it would allow industry to exceed the

threshold of one pollutant but avoid fees by balancing against the lower levels of the other pollutant. Better Brazoria stated the reliance on the HGB fee program under the one-hour ozone standard for baseline amount aggregation is not justified since EPA indicated concerns with allowing flexibilities for the 2008 eight-hour ozone NAAQS. Earthjustice Group Two requested an update to the proposed fee program to include separate baseline amount calculations NO_x and VOC to comply with FCAA, §185. Earthjustice Group Two and Better Brazoria opposed the aggregation of NO_x and VOC to determine the baseline amount stating that FCAA, §185 states that the fee applies to each major stationary source of VOCs and FCAA, §182(f) separately extends the coverage of major stationary sources of VOC to major sources of NO_x. Better Brazoria asserted that FCAA, §182(f) did not intend for VOC controls to be replaced by NO_x-equivalent controls and the NO_x requirement is in addition to, not in lieu of, required VOC controls. Earthjustice Group Two asserts that the silence on intermingling language speaks to the intent for the pollutants to have separate baseline amounts and they cited examples of when the FCAA expressly allowed NO_x to be substituted for VOC. Better Brazoria stated that NO_x and VOC may not equally contribute to ozone formation as another reason to not allow pollutant aggregation. Environmental Groups further stated that aggregation could weaken enforcement and undermine ozone reduction goals and urged TCEQ to maintain separate baselines in accordance with EPA precedent. Earthjustice Group Two stated that TCEQ's reasoning for aggregating pollutant baseline amounts is that both pollutants contribute to ozone formation, which is inconsistent with TCEQ's statements that the intent of FCAA, §185 is not emissions reductions.

Response

The commission disagrees that baseline amount aggregation of VOC and NO_x is not allowed or that it is inconsistent with the commission's interpretation that FCAA, §185 does not require emissions reductions. Attachment C of EPA's 2010 guidance memo acknowledged

that pollutant aggregation could be approvable. The plain language of FCAA, §182(f), does not require that SIP rules apply *separately* to VOC and NOx but instead requires that the rule apply to VOC and *also* NO_x. Thus, there is no requirement to calculate the baseline amounts separately. This rule requires major stationary sources of NO_x to also be subject to the Section 185 fee program, and this requirement meets the provision of FCAA, §182(f). The commission's interpretation that FCAA, §185 does not require emissions reductions is not relevant to baseline aggregation for the purposes of Section 185 fee assessment.

The commission disagrees that pollutant aggregation should also not be allowed because of the potential ozone formation differences between VOC and NO_x. As discussed in this preamble, VOC and NO_x emissions reductions have the potential to lower ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas. Based on this information, major stationary sources can aggregate both VOC and NO_x emissions into one baseline amount.

Comments about implementing flexible Section 185 fee programs are addressed elsewhere in this Response to Comments.

No changes were made in response to these comments.

Comment

Better Brazoria also stated that allowing pollutant aggregation may disincentivize sources from applying for a major source application.

Response

The commission disagrees with this comment since a major stationary source is required to

first determine its major source applicability for both VOC and NO_x emissions under §116.12, which is not impacted by this rulemaking. A major stationary source cannot use pollutant aggregation to avoid applicability of this rule or major source status.

No changes were made in response to this comment.

Comment

Industry Groups supported the aggregation of VOC and NO_x for baseline determination and suggested it is consistent with FCAA, §182(f).

Response

The commission appreciates the support and concurs that FCAA §182(f) allows for the aggregation of ozone precursor emissions for baseline determination.

No changes were made in response to this comment.

Comment

Earthjustice Group Two requested an update to the proposed fee program to include separate baseline amount calculations for each major stationary source to comply with FCAA, §185. Earthjustice Group Two opposed the aggregation of sites under common control to determine the baseline amount stating that FCAA, §185 states that the fee applies to each major stationary source of VOCs and the fees are calculated per ton of VOC emitted by the source. Earthjustice Group Two contends that the terms “each” and “the” source intend source-specific baseline amounts. By allowing aggregation of sites under common control, one source’s emissions increase could be offset by another source’s emissions decrease from planned renovations or permanent shut-down. Earthjustice Group Two contends that since according to

TCEQ, the goal of FCAA, §185 is not emissions reductions, then there is no reason to allow site aggregation. Earthjustice Group Two stated that TCEQ used EPA's 2010 guidance memo and an inapplicable securities and exchange commissions (SEC) rule as support for the definition of sites under common control. EPA's 2010 guidance memo contradicted a 2018 guidance memo for NSR permitting purposes from EPA. The 2018 guidance memo states that separately permitted facilities' emissions streams would not be aggregated for NSR purposes to determine whether a source is major or minor. Better Brazoria opposed aggregation of emissions across sources in different locations, but under common control, since it conflicts with the FCAA requirement for penalties to incentivize emissions reductions by assessing a penalty on each major source that fails to achieve emissions reductions. Better Brazoria asserted that aggregation of sites under common control disincentivizes a major source from decreasing its emissions because it could reduce emissions at another source included in the aggregated group to eliminate the fee owed and may adversely impact overburdened communities. Better Brazoria provide the example that if there was an emissions decrease at the source(s) located outside the overburdened community, then this could result in an emissions increase at source(s) located in the overburdened community with no fee assessed.

Response

The commission disagrees that sites under common control are not allowed to aggregate to determine a baseline amount. EPA's NSR guidance establishes when a source is major or minor for permitting purposes, the Section 185 fee program applies to sources that are already determined to be major stationary sources. Site aggregation for these Section 185 fee major stationary sources is appropriate for determining baseline amounts, as reflected in Attachment C of EPA's 2010 guidance memo and previously approved by EPA in the Section 185 fee program for the HGB nonattainment area under the one-hour ozone standard.

The commission disagrees that it incorrectly relied on the SEC rule for definition of control. As discussed in this preamble, EPA stated that it would utilize the definition of control used by the SEC and EPA generally continues to assess common control in relation to this definition.

The commission also disagrees that aggregating sites under common control does not follow the intent of FCAA, §185. While the FCAA, §185 may incentivize major stationary sources to reduce emissions in the form of an imposed penalty fee, an incentive is not the same as a requirement and emissions reductions are not required by FCAA, §185.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Industry Groups approved of aggregation of sites under common control for baseline determination.

Response

The commission appreciates the support. No changes were made in response to this comment.

Comment

Better Brazoria, Fenceline Watch, and an individual commented that flexibilities like baseline amount aggregation are not allowed since it violates the plain language of FCAA, §185. Better Brazoria opposes baseline amount aggregation since aggregation is not representative of the

required actual emissions and stated that the rule must assess penalties based on the "actual emissions" of a major source for limited prescribed periods of time. Better Brazoria asserted that if a source selects the highest emissions to total from major sources (either increased or decreased emissions) without providing a cumulative measure and without considering distribution or centrality, it creates an artificial sum of the source's emissions. Better Brazoria also noted that EPA disapproved of portions of Section 185 Fee Programs that average baseline emissions over 2-5 years.

Response

The commission disagrees that fee assessments following the same aggregation option chosen for the baseline amount determination is not representative of actual emissions. This rulemaking follows the same principles of baseline amount aggregation by pollutant and/or sites under common control as approved by EPA in a final rule published in the February 14, 2020, *Federal Register* (85 FR 8411) for the Section 185 Fee Program in the HGB nonattainment area under the one-hour ozone standard.

To be considered a site under common control, the major stationary sources requesting to aggregate must share a Customer Reference Number in TCEQ's Central Registry Database. Sites under common control are determined by TCEQ. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the fee, as addressed under circumvention requirements of §101.3.

If a major stationary source chooses to aggregate by pollutant and/or sites under common control, then the fee is required to be assessed in the same manner. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for the annual fee assessment. Sources are not allowed to artificially inflate baseline amounts

for fee assessment purposes, since the baseline year, same 24-month consecutive period, or other timeframe used to establish baseline amounts are required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation.

The commenter included a reference to an EPA disapproval of another Section 185 fee program that averaged baseline emissions over 2-5 years. The commission did not include this averaging timeframe as an option in this rulemaking.

The commission disagrees that baseline aggregation is not allowed under FCAA, 185. FCAA, §185 allows the administrator to provide guidance for determining baseline amounts and Attachment C of EPA's 2010 guidance memo acknowledged that aggregation could be approvable.

No changes were made in response to these comments.

Comment

Texas cannot engage in source or emission aggregation which allow industry to circumvent fee payment.

Response

The commission disagrees that baseline aggregation by pollutant and/or sites under common control allows the major stationary source to circumvent fee payment. Baseline amounts are first required to be calculated separately for each individual major stationary source for VOC or NO_x emissions, or for both. The separate initial baseline amounts for each pollutant at an individual major stationary source must also be submitted in a format specified by the executive director with supporting documentation. Providing the separate

initial calculations of baseline amounts is intended to provide transparency and consistency and to assist with quality assurance of baseline amount determinations with any subsequent aggregation. After establishing separate baseline amounts, then the baseline amount could be aggregated by multiple pollutants, multiple stationary sources under common control, or both. If an aggregation route is chosen, then that same aggregation method is required for the annual fee assessment.

Additionally, prevention of fee payment circumvention is addressed in the preamble and rule language. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the fee, as addressed under circumvention requirements of §101.3. Major stationary sources that transfer ownership of emissions unit(s) from one major source to a minor source(s) cannot have their baseline amounts adjusted to prevent circumvention of the fee, as addressed under circumvention requirements of §101.3. §101.713(g) relating to Enforcement states that a major stationary source that fails to submit an emissions inventory to circumvent assessment of the fee is subject to enforcement account under Texas Water Code (TWC), Chapter 7.

No changes were made in response to these comments.

Adjustment of Baseline Amount

Comment

Green Consulting approved baseline amount adjustments for newly regulated sites to adjust their baseline emissions after 24 months of consecutive operations.

Response

The commission appreciates Green Consulting's support. The commission clarifies that after completing 24 months of consecutive operations, the major stationary source may request that the baseline amount be adjusted using the average actual emissions during the first 24 months of consecutive operation for the baseline emissions. If the total annual authorizations determined the initial baseline amount were still lower than the adjusted baseline emissions, then an adjustment may not be requested. If during the 24 months of consecutive operation the emissions were irregular, cyclical, or otherwise vary significantly then a baseline amount adjustment may be requested.

No changes were made in response to this comment.

Comment

Green Consulting and Industry Groups requested a rule language update to §101.709 to include emissions authorized outside of Nonattainment New Source Review (NNSR) permits after the baseline year to adjust the baseline amount because permits can be issued outside of Chapter 116, Subchapter B, Division 5.

Response

The commissions disagrees that permits issued under authorizations outside of Chapter 116, Subchapter B, Division 5 for NNSR permits should be allowed to request a baseline amount adjustment. As discussed in this preamble, adjusting a major stationary source's established baseline amount for new construction that occurred after the baseline year is a flexibility. The commission intended that this baseline amount adjustment flexibility only be extended to construction of equipment that went through NNSR since that process requires a netting analysis to determine whether a source is required to use the LAER and emissions offsets. As a result, adjustment of the baseline amount for new construction at an

existing major source could not be requested for other authorization types including but not limited to Permit by Rule and Standard Operating Permits.

No changes were made in response to these comments.

Comment

Better Brazoria commented that selling or transfer of "equipment" between companies should not be allowed when there is credible evidence that an owner is transferring equipment to circumvent the fee. Better Brazoria requested inclusion of objective factors to evaluate whether equipment sold of transferred near or around the attainment date may have been used to avoid the fee.

Response

The commission agrees that ownership transfers of emissions units must ensure no circumvention of the fee. This rulemaking requires that all emissions units located at the major stationary source as of December 31 of the baseline year be included in the baseline amount determination. If a 24-month consecutive period is chosen for a major stationary source that operated the entire baseline year, then all emissions units located at the major stationary source as of December 31 of the baseline year must be included, regardless of whether they were located at the major stationary source during the period chosen. An owner or operator of a major stationary source may not exclude new emissions units added by the baseline year from the 24-month consecutive historical period.

As discussed in this preamble, there are additional safeguarding requirements to ensure ownership-transferred emissions units do not circumvent the fee. A change in control of emissions units does not change the historical operation, reported emissions from the

emissions units, or previously invoiced amounts before the ownership transfer occurred. The ownership transfer must first be approved by and/or reported to the TCEQ Air Permits Division and be appropriately reflected in all related permits before adjustments of the baseline amounts can be requested. The originating major stationary source may transfer (subtract) the baseline amounts and fee associated for each emissions unit having a change in control to the recipient major stationary source who will add the baseline amount for the transferred emissions unit to their baseline amount. There is no change for the calculated baseline amounts for the transferred emissions units or remaining emissions units that were not involved in the ownership transfer. Major stationary sources that transfer ownership of emissions units from one major source to a minor source(s) will not have their baseline amounts adjusted to prevent circumvention of the fee, as addressed under §101.3. To qualify for an ownership transfer baseline amount adjustment, the ownership transfer must occur between major stationary sources of the same pollutant, or aggregated pollutants, located within the same nonattainment area. All adjusted baseline amounts are reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years are not processed based on the final adjustments to ensures accounting stability for the Section 185 fee program.

No changes were made in response to this comment.

Fee Assessment and Payment

Comment

Green Consulting requested clarification that "recorded in the annual emissions inventory" includes TCEQ's non-applicability letter with the total sitewide NO_x and volatile VOC certified in

the letter.

Response

It appears that the commenter refers to the definition of actual emissions in Figure 30 TAC §101.713(f) regarding emissions that must be included for annual fee assessment. The commission disagrees that a clarification is needed since it never intended that Inapplicability Notification Letters with certified emissions totals be used for Section 185 fee program purposes. Since all major stationary sources located in a 2008 eight-hour ozone standard nonattainment area classified as severe or extreme meet the VOC and NO_x emissions reporting thresholds for the TCEQ's point source emissions inventory, these sources may not submit an Inapplicability Notification Letter to TCEQ.

No changes were made to this rule in response to these comments.

Comment

Earthjustice Group Two asserted that assessing and collecting a prorated fee on industry, if TERP funds are insufficient to cover the entire nonattainment area's fee obligation, creates ambiguity on the amount and timing of the fee collection. They mentioned that TERP collections vary by consumer behavior from year to year which means the fee paid by industry will also depend on consumer behavior. Earthjustice Group Two claimed that a conventional fee program allows industry to anticipate its fee and either set aside funds or reduce emissions by 20% after the baseline year to avoid the fee.

Response

The commission disagrees that allowing for prorated fees when TERP funds are insufficient creates ambiguity regarding the amount and timing of fee collection. Static (the same

amount every year) annual fee assessment and collection is not possible, given that emissions may vary every year and the fee rate must be adjusted annually for inflation. Regardless of the Section 185 fee program, EPA does not release the annually adjusted fee rate for inflation until the fall of the fee assessment year (e.g., the 2024 fee rate was released in October 2024). TCEQ and major stationary sources cannot assess the fee until this final fee rate is released by EPA.

With the exception of the first fee collection year, which is dependent on the effective date of EPA's finding of failure to attain notice in the *Federal Register*, TCEQ anticipates annually performing the Fee Equivalency Demonstration in December and if required, would invoice major stationary sources on a prorated fee. Major stationary sources would be invoiced on the prorated fee amount and provided with enough time to pay according to the provisions of §101.714 on Fee Payment.

No changes were made to this rule in response to these comments.

Comment

Better Brazoria commented that to ensure the fees are effective, the regulations should set the fees high enough to compel business to invest in cleaner technologies rather than simply absorb costs as a business expense.

Response

As specified under FCAA, §185(b)(1) and (3), EPA, and not TCEQ, is tasked with setting the fee rate and adjusting it annually for inflation. EPA typically releases the updated fee rate every fall. As discussed in this preamble, the fee calculation appropriately uses EPA's annually provided fee rate.

The commission notes that major stationary sources of ozone precursor emissions have a choice to annually pay the fee or reduce emissions to below 80% of their baseline amount. The business decisions of sources impacted by the fee, such as installing control equipment or curtailing production to reduce emissions, or paying the fee instead of reducing emissions, depend on multiple factors and cannot be predicted.

No changes were made in response to this comment.

Comment

An individual commented that TCEQ should adopt a Section 185 fee program that provides transparency and accountability with fees. Better Brazoria requested a regulatory framework to provide transparency in funding allocation.

Response

The commission disagrees that this rulemaking has not established a Section 185 fee that provides transparency and accountability. Public participation in the rule development process provided transparency and accountability, and the regulatory framework establishing the Section 185 fee program (including baseline emission setting and fee assessment) is clear. In addition to providing the opportunity to comment at a virtual public hearing, TCEQ also provided the public with the option to submit written comments by mail, fax, or electronically through TCEQ's Public Comment system. Instructions for the submittal of written comments were provided in the proposed rulemaking documents and public notices.

No changes were made in response to these comments.

Comment

Ash Grove stated that if point sources reduce their future emissions to less than 80% of the baseline amount then costs increase at each site.

Response

The commission acknowledges the potential business impacts of the Section 185 fee program and the choices facing major stationary sources, such as potential cost increases to either reduce emissions or pay the fee. As discussed in this preamble, the provisions of FCAA, §185 require a penalty fee on major stationary sources of ozone precursor emissions located in a severe or extreme nonattainment area that fail to attain an ozone standard by the attainment date. TCEQ is required to implement these penalty provisions if a severe ozone nonattainment area, such as the HGB or DFW nonattainment areas, after EPA determines that the areas failed to attain the 2008 eight-hour ozone standard by the attainment date.

However, TCEQ has adopted a Section 185 fee program that will allow the partial or full offset of fees owed by utilizing TERP revenue. As discussed in the Fiscal Note of the proposal preamble, "During the first five years, the proposed rule should not impact positively or negatively the state's economy, particularly if TERP revenue is sufficient to offset the Section 185 fee obligation."

No changes were made in response to this comment.

Other Failure to Attain Fee Fulfillment Options

Comment

Environmental Groups commented that supplemental environmental projects (SEPs) are not an appropriate mechanism to offset the Section 185 fee. They stated that SEPs are designed to reduce and remediate pollution, with preference given to communities impacted by the pollution resulting from violations, as part of agreed resolutions for such violations. They explained that per the Legislature, only local governments are entitled to use SEPs to remedy noncompliance. Absent resolution of violations and enforcement actions in the context of the Section 185 fee, they assert that TCEQ does not have the statutory authority to allow major sources to fulfill Section 185 liability via contributions to SEPs. Lastly, they commented that the commission should consider creating a structure within TERP or other agency programs where major stationary sources could contribute actual funds to satisfy Section 185 fee liability.

Response

The commission disagrees that contributions to SEPs are not appropriate to offset the fee as SEPs provide environmental benefits to communities, as prescribed by TWC, §7.067, and such benefits are an important element of the commission's determination that allowing offsets of any required Section 185 fee amount is appropriate. The commission also disagrees that it lacks authority to allow Section 185 fees to be offset using SEPs as the commission has broad authority granted by the legislature in the Texas Clean Air Act, Texas Health and Safety Code, Chapter 382 and the Texas Water Code, Chapter 5 to adopt and implement a plan to rules to safeguard air quality and control the state's air. As discussed elsewhere in this preamble, the commission has determined that allowing the offset of Section 185 fees is appropriate.

This adopted rule provides an option for major stationary sources owing Section 185 fees to offset those fees if the major source is an enforcement respondent that chooses to participate in the SEP program, meets the criteria specified in the rule, and obtains approval

for the Section 185 fee offset. Utilizing the SEP program is voluntary, and participation in SEPs to offset Section 185 fees must conform to criteria, performance, and oversight as required by the SEP program as well as this adopted rule. Further, the commission notes that local governments are not the only entities that are entitled to use SEPs.

The commission appreciates the support for adding funding mechanisms that could be used to achieve environmental benefits but has identified no additional programs that could be used to offset Section 185 fee liability. The commission also agrees that incentivizing additional environmentally beneficial projects is desirable and, in response to this comment and after further consideration of the SEP program, has adopted a rule change that would allow money contributed to SEPs to offset administrative penalties in an enforcement action to also be used to offset the Section 185 fee if the respondent spends at least 110% or more of the SEP Offset Amount. Allowing the crediting of the SEP Offset Amount in this circumstance should incentivize larger compliance projects (or larger amounts paid to third-party pre-approved SEPs) with ozone precursor emissions reductions that directly benefit the nonattainment area. Additionally, the commission has further clarified that no enforcement administrative penalty paid to the commission, or any amount deferred (not paid) as incentive for early resolution of the enforcement action may be used to partially or completely fulfill the Failure to Attain Fee to ensure that only amounts paid to SEPs are creditable to offset the Section 185 fee.

Cessation of Fee Program

Comment

Better Brazoria commented that the fee program should only end according to the FCAA requirement of program termination upon EPA's redesignation of HGB to attainment. For the HGB fee program under the one-hour ozone standard, additional options were provided to end

that fee program, but EPA only explicitly approved the portion of these rules that is consistent with the FCAA. EPA took no action on the other provisions included in the SIP submittal that did not correspond to the FCAA. Fenceline Watch commented that the FCAA is clear that all major sources are subject to the fee program for the entire period of nonattainment.

Response

The commission disagrees that additional provisions beyond an EPA redesignation to attainment are not appropriate for the 2008 eight-hour ozone standard. EPA did approve an additional provision to end the Section 185 fee program relating to EPA otherwise terminating the Section 185 fee requirement in its approval of the Sacramento's Section 185 fee program under the one-hour ozone standard and have proposed approval of this additional provision for Sacramento's Section 185 fee program under the 1997, 2008, and 2015 eight-hour ozone standards (88 *FR* 86870).

No rule changes were in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

SUBCHAPTER K: FAILURE TO ATTAIN FEE FOR THE 2008 EIGHT-HOUR OZONE STANDARD

§101.700 – 101.718

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act.

The new sections are also adopted under TWC, §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also adopted under 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; and 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; and THSC, §382.0622, concerning Clean Air Act Fees, specifying that any fees collected as required by Federal Clean Air Act (FCAA), §185 are clean air act fees under the THSC. The new sections are also adopted to comply with FCAA, 42 United States Code (USC), §7511a(d)(3), (e), and (f) (FCAA, §182(d)(3), (e), and (f)) regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d (FCAA, §185) regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

The adopted new sections implement the requirements of THSC, §§382.002, 382.011, 382.012, 382.017 and 382.0622; TWC, §§5.102, 5.103, 5.105, 5.701 - 5.703 and 5.705 – 5.706; as well as FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d (FCAA, §182(d)(3), (e), and (f), and §185).

§101.700. Definitions.

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

(1) Actual emissions--As defined in §101.10 of this title (relating to Emissions Inventory Requirements).

(2) Area §185 Obligation--The total annual amount of Failure to Attain Fees due from all applicable major stationary sources or Section 185 Accounts in a severe or extreme ozone nonattainment area that failed to attain the 2008 eight-hour ozone National Ambient Air Quality Standard by its applicable attainment date.

(3) Attainment date--The U.S. Environmental Protection Agency-specified date that a severe or extreme nonattainment area must attain the 2008 eight-hour ozone National Ambient Air Quality Standard.

(4) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data submitted to and reviewed by the executive director. The baseline amount is the lower of baseline emissions (actual emissions) or total annual authorizations or pending authorizations emissions at a major stationary source during the baseline year or timeframe as otherwise specified under this subchapter.

(5) Baseline emissions--Emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title. The emissions must include all annual routine emissions associated with authorized normal operations, which includes reported emissions from authorized maintenance, startup, and shutdown activities and excludes all unauthorized emissions. The timeframe options are as follows:

(A) reported emissions from the baseline year; or

(B) reported emissions as an average of any single consecutive 24-month period as allowed under §101.705(b)(2) of this title (relating to Baseline Amount) for major stationary sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year.

(6) Baseline year--The baseline year is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in this subchapter.

(7) Electric utility steam generating unit--As defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

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

(9) Equivalency credits--An amount equivalent to the revenue collected, as long as any revenue is also expended within a nonattainment area, in accordance with §101.703 of this title (relating to Fee Equivalency Account) for accumulation in the Fee Equivalency Account.

(10) Extension year--A year as defined in FCAA §181(a)(5).

(11) Failure to Attain Fee--The fee assessed and due from each major stationary source or Section 185 Account based on actual emissions whether authorized or unauthorized of volatile organic compounds, nitrogen oxides, or both pollutants that exceed 80% of the baseline amount.

(12) Fee assessment year--Calendar year used to calculate and assess the Failure to Attain Fee under the provisions of this subchapter.

(13) Fee collection year--Calendar year in which the Failure to Attain Fee is invoiced.

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

(15) Section 185 Account--The TCEQ-assigned account number for one major stationary source or a group of two or more major stationary sources under common control located within the same severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

(16) Supplemental Environmental Project (SEP) Offset Amount--The portion of an enforcement case's assessed administrative penalty approved for use in the performance of, or contribution to, a SEP, instead of being paid to the commission as a penalty.

§101.701. Applicability.

(a) The provisions of this subchapter will become applicable in an area designated nonattainment and classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) when the U.S. Environmental Protection Agency (EPA) determines that the area has failed to attain the standard by its applicable severe or extreme attainment date. The determination will be the effective date of EPA's finding of failure to attain notice published in the Federal Register.

(b) Except as otherwise provided in §101.702 of this title (relating to Exemption), the provisions of this subchapter apply to all regulated entities that meet the definition of major stationary sources of volatile organic compounds or nitrogen oxides located in a nonattainment area classified as severe or extreme for the 2008 eight-hour ozone standard.

§101.702. Exemption.

No major stationary source subject to the Failure to Attain Fee under this subchapter is required to remit the fee during any calendar year for which the U.S. Environmental Protection Agency has finalized an extension of the attainment date for the nonattainment area applicable to the major stationary source under the 2008 eight-hour ozone National Ambient Air Quality Standard.

§101.703. Fee Equivalency Account.

(a) Fee Equivalency Account. The executive director will establish and maintain a Fee Equivalency Account to document the equivalency credits ~~revenue collected and available for use in demonstrating equivalency with the Area §185 Obligation~~. No actual money will be deposited into the Fee Equivalency Account. The Fee Equivalency Account will reflect equivalency credits based upon revenue collected and made available for programs of the Texas Emissions Reduction Plan (TERP) under authority of the Texas Health and Safety Code, Chapter 386.

(b) Revenue eligibility. The revenue eligible for credits to the Fee Equivalency Account must be from the severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area and cannot be transferred between nonattainment areas.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account will be credited for the years TERP funding is expended in a severe or extreme 2008 eight-hour ozone standard nonattainment area beginning with the first fee assessment year until the Failure to

Attain Fee no longer applies to the nonattainment area as described under §101.718 of this title (relating to Cessation of Program).

(d) Other revenue sources. The executive director may credit revenue from other emissions reductions grant programs as funds become available. The executive director will apply revenue from such grant programs to the Fee Equivalency Account according to the requirements of this section and §101.704 of this title (relating to Fee Equivalency Accounting).

§101.704. Fee Equivalency 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 Area §185 Obligation determination.

(b) Area §185 Obligation determination. Annually, the executive director will calculate the applicable Area §185 Obligation for all major stationary sources or Section 185 Accounts in a severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area by summing the Failure to Attain Fee for each major stationary source or Section 185 Account. The summed amount will represent the calendar year Area §185 Obligation for the severe or extreme 2008 eight-hour ozone standard nonattainment area. The annual Area §185 Obligation will be calculated using actual emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year.

(c) Annual demonstration of equivalency. The executive director will annually determine the amount of equivalency credits available in the Fee Equivalency Account to determine the

Area §185 Obligation calculated under this subsection. This demonstration will continue annually until the 2008 eight-hour ozone standard nonattainment area is no longer subject to the fee according to the provisions of §101.718 of this title (relating to Cessation of the Program).

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

Figure: 30 TAC §101.704(c)(1)

$$FeeBalance = AreaObligation - FeeEquivAcct$$

Definitions:

AreaObligation = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the Failure to Attain Fee from all major stationary sources or Section 185 Accounts in the severe or extreme 2008 eight-hour ozone standard nonattainment area for a fee assessment year.

FeeEquivAcct = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.703 of this title (relating to Fee Equivalency Account).

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

(2) If the Fee Equivalency Account balance is calculated to be less than or equal to zero in paragraph (1) of this subsection, sufficient equivalency credits were available to

offset the Area §185 Obligation. The executive director will not assess a Failure to Attain Fee on major stationary sources or Section 185 Accounts for the fee assessment year.

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

Figure: 30 TAC §101.704(c)(3)

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

Definitions:

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

AreaObligation = The Area §185 Obligation calculated under this subsection for the fee assessment year.

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

ProratedFee = The reduced Failure to Attain Fee each major stationary source or Section 185 Account to be assessed if insufficient equivalency credits are available in the Fee Equivalency Account.

§101.705. Baseline Amount.

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

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under authorizations, including authorized emissions from maintenance, shutdown, and startup activities, applicable to the source in the baseline year. Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year may be included in the total annual emissions allowed under authorizations.

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

(1) the baseline year; or

(2) a historical period, if the major stationary source's or Section 185 Account's emissions are irregular, cyclical, or otherwise vary significantly from year to year. Any single 24-month consecutive period within a historical period preceding January 1 of the baseline year

may be used to calculate an average baseline emissions amount in tons per year for the major stationary source as the historical period. 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) Historical period. If a major stationary source or Section 185 Account uses a historical period as defined in subsection (b)(2) of this section, the baseline amount will:

(1) use adequate data for calculating the ~~equivalent alterative fee~~ baseline emissions;

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

(3) be adjusted downward to exclude any emissions during the consecutive 24-month period that would have exceeded an emissions limitation that was legally enforceable in effect by December 31 of the baseline year. ~~for rules and regulations with which the source had to comply during the baseline year.~~

(d) Adjustments. The baseline amounts must be adjusted downward to exclude any emissions that exceeded an emissions limit that was legally enforceable ~~for rules or regulations~~ in effect by December 31 of the baseline year.

(e) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of December 31 of the baseline year. When control or ownership of emission units changes during the baseline year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emissions unit on December 31 of the baseline year.

(f) Calculations. A baseline amount, reported in units of tons per year, must be calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides, for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(g) Compliance schedule. The owner or operator of each major stationary source meeting the requirements of §101.701 of this title must submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amounts forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120 days after the effective date of a finding of failure to attain, whichever is later.

(h) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions. After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.706. Baseline Amount for New Major Stationary Sources.

(a) Baseline amounts. A baseline amount must be established for major stationary sources or Section 185 Accounts that begin operating during or after the baseline year. The baseline amount must use the first full year of operation as a major source and be the lower of:

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under applicable authorizations, including emissions from maintenance, startup, and shutdown activities. Emissions from pending authorizations with administratively complete applications as of the last day of the full first calendar year of operation may be included in the total annual emissions allowed under authorizations.

(b) Adjustments. The baseline amount must be adjusted downward to exclude any emissions that exceeded an emissions limit for rules or regulations in effect by the last day of the one-year period used to determine the baseline amount.

(c) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of the last day of the one-year period used to determine the baseline amount. When control or ownership of emission units changes during the calendar year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on the last day of the one-year period used to determine the baseline amount.

(d) Calculations. A baseline amount, reported in units of tons per year, must be

calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(e) Compliance schedule. Within 90 calendar days of completing the first full year operating as a major stationary source, the major stationary source or Section 185 Account must submit to the executive director a report establishing the baseline amount on a form published by the executive director.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as allowed under this subchapter.

§101.707. Aggregated Baseline Amount.

(a) Aggregation. After determining separate baseline amounts for each pollutant at each major stationary source or Section 185 Account according to the requirements of §101.705 of this title (relating to Baseline Amount) or §101.706 of this title (relating to Baseline Amount for New Major Stationary Sources), an owner or operator of a major stationary source or Section 185 Account may choose to combine baseline amounts as follows:

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

(2) nitrogen oxides (NO_x) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(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 under common control.

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

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

(2) the same basis of baseline emissions or total annual authorized emissions to calculate the baseline amount.

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

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

(e) Compliance schedule. The owner or operator of each major stationary source or

Section 185 Account must submit to the executive director a report establishing its aggregated baseline amount on a form published by the executive director.

(1) For major stationary sources or Section 185 Accounts that operated the entire baseline year, the aggregated ~~equivalent alternative~~ baseline amount forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120 days after the finding of failure to attain effective date in the Federal Register, whichever is later.

(2) For major stationary sources or Section 185 Account that began operating during or after the baseline year, the aggregated baseline amount forms must be submitted within 90 calendar days of completing the first full year operating as a major stationary source.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permit data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions. After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.708. Adjustment of Baseline Amount for Major Stationary Sources with Less Than 24 Months of Operation.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of the baseline amount established under this subchapter:

(1) if the major stationary source or emissions units at the major stationary source experienced less than 24 months of consecutive operation by December 31 of the baseline year, and~~:~~

(2) if~~If~~ the emissions were irregular, cyclical, or otherwise vary significantly from year to year, then the baseline amount may be adjusted as the lower of the following:

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

(B) ~~(2)~~ total annual emissions allowed under authorizations applicable to the major stationary source during the first year operating as a major stationary source. Emissions from pending authorizations with administratively complete applications as of the last day of the one-year period used to determine the baseline amount may be included in the total annual emissions allowed under authorizations.

(b) Compliance schedule. Within 90 calendar days of completing 24 consecutive months of operation, the owner or operator of the major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as

allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.709. Adjustment of Baseline Amount for New Construction at a Major Stationary Source

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter to include emissions limits from new construction of authorized emissions units not included in baseline amounts previously established by the executive director. Adjustments to the baseline amount are limited as follows.

(1) The emissions units must have been authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(2) The emissions considered for the adjusted baseline amount for new emissions units are restricted to emissions units without a previously established baseline amount.

(b) Compliance schedule. Within 90 calendar days of completed construction of the new emissions units, the owner or operator of the major stationary source or Section 185 Account

must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.710. Adjustment of Baseline Amount for Ownership Transfers.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter if ownership and operation of emissions units are 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 emissions units ~~equipment~~ no longer under common ownership or control, will be transferred from the original reporting major stationary source or Section 185 Account to the new major stationary source or Section 185 Account without modification to the reported amount; and

(2) The baseline amount for remaining emissions units ~~equipment~~ at the originating and recipient major stationary source or Section 185 Account will not be adjusted based on a change of ownership or control of emissions units to or from a major stationary source or Section 185 Account.

(b) Adjustment qualification. To qualify for this baseline amount adjustment, the ownership transfer of the emissions units must take place between major stationary sources of the same pollutant or aggregated pollutants, volatile organic compounds and/or nitrogen oxides located within the same nonattainment area.

(c) Compliance schedule. Within 90 calendar days of the effective date of a change of ownership or control of emissions units, the owner or operator of each major stationary source or Section 185 Account affected by the change in ownership or control of emissions units must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(d) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(e) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no

longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.711. Adjustment of Baseline Amount for Final Emissions Inventory Data

(a) Baseline amounts. Baseline amounts established under this subchapter may be adjusted based on final quality assured emissions inventory data.

(b) Compliance schedule. Within 90 calendar days of receipt of final quality assured emissions inventory data or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, the owner or operator of each major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of the reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.712. Failure to Establish a Baseline Amount.

The executive director will determine baseline amounts for any major stationary source subject to §101.701 of this title (relating to Applicability) that fails to submit a baseline amount by the due date specified by the commission as follows:

(1) If information is available to determine a baseline amount for each pollutant for which the source meets major source applicability requirements, the executive director will determine the baseline amount to be the lower of:

(A) baseline emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements); or

(B) total annual emissions allowed under authorizations, including authorized emissions from maintenance, startup, and shutdown activities.

(2) If no emissions inventory information required to determine baseline amount information is available, the executive director will establish the baseline amount as:

(A) 12.5 tons of volatile organic compounds (VOC) emissions for major stationary sources of VOC emissions;

(B) 12.5 tons of nitrogen oxides (NO_x) emissions for major stationary sources of NO_x emissions; or

(C) 12.5 tons of VOC emissions and 12.5 tons of NO_x emissions for major stationary sources of VOC and NO_x emissions.

(3) The executive director will not aggregate baseline amounts under §101.707 of this title (relating to Aggregated Baseline Amount) or adjust baseline amounts as provided in this subchapter to determine a baseline amount under this section.

(4) A major stationary source will pay the Failure to Attain Fee according to §101.714 of this title (relating to Failure to Attain Fee Payment).

(5) If the major stationary source submits a complete and verifiable emissions inventory according to §101.10 of this title, the major stationary source may then submit a baseline amount to the executive director on a form published by the executive director.

(6) After the executive director finalizes the baseline amount based on demonstrated compliance with the criteria in this subchapter, the baseline amount will be applied starting with the fee assessment year after finalization and will continue until:

(A) a baseline amount is established by the major stationary source or Section 185 Account in accordance with paragraph (5) of this section and reviewed by the executive director to ensure alignment with the emissions inventory database or air permit systems; or

(B) the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.713. Failure to Attain Fee Assessment.

(a) Pollutant applicability. The executive director will annually assess the Failure to Attain Fee for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO_x), or both, for which the major stationary source or Section 185 Account meets the requirements of §101.701 of this title (relating to Applicability) at any time during a calendar year.

(b) Aggregation. The fee will be assessed and calculated using the same Failure to Attain Fee determination method used under this subchapter. 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 VOC and NO_x emissions may both be aggregated together across multiple major stationary sources. Aggregation must be conducted as described under §101.707 of this title (relating to Aggregated Baseline Amount) and is limited to emissions from:

(1) major stationary sources that aggregated VOC baseline amounts;

(2) major stationary sources that aggregated NO_x baseline amounts; or

(3) major stationary sources that aggregated VOC with NO_x baseline amounts.

(c) Assessment. The owner or operator of each major stationary source to which this rule applies must annually pay the Failure to Attain Fee to the commission calculated in accordance with either subsection (d) or (e) and subsection (f) of this section. The Failure to Attain Fee will be assessed on actual emissions of VOC and/or NO_x as recorded in the emissions

inventory under §101.10 of this title (relating to Emissions Inventory Requirements), that exceed 80% of the pollutant baseline amount, rounded up to the nearest whole number.

(d) Fee assessment for separate pollutants. The Failure to Attain Fee from major stationary sources that did not aggregate baseline amounts under §101.707 of this title will remain separate and due from each major stationary source or Section 185 Account for each pollutant for which the source meets the major source applicability requirements. The fee will be calculated separately by the formula in subsection (f) of this section.

(e) Fee assessment for aggregated pollutants. The Failure to Attain Fee will be calculated in accordance with subsection (f) of this section and the method used for an aggregated baseline amount determination as described under §101.707(a) of this title.

(1) If VOC emissions are aggregated, 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 emissions are aggregated, 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 emissions are aggregated with NO_x emissions at one major stationary source, VOC and NO_x emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC emissions are aggregated with NO_x emissions 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.

(f) Fee calculations. The fee will be calculated for VOC, NO_x, or both pollutants' emissions, as follows.

Figure: 30 TAC §101.713(f)

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

Definitions:

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

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

Actual = All quantifiable emissions of VOC and/or NO_x from the major stationary source or Section 185 Account; as recorded in the annual emissions inventory for the fee assessment year. Actual emissions include all authorized and unauthorized emissions in units of tons per year. Pollutants and/or sites aggregated under §101.707 of this title will be combined for fee assessment in the same manner.

BA = Baseline amount in tons per year from a major stationary source or Section 185 Account as calculated under this subchapter.

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

(g) Enforcement. Failure to submit an emissions inventory according to the provisions of §101.10 of this title (relating to Emissions Inventory Requirements) to circumvent assessment of the Failure to Attain Fee is also subject to enforcement account under Texas Water Code (TWC), Chapter 7.

§101.714. Failure to Attain Fee Payment.

(a) Fee timeframe. The Failure to Attain Fee is assessed, invoiced, and paid for each pollutant for which the source is major, volatile organic compounds and/or nitrogen oxides, starting the calendar year following the baseline year and continuing each year until the area is no longer subject to the Failure to Attain Fee as described under §101.718 of this title (relating to Cessation of Program).

(b) Payment. Payment of Failure to Attain 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.

(c) Fee payment due date. The Failure to Attain Fee payment is due by the due date

specified on the invoice. The invoice due date will be a minimum of 30 days after the invoice mail date.

(d) Nonpayment of fees. Each emissions Failure to Attain Fee payment must be paid at the time and in the manner and amount provided by this subsection. Failure to pay the full Failure to Attain Fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178.

(e) Late payments. The agency will impose interest and penalties on owners or operators of a major stationary source or Section 185 Account who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.715. Eligibility for Other Failure to Attain Fee Fulfillment Options.

(a) Alternative fulfillment options. Notwithstanding any requirement in this subchapter, the owner or operator of a major stationary source or Section 185 Account required 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 in compliance with §101.716 (relating to Relinquishing Credits to Fulfill a Failure to Attain Fee and §101.717 of this title (relating to Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee).

(b) Unfulfilled portions. If a Failure to Attain Fee cannot be completely fulfilled using alternate fulfillment options, then the unfulfilled portion of the Failure to Attain Fee is required to be calculated, assessed, and paid according to the provisions of this subchapter.

(c) Reporting. The owner or operator of a major stationary source or Section 185

Account must inform the executive director if they choose an alternative fulfillment option for all or a portion of the Failure to Attain Fee as described in §101.716 and §101.717 of this title. The request must be submitted on a form specified by the executive director and include a list of the emissions in tons of volatile organic compounds and/or nitrogen oxides or the dollar-for-dollar amount requested from alternative fulfillment options, payment, or combination to cover the entire Failure to Attain Fee.

(d) Compliance schedule. No later than 90 days after the executive director requests submission of the form specified in subsection (c) of this section ~~the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the first fee assessment year~~ and continuing annually, the owner or operator of a major stationary source or Section 185 Account must submit the form ~~request~~ specified in subsection (c) and ensure the following conditions are met:

(1) all emissions credits under §101.716 of this title must be approved, exercised, or ~~otherwise~~ completed during or after the baseline year; and

(2) all Supplemental Environmental Projects under §101.717 of this title must be approved and completed during or after the baseline year ~~funded~~.

(e) If the executive director does not receive the form specified in subsection (c) of this section by the due date specified in subsection (d) of this section ~~notification request to use alternative fulfillment options for all or a portion of the Failure to Attain Fee or the alternate fulfillment options are not approved and funded, exercised, or otherwise completed as required by this subsection~~, the Failure to Attain Fee payment will be due in full as described under §101.714 of this title (relating to Failure to Attain Fee Payment).

§101.716. Relinquishing Credits to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by substituting emissions 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 emissions reduction credits;

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

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

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

§101.717. Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by participating in the ~~contributing to a~~ Supplemental Environmental Projects (SEPs)

program. ~~Project (SEP), on 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 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

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

(d) Any amounts paid in excess of the SEP Offset Amount may be used to partially or completely fulfill the Failure to Attain Fee.

(e) If the total amount paid to the SEP is greater than or equal to 110% of the SEP Offset Amount, then both the SEP Offset Amount and the amount paid in excess of the SEP Offset Amount may be used to partially or completely fulfill the Failure to Attain Fee.

(f) Amounts as specified in subsection (d) or subsection (e) of this section must be credited on a dollar-for-dollar basis and will not be discounted due to the passage of time. Those credits may be accumulated from year to year, and if a surplus exists in any given year, the credits may be used to partially or completely fulfill the Failure to Attain Fee as needed.

(g) The following cannot be used to partially or completely fulfill the Failure to Attain Fee:

(1) any amount of the enforcement administrative penalty paid to the commission; or

(2) any amount deferred to expedite settlement of an enforcement administrative penalty.

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

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

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

§101.718. Cessation of Program.

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

(1) the effective date of redesignation of the area classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) to attainment by the U.S. Environmental Protection Agency (EPA);

(2) any final action or final rulemaking by EPA to end the Failure to Attain Fee requirement; ~~fee; or~~

(3) finding of attainment by EPA; or ~~.~~

(4) a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States.

(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 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS), or a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States, are submitted to EPA. The design value may exclude days submitted to EPA by the executive director that exceeded the standard because of exceptional events. Fee collection will remain in abeyance until EPA takes final action on its review of the certified monitoring data and any demonstration(s).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Rulemaking Adoption

AGENDA REQUESTED: October 22, 2025

DATE OF REQUEST: October 3, 2025

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

CAPTION: Docket No. 2023-1061-RUL. Consideration of the adoption of new 30 TAC Chapter 101, General Air Quality Rules, Subchapter K, Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard and corresponding revisions to the State Implementation Plan.

The adoption would establish the TCEQ Section 185 fee program for the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS) as required by federal Clean Air Act (FCAA), Section 182(d)(3) and (e) and Section 185. The penalty fee is applicable to major stationary sources of volatile organic compounds or nitrogen oxides located in an ozone nonattainment area classified as severe or extreme if that area fails to attain the ozone NAAQS by the applicable attainment date. The rulemaking includes requirements addressing: applicability, cessation of the program, exemptions to the program, baseline amount determination options, fee calculation, fee assessment, fee collection, fee payment, and compliance schedules among other requirements. The proposed rules were published in the May 16, 2025, issue of the *Texas Register* (50 TexReg 2925). (Jill Dickey-Hull, Project Manager; Terry Salem, Lead Attorney; Rule Project No. 2023-131-101-AI)

Richard C. Chism
Director

Donna F. Huff
Division Deputy Director

Gwen Ricco
Agenda Coordinator

Copy to CCC Secretary? NO ☐ YES ☒

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** October 3, 2025

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Executive Director

From: Richard C. Chism, Director *RCC*
Office of Air

Docket No.: 2023-1061-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 101, General Air Quality Rules
Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard
Rule Project No. 2023-131-101-AI

Background and reason(s) for the rulemaking:
On October 7, 2022, the U.S. Environmental Protection Agency (EPA) published reclassifications for nonattainment areas under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS) of 0.075 parts per million [75 parts per billion (ppb)], effective November 7, 2022 (87 *Federal Register* (FR) 60926). The Dallas Fort-Worth (DFW) nonattainment area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the Houston-Galveston-Brazoria (HGB) nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) were reclassified from serious to severe nonattainment. The DFW and HGB nonattainment areas must attain the 2008 eight-hour ozone NAAQS by July 20, 2027, based on 2024, 2025, and 2026 monitoring data.[1] The preliminary 2025 design value for the DFW nonattainment is 83 ppb and for HGB is 85 ppb.

With the severe classification, the DFW and HGB areas are subject to FCAA, §182(d)(3), Ozone Plan Submissions and Requirements, which requires states to submit plans to include the requirements of §185, Enforcement for Severe and Extreme Ozone Nonattainment Areas for Failure to Attain. Rules to address these requirements, referred to as Section 185 fee rules, must be submitted to EPA by November 7, 2025.

This rulemaking would implement the FCAA, §185 requirements. FCAA, §185(a) requires each state implementation plan (SIP) to impose a penalty fee for major stationary sources of volatile organic compounds (VOC) located in the nonattainment area if the area fails to attain the ozone NAAQS by the applicable attainment date. Section 182(f) of the FCAA requires that all SIP provisions applicable to VOC emissions also apply for nitrogen oxides (NO_x) emissions. The fee is required to be imposed for each calendar year after failure to attain by the attainment date until EPA redesignates the area as attainment for the 2008 eight-hour ozone NAAQS. If the state does not impose and collect the fee, or if EPA finds that the state's fee provisions do not meet the FCAA requirements, then FCAA, §185(d) requires that EPA impose and collect the fee with interest. The fee and interest would go to the U.S. Treasury and would not be returned to the state.

Scope of the rulemaking:
The rulemaking will implement the required FCAA, §185 fee program for severe or extreme 2008 eight-hour ozone NAAQS nonattainment areas that have failed to attain by the applicable attainment date.

[1] The attainment year ozone season is the ozone season immediately preceding a nonattainment area's attainment deadline.

Re: Docket No. 2023-1061-RUL

A.) Summary of what the rulemaking will do:
This rulemaking will establish the TCEQ Section 185 fee program for the 2008 eight-hour ozone NAAQS in Chapter 101, Subchapter K, Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard.

The rulemaking adoption includes requirements addressing applicability, cessation of the program, exemption to the program, baseline amount determination options, fee assessment, fee calculation, fee collection, fee payment, and compliance schedules among other requirements.

The adopted fee calculation reflects the FCAA, §185 penalty fee rate. As stated in FCAA, §185, the fee rate at the time of the 1990 FCAA Amendments was $5,000 per ton and is adjusted annually for inflation by the Consumer Price Index (CPI). The EPA-specified adjusted fee rate for calendar year 2024 is $12,476.67 per ton.[2]

The FCAA, §185 penalty fee is assessed on each ton of NO_x, VOC, or both emitted in excess of 80% of a major stationary source's baseline emissions. The major stationary source's baseline amount is determined as the lower of the actual emissions or allowable emissions during the applicable attainment year. The attainment year is the year contained within the attainment date (e.g. 2027 is the attainment year for the July 20, 2027, attainment date). A major stationary source for NO_x is subject to the fees on NO_x emissions; a major stationary source for VOC is subject to the fees on VOC emissions; and a major stationary source for both NO_x and VOC is subject to the fee on emissions of both pollutants.

The rulemaking adoption allows offsets to the nonattainment area's fee obligation using mobile source grant program revenue, emissions-based alternatives to paying the fee, and baseline determination flexibilities.

B.) Scope required by federal regulations or state statutes:
The rulemaking will implement the required FCAA, §185 fee program for severe or extreme 2008 eight-hour ozone NAAQS nonattainment areas that have failed to attain by the applicable attainment date. The following FCAA requirements are included in the rulemaking adoption:

- The baseline amount for each major stationary source is determined as the lower of a major stationary source's actual emissions (as reported in the annual emissions inventory) or authorized emissions (from all applicable permits or authorizations) during the applicable attainment year.
- A major stationary source is assessed the Section 185 fee annually on emissions of NO_x, VOC, or both pollutants (depending on a source's major source determination), as reported in the annual emissions inventory for the applicable attainment year, that exceed 80% of the source's baseline amount.
- The fee calculation for annual fee assessment reflects the FCAA, §185-required penalty of $5,000 per ton as adjusted annually by the CPI.
- The Section 185 fee program would end when the area is redesignated as attainment by EPA.
- If EPA approves a one-year extension of the attainment date for the nonattainment area, major stationary sources will not have to pay the Section 185 fee for that extension year, but the fee would be implemented upon failure to attain by the extended attainment date.

C.) Additional staff recommendations that are not required by federal rule or state statute:
The adopted rule includes various program elements not specifically addressed in FCAA, §185 provisions. These elements include:

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[2] https://www.epa.gov/system/files/documents/2024-10/memorandum-sec-185-penalty-fees-for-year-2024_0.pdf

- equivalent alternative fee program allowed under FCAA, §172(e) to offset all or a portion of a nonattainment area's fee obligation with revenue collected for the Texas Emissions Reduction Plan (TERP) if any funds are also expended within that severe nonattainment area;
- provisions to fulfill an individual major stationary source's fee obligation by relinquishing emissions credits or investing in a supplemental environmental project (SEP) specific to the severe or extreme nonattainment area;
- baseline amount determination flexibilities such as aggregation by pollutant and/or sites under common control;
- applicability requirements for sources that become major during or after the attainment year;
- adjustment of baseline amounts for specific situations that occur after the baseline year;
- determination of baseline amounts for source emissions that are irregular, cyclical, or otherwise vary significantly from year to year; and
- options to terminate the fee program or place the fee program in abeyance prior to EPA redesignating an area to attainment for the 2008 eight-hour ozone NAAQS.

Statutory authority:
Texas Clean Air Act, §§382.002, 382.011 382.012, 382.017, and 382.0622; and Texas Water Code, §§5.102, 5.103, 5.105, 5.701, 5.702, 5.703, 5.705, and 5.706.

Effect on the:

A.) Regulated community:
Based on recent emissions inventory and FCAA Title V operating permit data, this rulemaking could impact approximately 180 DFW-area and 280 HGB-area major stationary sources emitting NO_x and/or VOC. The rulemaking will require assessment of the annual penalty fee in 2028 if EPA officially determines that a severe or extreme ozone nonattainment area fails to attain the 2008 eight-hour ozone NAAQS by the July 20, 2027, attainment date.

If the proposed rules are adopted, it is unknown if or how major stationary sources may choose to exercise the baseline amount flexibility options provided, whether future TERP revenue would partially or completely offset the nonattainment's area fee obligation, and future fee rates; therefore, it is not possible to determine an accurate projected fee obligation for the nonattainment areas. Assuming no baseline amount flexibilities exercised, no emissions reductions from the baseline, no fee offsets from TERP revenue, and an estimated future fee rate, an estimated maximum annual fee obligation for the DFW area could be as much as $47 million annually, and the HGB area fee could be as much as $171 million annually.

B.) Public:
Citizens may be impacted if companies raise the price of goods and services or curtail or cease operations to meet FCAA, §185 fee obligations. If major stationary sources choose to reduce emissions to minimize or avoid the FCAA, §185 penalty fee, the public in both the DFW and HGB nonattainment areas may benefit from reduced ozone precursor emissions.

C.) Agency programs:
This rulemaking would affect certain parts of the agency. The Air Quality Division would be required to implement the program and assess the fee annually. Support may be required from the Financial Administration Division of the Office of Administrative Services to implement the fee invoicing process. Support from the Information Resources Division in the Office of

Administrative Services would be needed for database maintenance and potential enhancements. Support may be required from the Office of Legal Services regarding rule interpretation and SEP program participation.

Stakeholder meetings:
Public meetings for the DFW area were held virtually on August 24, 2022; September 6, 2022; and September 7, 2022. TCEQ held a hybrid (in-person and virtual) meeting at the North Central Texas Council of Governments on February 17, 2023. HGB public meetings were held on July 28, 2022; September 7, 2022; and September 8, 2022. TCEQ held a hybrid (in-person and virtual) meeting at the Houston-Galveston Area Council on April 26, 2023.

Formal stakeholder meetings were held virtually on August 6, 2024, for the DFW area and August 8, 2024, for the HGB area, with simultaneous Spanish interpretation. Informal stakeholder comments were solicited through September 9, 2024, and were considered during development of the proposed rulemaking. Seven organizations submitted informal comments either supporting or opposing equivalent alternative or conventional fee programs. Comments were also provided on fee baseline amount determinations options. The informal comments received are posted on the Stakeholder Group: Federal Clean Air Act Section 185 Fee webpage. (*https://www.tceq.texas.gov/airquality/point-source-ei/185-fee*).

Public Involvement Plan
Yes.

Alternative Language Requirements
Yes. Spanish.

Public comment:
The public comment period opened on May 6, 2025, and closed on June 18, 2025. The commission held a virtual public hearing on June 12, 2025, at 2:00 p.m. Notice of the public hearing was published in English in the *Dallas Morning News* newspaper and in Spanish in the *Al Dia* newspaper on May 7, 2025. Notice of the public hearing was published in English in the *Houston Chronicle* newspaper on May 6, 2025, and in Spanish in the *La Voz* newspaper on May 14, 2025. Notices in English and Spanish were also distributed to subscribers through GovDelivery and posted to TCEQ's website, and a notice was published in English in the *Texas Register* on May 16, 2025 (50 *Texas Register* 2925). A plain language summary in both English and Spanish was posted to TCEQ's website. TCEQ staff opened the virtual public hearing for public comment and received oral testimony. A Spanish language interpreter provided hearing instructions in Spanish, the comments were recorded and transcripts prepared.

During the comment period, comments were received from: Air Alliance Houston; Ash Grove Cement Company, a CRH Company; CEMEX; Holcim (US) Inc.; Earthjustice on behalf of Air Alliance Houston, Downwinders at Risk, and Lone Star Chapter of Sierra Club; a group including Earthworks, Environment Texas, Environmental Defense Fund, Liveable Arlington, and Public Citizen; Fenceline Watch; GREEN Environmental Consulting, Inc.; Harris County Attorney Christian D. Menefee; Lone Star Legal Aid on behalf of Better Brazoria – Clean Air & Clean Water; North Central Texas Council of Governments; Public Citizen; Smith Jolin on behalf of Gerdau Ameristeel, US Inc., and Texas Lime Company; Summitt Next Gen LLC; a group including Texas Chemical Council, Texas Oil and Gas Association, and Texas Pipeline Association; the Honorable Brian Harrison who represents District 10 in the Texas House of Representatives; and 47 individuals. The public comments received are summarized and addressed in this rulemaking.

Generally, the comments focused on the adverse health and environmental impacts of ozone, the equivalent fee options (TERP revenue to offset the fee and baseline amount determination flexibilities), requests to implement a conventional fee program to meet the intention and plain language of the FCAA, baseline amount determination options for new major stationary sources, and additional flexibilities for sources with emissions that are irregular, cyclic or otherwise significantly varying from year to year.

Significant changes from proposal:
This rulemaking adopts a Failure to Attain Fee program for nonattainment areas classified as severe or extreme under the 2008 eight-hour ozone NAAQS with equivalent fee options as allowed under FCAA, §172(e). Non-substantive edits to rule language have been made for clarification or to improve readability. Additionally, the following rule language updates were made at adoption in response to comments received or to conform rule language with preamble intent:

- **§101.700, *Definitions*** – The term equivalency credits in §101.700(9) was updated to align with rule language in §101.703(a) and (c) and the proposal's intent. Section 101.700(16) was added to define the "SEP Offset Amount" as "the portion of the enforcement case's assessed administrative penalty that is approved for use in the performance of, or contribution to, a SEP, instead of being paid to the commission as a penalty."
- **§101.710, *Adjustment of Baseline Amount for Ownership Transfers*** – The term "equipment" was corrected to "emissions unit" in §101.710(a)(1) and (2) in response to comment from Lone Star Legal Aid on behalf of Better Brazoria – Clean Air & Clean Water.
- **§101.712, *Failure to Establish a Baseline Amount*** – A provision described in the proposal preamble Section by Section was inadvertently left out of rule language, so §101.712(6)(A) was added at adoption to conform with the proposal's intent.
- **§101.715, *Eligibility for Other Failure to Attain Fee Fulfillment Options*** – After further consideration of the SEP program as an alternative fulfillment option, the rule language was updated to correct conflicting and outdated language and clarify intent, and corresponding discussions were added to the preamble. These rule language updates:
    - add "dollar-for-dollar" to language in §101.715(c) for completeness to include the SEP participation option;
    - modify proposed §101.715(d) to provide for a 90-day deadline instead of the emissions inventory due date for major stationary sources or Section 185 Fee Accounts to submit the required form notifying the commission that they intend to utilize alternative fulfillment options for all or a portion of their Failure to Attain Fee;
    - add language in §101.715(d) to specify that all actions must be completed during or after the baseline year to be eligible for offsetting the Failure to Attain Fee: e.g., emission credits must be approved, exercised, or completed; and SEPs must be approved and completed; and
    - modify proposed language in §101.715(e) for brevity, specifying that if the executive director does not receive notification or the alternative fulfillment option does not meet the specified criteria, the Failure to Attain Fee is due in full.
- **§101.717, *Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee*** – In response to a joint comment from Earthworks, Environmental Defense Fund, Environment Texas, Liveable Arlington, and Public Citizen, and after further consideration of the SEP program, the rule language was updated to correct conflicting and outdated language and clarify intent, and corresponding discussions were added to the preamble. These rule language updates:
    - change "contributing to a SEP" to "participating in a SEP" and remove subsections §101.717(a)(1) and (a)(2);
    - add new §101.717(d) to allow amounts paid in excess of the SEP Offset Amount to be used to partially or completely fulfill the Failure to Attain Fee to align with the intent of the proposed rule;

- add new §101.717(e) to allow *both* the SEP Offset Amount and the amount paid in excess of the SEP Offset Amount to be used to partially or completely fulfill the Failure to Attain Fee *if* the total amount paid to the SEP is greater than or equal to 110% of the SEP Offset Amount;[3]
- add new §101.717(f), which was proposed as §101.717(d), with modifications to reference new subsections (d) and (e) and other non-substantive changes;
- add new §101.717(g), which was proposed as §101.717(e), with changes to explicitly prohibit the use of any amount of an enforcement penalty paid to the commission or any amount deferred to expedite settlement of an enforcement action from being used to partially or completely fulfill the Failure to Attain Fee; and
- re-letter proposed §101.717(f) as §101.717(h) and make non-substantive changes.

Potential controversial concerns and legislative interest:

- **Equivalent Methods to Meet Fee Obligation** - EPA has not provided guidance for FCAA, §185 fee program development specific to the 2008 eight-hour ozone NAAQS, and the agency directed states to consult with the appropriate EPA Regional Office. EPA did not comment on this rulemaking. The majority of adverse and supportive comments on the rule were related to this topic.
- **Baseline Amount Flexibility** - Baseline amounts may be aggregated by pollutant and/or sites under common control for sites located in the same nonattainment area. Adverse and supportive comments were received on baseline amount flexibility.
- **Baseline Amount Adjustments** - Adjustments to established baseline amounts are allowed under limited circumstances, which EPA may not consider approvable.
- **Cessation of Fee Program** - The FCAA requires the fee to be paid until EPA redesignates the area as attainment. The rulemaking provides that the fee would also be terminated when EPA makes a finding of attainment or otherwise takes final action to end the Failure to Attain Fee. The rulemaking also provides that fee collection could be held in abeyance when TCEQ submits three consecutive years of quality-assured ambient monitoring data to EPA showing that no monitors exceed the NAAQS. The executive director would have discretion to hold the program's fee collection in abeyance from the time that certified clean data were submitted to EPA until EPA has made a finding. These provisions were adopted in the Section 185 fee program under the revoked one-hour ozone NAAQS for the HGB nonattainment area. EPA has not taken final action concerning these alternative criteria for the one-hour program but proposed disapproval, as published on December 19, 2024 (89 FR 103734), for the provisions allowing program cessation if EPA made a finding of attainment and the fee abeyance. On July 23, 2025, the commission adopted to withdraw these one-hour ozone NAAQS provisions from the SIP, and the withdrawal was submitted to EPA on July 30, 2025.

Will this rulemaking affect any current policies or require development of new policies?
Staff would need to develop procedures to determine the fee obligation for each nonattainment area and collect and maintain data in association with this rulemaking. A process would need to be established for Executive Director approval of SEPs eligible for use to offset the Failure to Attain Fee. Fiscal staff would invoice the affected major stationary sources when necessary and collect the revenue.

[3] The proposed rule prohibited the use of the SEP Offset Amount to partially or completely fulfill the Failure to Attain Fee.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?
If the state does not collect the fee or does not have an EPA-approved program, then under FCAA, §185(d), EPA must collect the fees with interest. These fees and interest would not be returned to the state. No alternatives to a fee-based program are listed in FCAA, §182(d)(3) or §185.

Key points in the adoption rulemaking schedule:
Texas Register **proposal publication date:** May 16, 2025
Anticipated ***Texas Register*** **adoption publication date:** November 7, 2025
Anticipated effective date: November 13, 2025
Six-month ***Texas Register*** **filing deadline:** November 16, 2025

Agency contacts:
Danielle Nesvacil, Emissions Assessment Section Manager, Air Quality Division, (512) 239-2102
Jill Dickey-Hull, Technical Specialist, Air Quality Division, (512)-239-5912
Terry Salem, Staff Attorney, Environmental Law Division, (512) 239-0469
Gwen Ricco, Texas Register Rule/Agenda Coordinator, General Law Division, (512) 239-2678

Attachments:
FCAA, §185; https://www.govinfo.gov/content/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapI-partD-subpart2-sec7511d.htm

Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements (80 FR 12264);
https://www.federalregister.gov/documents/2015/03/06/2015-04012/implementation-of-the-2008-national-ambient-air-quality-standards-for-ozone-state-implementation

cc: Chief Clerk, 2 copies
Executive Director's Office
Patrick Lopez
Jessie Powell
Krista Kyle
Office of General Counsel
Danielle Nesvacil
Jill Dickey-Hull
Terry Salem
Gwen Ricco
Jamie Zech

Filed with the Office of the Secretary of State on April 29, 2025.

TRD-202501413
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: June 15, 2025
For further information, please call: (512) 438-5609

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER K. FAILURE TO ATTAIN FEE FOR THE 2008 EIGHT-HOUR OZONE STANDARD

30 TAC §§101.700 - 101.718

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§101.700 - 101.718.

The proposed new sections will be submitted to the U.S. 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, generally) require the SIP to include a rule that implements a penalty fee (Section 185 fee, Failure to Attain Fee, fee) for major stationary sources (major 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) 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 (NO_x)." This FCAA requirement extends the Section 185 fee assessment to major stationary sources of NO_x emissions. The SIP must also include procedures for the assessment and collection of the penalty fee. If the state does not impose and collect the fee, then FCAA, §185(d) requires that EPA impose and collect the fee with interest, and the revenue is not returned to the state.

For the 2008 eight-hour ozone standard of 0.75 parts per million, on October 7, 2022, EPA published a final notice that reclassified the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) 2008 eight-hour ozone nonattainment areas from serious to severe effective November 7, 2022 (87 *Federal Register* (FR) 60926). The DFW severe nonattainment area consists of 10 counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise. The HGB severe nonattainment area consists of eight counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The DFW and HGB severe nonattainment areas are required to attain the 2008 eight-hour ozone standard by July 20, 2027. If a severe or extreme ozone nonattainment area does not attain by the attainment date, the area will be subject to the penalty fee requirements upon EPA issuing a finding of failure to attain for the area. For fee assessment purposes, the 2027 calendar year from January 1, 2027, through December 31, 2027, is anticipated to be the baseline year for these severe nonattainment areas since it is the year that contains the attainment date. The penalty fee is required to be paid until EPA redesignates the area as attainment for the 2008 eight-hour ozone standard or EPA takes action that results in termination of the fee.

As stated in FCAA, §182(d)(3) and (e) and §185, the required penalty is $5,000 per ton, as adjusted for inflation by the consumer price index (CPI), of VOC and/or NO_x emissions emitted in excess of 80% of a major stationary source's baseline amount. A baseline amount would be determined for each pollutant, VOC and/or NO_x, for which the source meets the major source applicability requirements. A source that is major for VOC emissions would be subject to the fee on VOC emissions; a source that is major for NO_x emissions would be subject to the fee on NO_x emissions; and a source that is major for both VOC and NO_x emissions would be subject to the fee on both VOC and NO_x emissions.

The major stationary source's fixed baseline amount is proposed to be calculated as the lower of the baseline emissions or total annual authorized emissions during the baseline year; the baseline amount must be adjusted downward to account for unauthorized emissions and/or emissions limitations in effect as of December 31 of the baseline year or timeframe used to determine the baseline amount. The major stationary source's baseline emissions are defined as the annual routine emissions reported to the TCEQ point source emissions inventory (emissions inventory) according to 30 TAC §101.10, excluding emissions not authorized by permit or rule, such as emissions from emissions events and scheduled or unscheduled maintenance, startup, and shutdown (MSS) activities. The major stationary source's authorized emissions include emissions allowed under any EPA or TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

The proposed rule allows for a baseline amount determination with flexibilities such as aggregating pollutants (VOC and NO_x emissions) and aggregating sites under common ownership and control into a single baseline. The proposed rule also allows for baseline amount determinations when a period other than the baseline year may be required, such as new major stationary sources that began operating after the baseline year or major stationary sources with emissions that are irregular, cyclic, or vary significantly from year to year. Under specific circumstances, as proposed, major stationary sources may request adjustments to the fixed baseline amount. The estimated maximum Section 185 fee without baseline amount flexibilities and alternative revenue for both the HGB and DFW severe ozone nonattainment areas would be over $200 million per year.

TCEQ proposes a program under FCAA, §172(e) with flexibility aspects not directly described in FCAA, §185, including but not limited to alternative revenue and baseline aggregation. Although EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, in its 2010 guidance (available at: *http://www.epa.gov/glo/pdfs/20100105185guidance.pdf*), multiple approvals of similar equivalent alternative programs in California and New York, and in a final rule published in

the February 14, 2020, *Federal Register* (85 FR 8411) for the Section 185 Fee Program in the HGB nonattainment area under the one-hour ozone standard (HGB Failure to Attain Fee), EPA approved the use of equivalent programs to fulfill the FCAA, §185 fee requirement. Although the 2010 guidance was vacated by the D.C. Circuit Court of Appeals on procedural grounds, EPA continued to utilize the principles outlined in the guidance as support for its approvals of equivalent alternative programs, *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. July 2011). Notably, the court did not prohibit alternative programs, instead stating that "neither the statute nor our case law obviously precludes that alternative." In the absence of formal EPA guidance for Section 185 fee programs under the 2008 eight-hour ozone standard, this proposed rulemaking relied on the 2010 guidance to develop Texas' fee program. In the HGB Failure to Attain Fee final approval, EPA approved fee programs funded to reduce VOC and NO_x emissions 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, which is consistent with the principles of the anti-backsliding principle of the FCAA §172(e). EPA's 2010 guidance requires 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.

EPA states in its 2010 guidance 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." 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 and EPA's final approval of the HGB Failure to Attain Fee, located in 30 Texas Administrative Code (TAC) 101 Subchapter B, 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 for the (now revoked) one-hour ozone standard. EPA approved other equivalent alternative programs pursuant to the 2010 guidance for the one-hour ozone standard including San Joaquin Valley (77 FR 50021), South Coast Air Quality Management District, (77 FR 74372), and the New York portion of the New York-Northern New Jersey-Long Island nonattainment area (84 FR 12511). EPA's approvals of these Section 185 fee programs under the one-hour ozone standard included alternative fee revenue by assessing a fee on mobile sources. The revenue was used to offset the fee due from major stationary sources in the nonattainment areas. EPA's prior approvals were based on its current interpretation that FCAA, §172(e) allows equivalent alternative fee programs for revoked ozone standards. However, nothing in FCAA, §172(e) prohibits equivalent alternative fee programs for active ozone standards and therefore the commission proposes an equivalent alternative fee program in this rule.

The HGB Failure to Attain Fee Rule allowed revenue collected from the HGB one-hour ozone standard nonattainment area for qualified programs that directly reduced VOC or NO_x emissions to offset the FCAA, §185 fee. No actual revenue or funding was transferred to the program; the funds were calculated, recorded, and assessed to ensure a sufficient amount was collected to offset the required Section 185 fee amount. The same approach is used for this proposed rulemaking.

Although EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, EPA originally described certain basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee for severe or extreme ozone nonattainment areas under the one-hour ozone standard. In a final rule published November 16, 2005, in the *Federal Register* (70 FR 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, 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" (70 FR 69440, 69441). The same rationale was used to establish the anticipated baseline year of 2027 for the DFW and HGB severe nonattainment areas under the 2008 eight-hour ozone standard.

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" (70 FR 69440, 69441 - 69442). Major stationary sources may elect to reduce their emissions to reduce the fee owed, or they may elect to pay the fee without reducing their emissions.

EPA also previously 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. EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions because a source's emissions may be irregular, cyclic, or otherwise vary significantly from year to year. This concept would be applicable regardless of the fee program implemented or the ozone standard requiring the fee program.

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 pe-

riod) to calculate an average annual actual emissions rate. 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 is reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission proposes to provide this option in the same manner as provided for in the Texas New Source Review Program. Since the PSD guidance is specific to sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, the averaging option would not be available for sources with steady-state operations.

A variability analysis on sites reporting to the TCEQ point source emissions inventory was performed to determine if VOC and NO_x emissions were variable over the twelve-year period between 2011 (the base year for the 2008 ozone standard) through 2022 (the most recent complete point source emissions inventory at the time this analysis was performed) for the DFW and HGB severe nonattainment areas. Data for the DFW and HGB variability analysis were analyzed separately for VOC and NO_x emissions. Sites that reported mean 2011 through 2022 emissions greater than 20 tons per year in the TCEQ emissions inventory were included in this analysis.

A site's emissions were determined to be variable if the following formula was true, where x = VOC or NO_x emissions and σ = one standard deviation of the data set:

Figure: 30 TAC Chapter 101 - Preamble

Variability of reported NO_x and VOC emissions ranged from 3% to 128% in the HGB area and from 0.1% to 265% in the DFW area over the twelve years examined. Fifty-nine percent or 162 of the 274 NO_x and/or VOC emissions sources in the HGB area were variable as defined by the above formula. Forty-eight percent or 115 of the 238 NO_x and/or VOC emissions sources in the DFW area were variable as defined by the above formula.

The variability analysis shows that a high level of source-level emissions variability occurred between 2011 and 2022 in the DFW and HGB severe nonattainment areas; therefore, it is appropriate to use a 24-month period during the previous ten years (or five years if the source is an electric utility steam generating unit) to establish a baseline for the FCAA, §185 fee program.

Based on the analysis above, the commission proposes to use EPA's baseline guidance and EPA's long-standing PSD regulations for sources with emissions that are irregular, cyclic, or otherwise vary significantly to offer an option for these source types to establish a baseline amount. Since FCAA, §185 states that the baseline amounts may be adjusted for these types of sources if the EPA Administrator issues guidance, the commission has proposed these provisions based on these EPA guidance documents.

Like the HGB Failure to Attain Fee Rule, the commission proposes to use the Texas Emissions Reduction Plan (TERP) revenue from each area collected after the 2008 eight-hour ozone attainment (baseline) year to offset the area's FCAA, §185 fee obligation.

The objectives of TERP are specifically described in statute and are consistent with EPA's objective for an equivalent FCAA, §185 fee 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."

TCEQ implements TERP to reduce NO_x emissions, a precursor to ozone pollution. TERP grant programs provide financial incentives to individuals, state and local governments, corporations, and other legal entities to upgrade or replace their older, higher emitting vehicles and equipment with newer, cleaner vehicles and equipment. The TERP programs also encourage the use of alternative fuels for transportation in Texas, and the implementation of new technologies that reduce emissions from stationary sources and oil and gas operations.

In the DFW severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 65%. In the HGB severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 55%. The emissions reduction grant programs that TERP funds decrease ozone precursor emissions more directly than a penalty fee assessed on major stationary sources. The commission proposes rules to credit the TERP revenue collected as an equivalent approach because TERP meets one of the three types of alternative programs that satisfy the requirements addressed in EPA's 2010 guidance memo. The grant programs funded through TERP are the same or similar programs that EPA previously approved as meeting the requirements for FCAA, §185 fee program equivalency under the HGB Failure to Attain Fee Rule.

Fees and surcharges related to the sale and use of vehicles and heavy-duty equipment in Texas fund the TERP programs. TCEQ would credit all revenue allocated for TERP programs and administration. TCEQ would identify and track TERP revenue generated from the DFW severe nonattainment area and the HGB severe nonattainment area in two separate Fee Equivalency Accounts to demonstrate equivalency of the area-specific TERP revenue to the penalty fee owed by major stationary sources located in that area.

Under the proposed rules, the commission would be required to annually estimate the expected Area §185 Obligation and compare this estimation with the expected TERP revenue. The commission proposes that TERP revenue collected after the attainment year (baseline year) and statutorily available for TERP programs would be credited towards meeting the FCAA, §185 fee obligation. For the DFW and HGB 2008 eight-hour ozone nonattainment areas, 2027 is the attainment year (baseline year) contained in the July 20, 2027, attainment date. Barring any extension to the attainment date, any TERP revenue generated from the nonattainment area starting with 2028 that is statutorily available for TERP programs could be credited to meet the Area §185 Obligation for DFW and HGB 2008 eight-hour ozone nonattainment areas.

To obtain the estimated total FCAA, §185 fee due from all major stationary sources, a baseline amount would be established for each major stationary source (or group of sources under a Section 185 Account, if aggregated as proposed and discussed later

in this preamble) within the DFW 2008 eight-hour ozone nonattainment area or located within the HGB 2008 eight-hour ozone nonattainment area. The two nonattainment areas are assessed separately, resulting in two Area §185 Obligations, one for DFW and one for HGB. Each major stationary source's or Section 185 Account's reported baseline amount(s) and actual emissions would be used to calculate a Failure to Attain Fee. The resulting amount due from each major stationary source or Section 185 Account for aggregated sources would be summed by location to determine the overall DFW and HGB 2008 eight-hour ozone nonattainment area's Area §185 Obligations.

If revenue generated from TERP is insufficient to fully offset the Area §185 Obligation for the DFW 2008 eight-hour ozone nonattainment area or HGB area 2008 eight-hour ozone nonattainment, then the remaining difference would be assessed as a Failure to Attain Fee on a major stationary source or Section 185 Account for the area on a prorated basis. The amount collected from each major stationary source or Section 185 Account would be discounted based on the amount of revenue credited to the Fee Equivalency Account. In this manner, these proposed rules would "backstop" any TERP revenue with fees directly assessed on major stationary sources as necessary to meet each year's fee. The Area §185 Obligation would be fully met either through the demonstration from the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees on major stationary sources or Section 185 Accounts. 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 Fee that would apply to each major stationary source, the commission proposes to provide major stationary sources a choice to individually determine baselines for VOC and NO_x emissions, aggregate VOC and NO_x emissions into one baseline if the source is major for both pollutants, or aggregate those emissions across multiple major stationary sources under common control. In Attachment C of EPA's 2010 guidance memo, EPA states it would ". . . allow for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." EPA's 2010 memo further states that EPA would allow aggregation of VOC with NO_x emissions, ". . . provided 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 proposed rulemaking would require a major stationary source to first determine its major source applicability for both VOC and NO_x emissions. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 fee rule. If the major stationary source chooses to aggregate baselines by pollutant or site or both, it would be required to provide to TCEQ the individual, unaggregated pollutant and site baselines for each pollutant(s) that determines major source status. This will ensure that staff can accurately enter aggregated baseline amounts into the TCEQ's Section 185 fee database.

In making determinations of whether common control exists, the commission would 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 FR 59878, September 11, 1980), 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)). EPA generally continues to assess common control based on the general principles outlined above and has periodically issued additional guidance for specific topics such as how to assess contiguous or adjacent properties, industrial grouping, etc. The commission would also use other criteria to determine common control consistent with participation in local area banking programs, such as the Mass Emissions Cap and Trade or the Highly-Reactive Volatile Organic Compound Cap and Trade programs. A group of major stationary sources choosing to aggregate under common control as a single customer would be identified with a single common customer identifier used by the commission, the customer number (CN). A group of major stationary sources under common control would be assigned a single Section 185 Account number by TCEQ.

Since VOC and NO_x emissions reductions are both effective at lowering ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas, major sources should be allowed to aggregate both NO_x and VOC emissions into one baseline amount. The commission adopted a strategy of targeting those pollutants in a way that would allow ozone nonattainment areas to attain the standard as expeditiously as practicable in the applicable attainment demonstration SIPs. 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 standard, and this approach is a result of the knowledge gained from research and detailed photochemical modeling of each nonattainment area. 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 the strategies outlined in the attainment demonstration SIPs. This proposed aggregation method compliments the multi-pollutant control strategies incorporated into the SIP for the DFW and HGB ozone nonattainment areas.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the imposition of a penalty 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. 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 Section 185 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 proposes 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 emissions 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),* 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 as long as the proposed rule remains applicable except as consistent with the proposed sections that allow adjustments under specific circumstances. Additionally, the proposed rules would require that calculation of the Failure to Attain Fee remain consistent with the baseline amount determination approach. Once a particular method for a baseline amount calculation is chosen, the Failure to Attain 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 proposed rulemaking as the most appropriate choice for determining a baseline amount, all subsequent assessments, and payments of the Failure to Attain Fee must remain consistent with that selection.

The commission also proposes compliance schedules for determining baseline amounts for each applicable baseline amount scenario. Since the proposed Failure to Attain Fee cannot be implemented until EPA finalizes a failure to attain notice that determines that a severe or extreme nonattainment area under the 2008 eight-hour ozone standard did not attain by the applicable due date, the due dates for major stationary sources operating during the baseline year are structured to account for issuance of this notice. New major stationary sources that begin operating during or after the baseline year would have a fixed amount of time to self-report the baseline amounts to TCEQ. The compliance schedules would ensure timely assessment of the fee.

The commission proposes to invoice and require fee payment in accordance with current state statute and regulations. Once the program is implemented, fee payments would be due each year until the Section 185 fee is terminated.

If this proposed rule is adopted, any Section 185 fee revenue collected by TCEQ would be deposited into the Clear Air Account according to THSC §382.0622. Since spending potential Section 185 fee revenue depends on this proposed rule's adoption, Texas' collection of the Section 185 fee, and future Legislative actions, this proposed rulemaking does not include options for how any potential collected Section 185 revenue would be spent.

The proposed rules would ensure stability of the Clean Air Account and any potential future programs that could be developed using the Failure to Attain Fee revenue by preventing adjustments to previously invoiced baseline amounts for instances in which baselines are adjusted as proposed in §101.708, §101.709, §101.710, and §101.711. No matter the scenario used to adjust the baseline amount it would apply starting with the next fee assessment year.

Section by Section Discussion

§101.700, Definitions

This proposed new section contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 Obligation, attainment date, baseline amount, baseline emissions, baseline year, electric utility steam generating unit, emissions unit, equivalency credits, extension year, Failure to Attain Fee, fee assessment year, fee collection year, major stationary source, and Section 185 Account.

As proposed, the term *actual emissions* would use the definition currently used in 30 TAC §101.10; this would ensure that the VOC and/or NO_x emissions assessed for the *Failure to Attain Fee* include all emissions emitted from the major stationary source for the calendar year being assessed, whether authorized or unauthorized emissions.

The *Area §185 Obligation* is proposed to be defined as the total amount of the *Failure to Attain Fee* due for an entire 2008 eight-hour ozone nonattainment area based on summing the *Failure to Attain Fee* due from each major stationary source for a fee assessment year. For the 2008 eight-hour ozone standard, the 10-county DFW and eight-county HGB nonattainment areas would have separate *Area §185 Obligations*. 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 ozone standard. The *Area §185 Obligation* is the basis for making an equivalency demonstration for the commission's proposed program. The *equivalency credits* are proposed to be defined as revenue collected in a calendar year from TERP to offset the *Area §185 Obligation* on a dollar-to-dollar basis. If there are insufficient funds to offset the entire *Area §185 Obligation,* then *Failure to Attain Fee* would be prorated and the prorated fee amount assessed directly on major stationary sources or Section 185 Accounts to meet the entire *Area §185 Obligation.*

Attainment date is proposed to be defined as the EPA-specified date an area is required to attain the 2008 eight-hour ozone standard under the FCAA.

The attainment year is the entire calendar year that contains the *attainment date.* For purposes of this proposed rulemaking, the *baseline year* is proposed to be defined as January 1 through December 31 of the attainment year. At the time of the proposed rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW nonattainment area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). The severe classification attainment date for these areas is July 20, 2027; therefore, the 2027 calendar year from January 1, 2027, through December 31, 2027, would determine both the attainment year and *baseline year* of 2027, unless EPA approved an attainment date extension under FCAA, §181(a)(5).

Consistent with FCAA, §185, *baseline amount* is proposed to be the lower of baseline emissions (actual emissions as described in §101.705) or total annual authorized or pending authorization emissions at a major stationary source as of December 31 of the baseline year if the major stationary source operated the entire baseline year. For major stationary sources that began operating during or after the baseline year, the first full year (12 consecutive months) operating as a major source would be used to determine the baseline emissions. If the major stationary source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are proposed to be averaged from any single consecutive 24-month period within a

historical period, as outlined in the proposed definition of *baseline emissions*.

For purposes of this proposed rulemaking, the term *baseline emissions* represents the "actual emissions" referenced in FCAA, §185(b)(2) and excludes unauthorized emissions. The baseline emissions are reported in the annual point source emissions inventory according to the Emissions Inventory Requirements of 30 TAC §101.10. The baseline emissions are proposed to include reported annual emissions that are authorized by permit or rule from routine operations, which includes authorized MSS activities during the baseline year or another time period as allowed by this proposed rule, but excludes unauthorized emissions. Emissions from emissions events and MSS activities not authorized by permit or rule must be excluded from the baseline emissions calculations because they are not authorized or representative of routine operations. The exclusion of unauthorized emissions from the baseline emissions calculation is consistent with the PSD definition of baseline actual emissions in §116.112 and 40 CFR §52.21(b)(48) that does not include unauthorized emissions in a baseline amount determination.

This proposed definition of *baseline emissions* differs from the definition of *actual emissions* in 30 TAC §101.10, which includes all emissions emitted, whether authorized or unauthorized, reported in the emissions inventory. The proposed definition of *baseline emissions* represents only the emissions from authorized routine operations reported in the emissions inventory.

If the major stationary source's emissions reported in the emissions inventory are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are proposed to be averaged from any single consecutive 24-month period within a historical period. The historical period allowed depends on the type of emissions units, following PSD guidance. *Electrical utility steam generating units* are included in this proposed rule because they may use a five-year historic look-back period. The definition of *electric utility steam generating units* is consistent with the definition used in 30 TAC §116.12. Other *emissions units*, as defined in §101.1, may use a ten-year historic look-back period.

Extension year is proposed to be defined as a year that meets the requirements of FCAA, §181(a)(5). It is unknown whether the 10-county DFW or the eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard may qualify for an extension, and an extension year may be applicable to future areas designated as severe or extreme nonattainment under the 2008 eight-hour ozone standard.

The *Failure to Attain Fee* is proposed to be defined as the fee assessed and due from each major stationary source or Section 185 Account based on actual emissions, whether authorized or unauthorized, of VOC, NO_x, or both exceeding 80% of the *baseline amount*.

The *fee assessment year* is proposed to be defined as the calendar year the actual emissions were emitted and reported to the emissions inventory and used to calculate the assessed fee amount. The actual emissions include all authorized and unauthorized emissions, such as routine, MSS, and emissions events (EE) reported in the emissions inventory, as discussed in §101.713. For the 10-county DFW and eight-county HGB severe classification nonattainment areas under 2008 eight-hour ozone standard, the fee could be assessed as early as calendar year 2028 should the areas not attain by July 20, 2027. The *fee collection year* is proposed to be defined as the calendar year the fee is invoiced by TCEQ.

The definition for *major stationary source* is consistent with the definition in §116.12 for determining a major source of VOC or NO_x emissions. Because major stationary sources under common control may opt to aggregate pollutants and/or sites for purposes of *baseline amount* determination and *Failure to Attain Fee* payment, a *Section 185 Account* represents either a major stationary source (if not choosing to aggregate) or a group of two or more major stationary sources (if aggregating). A single identifying Section 185 Account number would be assigned by TCEQ to track the option chosen for *baseline amounts* and *Failure to Attain Fee* assessments in the TCEQ Section 185 database. Because major stationary sources can be aggregated on a pollutant basis, 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. A single major stationary source could belong to two separate Section 185 Accounts, or a Section 185 Account may only have one major stationary source. All major stationary sources of VOC and/or NO_x emissions located in a severe or extreme 2008 eight-hour ozone nonattainment area that did not attain by the attainment date are subject to this proposed rule. Even if a major stationary source did not comply and, as a result, did not receive a Section 185 Account from TCEQ, that source would still be subject to this proposed rule and would still owe a Section 185 fee.

§101.701, Applicability

This new section proposes the applicability requirements for the FCAA, §185 fee (Failure to Attain Fee). 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 stationary 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 emissions sources also apply for NO_x emissions sources. Proposed §101.701 identifies the provisions that apply to any 2008 eight-hour ozone nonattainment area classified as severe or extreme that fails to demonstrate attainment of the 2008 eight-hour ozone standard by its attainment date.

The proposed rule is applicable to all major stationary sources in the 2008 eight-hour ozone nonattainment area each year that the penalty fee is applicable as required by FCAA, §185.

At the time of the proposed rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). In the future, should EPA designate other areas of Texas as severe or extreme nonattainment under the 2008 eight-hour ozone standard, then this proposed rulemaking would be applicable to those severe or extreme nonattainment areas.

The executive director would implement this proposed rule upon EPA determining that the area failed to attain the severe or extreme 2008 eight-hour ozone standard. This determination would be the effective date of EPA's finding of failure to attain notice for severe or extreme areas under the 2008 eight-hour ozone standard published in the *Federal Register*. There are no obligations for major stationary sources until the rule is

implemented. As part of its outreach efforts, TCEQ would electronically distribute courtesy notifications to regulated entities that the Section 185 fee has been implemented. Electronic notification, as allowed under 30 TAC §19.30, would include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee*), subscribers of the *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* email and text list (available at (*https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

The *Failure to Attain Fee* would start being assessed for the calendar year following the missed attainment date. The proposed rule defines the attainment year as the entire calendar year that contains the attainment date. For purposes of this proposed rulemaking, the term baseline year is defined as January 1 through December 31 of the attainment year. For the 10-county DFW and eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard, which have a July 20, 2027, attainment date, the attainment year and baseline year are anticipated to be 2027. The fee would start being assessed for calendar year 2028 (first fee assessment year), unless EPA approved an attainment date extension under FCAA, §181(a)(5).

§101.702, Exemption

This new section proposes that no Failure to Attain fee payment is due for a year determined by EPA to be an extension year under FCAA, §181(a)(5) for the 2008 eight-hour ozone standard. 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. It is unknown whether the 10-county DFW area or the eight-county HGB severe nonattainment area under the 2008 eight-hour ozone standard may qualify for an extension. Additionally, an extension year may be applicable if EPA designates future areas as severe or extreme nonattainment under the 2008 eight-hour ozone standard and grants those areas an extension year. For any area granted an extension, the fee would be applicable if the severe or extreme nonattainment area did not attain by the extension attainment date specified by EPA.

§101.703, Fee Equivalency Account

This new section proposes that the executive director establish a Fee Equivalency Account. This account would be a listing of revenues from designated programs that reduce VOC or NO_x emissions in 2008 eight-hour ozone nonattainment areas. Only the revenue collected within each 2008 eight-hour ozone nonattainment area would be credited and available to offset the Area §185 Obligation in the Fee Equivalency Account. Revenue collected in the 10-county DFW 2008 eight-hour ozone nonattainment area would be credited only within that nonattainment area. Revenue collected in the eight-county HGB 2008 eight-hour ozone nonattainment area would be credited only within that nonattainment area. Specifically, TCEQ proposes that revenue collected for the TERP program would be used to offset each 2008 eight-hour ozone nonattainment area's Area §185 Obligation for the area when funds are also expended within each area. This would result in a benefit directly to the nonattainment area from revenue collected. TERP's stated goals and statutory restrictions provide funding for programs or activities that result in reductions in VOC, NO_x, and other pollutant emissions into the atmosphere.

No transfer of revenue would occur between TERP and the Fee Equivalency Account. The Fee Equivalency Account is a documentation mechanism to verify the amount of TERP revenue collected in the 2008 eight-hour ozone nonattainment area to offset the fee on major stationary sources located in that area. If other emissions reduction grant programs become available those would be considered for inclusion to offset the Failure to Attain Fee.

§101.704, Fee Equivalency Accounting

This new section proposes that the Area §185 Obligation would be the total FCAA, §185 fee determined annually for each 2008 eight-hour ozone nonattainment area. The FCAA, §185 fee (Failure to Attain Fee) is proposed to be calculated for each major stationary source or Section 185 Account by TCEQ staff using the approved baseline amounts and emissions inventory data for the fee assessment year. These resultant individual Failure to Attain Fees would be summed to determine the overall Area §185 Obligation within the same 2008 eight-hour ozone nonattainment area.

Revenue, calculated on a dollar basis, associated with the Fee Equivalency Account would be credited starting with the first fee assessment year and continuing annually. The funding associated with the Fee Equivalency Account for a given fee assessment year would be compared with the Area §185 Obligation for a given fee assessment year.

If the Fee Equivalency Account does not have enough funds to fully meet the Area §185 Obligation, a backstop provision would be invoked under which major stationary sources or Section 185 Accounts would be assessed a prorated Failure to Attain Fee to generate sufficient funds 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 Failure to Attain Fee amount that the major stationary source or Section 185 Account would be required to pay is proposed to be reduced to the prorated Failure to Attain Fee amount based on the calculations in this proposed rulemaking. This process would be documented and made publicly available each year.

For example, a hypothetical Area §185 Obligation for HGB for the 2028 fee assessment year is calculated by TCEQ staff as $154 million. The HGB area Fee Equivalency Account for calendar year 2028 has $45 million available from TERP revenue. The HGB area balance for the 2028 fee assessment year is $109 million ($154 million less $45 million) and that amount must be paid by major stationary sources located in HGB that are subject to the Failure to Attain Fee. For the 2028 fee assessment year, the Fee Equivalency Account covers 29.22% ($45 million divided by $154 million, with the quotient multiplied by 100) of the Area §185 Obligation for HGB and each major stationary source's or Section 185 Account's fee will be reduced by 29.22%. TCEQ staff calculates that the Failure to Attain Fee for a hypothetical Section 185 Account located in HGB is $50,000 for the 2028 fee assessment year. The prorated Failure to Attain Fee for the hypothetical Section 185 Account would be calculated by reducing the $50,000 fee by 29.22%, resulting in the hypothetical Section 185 Account owing $35,389.61.

The timing of the demonstration would likely occur in December and then annually afterward, except for the first year the program is implemented. The date that TCEQ performs this evaluation for the first year of program implementation depends on the dates of future federal or state actions that are not currently scheduled

(e.g., effective date in the *Federal Register* of EPA's finding of failure to attain).

§101.705, Baseline Amount

This new section proposes the requirements for determining a baseline amount. FCAA, §185 requires a fee on emissions exceeding 80% of a fee baseline amount determined for the attainment year (referenced as baseline year in this proposed rulemaking) until the Section 185 fee (referred to as Failure to Attain Fee in this proposed rulemaking) no longer applies to the area. Unless the major stationary source or Section 185 Account qualifies for an adjustment to the baseline amount, as outlined in the various adjustment sections of this proposed rulemaking, the method for a fixed, one-time calculation of the baseline amount is provided in this proposed section.

A baseline amount would be required for each ozone precursor pollutant, VOC and/or NO_x, for which the source is major. If a stationary source is major for both VOC and NO_x emissions, a baseline amount would be required for both VOC and NO_x emissions. If the major stationary source is major for only VOC or NO_x emissions, the baseline amount would be required for just that pollutant, VOC or NO_x.

The baseline amount is proposed to be defined as the lower of either: the *baseline emissions* defined as the total annual routine emissions, including reported MSS emissions that are authorized by permit or rule, reported in the emissions inventory, as described in 30 TAC §101.10 for the baseline year, or timeframe otherwise specified in this proposed rule; or the total annual emissions allowed by the applicable authorizations or pending authorizations in effect for the major stationary source during the baseline year or timeframe otherwise specified in this proposed rule. MSS emissions reported in the emissions inventory that are authorized by permit or rule are considered routine and must be included in baseline emissions. The major stationary source's authorized or pending authorization emissions include emissions allowed under any TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year or timeframe otherwise specified may be included in the total annual emissions allowed under authorizations. Some owners or operators of major stationary sources may submit administratively complete applications for authorizing previously unauthorized emissions prior to December 31 of the baseline year or other approved timeframe. To not penalize sources in the process of obtaining an authorization, the commission proposes to allow the emission limits established by permits that were administratively complete to adjust the baseline amount by adding these amounts to the total annual authorized emissions. The proposed approach aligns with the FCAA intent of comparing authorized emissions with reported actual emissions to determine a baseline amount.

A timeframe chosen other than the baseline year to determine a baseline amount depends on whether the major stationary source began operating during or after the baseline year or if the major stationary source's emissions qualify to be averaged over a 24-month consecutive period. Applicable timeframes for baseline amounts are outlined in this proposed rulemaking.

Unauthorized emissions, such as from EE and MSS activities not authorized by permit or rule, are not included in the baseline amount. Exclusion of unauthorized emissions from a baseline amount is consistent with these emissions not being representative of normal, routine operations and with the PSD definition of baseline actual emissions in §116.112 and 40 CFR §52.21(b)(48). For example, an oil and gas major stationary source for both VOC and NO_x emissions experienced VOC emissions from tank flashing that exceeded an authorized permit limit. Tank flashing is a routine operation so the unauthorized VOC emissions resulting from the tank flashing that exceeded the permit limit are required to be reported in the emissions inventory as annual routine emissions. The unauthorized but routine VOC emissions from the tank flashing would be excluded from the baseline emissions calculations used to determine baseline amount.

If the major stationary source has reported emissions in the emissions inventory that are irregular, cyclical, or otherwise vary significantly from year to year, an alternate method to determine baseline emissions would be allowed. Whether a source qualifies as irregular, cyclical, or otherwise varying significantly is determined on a case-by-case basis. For these major stationary sources, any single consecutive 24-month period within a specified historical period could be averaged for the baseline emissions. Major stationary sources that qualify to establish an equivalent alternate fee baseline amount in this manner would calculate the baseline emissions using historical annual routine emissions, as recorded in the emissions inventory, which includes authorized emissions from MSS activities.

The FCAA, §185 does not address how to define a historical period; however, EPA issued a March 21, 2008, guidance memo, referenced elsewhere in this preamble, stating that an acceptable alternate method would be to determine an baseline amount using a period similar to estimating "baseline actual emissions" found in EPA's PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008, guidance, EPA used these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission levels for each emissions unit. The guidance continues by stating: "Once calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity may be used during the historical 24-month period selected, but emissions that do not comply with legally enforceable limits would have to be excluded. Legally enforceable emissions limits would include any state or federal requirements, including Best Achievable Control Technology or Lowest Achievable Emissions Rate.

According to PSD guidance, the timeframe for the historical look-back period for emissions units other than electric steam generating units is any single consecutive 24-month period within the ten-year period immediately preceding the date a complete permit application was submitted. For electric steam generating units the timeframe for the historical look-back period is any single consecutive 24-month period within the five-year period immediately preceding the date a complete permit application was submitted. The historical look-back period for the proposed equivalent alternate fee baseline amount determination would start the calendar year immediately preceding the baseline year. All emissions units at a major stationary source or Section 185

Account would be required to use the same 24-month period when calculating baseline amounts for aggregated pollutants or sites under common control or ownership. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions (actual emissions from the emissions inventory as defined in §101.701) or emissions allowed under authorizations (e.g. permitted emissions) to include emissions from this alternate method.

At the time of this proposed rulemaking, the baseline year is anticipated to be 2027 for the 10-county DFW and eight-county HGB 2008 eight-hour ozone standard severe nonattainment areas. The window used for the possible historical look-back period would be five years (2022 - 2026) for electric generating units (EGU) or 10 years (2007 - 2026) for non-EGU immediately preceding January 1, 2027. The average emissions during the single consecutive 24-month period would be the basis for determining the baseline emissions, in tons.

If rules or regulations take effect during the baseline year and/or 24-month consecutive period used for baseline amount determination, then the baseline emissions and total annual authorized emissions must be adjusted downward to reflect emissions that would have exceeded a legally enforceable emissions limitation requirement from a permit, rule, regulation, commission order, or court order during the applicable timeframe. The major stationary source would not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented during the baseline year and/or 24-month consecutive period used to calculate the baseline amount.

For example, a major stationary source of VOC emissions started operating prior to the 2027 baseline year, and the baseline amount was established from the baseline emissions during the 2027 baseline year. On March 1, 2027, a hypothetical federal rule takes effect that limits emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's emissions limits would be adjusted downward from January 1, 2027, through February 28, 2027, to account for the new limit. In another example, a major source of VOC emissions establishes a baseline amount using the 24-month consecutive period from July 12, 2022, through July 12, 2024. During calendar year 2027, a hypothetical federal rule takes effect that limits emissions from coatings emissions units located at the major source during the 24-month consecutive period chosen for the baseline amount. The baseline emissions for coatings emissions units impacted by the 2027 federal rules' emissions limits would be adjusted downward during the July 12, 2022, through July 12, 2024, period chosen for the baseline amount.

Fugitive emissions would be required to be included for the purposes of the baseline emissions calculations and fee assessments. This is similar to the Title V Emissions Fees described in 30 TAC §101.27, which requires all fugitive emissions to be included in fee calculations after applicability of the fee has been established. Per 40 CFR §70.2, fugitive emissions of VOC or NO_x belonging to one of the categories listed in paragraph 2 of the definition of major sources may be excluded from counting toward major source applicability. Once the source meets the major stationary source applicability requirements of 30 TAC §116.12, fugitive emissions are required to be reported in the emissions inventory, and the fugitive emissions must be used for both baseline emissions calculations and fee assessments.

As allowed under the Emissions Inventory Requirements described in 30 TAC §101.10, a regulated entity that meets the applicability requirements to submit an emissions inventory, which includes major stationary sources, may submit a certifying letter instead of reporting updated emissions in the emissions inventory. The certifying letter option is allowed for any regulated entity (identified by the nine-digit regulated entity reference number (RN) and a seven-character alphanumeric TCEQ account number) that experienced an insignificant change in operating conditions compared to the most recently submitted emissions inventory. An insignificant change in emissions is defined as including start-ups, permanent shut-downs of individual units, or process changes that result in at least a 5.0% or 5 tpy, whichever is greater, increase or reduction in total annual emissions of VOC, NO_x, carbon monoxide, sulfur dioxide, lead, particulate matter (PM) less than or equal to 10 microns in diameter, or PM less than or equal to 2.5 microns in diameter. If a regulated entity submits a certifying insignificant change notification letter instead of updating the emissions, then the emissions reported in the most recently submitted emissions inventory are copied over to the current emissions inventory reporting year. For example, if a regulated entity submits an insignificant change notification letter for the 2027 emissions inventory reporting year and TCEQ staff verified that the requirements of the insignificant change notification letter were met, then the 2026 emissions are copied over to also represent the 2027 emissions. Major sources are cautioned to consider the impacts of choosing to submit an insignificant change letter instead of updating emissions in the emissions inventory because of the implications for baseline amount determinations and fee assessments.

Emissions inventory data are collected annually by the commission and, after quality assurance review, are loaded into the state's air emissions inventory database, the State of Texas Air Reporting System (STARS). Since Texas' emissions inventory program submits data to EPA's National Emissions Inventory (NEI), the quality assurance of emissions inventory data is subject to a federally mandated Quality Management Plan (QMP) that annually documents and describes the emissions inventory organization arrangements, processes, procedures, and requirements. As part of the QMP, the emissions inventory program annually submits a Quality Assurance Project Plan (QAPP) documenting the emissions inventory quality assurance process for EPA's review and approval. The QAPP includes information on how TCEQ staff perform annual detailed technical reviews of point source emissions inventories, correct issues, and document the outcome of the review. Actual emissions reported in the emissions inventory that are subject to the detailed quality assurance process include: all emissions resulting from routine operations, including emissions from authorized MSS activities; all unscheduled MSS activities (reportable and non-reportable); and all emissions events (reportable and non-reportable). Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, revise emissions submitted for the current reporting year and for the reporting year immediately prior. Revisions to historical inventory data outside of this timeframe are done on a case-by-case basis usually as a result of a TCEQ-directed emissions inventory improvement initiative or TCEQ's compliance and enforcement processes. The commission uses emissions inventory data 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 emis-

sions inventory emissions rates solely for purposes of adjusting the baseline amounts and related calculations is not supported. Similar to emissions inventories, air permits are reviewed to ensure accuracy of emissions.

A baseline amount would account for all emissions units located at the major stationary source as of December 31 of the baseline year. Any ownership transfer of emissions units that occurred by December 31 of the baseline year would also need to be included in the baseline amount calculation. If a 24-month consecutive period is chosen for a major source that operated the entire baseline year, then all emissions units located at the major stationary source as of December 31 of the baseline year must be included, regardless of whether they were located at the major stationary source during the period chosen. An owner or operator of a major stationary source or Section 185 Account may not exclude new emissions units added by the baseline year from the 24-month consecutive historical period. For example, a qualified major stationary source chooses March 19, 2022, through March 19, 2024, as the 24-month consecutive period for the baseline emissions. An emissions unit was purchased, and ownership transferred to the source on September 1, 2026; therefore, those emissions must be averaged and added to the 24-month period chosen. The major stationary source that sold the emissions units may not include the sold emissions units in their baseline amount to avoid double-counting of the same emissions units in different baseline amounts.

The proposed rule would require that the baseline amount calculation and supporting documentation be submitted to TCEQ in a format specified by the executive director. Documentation would include either a list of all emission units by their corresponding path-level emissions reported in the point source emissions inventory or all applicable air permits by Emissions Point Identification Number (EPN) (depending on which one is required for the baseline amount determination). If a major source uses path-level emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported by a combination of Facility Identification Number (FIN) and corresponding EPN that match the most recent point source emissions inventory. If a major stationary source uses permitted allowable emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported at the EPN level. Sample calculations would be required for each path-level (emissions inventory) or EPN level (air permits) used for baseline amount determination.

A major stationary source may choose to establish a baseline amount from baseline emissions for sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year. Sufficient supporting documentation would be required to verify that the major stationary source's emissions qualify as irregular, cyclical, or otherwise vary significantly from year to year. Additionally, details on why and how the 24-month consecutive period chosen accurately represents the major source's emissions would be required.

There is no list of sites that meet the definition of a major stationary source as defined in 30 TAC §116.12. TCEQ would use established programs to assist with notifying major sources of NO_x and/or VOC emissions subject to the fee to provide baseline amounts by the due dates in this proposed rulemaking. Although TCEQ would attempt to notify all applicable major stationary sources by using the Title V permitting and air emissions inventory programs as surrogate data for major sources, compliance with this proposed rulemaking is required even if TCEQ does not specifically notify the major stationary source. Compliance with the Section 185 fee program is a requirement of FCAA, §185, and a major stationary source that does not provide a baseline amount by the specified due date would be subject to the executive director establishing the baseline amounts as described in this proposed rulemaking so that TCEQ can assess the required fee.

For major stationary sources operating prior to January 1 of the baseline year or that operated the entire baseline year, the regulated entity will complete the baseline amount form and supporting documentation. A specific due date for initial baseline amount cannot be provided since the implementation of the Failure to Atain Fee depends on the timing of three future actions: TCEQ adoption of this proposed rule; the severe nonattainment areas failing to attain by July 20, 2027, based on 2024, 2025, and 2026 ambient air monitoring data (or by the date established by any extension year granted by EPA); and the effective date in the *Federal Register* of EPA's finding of failure to attain. As proposed, regulated entities would submit baseline forms either on the emissions inventory due date specified under the Emissions Inventory Requirements in 30 TAC §101.10 for the fee assessment year or 120 days from the effective date of EPA's failure to attain notice. Providing no less than 120 days for regulated entities to prepare baseline amounts allows flexibility for the executive director to initially implement the final Failure to Attain Fee rule and initiate related business processes. For the 10-county DFW and eight-county HGB severe 2008 eight-hour ozone nonattainment areas at the time of this proposed rulemaking, the baseline amount based on a 2027 baseline year may be due March 31, 2028 (depending on final Air Emissions Inventory Reporting Rule updates currently in progress by EPA as of the date of this proposed rulemaking), or 120 days from the effective date of EPA's failure to attain notice.

Electronic notification, as allowed under 30 TAC §19.30, would include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee*), subscribers to the listserv for *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* would receive email and/or text notifications (sign-up available at (*https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

Once finalized, the baseline amount would be fixed and would not be changed except as consistent with the proposed adjustments in §§101.708-711.

§101.706, Baseline Amount for New Major Stationary Sources

States are required to assess the Section 185 fee on all major sources of VOC and/or NO_x emissions located in a severe or extreme ozone nonattainment area that fails to attain by its attainment date. This would include major stationary sources that began operating as a major source or transitioned to a major source status during the baseline year or after the baseline year. Since FCAA, §185 does not provide baseline amount determinations for these scenarios, the commission proposes this new section to determine a baseline amount for these new major stationary sources.

The commission proposes that these new major stationary sources use their first year (12 consecutive months) operating as a major stationary source to determine the baseline amount or aggregated baseline amount. The baseline amount must be the lower of the baseline emissions during the first year

of operation as a major source or the total annual authorized emissions during the first year of operation as a major source.

EPA, in its December 14, 2012, notice of final approval of the South Coast Air Quality Management District (SCAQMD) SIP revision (77 FR 74372), allowed a major stationary source subject to FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation to set a baseline amount. EPA, in its February 14, 2020, notice of final approval of the HGB Failure to Attain Fee (85 FR 8411), allowed major stationary sources to determine the baseline amounts on the lower of actual or allowable data available in their first year of operation as a major stationary source.

If rules or regulations take effect during the first full year operating as a major source, then the baseline emissions and total annual authorized emissions must be adjusted downward to reflect those emissions limitations in effect during that timeframe. For example, a major stationary source of VOC emissions started operating January 10, 2027, and the baseline amount was established from the baseline emissions during the first full year of operation, from January 10, 2027, to January 10, 2028. On March 1, 2027, a hypothetical federal rule takes effect that limit emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's emissions limits would be adjusted downward for the entire baseline period (January 10, 2027, through January 10, 2028) to account for the new limit. The major source would not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented or in effect during the calendar year used to calculate baseline emissions.

A baseline amount at a new major stationary source would account for all emissions units located at the major stationary source as of the last calendar day of the first full year operating as a major source. For example, a major stationary source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using the February 4, 2028, through February 4, 2029, timeframe. In this example, the major stationary source would include all emissions units, including any ownership transferred emissions units as of February 4, 2029, in the baseline amount.

For major stationary sources that begin operating between January 1 and December 31 of the baseline year or after December 31 of the baseline year, regulated entities would have 90 days from the last calendar day of the first full year operating as a major source to submit the baseline amount form. Since initial Section 185 fee program implementation has already occurred, a 90-day timeframe is an appropriate length of time for form submission and is consistent with emissions inventory reporting timeframes. For example, a major source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using February 4, 2028, through February 4, 2029. In this example, the regulated entity would have 90 days from February 4, 2029, to submit the baseline amounts and supporting documentation.

§101.707, Aggregated Baseline Amount

This proposed new section would provide for the aggregation of either VOC or NO_x emissions (or both) at multiple major stationary sources to align fee obligations with attainment demonstration emissions reduction approaches. 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 emissions at a single major stationary source or VOC with NO_x emissions across multiple major stationary sources under common control, provided that the stationary sources are major for both pollutants. Once an owner or operator chooses aggregation, then the baseline amount would remain aggregated, and the fees would be assessed in the same manner as the aggregation until the Failure to Attain Fee no longer applies to the area.

Baseline amounts would first be calculated separately for each individual major stationary source for VOC or NO_x emissions, or for both, using the method described in proposed new §101.705 or §101.706. The separate initial baseline amounts for each pollutant at an individual major stationary source must also be submitted in a format specified by the executive director with supporting documentation. Providing the separate initial calculations of baseline amounts is intended to provide transparency and consistency and to assist with quality assurance of baseline amount determinations with any subsequent aggregation. After establishing separate baseline amounts, then the baseline amount could be aggregated by multiple pollutants, multiple stationary sources under common control, or both.

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. Only major stationary sources under common control may be included in the aggregate group. The aggregation methodology must remain consistent throughout the baseline amount calculation and assessment of the Failure to Attain Fee. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for Failure to Attain Fee assessment. The baseline year, same 24-month consecutive period, or other timeframe used to establish baseline amounts would be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation.

Like the baseline amount compliance schedule, major stationary sources that choose to aggregate would submit the required forms and supporting documentation either on the emissions inventory due date of the fee assessment year, as specified under Emissions Inventory Requirements in 30 TAC §101.10, or 120 days from the effective date of EPA's failure to attain notice, whichever is later. Providing no less than 120 days for regulated entities to prepare aggregated baseline amounts allows flexibility for the executive director to implement the final Failure to Attain Fee rule and initiate related business processes. For aggregation, a list of all sites under common control by RN aggregated under an baseline amount must be provided in addition to the supporting documentation provided for individual baseline amounts described under Baseline Amounts. If sites under common control chose to aggregate, then those sites must share the same Customer Reference Number (CN) in TCEQ's Central Registry database. Sites under common control are determined by TCEQ. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the Failure to Attain Fee, as addressed under circumvention requirements of 30 TAC §101.3.

§101.708, Adjustment of Baseline Amount for Major Sources with Less than 24 Months of Operation

Major stationary sources with less than 24 months of consecutive operation as of December 31 of the baseline year or that began operation after the baseline year would not have sufficient data to initially determine if emissions are irregular, cyclical, or otherwise vary significantly from year to year to establish baseline emissions. The provisions of this proposed new section are intended to allow a major source with less than 24 months of consecutive operation an opportunity to adjust the established baseline amount after establishing the emissions history. After completing 24 months of consecutive operations, the major stationary source may request that the baseline amount be adjusted using the average rate during the first 24 months of consecutive operation for the baseline emissions. If the total annual authorizations determined the initial baseline amount and were still lower than the adjusted baseline emissions, then an adjustment may not be requested. If these emissions varied significantly during the 24 months of consecutive operation, the emissions may be considered as irregular, cyclical, or otherwise varying significantly. Under the proposed rules, a major stationary source would be allowed to request an adjustment to its established baseline amount within 90 calendar days of completing 24 months of consecutive operation. EPA published approval for a similar approach for new major stationary sources for the HGB Failure to Attain Fee in February 2020.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.709, Adjustment of Baseline Amount for New Construction

This proposed new section would allow an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction and comply with emissions limits that achieve the lowest achievable emissions rate. The newly constructed emissions units would not have been included in the previously established baseline amount. Under the proposed rules, a major stationary source would be allowed to request an adjustment to its established baseline amount within 90 calendar days of completed construction of the new emissions units.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. . Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.710, Adjustment of Baseline Amount for Ownership Transfers

This proposed new section outlines when an established baseline amount may be adjusted because of ownership transfers. Emissions units may not always be under the same common ownership or control. Owners or operators of major stationary sources, as part of normal business, may transfer ownership of some or all emissions units at a major stationary source or Section 185 Account to another major stationary source or Section 185 Account. The commission recognizes that a change in ownership or control of emissions units could change the Failure to Attain Fee owed for both major stationary sources or Section 185 Accounts. The change in control of emissions units does not change the historical operation, reported emissions of the emissions units, or previously invoiced amounts before the ownership transfer occurred. The ownership transfer must first be approved by and/or reported to the TCEQ Air Permits Division before adjustments of the baseline amounts could be requested.

A change in control or ownership, such as with an emissions unit transfer, would not affect the already established time period or baseline amounts on the remaining emissions units at either major stationary source or Section 185 Account. The already established baseline amounts would be transferred from one major stationary source or Section 185 Account to the other major stationary source or Section 185 Account.

In a manner similar to transferring other obligations such as emissions authorizations, the commission would allow the affected major stationary sources or Section 185 Accounts to transfer the baseline amounts and Failure to Attain Fee associated with each emissions unit having a change in control. The commission would not change the calculated baseline amounts for the transferred emissions units or remaining emissions units.

Major stationary sources that transfer ownership of equipment from one major source or Section 185 Account to a minor source(s) would not have their baseline amounts adjusted to prevent circumvention of the Failure to Attain Fee, as addressed under 30 TAC §101.3.

To qualify for an ownership transfer baseline amount adjustment, the ownership transfer must occur between major stationary sources or Section 185 Accounts of the same pollutant, or aggregated pollutants, located within the same nonattainment area. For example, if an ownership transfer occurred between a major source located in the 10-county DFW nonattainment area under the 2008 eight-hour ozone standard and the eight-hour HGB nonattainment area under the 2008 eight-hour ozone standard, then the baseline amounts could not be adjusted.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

Once finalized, the major stationary source or Section 185 Account that received the ownership-transferred emissions units would add the unaltered baseline amounts from those units to their existing major stationary source or Section 185 Account baseline amounts. There is no baseline amount adjustment for emissions units that were not ownership transferred at the originating or recipient major source. The major stationary source or Section 185 Account that transferred the emissions units would subtract the transferred emissions units' baseline amounts from their major stationary source or Section 185 Account baseline amount. While baseline amounts may increase or decrease at a major stationary source or Section 185 Account resulting from ownership transfers, the overall Area §185 Obligation for the nonattainment area would not change.

To transfer the baseline and the Failure to Attain Fee, the new owner or operator of each major stationary source or Section 185 Account affected by the change in common control would be required to submit a request to the executive director within 90 days of the ownership change for the executive director's approval.

§101.711, Adjustment of Baseline Amount for Final Emissions Inventory Data

This proposed new section addresses the situation when baseline emissions may need to be adjusted upon the availability of final quality assured and TCEQ-approved emissions inventory data. The Failure to Attain Fee would be implemented upon the effective date of EPA's finding of failure to attain notice published in the *Federal Register* for a severe or extreme ozone nonattainment area under the 2008 eight-hour ozone standard that fails to attain by the attainment date. It is unknown when EPA would issue the finding of failure to attain; therefore, the specific dates to establish an initial baseline amount are unknown. Because of implementation timing, final quality assured and TCEQ-approved emissions inventory data could occur after the baseline amount is established. If a major stationary source had used emissions inventory data to establish the baseline amount, then TCEQ may request adjustments based on the final quality assured emissions inventory data.

Additionally, major stationary sources may initiate emissions inventory revisions that require baseline amount adjustments. Due to limited staff resources, approval of regulated entity-initiated requests would be based on the revisions guidance in the Emissions Inventory Guidelines published annually and posted on the Point Source Emissions Inventory webpage located at (*https://www.tceq.texas.gov/airquality/point-source-ei/psei.html*). Emissions inventory data are used extensively for air quality planning purposes, such as SIP revisions and rule development, submitting to required federal programs, such as the NEI, and assessment of other applicable fees such as the Title V fees. For these reasons, emissions inventory revisions are allowed for specific circumstances. Emissions inventory revisions submitted solely for the purpose of adjusting a baseline amount would not be accepted.

Regulated entities, including major sources, are provided an opportunity to review and if necessary, revise emissions data submitted for the current emissions inventory reporting year and for one year immediately prior. Major stationary sources would have 90 days or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, to submit adjusted baseline amount requests due to final, quality-assured emissions data. Revisions to historical emissions inventory data outside of this timeframe are evaluated on a case-by-case basis, usually as the result of a TCEQ-directed emissions inventory improvement project or TCEQ's compliance and enforcement process.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with final emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.712, Failure to Establish a Fee Baseline Amount

This proposed new section outlines the procedures for the executive director to establish a baseline amount. Timely and accurate baseline amounts are required from each applicable major stationary source to implement the FCAA-required Section 185 fee program. If a major stationary source does not submit an approvable baseline amount by the due date specified by the executive director, then the executive director would determine baseline amount(s) for that major stationary source. In accordance with the requirements of FCAA, §185, the lower of actual emissions (reported in the emissions inventory as described in §101.705) or allowable emissions (permits or authorizations) from the attainment year (referenced as baseline year in this proposed rulemaking), would be used, if both were available, to determine separate baseline amounts for each pollutant that determined major source applicability. Since the executive director would not have sufficient information, aggregation by pollutant or sites under common control and any adjustments allowed under this proposed rulemaking would not be used.

If available, emissions inventory data reported under 30 TAC §101.10 would be used for determining the baseline emissions. However, if only permit allowable data are available, a baseline amount would be established as 12.5 tons for VOC and/or 12.5 tons for NO_x (depending on the pollutant(s) that determined major source applicability) until the major stationary source submitted an approvable baseline amount. Allowable (permits or authorizations) emissions are typically higher than the actual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or allowable emissions, so the executive director would establish the baseline emissions from the unavailable emissions inventory as 12.5 tons, which represents one-half of the major stationary source threshold of 25 tons. If the executive director used the allowable emissions from the permit to establish the baseline amount, then the non-compliant major stationary source would gain the advantage of a higher baseline amount by not reporting their actual emissions.

If the executive director establishes the baseline amounts, then those baseline amounts would be applicable until the major stationary source submits a verifiable and complete emissions inventory according to the Emissions Inventory Requirements of 30 TAC §101.10 and baseline amount. After the major stationary source submits a baseline amount and the executive director reviews the baseline amount to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division, the final baseline amount would apply starting with the next fee assessment year. Adjustments to previous fee invoices based on baseline amounts established by the executive director would not be allowed.

§101.713, Failure to Attain Fee Assessment

The proposed new section outlines the method used to assess the Failure to Attain Fee (total fee) for VOC or NO_x emissions, or both. If the major stationary source is major for just one pollutant, the total fee would be assessed for just the one pollutant, VOC or NO_x. If the major stationary source is major for both VOC and NO_x emissions, the total fee would be assessed for both pollutants.

This proposed new section also provides for the total fee calculation for owners or operators of major stationary sources or Section 185 Accounts. Fee assessments must follow the same method chosen for the baseline amount determination. The total fee from VOC and/or NO_x emissions from a major stationary source that is major for one pollutant and does not have multiple sites under common control, does not choose to aggregate

baseline amounts, or does not comply with the provisions of proposed §101.707 would remain separate and due from each major stationary source or Section 185 Account. The total fee for owners or operators of major stationary sources that choose to aggregate VOC and/or NO_x emissions would also be due according to the provisions of this proposed section. The aggregation of VOC with NO_x emissions may occur at one major stationary source or across multiple major stationary sources under common control. Because both pollutants were used to aggregate a baseline amount, the total fee would be due on actual emissions of both VOC and NO_x emissions. Consistency between the baseline amount determination and the total fee calculation would be maintained with this approach. An owner or operator of multiple sources under common control who chooses to combine a single pollutant from multiple major stationary sources in a baseline amount must aggregate actual emissions of that single pollutant in the total fee payment. If an owner or operator opted to combine VOC with NO_x emissions at a major stationary source, both VOC and NO_x emissions must be aggregated for the total fee payment. Similarly, owners or operators who choose to combine VOC and NO_x emissions in a baseline amount 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 total fee. For example, if five major stationary sources of both VOC and NO_x emissions elected to aggregate into one Section 185 fee account to determine the NO_x baseline amount, then the total NO_x portion of the fee payment would be based on all actual reported NO_x emissions from those five major stationary sources. Since the five major stationary sources did not elect to aggregate VOC emissions into one baseline amount, then the total fee payment for VOC emissions would be assessed separately for the five different Section 185 fee accounts using actual reported VOC emissions for these major stationary sources. Similarly, if owners or operators choose to combine multiple major stationary sources into one baseline amount for VOC and NO_x emissions, then the total fee payment would be due from the combined major stationary sources for both pollutants together.

The total fee would be applicable to and calculated for each pollutant (VOC or NO_x) for which the major source meets the applicability requirements of this proposed rulemaking from the actual emissions reported in the emissions inventory for the fee assessment year. The fee amount assessed, calculated, and invoiced would be based on the actual emissions from the fee assessment year's emissions inventory that exceeded 80% of the baseline amount, rounded up to the nearest whole number. If the actual emissions reported in the emissions inventory are less than 80% of the baseline amount, then the fee would be assessed at $0.00 dollars and no fee payment would be due from that major stationary source or Section 185 Account for that fee assessment year for that pollutant. For future fee assessment years, the fee would be due if the actual emissions reported in the emissions inventory exceeded 80% of the baseline amount.

Rounding up to the nearest whole number is standard practice for fee assessment since assessing fees on fractional amounts creates fee amounts with several decimal places that can cause errors in the fee invoice data systems, which accept only two decimal places. An example of rounding up to the nearest whole number would be the fee assessment amount calculated as 10.0319 tons, rounding up to the nearest whole number, the fee would be assessed and invoiced on 11 tons.

The total 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, rounded up to the nearest whole number.

While baseline amounts exclude unauthorized emissions, fee assessments would be based on actual emissions, as defined in 30 TAC §101.10, which includes emissions from annual routine operations, MSS operations, and other events not otherwise authorized (emissions from emissions events or MSS activities). Inclusion of unauthorized emissions in fee assessment is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the year that the fee is owed. Inclusion of unauthorized emissions in fee assessment is also required in TCEQ's emissions fee rule in 30 TAC §101.27, which requires all MSS and emissions event emissions to be included in fee calculations.

FCAA, §185 requires the annual fee to be adjusted by the consumer price index (CPI) and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502 requires the fee to be adjusted annually per the CPI for all-urban consumers published by the United States Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. FCAA, §185 requires these fees to be assessed on a calendar-year basis, and the inflation factor based on the CPI is applied in September for the fiscal year (based on the previous September through August data). Therefore, the calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January through August and one third of the fee associated with September through December). For example, a 2028 calendar-year fee would span the 2028 fiscal year and the 2029 fiscal year. Thus, a calendar-year 2028 fee requires two thirds of the annual CPI ending in August 2028 and one third of the annual CPI ending in August 2029. The commission proposes this methodology to calculate the fee from EPA's guidance memo (Page 10, available at (*https://www.epa.gov/sites/default/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf*). The proposed fee calculation uses the 40 CFR Part 70 Presumptive Minimum fee basis from EPA's guidance memo. The Part 70 fee rate is published annually by EPA and is available at (). The Part 70 fee is the rate used to calculate emissions-based fees for Part 70 permit programs. Rather than calculating the rate directly from the CPI, the proposed method uses the Part 70 fee rate published by EPA. The Part 70 fee already has the required CPI adjustment incorporated into it.

The timing of the fee assessment depends on the effective date of EPA's finding of failure to attain. For the 10-county DFW and eight-county HGB 2008 eight-hour ozone nonattainment areas, 2028 is the first year after the attainment date of July 20, 2027. Since the 2027 emissions inventories would be due in 2028, TCEQ staff would have until the end of 2028 to complete the quality assurance reviews of the 2027 annual emissions inventories that would be used to determine the baseline amount. Major sources would require time to establish the baseline amounts based on final emissions reported in the 2027 emissions inventory. TCEQ staff would require time to quality assure the baseline amounts submitted by each major source. To establish and quality assure the baseline amounts, the fee collection year would generally be proposed as two calendar years following the fee assessment year. A potential scenario could include regulated entities submitting the 2027 emissions inventories by the March 31, 2028, due date, and TCEQ staff completing the quality assur-

ance reviews of the 2027 emissions inventories by the end of calendar year 2028. If the area(s) fail to attain the 2008 eight-hour ozone standard, and EPA finalizes a failure to attain notice in October 2027, then, following EPA's effective date of the failure to attain notice, TCEQ could provide a courtesy electronic notification to regulated entities that major sources must submit their baseline amount to TCEQ by March 31, 2028. TCEQ staff would quality assure the 2027 baseline amounts during calendar year 2028. The 2028 emissions inventories are due by April 2, 2029 (since March 31, 2029, falls on a Saturday), and TCEQ staff would complete the quality assurance process for the 2028 emissions inventories by the end of calendar year 2029. TCEQ would implement the calendar-year 2028 Section 185 fee rate once EPA publishes it, typically by the end of October each year. Assuming EPA publishes the 2028 Section 185 fee rate in October 2028, TCEQ would then assess the calendar-year 2028 fees in late 2029 and prepare and send invoices in early calendar-year 2030. As a result, calendar year 2030 becomes the first fee collection year for the first fee assessment year of 2028, based on the actual emissions reported in the 2028 emissions inventory.

A major stationary source subject to the requirements of this proposed rulemaking would also be required to submit an annual emissions inventory according to §101.10. The annual fee assessment requires the submission of the emissions inventory by the due date to invoice the source on actual emissions of VOC, NO_x, or both for that fee assessment year. Regulated entities subject to the Section 185 fee that do not submit an emissions inventory by the due date would be subject to enforcement.

§101.714, Failure to Attain Fee Payment

This proposed section stipulates that payment of the Failure to Attain Fee must be made by check, certified check, electronic funds transfer, or money order made payable to TCEQ. Payment must be sent to the TCEQ address provided on the billing statement by the date specified on the invoice. Generally, sites will have a minimum of 30 days to pay the invoice.

This proposed rule would impose interest and penalties in accordance with 30 TAC Chapter 12 to owners or operators of major sources subject to the applicability provisions of this proposed subchapter who fail to make full payment of the Failure to Attain Fees by the due date.

§101.715, Eligibility for Other Failure to Attain Fee Fulfillment Options

This proposed new section would allow major stationary sources or Section 185 Accounts required to pay a Failure to Attain Fee (total fee) to partially or completely fulfill the total fee owed by relinquishing emissions credits or using Supplemental Environmental Projects (SEPs) instead of issuing full payment. These other fulfillment options could be considered individual fee offsets for major stationary sources or Section 185 Accounts. The amount of emissions tonnage upon which the total fee is owed or the total fee amount owed would be reduced for the major stationary source or Section 185 Account while the nonattainment area receives emissions reductions benefits. If relinquishing emissions credits or using SEPs does not completely fulfill the entire fee owed by a major stationary source or Section 185 Account, the remaining portion of the total fee remains due according to the Failure to Attain Fee Payment section of this proposed rulemaking.

As explained previously in this preamble, the implementation of the Section 185 fee program depends on several future factors including the effective date of EPA's finding of failure to attain action. According to proposed §101.714, the invoice due date would be provided by the executive director after the program is implemented. The commission must be timely informed if other options would be requested to fulfill the total fee. The commission proposes that the emissions inventory due date specified under the Emissions Inventory Requirements of 30 TAC §101.10 for the fee assessment year would be the proposed date that major stationary sources or Section 185 Account must inform the executive director that these other fulfillment options would be used. Further, the commission proposes that the emissions inventory due date specified under the Emissions Inventory Requirements of 30 TAC §101.10 for the fee assessment year would be the proposed date allowances traded under §101.716 must be approved and completed, and SEPs, under §101.717, must be approved and funded. If other fulfillment options under §101.716 are not approved and funded, exercised, or otherwise completed by the emissions inventory due date, these other fulfillment options would not be eligible to be applied to the total fee. Because a SEP may be a capital project requiring more than 30 days to complete, SEPs must be approved and funded by the emissions inventory due date. All requests to use a SEP as the other option to fulfill the total fee would be subject to the executive director's approval to ensure applicability to the nonattainment area.

§101.716, Relinquishing Credits to Fulfill a Failure to Attain Fee

This proposed new section allows major stationary sources or Section 185 Accounts to request to fulfill all or a portion of their Failure to Attain Fee (total fee) 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 total fee reduction purposes, on a ton-for-ton basis, would only be allowed for use as a fulfillment option for the pollutant (VOC or NO_x) specified on the credit. VOC credits or HECT allowances must only be used as a fulfillment option for VOC tons in excess of the baseline; NO_x credits must only be used as a fulfillment option for NO_x tons. The 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 or Section 185 Accounts located in the 2008 eight-hour ozone nonattainment area. Significant digit rounding of the emissions reduction must be limited to one-tenth of a ton. Removing these emissions, represented as allowances, on a ton-per-ton basis furthers the goals of reducing ozone-causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

§101.717, Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee

This proposed new section allows major stationary sources or Section 185 Accounts to request to fulfill all or part of their Failure to Attain Fee (total fee) by contributing to a SEP within the 2008 eight-hour ozone nonattainment area where the major stationary source or Section 185 Account is located. 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 opportu-

nities that more directly benefit 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's or Section 185 Account's Failure to Attain Fee on a dollar-per-dollar or ton-by-ton basis. As proposed, the rule would also allow a major stationary source or Section 185 Account to use surplus SEP funds from year to year. The funding would not be discounted or depreciated over time.

The proposed rule language would only allow funding for air-related projects that are implemented within the same 2008 eight-hour ozone nonattainment area. For example, in the 10-county DFW nonattainment area under the 2008 eight-hour ozone standard, SEPs are restricted to fulfillment options for major stationary sources or Section 185 Accounts located in the DFW nonattainment area. This rule would restrict SEPs to projects that offset the Failure to Attain Fee on a dollar-per-dollar or ton-by-ton 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.

Because a SEP can be used to offset an administrative penalty, it is inappropriate for those funds to also be used for credit or offset for the Failure to Attain Fee. For many SEPs, only half the dollar amount of the SEP may be used to offset an administrative penalty. The use of Failure to Attain Fee credit from the SEP would be restricted to be the portion of funds not used to offset an administrative penalty. The SEP must also be enforceable through an Agreed Order or other enforceable document to ensure compliance with the SEP objectives.

§101.718, Cessation of Program

This proposed new section outlines the circumstances that would end the Failure to Attain Fee for an applicable nonattainment area. FCAA, §185 requires the penalty fee to be collected until redesignation of the nonattainment area to attainment by EPA, any final action or final rulemaking by EPA to end the Failure to Attain fee, or a finding of attainment by EPA. After EPA redesignates an area to attainment and publishes the final approval of the attainment redesignation in the *Federal Register*, the Failure to Attain Fee would no longer be applicable to that ozone nonattainment area as of the effective date specified in the *Federal Register*.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the commission proposes that the Failure to Attain Fee would be assessed, but the fee collection would 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 2008 eight-hour ozone standard are submitted to EPA. The commission also proposes as part of this design value determination, the ability to exclude days that exceeded the 2008 eight-hour ozone standard because of exceptional events or emissions emanating outside the United States.

Fiscal Note: Costs to State and Local Government

Kyle Girten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, fiscal implications may result for TCEQ and other units of government during implementation of the proposed rule.

If DFW and/or HGB areas do not attain the 2008 eight-hour NAAQS by July 20, 2027 or EPA does not abolish the program, these areas would be subject to the Section 185 fee in the proposed rulemaking (30 TAC Subchapter K. If this is the case, TCEQ currently estimates it would require the addition of three full-time-equivalents (FTEs) beginning in FY 2028 and for the update and maintenance of a database for tracking information as applicable to TCEQ's 185 fee program. It is anticipated that the three FTEs would include a Natural Resources Specialist (NRS) V (B24) and two NRS IVs (B22) in years 3 and 4 (FY 2028 and FY 2029), and two FTEs (one NRS V and one NRS IV) in year 5 (FY 2030) as necessary to implement the program. These staff would develop and implement business processes for (1) establishing and maintaining a fee equivalency account (§§101.703-704), (2) establishing baseline determinations using data submitted by regulated entities (§§101.705-712), (3) annually assessing and collecting fees based on data from annual emissions inventories (§§101.713-714), (4) reviewing and assessing fee payments (§§101.715-717), and (5) updating and maintaining the database for the program. The total cost for FTEs, including salaries and other costs, but excluding fringe and payroll costs is estimated at $277,818 in FY 2028, $252,318 in FY 2029, and $171,920 in FY 2030. It is estimated that $250,000 will be needed annually for the update of the Section 185 database in FY 2028 and FY 2029, and $50,000 would be needed in FY 2030. In summary, it is anticipated there will be no costs to TCEQ during the first two years the rules are in effect, and the total cost to TCEQ is estimated at $527,818 in FY 2028, $502,318 in FY 2029, and $221,920 in FY 2030.

TCEQ may receive revenue from fees that may be required of entities that include major stationary sources of VOC and/or NO_x emissions in these areas. Whether fees will ultimately be assessed as a result of this rulemaking is dependent on how baselines are determined for the HGB and DFW sources (§§101.705-712), actual emissions for each year when fees are assessed (§§101.713-714), the amount of TERP revenue in these areas that is eligible to offset fee obligations (§§101.703-704), whether and to what extent equivalent alternatives are used in lieu of fee payments (§§101.715-717), and the unit cost per ton of VOC and/or NO_x emissions billed as required by FCAA, §182(d)(3) and (e) and §185.

It is noted that when the Section 185 fee program was implemented for the HGB one-hour ozone severe nonattainment area for major sources of VOC and/or NO_x emissions, TERP revenue was sufficient to offset all fee obligations every year fees were required to be assessed (calendar years 2012-2019), and TCEQ did not invoice fees during this timeframe. For this rulemaking, TCEQ estimates that between $0 - $129,000,000 in revenue will be received annually during the third, fourth, and fifth years after the proposed rules are in effect.

This estimate was derived using the 2023 fee rate from EPA ($11,922 per ton VOC and/or NO_x) adjusted to increase by an assumed inflation rate of 2.5% between 2023 and 2028. For DFW, revenue received by TCEQ is estimated to be between $0 - $5,000,000 each year starting in 2028, assuming TCEQ receives the lowest amount of eligible TERP revenue for this area in the past ten years ($42,000,000). For HGB, revenue received is estimated to be between $0 - $124,000,000, assuming TCEQ receives the lowest amount of eligible TERP revenue for this area in the past ten years ($47,000,000).

Fiscal implications for other governmental entities would be dependent on whether fees need to be assessed for major stationary sources in the DFW and/or HGB areas. Affected entities include major stationary sources of VOC and/or NO_x emissions in these areas. In the DFW area, it is estimated that eight landfills, one university, and one sewage facility are governmental entities

that would meet eligibility requirements. In HGB, it is estimated that six landfills, two universities, one research facility, and four sewage facilities would meet eligibility requirements Entities for DFW and/or HGB would be required to submit baseline information for VOC and/or NO_x, and prorated based on TERP offsets, they would be responsible for pay the annual Section 185 fee or apply equivalent alternatives based on their actual emissions over baseline amounts.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with federal law. If this rulemaking were not to occur, in accordance with FCAA, §185(d), EPA would have the ability to impose and collect the fee with interest, and this revenue would not be returned to the state. Additionally, although the Section 185 fee is a penalty and not a control strategy, the magnitude of the fee could potentially incentivize major stationary sources to reduce ozone precursor emissions in the DFW and/or HGB nonattainment areas.

This rulemaking may have fiscal impacts on 461 major stationary sources, including the 23 governmental sources noted above. These sources are from a range of industrial source categories, with the most common categories being industrial organic chemicals, crude petroleum and natural gas, electric services, petroleum bulk stations and terminals, special warehousing and storage, natural gas liquids, plastic materials and synthetic resins, refuse systems, refined petroleum pipelines, petroleum refining, industrial gases, and natural gas transmission. As noted above, the fee per sources is dependent on multiple factors, and the total impact for DFW and HGB areas could range from $0 - $129,000,000 annually during the third, fourth, and fifth years after the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking is not anticipated to adversely affect a local economy in a significant way for the first five years that the proposed rule is in effect. While the magnitude of fees assessed has the potential to be high in the DFW and HGB areas, the number of businesses and governmental entities affected is very small in proportion to the overall number of industries and business and governmental entities in these areas. It is unknown whether and to what extent this rulemaking would affect business decisions made by entities directly affected by this rule.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. This rulemaking applies to DFW and HGB areas, which are areas with large populations; therefore, rural communities are not significantly impacted.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect. No small businesses have been identified that would be affected by this rulemaking.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and may require a request for an increase in future legislative appropriations to the agency. The proposed rulemaking is anticipated to require the creation of new employee positions, and it may increase fees paid to the agency. The proposed rulemaking establishes a new regulation, with major sources of VOC or NO_x emissions in the DFW and/or HGB areas subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy, particularly if TERP revenue is sufficient to offset the Section 185 fee obligation.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking considering 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, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. 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 specific intent of the proposed rules is to comply with the requirements of 42 U.S.C. §7511a and §7511d (FCAA, §182 and §185) for the DFW and HGB 2008 ozone nonattainment areas, as discussed further elsewhere in this preamble. Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. 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 42 U.S.C. §7511d(d) (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.

States are required to adopt State Implementation Plans (SIPs) with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. As discussed in the Fiscal Note portion of this preamble, the proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is necessary to comply with federal law on 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. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410 (FCAA, §110(c)).

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis contemplated by SB 633. Requiring a full regulatory impact analysis for all federally required rules 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 that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rules do not impose burdens greater than required to comply with federal law, as discussed elsewhere in this preamble. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, 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." (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 applying the standard of "substantial compliance" specified in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard.

As presented in this analysis and elsewhere in this preamble, the evidence supports the conclusion that the commission has substantially complied with the requirements of Texas Government Code, §2001.0225. The proposed rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble. The proposed rules were determined to be necessary to comply with federal law and will not exceed any standard set by state or federal law. These proposed rules are not an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the proposed rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The proposed rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble, including THSC, §§382.011, 382.012, and 382.017. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmen-

tal action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043.

The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to meet federal requirements for the inclusion of penalty fee programs for major stationary sources in State Implementation Plans (SIPs) as mandated by 42 United States Code (USC), §§7410, 7511a, and 7511d (Federal Clean Air Act (FCAA), §§110, 182 and 185). Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. 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 42 U.S.C. §7511d(d) (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.

States are required to adopt SIPs with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410(c) (FCAA, §110(c)).

The proposed rules will not create any additional burden on private real property beyond what is required under federal law, as the proposed rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the commission concludes that the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

Written comments on the consistency of this rulemaking 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 K would not require revisions to existing Federal Operating Permits under 30 TAC §122, Federal Operating Permits Program.

Announcement of Hearing

The commission will hold a virtual public hearing on this proposal on June 12, 2025, at 2:00 p.m. via virtual platform such as Microsoft Teams. The hearing is structured for the receipt of oral comments by the public. Individuals may register to provide oral comments and 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.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by June 5, 2025, for the June 12, 2025, hearing. To register for the hearing, please email *Rules@tceq.texas.gov* and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent by June 6, 2025, for the June 12, 2025, hearing to those who register for the hearing.

Members of the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://events.teams.microsoft.com/event/589ff6dc-dcbe-4ce9-ae8c-45a18864e652@871a83a4-a1ce-4b7a-8156-3bcd93a08fba

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: *https://tceq.commentinput.com/comment/search*. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-131-101-AI. The comment period opens on May 6, 2025, and closes on June 18, 2025. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Jill Dickey-Hull, Emissions Assessment Section, (512) 239-5912, and 185Rule@tceq.texs.gov.

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 com-

mission 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 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 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; and 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; and THSC, §382.0622, concerning Clean Air Act Fees, specifying that any fees collected as required by Federal Clean Air Act (FCAA), §185 are clean air act fees under the THSC. The new sections are also proposed to comply with FCAA, 42 United States Code (USC), §7511a(d)(3), (e), and (f) (FCAA, §182(d)(3), (e), and (f)) regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d (FCAA, §185) 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, 382.017 and 382.0622; TWC, §§5.102, 5.103, 5.105, 5.701 - 5.703 and 5.705- 5.706; as well as FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d (FCAA, §182(d)(3), (e), and (f), and §185).

§101.700. Definitions.

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

(1) Actual emissions--As defined in §101.10 of this title (relating to Emissions Inventory Requirements).

(2) Area §185 Obligation--The total annual amount of Failure to Attain Fees due from all applicable major stationary sources or Section 185 Accounts in a severe or extreme ozone nonattainment area that failed to attain the 2008 eight-hour ozone National Ambient Air Quality Standard by its applicable attainment date.

(3) Attainment date--The U.S. Environmental Protection Agency-specified date that a severe or extreme nonattainment area must attain the 2008 eight-hour ozone National Ambient Air Quality Standard.

(4) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data submitted to and reviewed the executive director. The baseline amount is the lower of baseline emissions (actual emissions) or total annual authorizations or pending authorizations emissions at a major stationary source during the baseline year or timeframe as otherwise specified under this subchapter.

(5) Baseline emissions--Emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title. The emissions must include all annual routine emissions associated with authorized normal operations, which includes reported emissions from authorized maintenance, startup, and shutdown activities and excludes all unauthorized emissions. The timeframe options are as follows:

(A) reported emissions from the baseline year; or

(B) reported emissions as an average of any single consecutive 24-month period as allowed under §101.705(b)(2) of this title (relating to Baseline Amount) for major stationary sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year.

(6) Baseline year--The baseline year is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in this subchapter.

(7) Electric utility steam generating unit--As defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

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

(9) Equivalency credits--An amount equivalent to the revenue collected in accordance with §101.703 of this title (relating to Fee Equivalency Account) for accumulation in the Fee Equivalency Account.

(10) Extension year--A year as defined in FCAA §181(a)(5).

(11) Failure to Attain Fee--The fee assessed and due from each major stationary source or Section 185 Account based on actual emissions whether authorized or unauthorized of volatile organic compounds, nitrogen oxides, or both pollutants that exceed 80% of the baseline amount.

(12) Fee assessment year--Calendar year used to calculate and assess the Failure to Attain Fee under the provisions of this subchapter.

(13) Fee collection year--Calendar year in which the Failure to Attain Fee is invoiced.

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

(15) Section 185 Account--The TCEQ-assigned account number for one major stationary source or a group of two or more major stationary sources under common control located within the same severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

§101.701. Applicability.

(a) The provisions of this subchapter will become applicable in an area classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) when the U.S. Environmental Protection Agency (EPA) determines that the area has failed to attain the standard by its applicable severe or extreme attainment date. The determination will be the effective date of EPA's finding of failure to attain notice published in the *Federal Register*.

(b) Except as otherwise provided in §101.702 of this title (relating to Exemption), the provisions of this subchapter apply to all regulated entities that meet the definition of major stationary sources of volatile organic compounds or nitrogen oxides located in a nonattainment area classified as severe or extreme for the 2008 eight-hour ozone standard.

§101.702. Exemption.

No source subject to the Failure to Attain Fee under this subchapter is required to remit the fee during any calendar year for which the U.S. Environmental Protection Agency has finalized an extension of the attainment date for the nonattainment area applicable to the source under the 2008 eight-hour ozone National Ambient Air Quality Standard.

§101.703. Fee Equivalency Account.

(a) Fee Equivalency Account. The executive director will establish and maintain a Fee Equivalency Account to document revenue collected and available for use in demonstrating equivalency with the Area §185 Obligation. No actual money will be deposited into the Fee Equivalency Account. The Fee Equivalency Account will reflect equivalency credits based upon revenue collected and made available for programs of the Texas Emissions Reduction Plan (TERP) under authority of the Texas Health and Safety Code, Chapter 386.

(b) Revenue eligibility. The revenue eligible for credits to the Fee Equivalency Account must be from the severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area and cannot be transferred between nonattainment areas.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account will be credited for the years TERP funding is expended in a severe or extreme 2008 eight-hour ozone standard nonattainment area beginning with the first fee assessment year until the Failure to Attain Fee no longer applies to the nonattainment area as described under §101.718 of this title (relating to Cessation of Program).

(d) Other revenue sources. The executive director may credit revenue from other emissions reductions grant programs as funds become available. The executive director will apply revenue from such grant programs to the Fee Equivalency Account according to the requirements of this section and §101.704 of this title (relating to Fee Equivalency Accounting).

§101.704. Fee Equivalency 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 Area §185 Obligation determination.

(b) Area §185 Obligation determination. Annually, the executive director will calculate the applicable Area §185 Obligation for all major stationary sources or Section 185 Accounts in a severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area by summing the Failure to Attain Fee for each major stationary source or Section 185 Account. The summed amount will represent the calendar year Area §185 Obligation for the severe or extreme 2008 eight-hour ozone standard nonattainment area. The annual Area §185 Obligation will be calculated using actual emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year.

(c) Annual demonstration of equivalency. The executive director will annually determine the amount of equivalency credits available in the Fee Equivalency Account to determine the Area §185 Obligation calculated under this subsection. This demonstration will continue annually until the 2008 eight-hour ozone standard nonattainment area is no longer subject to the fee according to the provisions of §101.718 of this title (relating to Cessation of the Program).

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

Figure: 30 TAC §101.704(c)(1)

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

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

Figure: 30 TAC §101.704(c)(3)

§101.705. Baseline Amount.

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

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under authorizations, including authorized emissions from maintenance, shutdown, and startup activities, applicable to the source in the baseline year. Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year may be included in the total annual emissions allowed under authorizations.

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

(1) the baseline year; or

(2) a historical period, if the major stationary source's or Section 185 Account's emissions are irregular, cyclical, or otherwise vary significantly from year to year. Any single 24-month consecutive period within a historical period preceding January 1 of the baseline year may be used to calculate an average baseline emissions amount in tons per year for the major stationary source as the historical period. 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) Historical period. If a major stationary source or Section 185 Account uses a historical period as defined in subsection (b)(2) of this section, the baseline amount will:

(1) use adequate data for calculating the equivalent alterative fee baseline emissions;

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

(3) be adjusted downward to exclude any emissions during the consecutive 24-month period that would have exceeded an emissions limitation for rules and regulations with which the source had to comply during the baseline year.

(d) Adjustments. The baseline amounts must be adjusted downward to exclude any emissions that exceeded an emissions limit for rules or regulations in effect by December 31 of the baseline year.

(e) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of December 31 of the baseline year. When control or ownership of emission units changes during the baseline year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emissions unit on December 31 of the baseline year.

(f) Calculations. A baseline amount, reported in units of tons per year, must be calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides, for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(g) Compliance schedule. The owner or operator of each major stationary source meeting the requirements of §101.701 of this title must submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amounts forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120 days after the effective date of a finding of failure to attain, whichever is later.

(h) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions. After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.706. Baseline Amount for New Major Stationary Sources.

(a) Baseline amounts. A baseline amount must be established for major stationary sources or Section 185 Accounts that begin operating during or after the baseline year. The baseline amount must use the first full year operation as major source and be the lower of:

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under applicable authorizations, including emissions from maintenance, startup, and shutdown activities. Emissions from pending authorizations with administratively complete applications as of the last day of the full first calendar year of operation may be included in the total annual emissions allowed under authorizations.

(b) Adjustments. The baseline amount must be adjusted downward to exclude any emissions that exceeded an emissions limit for rules or regulations in effect by the last day of the one-year period used to determine the baseline amount.

(c) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of the last day of the one-year period used to determine the baseline amount. When control or ownership of emission units changes during the calendar year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on the last day of the one-year period used to determine the baseline amount.

(d) Calculations. A baseline amount, reported in units of tons per year, must be calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(e) Compliance schedule. Within 90 calendar days of completing the first full year operating as a major stationary source, the major stationary source or Section 185 Account must submit to the executive director a report establishing the baseline amount on a form published by the executive director.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as allowed under this subchapter.

§101.707. Aggregated Baseline Amount.

(a) Aggregation. After determining separate baseline amounts for each pollutant at each major stationary source or Section 185 Account according to the requirements of §101.705 of this title (relating to Baseline Amount) or §101.706 of this title (relating to Baseline Amount for New Major Stationary Sources), an owner or operator of a major stationary source or Section 185 Account may choose to combine baseline amounts as follows:

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

(2) nitrogen oxides (NO_x) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(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 under common control.

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

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

(2) the same basis of baseline emissions or total annual authorized emissions to calculate the baseline amount.

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

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

(e) Compliance schedule. The owner or operator of each major stationary source or Section 185 Account must submit to the executive director a report establishing its aggregated baseline amount on a form published by the executive director.

(1) For major stationary sources or Section 185 Accounts that operated the entire baseline year, the aggregated equivalent alternative baseline amount forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120

days after the finding of failure to attain effective date in the *Federal Register*, whichever is later.

(2) For major stationary sources or Section 185 Account that began operating during or after the baseline year, the aggregated baseline amount forms must be submitted within 90 calendar days of completing the first full year operating as a major stationary source.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permit data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions . After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.708. Adjustment of Baseline Amount for Major Stationary Sources with Less Than 24 Months of Operation.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of the baseline amount established under this subchapter if the major stationary source or emissions units at the major stationary source experienced less than 24 months of consecutive operation by December 31 of the baseline year. If the emissions were irregular, cyclical, or otherwise vary significantly from year to year, then the baseline amount may be adjusted as the lower of the following:

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

(2) total annual emissions allowed under authorizations applicable to the major stationary source during the first year operating as a major stationary source. Emissions from pending authorizations with administratively complete applications as of the last day of the one-year period used to determine the baseline amount may be included in the total annual emissions allowed under authorizations.

(b) Compliance schedule. Within 90 calendar days of completing 24 consecutive months of operation, the owner or operator of the major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.709. Adjustment of Baseline Amount for New Construction at a Major Stationary Source

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter to include emissions limits from new construction of authorized emissions units not included in baseline amounts previously established by the executive director. Adjustments to the baseline amount are limited as follows.

(1) The emissions units must have been authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(2) The emissions considered for the adjusted baseline amount for new emissions units are restricted to emissions units without a previously established baseline amount.

(b) Compliance schedule. Within 90 calendar days of completed construction of the new emissions units, the owner or operator of the major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.710. Adjustment of Baseline Amount for Ownership Transfers.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter if ownership and operation of emissions units are 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 major stationary source or Section 185 Account to the new major stationary source or Section 185 Account without modification to the reported amount; and

(2) The baseline amount for remaining equipment at the originating and recipient major stationary source or Section 185 Account will not be adjusted based on a change of ownership or control of emissions units to or from a major stationary source or Section 185 Account.

(b) Adjustment qualification. To qualify for this baseline amount adjustment, the ownership transfer of the emissions units must take place between major stationary sources of the same pollutant or aggregated pollutants, volatile organic compounds and/or nitrogen oxides located within the same nonattainment area.

(c) Compliance schedule. Within 90 calendar days of the effective date of a change of ownership or control of emissions units, the owner or operator of each major stationary source or Section 185 Account affected by the change in ownership or control of emissions units must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(d) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(e) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.711. Adjustment of Baseline Amount for Final Emissions Inventory Data

(a) Baseline amounts. Baseline amounts established under this subchapter may be adjusted based on final quality assured emissions inventory data.

(b) Compliance schedule. Within 90 calendar days of receipt of final quality assured emissions inventory data or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, the owner or operator of each major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of the reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.712. Failure to Establish a Baseline Amount.

The executive director will determine baseline amounts for any major stationary source subject to §101.701 of this title (relating to Applicability) that fails to submit a baseline amount by the due date specified by the commission as follows:

(1) If information is available to determine a baseline amount for each pollutant for which the source meets major source applicability requirements, the executive director will determine the baseline amount to be the lower of:

(A) baseline emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements); or

(B) total annual emissions allowed under authorizations, including authorized emissions from maintenance, startup, and shutdown activities.

(2) If no emissions inventory information required to determine baseline amount information is available, the executive director will establish the baseline amount as:

(A) 12.5 tons of volatile organic compounds (VOC) emissions for major stationary sources of VOC emissions;

(B) 12.5 tons of nitrogen oxides (NO_x) emissions for major stationary sources of NO_x emissions; or

(C) 12.5 tons of VOC emissions and 12.5 tons of NO_x emissions for major stationary sources of VOC and NO_x emissions.

(3) The executive director will not aggregate baseline amounts under §101.707 of this title (relating to Aggregated Baseline Amount) or adjust baseline amounts as provided in this subchapter to determine a baseline amount under this section.

(4) A major stationary source will pay the Failure to Attain Fee according to §101.714 of this title (relating to Failure to Attain Fee Payment).

(5) If the major stationary source submits a complete and verifiable emissions inventory according to §101.10 of this title, the major stationary source may then submit a baseline amount to the executive director on a form published by the executive director.

(6) After the executive director finalizes the baseline amount based on demonstrated compliance with the criteria in this subchapter, the baseline amount will be applied starting with the fee assessment year after finalization and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.713. Failure to Attain Fee Assessment.

(a) Pollutant applicability. The executive director will annually assess the Failure to Attain Fee for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO_x), or both, for which the major stationary source or Section 185 Account meets the requirements of §101.701 of this title (relating to Applicability) at any time during a calendar year.

(b) Aggregation. The fee will be assessed and calculated using the same Failure to Attain Fee determination method used under this subchapter. 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 VOC and NO_x emissions may both be aggregated together across multiple major stationary sources. Aggregation as described under §101.707 of this title (relating to Aggregated Baseline Amount) is limited to emissions from:

(1) major stationary sources that aggregated VOC baseline amounts;

(2) major stationary sources that aggregated NO_x baseline amounts; or

(3) major stationary sources that aggregated VOC with NO_x baseline amounts.

(c) Assessment. The owner or operator of each major stationary source to which this rule applies must annually pay the Failure to Attain Fee to the commission calculated in accordance with either subsection (d) or (e) and subsection (f) of this section. The Failure to Attain Fee will be assessed on actual emissions of VOC and/or NO_x as recorded in the emissions inventory under §101.10 of this title (relating to Emissions Inventory Requirements), that exceed 80% of the pollutant baseline amount, rounded up to the nearest whole number.

(d) Fee assessment for separate pollutants. The Failure to Attain Fee from major stationary sources that did not aggregate baseline amounts under §101.707 of this title will remain separate and due from each major stationary source or Section 185 Account for each pollutant for which the source meets the major source applicability requirements. The fee will be calculated separately by the formula in subsection (f) of this section.

(e) Fee assessment for aggregated pollutants. The Failure to Attain Fee will be calculated in accordance with subsection (f) of this section and the method used for an aggregated baseline amount determination as described under §101.707(a) of this title.

(1) If VOC emissions are aggregated, 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 emissions are aggregated, 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 emissions are aggregated with NO_x emissions at one major stationary source, VOC and NO_x emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC emissions are aggregated with NO_x emissions 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.

(f) Fee calculations. The fee will be calculated for VOC, NO_x, or both pollutants' emissions, as follows.
Figure: 30 TAC §101.713(f)

(g) Enforcement. Failure to submit an emissions inventory according to the provisions of §101.10 of this title (relating to Emissions Inventory Requirements) to circumvent assessment of the Failure to Attain Fee is also subject to enforcement account under Texas Water Code (TWC), Chapter 7.

§101.714. Failure to Attain Fee Payment.

(a) Fee timeframe. The Failure to Attain Fee is assessed, invoiced, and paid for each pollutant for which the source is major, volatile organic compounds and/or nitrogen oxides, starting the calendar year following the baseline year and continuing each year until the area is no longer subject to the Failure to Attain Fee as described under §101.718 of this title (relating to Cessation of Program).

(b) Payment. Payment of Failure to Attain 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.

(c) Fee payment due date. The Failure to Attain Fee payment is due by the due date specified on the invoice. The invoice due date will be a minimum of 30 days after the invoice mail date.

(d) Nonpayment of fees. Each emissions Failure to Attain Fee payment must be paid at the time and in the manner and amount provided by this subsection. Failure to pay the full Failure to Attain Fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178.

(e) Late payments. The agency will impose interest and penalties on owners or operators of a major stationary source or Section 185 Account who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.715. Eligibility for Other Failure to Attain Fee Fulfillment Options.

(a) Alternative fulfillment options. Notwithstanding any requirement in this subchapter, the owner or operator of a major stationary source or Section 185 Account required 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 in compliance with §101.716 (relating to Relinquishing Credits to Fulfill a Failure to Attain Fee and §101.717 of this title (relating to Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee).

(b) Unfulfilled portions. If a Failure to Attain Fee cannot be completely fulfilled using alternate fulfillment options, then the unfulfilled portion of the Failure to Attain Fee is required to be calculated, assessed, and paid according to the provisions of this subchapter.

(c) Reporting. The owner or operator of a major stationary source or Section 185 Account must inform the executive director if they choose an alternative fulfillment option for all or a portion of the Failure to Attain Fee as described in §101.716 and §101.717 of this title. The request must be submitted on a form specified by the executive director and include a list of the emissions in tons of volatile organic compounds and/or nitrogen oxides requested from alternative fulfillment options, payment, or combination to cover the entire Failure to Attain Fee.

(d) Compliance schedule. No later than emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the first fee assessment year and continuing annually, the owner or operator of a major stationary source or Section 185 Account must submit the request specified in subsection (c) and ensure the following conditions are met:

(1) all emissions credits under §101.716 of this title must be approved, exercised, or otherwise completed; and

(2) all Supplemental Environmental Projects under §101.717 of this title must be approved and funded.

(e) If the executive director does not receive the notification request to use alternative fulfillment options for all or a portion of the Failure to Attain Fee or the alternate fulfillment options are not approved and funded, exercised, or otherwise completed as required by this subsection, the Failure to Attain Fee payment will be due in full as described under §101.714 of this title (relating to Failure to Attain Fee Payment).

§101.716. Relinquishing Credits to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by substituting emissions 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 emissions reduction credits;

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

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

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

§101.717. Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by contributing to a Supplemental Environmental Project (SEP), on 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 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

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

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

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

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

§101.718. Cessation of Program.

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

(1) the effective date of redesignation of the area classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) to attainment by the U.S. Environmental Protection Agency (EPA);

(2) any final action or final rulemaking by EPA to end the Failure to Attain fee; or

(3) finding of attainment by 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 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS), or a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States, are submitted to EPA. The design value may exclude days submitted to EPA by the executive director that exceeded the standard because of exceptional events. Fee collection will remain in abeyance until EPA takes final action on its review of the certified monitoring data and any demonstration(s).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 2, 2025.

TRD-202501515
Charmaine Backens
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 15, 2025
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 16. COMPTROLLER GRANT PROGRAMS

SUBCHAPTER C. TEXAS OPIOID ABATEMENT FUND PROGRAM

34 TAC §§16.200, 16.208, 16.211

The Comptroller of Public Accounts proposes amendments to §16.200, concerning definitions, §16.208, concerning grant application review, and §16.211, concerning allowable costs.

The comptroller proposes the amendments to make the Opioid Abatement Fund Council's evaluation and review of grant applications more efficient and to prevent excessive costs due to the external peer review of large numbers of grant applications. The legislation enacted within the last four years that provides the statutory authority for the amendments is Senate Bill 1827, 87th Legislature, R.S., 2021.

The amendments to §16.200 update definitions.

The amendments to §16.208(a) change the application review process to allow the office to evaluate grant applications to either be reviewed internally by program staff or through a peer review process based on the value of the grant.

The amendments to §16.211(b) change the grant disbursement process to allow the council to disburse funds on a reimbursement or on an as needed basis as determined by the council to effectuate the purposes of the grant.

Tetyana Melnyk, Director of Revenue Estimating Division, has determined that during the first five years that the proposed amended rules are in effect, the rules: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Ms. Melnyk also has determined that the proposed amended rules would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amended rules would benefit the public by improving the clarity and implementation of the sections. There would be no significant anticipated economic cost to the public. The proposed amended rules would have no significant fiscal impact on small businesses or rural communities.

You may submit comments on the proposal to Katy Fallon-Brown, Director, Opioid Abatement Fund Council, at OAFC.Public@cpa.texas.gov or at P.O. Box 13528 Austin, Texas 78711. The comptroller must receive your comments no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under Government Code, §403.511, which authorizes the comptroller to adopt rules to implement Government Code, Chapter 403, Subchapter R, concerning the statewide opioid settlement agreement.

The amendments implement Government Code, Chapter 403, Subchapter R, concerning the statewide opioid settlement agreement.

§16.200. Definitions.

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

(1) Authorized official--The individual, including designated alternates, named by a grant applicant or grant recipient, who is authorized to act for the grant applicant or grant recipient in submitting the grant application and executing the grant agreement and associated documents or requests.

	Someone in the client's home or a client receiving emergency response services, home-delivered meals, community attendant services, family care, primary home care, or special services to persons with disabilities threatens HHSC staff or provider agency staff's health or safety.
	[~~A client receiving residential care, adult foster care, day activity and health services, or special services to persons with disabilities threatens his own health or safety or that of others; or~~]
	[~~Someone in the client's home or a client receiving emergency response services, home-delivered meals, waiver services, family care, primary home care, or special services to persons with disabilities threatens the Texas Department of Human Services' (DHS's)] staff or provider's health or safety.~~]
Termination is because the client lacks TANF, SSI, Medicaid or SNAP eligibility,	Services continue only to the end of the month that the client is determined ineligible, even if the action is appealed.
Termination or reduction is because of budgetary constraints or changes in federal law or state regulations, and services are reduced or terminated for an entire categorical client group,	Services continue only through the date of termination of a categorical client group, even if appealed.
Termination is because the client lacks a practitioner's statement of medical need for the service,	Services continue only through the date the previous practitioner's statement of medical need ends, even if the action is appealed.

Figure: 30 TAC Chapter 101 - Preamble

$$\overline{x}_{lookback\ period} > \overline{x}_{2011-2022} + \sigma_{2011-2022}$$

Figure: 30 TAC §101.704(c)(1)

$$FeeBalance = AreaObligation - FeeEquivAcct$$

Definitions:

AreaObligation = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the Failure to Attain Fee from all major stationary sources or Section 185 Accounts in the severe or extreme 2008 eight-hour ozone standard nonattainment area for a fee assessment year.

FeeEquivAcct = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.703 of this title (relating to Fee Equivalency Account).

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

Figure: 30 TAC §101.704(c)(3)

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

Definitions:

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

AreaObligation = The Area §185 Obligation calculated under this subsection for the fee assessment year.

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

ProratedFee = The reduced Failure to Attain Fee each major stationary source or Section 185 Account to be assessed if insufficient equivalency credits are available in the Fee Equivalency Account.

Figure: 30 TAC §101.713(f)

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

Definitions:

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

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

Actual = All quantifiable emissions of VOC and/or NO_x from the major stationary source or Section 185 Account; as recorded in the annual emissions inventory for the fee assessment year. Actual emissions include all authorized and unauthorized emissions in units of tons per year. Pollutants and/or sites aggregated under §101.707 of this title will be combined for fee assessment in the same manner.

BA = Baseline amount in tons per year from a major stationary source or Section 185 Account as calculated under this subchapter.

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

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§101.700 - 101.718

New §§101.704, 101.709, 101.711, 101.714, and 101.716 are adopted without changes to the proposed text. New §§101.700, 101.701, 101.702, 101.703, 101.705, 101.706, 101.707, 101.708, 101.710, 101.712, 101.713, 101.715, 101.717, and 101.718 are adopted with changes to the proposed text as published in the May 16, 2025, issue of the *Texas Register* (50 TexReg 2925) and, therefore, will be republished.

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

Background and Summary of the Factual Basis for the Adopted Rules

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 (Section 185, generally) require the SIP to include a rule that implements a penalty fee (Section 185 fee, Failure to Attain Fee, fee) for major stationary sources (major 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) 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 (NO_x)." This FCAA requirement extends the Section 185 fee assessment to major stationary sources of NO_x emissions. The SIP must also include procedures for the assessment and collection of the penalty fee. If the state does not impose and collect the fee, then FCAA, §185(d) requires that EPA impose and collect the fee with interest, and the revenue is not returned to the state.

For the 2008 eight-hour ozone standard of 0.075 parts per million, on October 7, 2022, EPA published a final notice that reclassified the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) 2008 eight-hour ozone nonattainment areas from serious to severe effective November 7, 2022 (87 *Federal Register* (FR) 60926). The DFW severe nonattainment area consists of 10 counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise. The HGB severe nonattainment area consists of eight counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The DFW and HGB severe nonattainment areas are required to attain the 2008 eight-hour ozone standard by July 20, 2027. If a severe or extreme ozone nonattainment area does not attain by the attainment date, the area will be subject to the penalty fee requirements upon EPA issuing a finding of failure to attain for the area. For fee assessment purposes, the 2027 calendar year from January 1, 2027, through December 31, 2027, is anticipated to be the baseline year for these severe nonattainment areas since it is the year that contains the attainment date. The penalty fee is required to be paid until EPA redesignates the area as attainment for the 2008 eight-hour ozone standard or EPA takes action that results in termination of the fee.

As stated in FCAA, §182(d)(3) and (e) and §185, the required penalty is $5,000 per ton, as adjusted for inflation by the consumer price index (CPI), of VOC and/or NO_x emissions emitted in excess of 80% of a major stationary source's baseline amount. A baseline amount will be determined for each pollutant, VOC and/or NO_x, for which the source meets the major source applicability requirements. A source that is major for VOC emissions will be subject to the fee on VOC emissions; a source that is major for NO_x emissions will be subject to the fee on NO_x emissions; and a source that is major for both VOC and NO_x emissions will be subject to the fee on both VOC and NO_x emissions.

The major stationary source's fixed baseline amount is calculated as the lower of the baseline

emissions or total annual authorized emissions during the baseline year; the baseline amount must be adjusted downward to account for unauthorized emissions and/or emissions limitations in effect as of December 31 of the baseline year or timeframe used to determine the baseline amount. The major stationary source's baseline emissions are defined as the annual routine emissions reported to the TCEQ point source emissions inventory (emissions inventory) according to 30 TAC §101.10, excluding emissions not authorized by permit or rule, such as emissions from emissions events and scheduled or unscheduled maintenance, startup, and shutdown (MSS) activities. The major stationary source's authorized emissions include emissions allowed under any EPA or TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

The rule allows for a baseline amount determination with flexibilities such as aggregating pollutants (VOC and NO_x emissions) and aggregating sites under common ownership and control into a single baseline. The rule also allows for baseline amount determinations when a period other than the baseline year may be required, such as new major stationary sources that began operating after the baseline year or major stationary sources with emissions that are irregular, cyclic, or vary significantly from year to year. Under specific circumstances, major stationary sources may request adjustments to the fixed baseline amount. The estimated Section 185 fee, based on a conventional fee program, without baseline amount flexibilities and fee offsets for both the HGB and DFW severe ozone nonattainment areas is over $200 million per year.

TCEQ adopts an equivalent fee program (Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard, Failure to Attain Fee program, Section 185 fee program) under FCAA, §172(e) with flexibility aspects not directly described in FCAA, §185, including but not limited to other mechanisms to offset the fee on major stationary sources and baseline aggregation. Although

EPA has not issued specific guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, in its 2010 guidance (available at: *https://www.epa.gov/sites/default/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf),* multiple approvals of similar equivalent alternative programs in California and New York, and in a final rule published in the February 14, 2020, *Federal Register* (85 *FR* 8411) for the Section 185 Fee Program in the HGB nonattainment area under the one-hour ozone standard (HGB Failure to Attain Fee), EPA approved the use of programs that are not less stringent (equivalent) alternative programs to fulfill the FCAA, §185 fee requirement. Although the 2010 guidance was vacated by the D.C. Circuit Court of Appeals on procedural grounds, *NRDC v. EPA*, 643 F.3d 311, EPA continued to utilize the principles outlined in the guidance as support for its approvals of equivalent alternative programs, as "not less stringent than" the requirements specified in FCAA, §185, based on its interpretation of the requirements of FCAA, §172(e), as upheld by *NRDC v. EPA*, 779 F.3d 1119 (9th Circuit 2015) and *Medical Advocates for Healthy Air v. EPA*, 607 Fed. Appx 759 (9th Cir. 2015). Notably, the court in *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. July 2011) did not prohibit equivalent alternative programs, instead stating that "neither the statute nor our case law obviously precludes that alternative." In the absence of formal EPA guidance for Section 185 fee programs under the 2008 eight-hour ozone standard, this rulemaking relies on the 2010 guidance and the court decisions holding that FCAA, §172(e) applies also when EPA strengthens a NAAQS to develop Texas' fee program. In the HGB Failure to Attain Fee final approval, EPA approved fee programs funded to reduce VOC and NO_x emissions 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, which is consistent with the principles of the anti-backsliding principle of the FCAA §172(e). EPA's 2010 guidance requires 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.

EPA states in its 2010 guidance that it may allow equivalent 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." 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 and EPA's final approval of the HGB Failure to Attain Fee, located in 30 Texas Administrative Code (TAC) 101 Subchapter B, 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 for the (now revoked) one-hour ozone standard. EPA approved other equivalent alternative programs pursuant to the 2010 guidance for the one-hour ozone standard including San Joaquin Valley (77 FR 50021), *South Coast Air Quality Management District*, (77 FR 74372), and the New York portion of the New York-Northern New Jersey-Long Island nonattainment area (84 FR 12511). EPA's approvals of these Section 185 fee programs under the one-hour ozone standard included equivalent fee revenue by assessing a fee on mobile sources. The revenue was used to offset the fee due from major stationary sources in the nonattainment areas. EPA's prior approvals were based on its interpretation that FCAA, §172(e) allows equivalent alternative fee programs for revoked ozone standards. As noted above, FCAA, §172(e) provides that if EPA relaxes a NAAQS, EPA must provide for controls that are "not less stringent than the [applicable] controls". While FCAA, §172(e) clearly applies to future standards that are less stringent, EPA argued, and the D.C. Circuit upheld, that FCAA, §172(e) also applies to standards that are more stringent, requiring that specific obligations (anti-backsliding obligations) continue to apply for revoked NAAQS and current

NAAQS (*South Coast Air Quality Management District v. EPA*, 472 F.3d. 882, 900 (2006)). Interpreting the FCAA to allow for equivalent alternative fee programs for current NAAQS promotes consistency, particularly given that FCAA, §185 fee programs are a required anti-backsliding measure for both revoked and current NAAQS. Since nothing in FCAA, §185 requires emission reductions, only the payment of fees, allowing the offset of fees by funds that are spent to obtain emission reductions is equivalent or better than the payment of fees. Additionally, nothing in FCAA, §172(e) prohibits equivalent alternative fee programs for active ozone standards, and courts have upheld the applicability of FCAA, §172(e) for both relaxed and strengthened NAAQS. Therefore, the commission adopts an equivalent alternative fee program in this rule.

The TCEQ's HGB Failure to Attain Fee Rule adopted in 2013 and approved by EPA in 2020, allowed revenue collected from the HGB one-hour ozone standard nonattainment area for qualified programs that directly reduced VOC or NO_x emissions to offset the FCAA, §185 fee. No actual revenue or funding was transferred to the Section 185 fee program; funds were calculated, recorded, and assessed to ensure a sufficient amount was collected to offset the required Section 185 fee amount. The same approach is used for this rulemaking.

Although EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, EPA originally described certain basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee for severe or extreme ozone nonattainment areas under the one-hour ozone standard. In a final rule published November 16, 2005, in the *Federal Register* (70 FR 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, 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" (70 FR 69440, 69441). The same rationale is used to establish the anticipated baseline year of 2027 for the DFW and HGB severe nonattainment areas under the 2008 eight-hour ozone standard.

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" *(*70 FR 69440, 69441 - 69442). Major stationary sources may elect to reduce their emissions to reduce the fee owed, or they may elect to pay the fee without reducing their emissions.

EPA also previously 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: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20080321_harnett_emissions_basline_185.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. EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions because a source's emissions may be irregular, cyclic, or otherwise vary significantly from year to year. This concept will be applicable regardless of the fee program implemented or the ozone standard requiring the fee program.

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. 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 is reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission adopts this option in the same manner as provided for in the Texas New Source Review Program. Since the PSD guidance is specific to sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, the averaging option is not available for sources with steady-state operations.

A variability analysis on sites reporting to the TCEQ point source emissions inventory was performed to determine if VOC and NO_x emissions were variable over the twelve-year period between 2011 (the base year for the 2008 ozone standard) through 2022 (the most recent

complete point source emissions inventory at the time this analysis was performed) for the DFW and HGB severe nonattainment areas. Data for the DFW and HGB variability analysis were analyzed separately for VOC and NO_x emissions. Sites that reported 2011 through 2022 mean emissions greater than 20 tons per year in the TCEQ emissions inventory were included in this analysis.

A site's emissions were determined to be variable if the following formula was true, where x = VOC or NO_x emissions and σ = one standard deviation of the data set:

Figure 1: Formula for Emissions Variability Determination

$$\overline{x}_{lookback\ period} > \overline{x}_{2011-2022} + \sigma_{2011-2022}$$

Variability of reported NO_x and VOC emissions ranged from 3% to 128% in the HGB area and from 0.1% to 265% in the DFW area over the twelve years examined. Fifty-nine percent or 162 of the 274 NO_x and/or VOC emissions sources in the HGB area were variable as defined by the above formula. Forty-eight percent or 115 of the 238 NO_x and/or VOC emissions sources in the DFW area were variable as defined by the above formula.

The variability analysis shows that a high level of source-level emissions variability occurred between 2011 and 2022 in the DFW and HGB severe nonattainment areas; therefore, it is appropriate to use a 24-month period during the previous ten years (or five years if the source is an electric utility steam generating unit) to establish a baseline for the FCAA, §185 fee program.

Based on the analysis above, the commission adopts EPA's baseline guidance and EPA's long-

standing PSD regulations for sources with emissions that are irregular, cyclic, or otherwise vary significantly to offer an option for these source types to establish a baseline amount. Since FCAA, §185 states that the baseline amounts may be adjusted for these types of sources if the EPA Administrator issues guidance, the commission adopts these provisions based on these EPA guidance documents.

Like the HGB Failure to Attain Fee Rule, the commission adopts a fee program that credits the Texas Emissions Reduction Plan (TERP) funds collected from fees and surcharges related to the sale and use of vehicles and heavy-duty equipment (TERP revenue) from each area after the 2008 eight-hour ozone attainment (baseline) year as discussed below to offset the Area §185 Obligation. The Area §185 Obligation is the total amount of the Failure to Attain Fee due for an entire 2008 eight-hour ozone nonattainment area based on summing the Failure to Attain Fee due from each major stationary source or Section 185 Account for a fee assessment year.

The objectives of TERP are specifically described in statute and are consistent with EPA's objective for an equivalent FCAA, §185 fee 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."

TCEQ implements TERP to reduce NO_x emissions, a precursor to ozone pollution. TERP grant programs provide financial incentives to individuals, state and local governments, corporations, and other legal entities to upgrade or replace their older, higher emitting vehicles and equipment with newer, cleaner vehicles and equipment. TERP programs also encourage the use

of alternative fuels for transportation in Texas, and the implementation of new technologies that reduce emissions from stationary sources and oil and gas operations.

In the DFW severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 65%. In the HGB severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 55%. Since the federal government regulates mobile sources under FCAA, Title II, states cannot develop mobile source emissions standards and have limited authority to directly regulate emissions from mobile sources. TERP is a state-specific program used primarily to obtain voluntary mobile source emissions reductions since the state has limited regulatory authority.

The emissions reduction grant programs that TERP funds decrease ozone precursor emissions more directly than a penalty fee assessed on major stationary sources. FCAA, §185 provides major stationary sources with a choice to either reduce ozone precursor emissions to below 80% of their baseline amount or pay a fee. An economic incentive to reduce emissions is not the same as a requirement to reduce emissions, therefore the FCAA, §185 may or may not result in emissions reductions. However, the imposition of a conventional fee would likely result in an economic burden to the state and potentially the country, due to the large economic impact of the DFW and HGB nonattainment areas. As the fifth largest Metropolitan Statistical Area (MSA) in the county, Houston in particular accounts for significant portions of the country's and Texas' economy and as of 2021, accounted for 44% of the country's base petrochemical capacity with many of the top employers in the energy, petrochemical, or refinery related fields. Therefore, the commission adopts an equivalent fee program as proposed and adopts rules to credit the TERP revenue because TERP meets one of the three types of alternative programs that satisfy the requirements addressed in EPA's 2010 guidance memo and adopts other flexibilities as discussed elsewhere in this preamble. The grant programs funded through TERP are the

same (or similar to) programs that EPA previously approved as meeting the requirements for FCAA, §185 fee program equivalency under the HGB Failure to Attain Fee Rule. Fees and surcharges related to the sale and use of vehicles and heavy-duty equipment in Texas fund the TERP programs. The revenue collected for the TERP program will be used to offset each 2008 eight-hour ozone nonattainment area's Area §185 Obligation when any TERP grant funds are also expended within the same area; this revenue is referred to as "TERP revenue collected and expended" throughout this subchapter. TCEQ will identify and track TERP revenue from the DFW severe nonattainment area and the HGB severe nonattainment area in two separate Fee Equivalency Accounts to demonstrate equivalency of the area-specific TERP revenue to the penalty fee owed by major stationary sources located in that area.

The commission will be required to annually determine the expected Area §185 Obligation and compare this estimation with the expected TERP revenue. TERP revenue collected and expended after the attainment year (baseline year) and statutorily available for TERP programs will be credited towards meeting the Area §185 Obligation. For the DFW and HGB 2008 eight-hour ozone nonattainment areas, 2027 is the attainment year (baseline year) contained in the July 20, 2027, attainment date. Barring any extension to the attainment date, any TERP revenue from the nonattainment area starting with 2028 that is statutorily available for TERP programs could be credited to meet the Area §185 Obligation for DFW and HGB 2008 eight-hour ozone nonattainment areas. In addition to providing grants, TERP revenue will provide equivalency credits for the purposes of offsetting the Failure to Attain Fee. These equivalency credits will be credited to the Failure to Attain Fee program to document the amount of revenue available in a Fee Equivalency Account. This documentation does not involve money exchanged or being transferred from TERP to the Fee Equivalency Account. Revenue from future grant programs as discussed in §101.703 would also provide equivalency credits for the purpose of offsetting the Failure to Attain Fee.

Since the amount of available TERP revenue is recorded in the TCEQ's Section 185 fee database as a credit to offset the Area §185 Obligation, this Failure to Attain Fee program does not impact or change how the TERP program operates. Any TERP revenue available in the TERP Trust will continue to be used to provide grants.

To determine the estimated total FCAA, §185 fee due from all major stationary sources, a baseline amount will be established for each major stationary source (or group of sources under a Section 185 Account, if aggregated as discussed later in this preamble) within the DFW 2008 eight-hour ozone nonattainment area or located within the HGB 2008 eight-hour ozone nonattainment area. The two nonattainment areas are assessed separately, resulting in two Area §185 Obligations, one for DFW and one for HGB. Each major stationary source's or Section 185 Account's reported baseline amount(s) and actual emissions as reported in the point source emissions inventory will be used to calculate a Failure to Attain Fee. The resulting amount due from each major stationary source or Section 185 Account for aggregated sources will be summed by location to determine the overall DFW and HGB 2008 eight-hour ozone nonattainment area's Area §185 Obligations.

If TERP revenue is insufficient to fully offset the Area §185 Obligation (as an equivalency credit in the Fee Equivalency Account) for the DFW 2008 eight-hour ozone nonattainment area or HGB 2008 eight-hour ozone nonattainment area, then the remaining difference will be assessed as a Failure to Attain Fee on a major stationary source or Section 185 Account for the area on a prorated basis. The fee assessed and amount collected from each major stationary source or Section 185 Account will be discounted based on the amount of revenue credited to the Fee Equivalency Account. In this manner, these rules "backstop" the TERP revenue that is credited as an offset with fees directly assessed on major stationary sources as necessary to meet each

year's Area §185 Obligation. The Area §185 Obligation will be fully met either through the demonstration from the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees on major stationary sources or Section 185 Accounts. Since the same amount of Failure to Attain Fees will be assessed then 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 Fee that will apply to each major stationary source, major stationary sources are provided a choice to individually determine baselines for VOC and NO_x emissions, aggregate VOC and NO_x emissions into one baseline if the source is major for both pollutants, or aggregate those emissions across multiple major stationary sources under common control. In Attachment C of EPA's 2010 guidance memo, EPA states it would ". . . allow for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." EPA's 2010 memo further states that EPA would allow aggregation of VOC with NO_x emissions, ". . . provided 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 rulemaking will require a major stationary source to first determine its major source applicability for both VOC and NO_x emissions. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 fee rule. If the major stationary source chooses to aggregate baselines by pollutant or site or both, it will be required to provide to TCEQ the individual, unaggregated pollutant and site baselines for each pollutant(s) that determines major source status. This will ensure that staff can accurately enter aggregated baseline amounts into the TCEQ's Section 185 fee database.

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 FR 59878, September 11, 1980), 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)). EPA generally continues to assess common control based on the general principles outlined above and has periodically issued additional guidance for specific topics such as how to assess contiguous or adjacent properties, industrial grouping, etc. The commission will also use other criteria to determine common control consistent with participation in local area banking programs, such as the Mass Emissions Cap and Trade or the Highly-Reactive Volatile Organic Compound Cap and Trade programs. A group of major stationary sources choosing to aggregate under common control as a single customer will be identified with a single common customer identifier used by the commission, the customer number (CN). A group of major stationary sources under common control will be assigned a single Section 185 Account number by TCEQ.

Since VOC and NO_x emissions reductions are both effective at lowering ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas, major sources should be allowed to aggregate both NO_x and VOC emissions into one baseline amount. The commission adopted a strategy of targeting those pollutants in a way that allows ozone nonattainment areas to attain the standard as expeditiously as practicable in previously adopted applicable attainment demonstration SIPs. 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 standard, and this approach is a result of the knowledge gained from research and detailed photochemical modeling of each nonattainment area. The flexibility option to allow aggregation of VOC and NO_X as well as major stationary source aggregation for both pollutants continues to support the strategies outlined in the attainment demonstration SIPs. This aggregation method compliments the multi-pollutant control strategies incorporated into the SIP for the DFW and HGB ozone nonattainment areas.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the imposition of a penalty 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. Both VOC and NO_X control strategies have a common goal: to reduce ozone-forming emissions. However, the effectiveness of VOC and NO_X emissions reductions often varies between, or even within, nonattainment areas due to the complex nature of ozone formation. Ozone is formed through a series of chemical reactions between precursors (VOC and NO_X), in proportions determined by their molecular properties and based upon multiple factors including meteorology, background ozone, presence of precursors and emissions. As a result of these complexities, VOC and NO_X emissions are considered equal for the purposes of fee assessment. Even though the Section 185 fee program cannot require emissions reductions, if a major source chooses to reduce emissions to lower its Section 185 fee burden, any reduction in ozone precursors may contribute towards the common goal of ozone reduction.

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 Section 185 per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC or NO_x. A major stationary source may 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 emissions to be aggregated for both baseline amount determinations and fee assessments. In its December 1993, NO_x Substitution Guidance (available at: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2_old/19931201_oaqps_nox_substitution_guidance.pdf),* 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 rules require that baseline amounts and aggregation methods, once established, will remain fixed as long as the rule remains applicable except as consistent with the adopted sections that allow adjustments under specific circumstances. Additionally, the rules will require that calculation of the Failure to Attain Fee remains consistent with the baseline amount determination approach. Once a particular method for a baseline amount calculation is chosen, the Failure to Attain 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 adopted rulemaking as the

most appropriate choice for determining a baseline amount, all subsequent assessments, and payments of the Failure to Attain Fee must remain consistent with that selection.

Compliance schedules for determining baseline amounts for each applicable baseline amount scenario are included in the adopted rule. Since the Failure to Attain Fee cannot be implemented until EPA finalizes a failure to attain notice that determines that a severe or extreme nonattainment area under the 2008 eight-hour ozone standard did not attain by the applicable due date, the due dates for major stationary sources operating during the baseline year are structured to account for issuance of this notice. New major stationary sources that begin operating during or after the baseline year will have a fixed amount of time to self-report the baseline amounts to TCEQ. The compliance schedules will ensure timely assessment of the fee.

Invoice and fee payments are required in accordance with current state statute and regulations. Once the program is implemented, fee payments will be due each year until the Failure to Attain fee is terminated.

Any Section 185 fee revenue collected by TCEQ will be deposited into the Clean Air Account according to THSC §382.0622. Since spending potential Section 185 fee revenue depends on Texas' collection of the Section 185 fee as well as future Legislative actions, this rulemaking does not include options for how any potential collected Section 185 fee revenue would be spent.

The rules ensure stability of the Clean Air Account and any potential future programs that could be developed using the Failure to Attain Fee revenue by preventing adjustments to previously invoiced baseline amounts for instances in which baselines are adjusted according to

§§101.708 - 101.711. No matter the baseline amount adjustment scenario used, the adjusted baseline amount would apply starting with the next fee assessment year.

Section by Section Discussion

§101.700, Definitions

This adopted new section contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 Obligation, attainment date, baseline amount, baseline emissions, baseline year, electric utility steam generating unit, emissions unit, equivalency credits, extension year, Failure to Attain Fee, fee assessment year, fee collection year, major stationary source, and Section 185 Account.

The term *actual emissions* uses the definition currently used in 30 TAC §101.10; this ensures that the VOC and/or NO_x emissions assessed for the *Failure to Attain Fee* include all emissions emitted from the major stationary source for the calendar year being assessed, whether authorized or unauthorized emissions.

The *Area §185 Obligation* is defined as the total annual amount of *Failure to Attain Fees* due from all applicable major stationary sources or Section 185 Accounts in a severe or extreme ozone nonattainment area that failed to attain the 2008 eight-hour ozone National Ambient Air Quality Standard by its applicable attainment date. The *Area §185 Obligation* is determined for an entire 2008 eight-hour ozone nonattainment area by summing the *Failure to Attain Fee* due from each major stationary source or Section 185 Account for a fee assessment year. For the 2008 eight-hour ozone standard, the 10-county DFW and eight-county HGB nonattainment areas will have separate *Area §185 Obligations*. 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 ozone standard. The *Area §185*

Obligation is the basis for making an equivalency demonstration for the commission's adopted program. The *equivalency credits* are defined as revenue collected, as long as any revenue is also expended in a calendar year, from TERP or future grant programs to offset the *Area §185 Obligation*. A rule language update was made at adoption to align the definition of equivalency credits with proposed rule language in §101.703(a) and (c) to indicate that it is revenue collected, as long as any revenue is also expended within a nonattainment area. If there are insufficient funds to offset the entire *Area §185 Obligation,* then *Failure to Attain Fee* will be prorated and the prorated fee amount assessed directly on major stationary sources or Section 185 Accounts to meet the entire *Area §185 Obligation.*

Attainment date is defined as the EPA-specified date an area is required to attain the 2008 eight-hour ozone standard under the FCAA.

The attainment year is the entire calendar year that contains the *attainment date.* For purposes of this rulemaking, the *baseline year* is defined as January 1 through December 31 of the attainment year. At the time of the rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW nonattainment area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). The severe classification attainment date for these areas is July 20, 2027; therefore, the 2027 calendar year from January 1, 2027, through December 31, 2027, will determine both the attainment year and *baseline year* of 2027, unless EPA approved an attainment date extension under FCAA, §181(a)(5).

Consistent with FCAA, §185, *baseline amount* is the lower of baseline emissions (actual emissions as described in §101.705) or total annual authorized or pending authorization

emissions at a major stationary source as of December 31 of the baseline year if the major stationary source operated the entire baseline year. For major stationary sources that began operating during or after the baseline year, the first full year (12 consecutive months) operating as a major source will be used to determine the baseline emissions. If the major stationary source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are averaged from any single consecutive 24-month period within a historical period, as outlined in the definition of *baseline emissions*.

For purposes of this rulemaking, the term *baseline emissions* represents the "actual emissions" referenced in FCAA, §185(b)(2) and excludes unauthorized emissions. The baseline emissions are reported in the annual point source emissions inventory according to the Emissions Inventory Requirements of 30 TAC §101.10. The baseline emissions include reported annual emissions that are authorized by permit or rule from routine operations, which includes authorized MSS activities during the baseline year or another time period as allowed by this rule but excludes unauthorized emissions. Emissions from emissions events and MSS activities not authorized by permit or rule must be excluded from the baseline emissions calculations because they are not authorized or representative of routine operations. The exclusion of unauthorized emissions from the baseline emissions calculation is consistent with the PSD definition of baseline actual emissions in §116.12 and 40 CFR §52.21(b)(48) that does not include unauthorized emissions in a baseline amount determination.

This definition of *baseline emissions* differs from the definition of *actual emissions* in 30 TAC §101.10, which includes all emissions emitted, whether authorized or unauthorized, reported in the emissions inventory. The definition of *baseline emissions* represents only the emissions from authorized routine operations reported in the emissions inventory.

If the major stationary source's emissions reported in the emissions inventory are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are averaged from any single consecutive 24-month period within a historical period. The historical period allowed depends on the type of emissions units, following PSD guidance. *Electrical utility steam generating units* are included in this rule because they may use a five-year historic look-back period. The definition of *electric utility steam generating units* is consistent with the definition used in §116.12. Other *emissions units*, as defined in §101.1, may use a ten-year historic look-back period.

Extension year is defined as a year that meets the requirements of FCAA, §181(a)(5). It is unknown whether the 10-county DFW or the eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard may qualify for an extension, and an extension year may be applicable to future areas designated as severe or extreme nonattainment under the 2008 eight-hour ozone standard.

The *Failure to Attain Fee* is defined as the fee assessed and due from each major stationary source or Section 185 Account based on actual emissions, whether authorized or unauthorized, of VOC, NO_x, or both exceeding 80% of the *baseline amount*.

The *fee assessment year* is defined as the calendar year the actual emissions were emitted and reported to the emissions inventory and used to calculate the assessed fee amount. The actual emissions include all authorized and unauthorized emissions, such as routine, MSS, and emissions events (EE) reported in the emissions inventory, as discussed in §101.713. For the 10-county DFW and eight-county HGB severe classification nonattainment areas under 2008 eight-hour ozone standard, the fee could be assessed as early as calendar year 2028 should the areas not attain by July 20, 2027. The *fee collection year* is defined as the calendar year the fee is

invoiced by TCEQ.

The definition for *major stationary source* is consistent with the definition in §116.12 for determining a major source of VOC or NO_x emissions. Because major stationary sources under common control may opt to aggregate pollutants and/or sites for purposes of *baseline amount* determination and *Failure to Attain Fee* payment, a *Section 185 Account* represents either a major stationary source (if not choosing to aggregate) or a group of two or more major stationary sources (if aggregating). A single identifying Section 185 Account number will be assigned by TCEQ to track the option chosen for *baseline amounts* and *Failure to Attain Fee* assessments in the TCEQ Section 185 database. Because major stationary sources can be aggregated on a pollutant basis, 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. A single major stationary source could belong to two separate Section 185 Accounts, or a Section 185 Account may only have one major stationary source. All major stationary sources of VOC and/or NO_x emissions located in a severe or extreme 2008 eight-hour ozone nonattainment area that did not attain by the attainment date are subject to this rule. Even if a major stationary source did not comply and, as a result, did not receive a Section 185 Account from TCEQ, that source will still be subject to this adopted rule and will still owe a Section 185 fee.

Regarding Supplemental Environmental Projects (SEPs), the *SEP Offset Amount* is defined as the portion of an enforcement case's assessed administrative penalty approved for use in the performance of, or contribution to a SEP, instead of being paid to the commission as a penalty. As discussed in §101.717, eligible major stationary sources may use the excess amounts to the *SEP Offset Amount* to partially or completely fulfill their Failure to Attain Fee. Additionally, the entire amount spent on a SEP may also be used to partially or completely fulfill the Failure to Attain Fee if the total amount paid to the SEP is at least 110% or more of the *SEP Offset Amount*.

§101.701, Applicability

This new section adopts the applicability requirements for the FCAA, §185 fee (Failure to Attain Fee). FCAA, §185 requires areas designated nonattainment and 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 stationary sources located in an area failing to attain the standard by the attainment date applicable to that area. A rule language update to §101.701(a) was made at adoption to clarify that the severe or extreme nonattainment area is first designated nonattainment and then classified as severe or extreme. FCAA, §182(f) further requires that all SIP requirements applying to VOC emissions sources also apply for NO_x emissions sources. §101.701 identifies the provisions that apply to any 2008 eight-hour ozone nonattainment area classified as severe or extreme that fails to demonstrate attainment of the 2008 eight-hour ozone standard by its attainment date.

The rule is applicable to all major stationary sources in a 2008 eight-hour ozone nonattainment area each year that the penalty fee is applicable as required by FCAA, §185. At the time of the rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). In the future, should EPA designate other areas of Texas as severe or extreme nonattainment under the 2008 eight-hour ozone standard, then this rulemaking will be applicable to those severe or extreme nonattainment areas.

The executive director will implement this rule upon EPA determining that the area failed to attain the severe or extreme 2008 eight-hour ozone standard. This determination will be the

effective date of EPA's finding of failure to attain notice for severe or extreme areas under the 2008 eight-hour ozone standard published in the *Federal Register*. There are no obligations for major stationary sources until the rule is implemented. As part of its outreach efforts, TCEQ will endeavor to electronically distribute courtesy notifications to regulated entities that sign up for the TCEQ Section 185 email and text distribution lists once the Section 185 fee has been implemented. Electronic notification, as allowed under 30 TAC §19.30, will include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee)*, subscribers of the *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* email and text list (available at: *https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

The *Failure to Attain Fee* will start being assessed for the calendar year following the missed attainment date. The rule defines the attainment year as the entire calendar year that contains the attainment date. For purposes of this rulemaking, the term baseline year is defined as January 1 through December 31 of the attainment year. For the 10-county DFW and eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard, which have a July 20, 2027, attainment date, the attainment year and baseline year are anticipated to be 2027. The fee will start being assessed for calendar year 2028 (first fee assessment year), unless EPA approved an attainment date extension under FCAA, §181(a)(5).

§101.702, Exemption

This new section adopts that no Failure to Attain fee payment is due for a year determined by EPA to be an extension year under FCAA, §181(a)(5) for the 2008 eight-hour ozone standard. 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. It is unknown whether the 10-county DFW area or the eight-county HGB severe nonattainment area under the 2008 eight-hour ozone standard may qualify for an extension. Additionally, an extension year may be applicable if EPA designates future areas as severe or extreme nonattainment under the 2008 eight-hour ozone standard and grants those areas an extension year. For any area granted an extension, the fee will be applicable if the severe or extreme nonattainment area did not attain by the extension attainment date specified by EPA. A rule language update was made at adoption to §101.702 by adding missing "major stationary" in front of "source" to clarify that the source must be a major stationary source.

§101.703, Fee Equivalency Account

This new section adopts that the executive director establishes a Fee Equivalency Account. This account will be a listing of revenues from designated programs that reduce VOC or NO_x emissions in 2008 eight-hour ozone nonattainment areas. Only the revenue collected within each 2008 eight-hour ozone nonattainment area will be credited and available to offset the Area §185 Obligation in the Fee Equivalency Account. Revenue collected in the 10-county DFW 2008 eight-hour ozone nonattainment area will be credited only within that nonattainment area. Revenue collected in the eight-county HGB 2008 eight-hour ozone nonattainment area will be credited only within that nonattainment area. Specifically, revenue collected for the TERP program will be used to offset each 2008 eight-hour ozone nonattainment area's Area §185 Obligation for the area when any TERP grant funds are also expended within each area; this revenue is referred to as "TERP revenue collected and expended" throughout this subchapter. This will result in potential benefits directly to the nonattainment area from revenue collected as TERP's stated goals and statutory restrictions provide funding for programs or activities that are designed to result in reductions in VOC, NO_x, and other pollutant emissions into the atmosphere.

No transfer of revenue would occur between TERP and the Fee Equivalency Account. The Fee Equivalency Account is a documentation mechanism to verify the amount of revenue collected in the 2008 eight-hour ozone nonattainment area available to offset the fee on major stationary sources located in that area.

If other emissions reduction grant programs become available those will be considered for inclusion in the Fee Equivalency Account for use in offsetting the Failure to Attain Fee. A rule language update was made at adoption to simplify the rule language by using the defined term "equivalency credit" instead of repeating the definition of equivalency credit.

§101.704, Fee Equivalency Accounting

This new section adopts that the Area §185 Obligation will be the total FCAA, §185 fee determined annually for each 2008 eight-hour ozone nonattainment area. The FCAA, §185 fee (Failure to Attain Fee) is calculated for each major stationary source or Section 185 Account by TCEQ staff using the approved baseline amounts and emissions inventory data for the fee assessment year. These resultant individual Failure to Attain Fees will be summed to determine the overall Area §185 Obligation within the same 2008 eight-hour ozone nonattainment area.

Revenue, calculated on a dollar basis, associated with the Fee Equivalency Account will be credited starting with the first fee assessment year and continuing annually. The funding associated with the Fee Equivalency Account for a given fee assessment year will be compared with the Area §185 Obligation for a given fee assessment year.

If the Fee Equivalency Account does not have enough funds to fully meet the Area §185 Obligation, a backstop provision will be invoked under which major stationary sources or

Section 185 Accounts will be assessed a prorated Failure to Attain Fee to generate sufficient funds to meet the Area §185 Obligation. The prorated Failure to Attain Fee will be calculated based on the amount in the Fee Equivalency Account and the overall Area §185 Obligation. The Failure to Attain Fee amount that the major stationary source or Section 185 Account will be required to pay reduces the prorated Failure to Attain Fee amount based on the calculations in this rulemaking. This process will be documented and made publicly available each year.

For example, a hypothetical Area §185 Obligation for HGB for the 2028 fee assessment year is calculated by TCEQ staff as $154 million. The HGB area Fee Equivalency Account for calendar year 2028 has $45 million available from TERP revenue. The HGB area balance owed for the 2028 fee assessment year is $109 million ($154 million less $45 million) and that amount must be paid by major stationary sources located in HGB that are subject to the Failure to Attain Fee. For the 2028 fee assessment year, the Fee Equivalency Account covers 29.22% ($45 million divided by $154 million, with the quotient multiplied by 100) of the Area §185 Obligation for HGB and each major stationary source's or Section 185 Account's fee would be reduced by 29.22%. Applying this example further, TCEQ staff calculates that the Failure to Attain Fee for one hypothetical Section 185 Account located in HGB is $50,000 for the 2028 fee assessment year. The prorated Failure to Attain Fee for that hypothetical Section 185 Account would be calculated by reducing the $50,000 fee by 29.22%, resulting in that hypothetical Section 185 Account owing $35,389.61 as its prorated Failure to Attain Fee. This process would be repeated so that each major stationary source or Section 185 Account located in the nonattainment area receives a fee rate reduced by 29.22%.

The timing of the demonstration to determine whether the equivalency credits in the Fee Equivalency Account can offset all or a portion of the Area §185 Obligation will likely occur in December and then annually afterward, except for the first year the program is implemented.

The date that TCEQ performs this evaluation for the first year of program implementation depends on the dates of future federal or state actions that are not currently scheduled (e.g., effective date in the *Federal Register* of EPA's finding of failure to attain).

§101.705, Baseline Amount

This new section adopts the requirements for determining a baseline amount. FCAA, §185 requires a fee on emissions exceeding 80% of a baseline amount determined for the attainment year (referenced as baseline year in this rulemaking) until the Section 185 fee (referred to as Failure to Attain Fee in this rulemaking) no longer applies to the area. Unless the major stationary source or Section 185 Account qualifies for an adjustment to the baseline amount, as outlined in the various adjustment sections of this adopted rulemaking, the method for a fixed, one-time calculation of the baseline amount is provided in this section.

A baseline amount will be required for each ozone precursor pollutant, VOC and/or NO_x, for which the source is major. If a stationary source is major for both VOC and NO_x emissions, a baseline amount will be required separately for VOC and NO_x emissions. If the major stationary source is major for only VOC or NO_x emissions, the baseline amount will be required for just that pollutant, VOC or NO_x.

The baseline amount is defined as the lower of either: the *baseline emissions* defined as the total annual routine emissions reported in the emissions inventory, including reported MSS emissions that are authorized by permit or rule, as described in 30 TAC §101.10 for the baseline year or timeframe otherwise specified in this adopted rule; or the total annual emissions allowed by the applicable authorizations or pending authorizations in effect for the major stationary source during the baseline year or timeframe otherwise specified in this adopted rule. MSS emissions reported in the emissions inventory that are authorized by permit

or rule are considered routine and must be included in baseline emissions. The major stationary source's authorized or pending authorization emissions include emissions allowed under any TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year or timeframe otherwise specified may be included in the total annual emissions allowed under authorizations. Some owners or operators of major stationary sources may submit administratively complete applications for authorizing previously unauthorized emissions prior to December 31 of the baseline year or other approved baseline timeframe. To not penalize sources in the process of obtaining an authorization, the commission allows the emission limits established by permits that were administratively complete to adjust the baseline amount by adding these amounts to the total annual authorized emissions. This approach aligns with the FCAA intent of comparing authorized emissions with reported actual emissions to determine a baseline amount.

A timeframe chosen other than the baseline year to determine a baseline amount depends on whether the major stationary source began operating during or after the baseline year or if the major stationary source's emissions qualify to be averaged over a 24-month consecutive period. Other applicable baseline timeframes for baseline amounts are outlined in this rulemaking.

Unauthorized emissions, such as from EE and MSS activities not authorized by permit or rule, are not included in the baseline amount. Exclusion of unauthorized emissions from a baseline amount is consistent with these emissions not being representative of normal, routine operations and with the PSD definition of baseline actual emissions in §116.12 and 40 CFR §52.21(b)(48). For example, an oil and gas major stationary source for both VOC and NO_x

emissions experienced VOC emissions from tank flashing that exceeded an authorized permit limit. Tank flashing is a routine operation so the unauthorized VOC emissions resulting from the tank flashing that exceeded the permit limit are required to be reported in the emissions inventory as annual routine emissions. The unauthorized but routine VOC emissions from the tank flashing would be excluded from the baseline emissions calculations used to determine baseline amount.

If the major stationary source has reported emissions in the emissions inventory that are irregular, cyclical, or otherwise vary significantly from year to year, an alternate method to determine baseline emissions will be allowed. Whether a source qualifies as irregular, cyclical, or otherwise varying significantly is determined on a case-by-case basis. For these major stationary sources, any single consecutive 24-month period within a specified historical period could be averaged for the baseline emissions. Major stationary sources that qualify to establish an alternate baseline amount in this manner will calculate the baseline emissions using historical annual routine emissions, as recorded in the emissions inventory, which includes authorized emissions from MSS activities. A rule language update was made at adoption to remove the outdated term “equivalent alternative baseline emissions” and correct to “baseline emissions” in §101.705(c)(1).

The FCAA, §185 does not address how to define a historical period; however, EPA issued a March 21, 2008, guidance memo, referenced elsewhere in this preamble, stating that an acceptable alternate method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found in EPA’s PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008, guidance, EPA used these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission

levels for each emissions unit. The guidance continues by stating: "Once calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity may be used during the historical 24-month period selected, but emissions that do not comply with legally enforceable limits would have to be excluded. Legally enforceable emissions limits would include any state or federal requirements, including Best Achievable Control Technology or Lowest Achievable Emissions Rate.

According to PSD guidance, the timeframe for the historical look-back period for emissions units other than electric steam generating units is any single consecutive 24-month period within the ten-year period immediately preceding the date a complete permit application was submitted. For electric steam generating units the timeframe for the historical look-back period is any single consecutive 24-month period within the five-year period immediately preceding the date a complete permit application was submitted. The historical look-back period for the baseline amount determination will start the calendar year immediately preceding the baseline year. All emissions units at a major stationary source or Section 185 Account will be required to use the same 24-month period when calculating baseline amounts for aggregated pollutants or sites under common control or ownership. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions (actual emissions from the emissions inventory as defined in §101.701) or emissions allowed under authorizations (e.g., permitted emissions) to include emissions from this alternate method.

At the time of this rulemaking, the baseline year is anticipated to be 2027 for the 10-county

DFW and eight-county HGB 2008 eight-hour ozone standard severe nonattainment areas. The window used for the possible historical look-back period will be five years (2022 - 2026) for electric generating units (EGUs) or 10 years (2017 - 2026) for non-EGUs immediately preceding January 1, 2027. The average emissions during the single consecutive 24-month period will be the basis for determining the baseline emissions, in tons.

If there are rules or regulations that take effect by December 31 of the baseline year used for baseline amount determination that specify emission limitations or standards, then the baseline emissions and total annual authorized emissions must be adjusted downward to exclude the amount of emissions that would have exceeded those emission limitations with a legally enforceable emissions limitation requirement (e.g. from a permit, rule, regulation, commission order, or court order) during the baseline year.

For sources that qualify for a consecutive 24-month baseline timeframe, the same downward adjustment is required for rules or regulations in effect during the selected 24-month baseline timeframe, in addition to rules or regulations that take effect by December 31 of the baseline year. The major stationary source will not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented during the baseline year and/or 24-month consecutive period used to calculate the baseline amount. A rule language update for §101.705(c)(3) and (d) was made at adoption to clarify that the emissions limitation is “legally enforceable” as already stated in this paragraph and for §101.705(c)(3) to align with the “in effect by December 31 of the baseline year” phrasing in §101.705(d).

For example, a major stationary source of VOC emissions started operating prior to the 2027 baseline year, and the baseline amount was established from the baseline emissions during the 2027 baseline year. On March 1, 2027, a hypothetical federal rule takes effect that limits

emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's emissions limits would be adjusted downward from January 1, 2027, through February 28, 2027, to account for the new limit. In another example, a major source of VOC emissions establishes a baseline amount using the 24-month consecutive period from July 12, 2022, through July 12, 2024. During calendar year 2027, a hypothetical federal rule takes effect that limits emissions from coatings emissions units located at the major source during the 24-month consecutive period chosen for the baseline amount. The baseline emissions for coatings emissions units impacted by the 2027 federal rules' emissions limits would be adjusted downward during the July 12, 2022, through July 12, 2024, period chosen for the baseline amount.

Fugitive emissions will be required to be included for the purposes of the baseline emissions calculations and fee assessments. This is similar to the Title V Emissions Fees described in 30 TAC §101.27, which requires all fugitive emissions to be included in fee calculations after applicability of the fee has been established. Per 40 CFR §70.2, fugitive emissions of VOC or NO_x belonging to one of the categories listed in paragraph 2 of the definition of major sources may be excluded from counting toward major source applicability. Once the source meets the major stationary source applicability requirements of 30 TAC §116.12, fugitive emissions are required to be reported in the emissions inventory, and the fugitive emissions must be used for both baseline emissions calculations and fee assessments.

As allowed under the Emissions Inventory Requirements described in 30 TAC §101.10, a regulated entity that meets the applicability requirements to submit an emissions inventory, which includes major stationary sources, may submit a certifying letter instead of reporting updated emissions in the emissions inventory. The certifying letter option is allowed for any regulated entity (identified by the nine-digit regulated entity reference number (RN) and a

seven-character alphanumeric TCEQ account number) that experienced an insignificant change in operating conditions compared to the most recently submitted emissions inventory. An insignificant change in emissions is defined as including start-ups, permanent shut-downs of individual units, or process changes that result in at least a 5.0% or 5 tpy, whichever is greater, increase or reduction in total annual emissions of VOC, NO_x, carbon monoxide, sulfur dioxide, lead, particulate matter (PM) less than or equal to 10 microns in diameter, or PM less than or equal to 2.5 microns in diameter. If a regulated entity submits a certifying insignificant change notification letter instead of updating the emissions, then the emissions reported in the most recently submitted emissions inventory are copied over to the current emissions inventory reporting year. For example, if a regulated entity submits an insignificant change notification letter for the 2027 emissions inventory reporting year and TCEQ staff verified that the requirements of the insignificant change notification letter were met, then the 2026 emissions are copied over to also represent the 2027 emissions. Major sources are cautioned to consider the impacts of choosing to submit an insignificant change letter instead of updating emissions in the emissions inventory because of the implications for baseline amount determinations and fee assessments.

Emissions inventory data are collected annually by the commission and, after quality assurance review, are loaded into the state's air emissions inventory database, the State of Texas Air Reporting System (STARS). Since Texas' emissions inventory program submits data to EPA's National Emissions Inventory (NEI), the quality assurance of emissions inventory data is subject to a federally mandated Quality Management Plan (QMP) that annually documents and describes the emissions inventory organization arrangements, processes, procedures, and requirements. As part of the QMP, the emissions inventory program annually submits a Quality Assurance Project Plan (QAPP) documenting the emissions inventory quality assurance process for EPA's review and approval. The QAPP includes information on how TCEQ staff perform

annual detailed technical reviews of point source emissions inventories, correct issues, and document the outcome of the review. Actual emissions reported in the emissions inventory that are subject to the detailed quality assurance process include: all emissions resulting from routine operations, including emissions from authorized MSS activities; all unscheduled MSS activities (reportable and non-reportable); and all emissions events (reportable and non-reportable). Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, revise emissions submitted for the current reporting year and for the reporting year immediately prior. Revisions to historical inventory data outside of this timeframe are done on a case-by-case basis usually as a result of a TCEQ-directed emissions inventory improvement initiative or TCEQ's compliance and enforcement processes. The commission uses emissions inventory data 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 solely for purposes of adjusting the baseline amounts and related calculations is not supported. Similar to emissions inventories, air permits are reviewed to ensure accuracy of emissions.

A baseline amount would account for all emissions units located at the major stationary source as of December 31 of the baseline year. Any ownership transfer of emissions units that occurred by December 31 of the baseline year will also need to be included in the baseline amount calculation. If a 24-month consecutive period is chosen for a major source that operated the entire baseline year, then all emissions units located at the major stationary source as of December 31 of the baseline year must be included, regardless of whether they were located at the major stationary source during the period chosen. An owner or operator of a major stationary source or Section 185 Account may not exclude new emissions units added

by the baseline year from the 24-month consecutive historical period.

For example, a qualified major stationary source chooses March 19, 2022, through March 19, 2024, as the 24-month consecutive period for the baseline emissions. An emissions unit was purchased, and ownership transferred to the source on September 1, 2026; therefore, those emissions must be averaged and added to the 24-month period chosen. The major stationary source that sold the emissions units may not include the sold emissions units in their baseline amount to avoid double-counting of the same emissions units in different baseline amounts.

The rule requires that the baseline amount calculation and supporting documentation be submitted to TCEQ in a format specified by the executive director. Documentation will include either a list of all emission units by their corresponding path-level emissions reported in the point source emissions inventory or all applicable air permits by Emissions Point Identification Number (EPN) (depending on which one is required for the baseline amount determination). If a major source uses path-level emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported by a combination of Facility Identification Number (FIN) and corresponding EPN that match the most recent point source emissions inventory. If a major stationary source uses permitted allowable emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported at the EPN level. Sample calculations will be required for each path-level (emissions inventory) or EPN level (air permits) used for baseline amount determination.

A major stationary source may choose to establish a baseline amount from baseline emissions for sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year. Sufficient supporting documentation would be required to verify that the major stationary source's emissions qualify as irregular, cyclical, or otherwise vary significantly from year to

year. Additionally, details on why and how the 24-month consecutive period chosen accurately represents the major source's emissions will be required.

There is no list of sites that meet the definition of a major stationary source as defined in 30 TAC §116.12. TCEQ would use established programs to assist with notifying major sources of NO_x and/or VOC emissions subject to the fee to provide baseline amounts by the due dates in this rulemaking. Although TCEQ will attempt to notify all applicable major stationary sources by using the Title V permitting and air emissions inventory programs as surrogate data for major sources, compliance with this rulemaking is required even if TCEQ does not specifically notify the major stationary source. Compliance with the Section 185 fee program is a requirement of FCAA, §185, and a major stationary source that does not provide a baseline amount by the specified due date will be subject to the executive director establishing the baseline amounts as described in this rulemaking so that TCEQ can assess the required fee.

For major stationary sources operating prior to January 1 of the baseline year or that operated the entire baseline year, the regulated entity will complete the baseline amount form and supporting documentation. A specific due date for initial baseline amount cannot be provided since the implementation of the Failure to Atain Fee depends on the timing of two future actions: the severe nonattainment areas failing to attain by July 20, 2027, based on 2024, 2025, and 2026 ambient air monitoring data (or by the date established by any extension year granted by EPA); and the effective date in the *Federal Register* of EPA's finding of failure to attain. Regulated entities will submit baseline forms either on the emissions inventory due date specified under the Emissions Inventory Requirements in 30 TAC §101.10 for the fee assessment year or 120 days from the effective date of EPA's failure to attain notice. Providing no less than 120 days for regulated entities to prepare baseline amounts allows flexibility for the executive director to initially implement the final Failure to Attain Fee rule and initiate

related business processes. For the 10-county DFW and eight-county HGB severe 2008 eight-hour ozone nonattainment areas at the time of this rulemaking, the baseline amount based on a 2027 baseline year may be due March 31, 2028 (barring any future updates to the Air Emissions Inventory Reporting Rule), or 120 days from the effective date of EPA's failure to attain notice.

As part of its outreach efforts, TCEQ will endeavor to electronically distribute courtesy notifications to regulated entities that sign up for TCEQ email and text distribution lists related to the Section 185 fee. Electronic notification, as allowed under 30 TAC §19.30, will include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee)*, subscribers to *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* will receive email and/or text notifications (sign-up available at: *https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

Once finalized, the baseline amount will be fixed and will not be changed except as consistent with the adjustments in §§101.708 – 101.711.

§101.706, Baseline Amount for New Major Stationary Sources

The requirements of §101.705 are also applicable to new major stationary sources and these additional provisions outlined in §101.706 provide baseline amount determination, baseline timeframe, and compliance schedules specific to new major stationary sources. States are required to assess the Section 185 fee on all major sources of VOC and/or NO_x emissions located in a severe or extreme ozone nonattainment area that fails to attain by its attainment date. This will include major stationary sources that began operating as a major source or transitioned to a major source status during or after the baseline year. Since FCAA, §185 does

not provide baseline amount determinations for these scenarios, this new section determines a baseline amount for these new major stationary sources.

These new major stationary sources will use their first full year (12 consecutive months) operating as a major stationary source to determine the baseline amount or aggregated baseline amount. The baseline amount must be the lower of the baseline emissions during the first full year of operation as a major source or the total annual authorized emissions during the first full year of operation as a major source.

EPA, in its December 14, 2012, notice of final approval of the South Coast Air Quality Management District (SCAQMD) SIP revision (77 FR 74372), allowed a major stationary source subject to FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation to set a baseline amount. EPA, in its February 14, 2020, notice of final approval of the HGB Failure to Attain Fee (85 FR 8411), allowed major stationary sources to determine the baseline amounts on the lower of actual or allowable data available in their first year of operation as a major stationary source.

If rules or regulations take effect during the first full year operating as a major source, then the baseline emissions and total annual authorized emissions must be adjusted downward to reflect those emissions limitations in effect during that timeframe. For example, a major stationary source of VOC emissions started operating January 10, 2027, and the baseline amount was established from the baseline emissions during the first full year of operation, from January 10, 2027, to January 10, 2028. On March 1, 2027, a hypothetical federal rule takes effect that limit emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's

emissions limits would be adjusted downward for the entire baseline period (January 10, 2027, through January 10, 2028) to account for the new limit. The major source would not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented or in effect during the calendar year used to calculate baseline emissions.

A baseline amount at a new major stationary source will account for all emissions units located at the major stationary source as of the last calendar day of the first full year operating as a major source. For example, a major stationary source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using the February 4, 2028, through February 4, 2029, timeframe. In this example, the major stationary source would include all emissions units, including any ownership transferred emissions units as of February 4, 2029, in the baseline amount.

For major stationary sources that begin operating between January 1 and December 31 of the baseline year or after December 31 of the baseline year, regulated entities will have 90 days from the last calendar day of the first full year operating as a major source to submit the baseline amount form. Since initial Section 185 fee program implementation has already occurred, a 90-day timeframe is an appropriate length of time for form submission and is consistent with emissions inventory reporting timeframes. For example, a major source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using February 4, 2028, through February 4, 2029. In this example, the regulated entity would have 90 days from February 4, 2029, to submit the baseline amounts and supporting documentation.

§101.707, Aggregated Baseline Amount

This adopted new section provides for the aggregation of either VOC or NO_x emissions (or both) at multiple major stationary sources to align fee obligations with attainment demonstration emissions reduction approaches. A rule language update was made at adoption to remove the outdated term “aggregated equivalent alternative baseline amount” and correct to “aggregated baseline amount” in §101.707(e)(1). Owners or operators of major stationary sources under common control may choose 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 emissions at a single major stationary source or VOC with NO_x emissions across multiple major stationary sources under common control, provided that the stationary sources are major for both pollutants. Once an owner or operator chooses aggregation, then the baseline amount will remain aggregated, and the fees will be assessed in the same manner as the aggregation until the Failure to Attain Fee no longer applies to the area.

Baseline amounts will first be calculated separately for each individual major stationary source for VOC or NO_x emissions, or for both, using the method described in §101.705 or §101.706. The separate initial baseline amounts for each pollutant at an individual major stationary source must also be submitted in a format specified by the executive director with supporting documentation. Providing the separate initial calculations of baseline amounts is intended to provide transparency and consistency and to assist with quality assurance of baseline amount determinations with any subsequent aggregation. After establishing separate baseline amounts, then the baseline amount could be aggregated by multiple pollutants, multiple stationary sources under common control, or both.

Owners or operators of major stationary sources may aggregate VOC and NO_x baseline amounts at a major stationary source. Sources under common ownership and/or control may also opt to

aggregate baseline amounts across multiple major stationary sources. Only major stationary sources under common control may be included in the aggregate group. The aggregation methodology must remain consistent throughout the baseline amount calculation and fee assessment of the Failure to Attain Fee. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for Failure to Attain Fee assessment. The baseline year, same 24-month consecutive period, or other timeframe used to establish baseline amounts will be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation.

Like the baseline amount compliance schedule, major stationary sources that choose to aggregate will submit the required forms and supporting documentation either on the emissions inventory due date of the fee assessment year, as specified under Emissions Inventory Requirements in 30 TAC §101.10, or 120 days from the effective date of EPA's failure to attain notice, whichever is later. Providing no less than 120 days for regulated entities to prepare aggregated baseline amounts allows flexibility for the executive director to implement the final Failure to Attain Fee rule and initiate related business processes. For aggregation, a list of all sites under common control by RN aggregated under a baseline amount must be provided in addition to the supporting documentation provided for individual baseline amounts described under Baseline Amounts. If sites under common control chose to aggregate, then those sites must share the same Customer Reference Number (CN) in TCEQ's Central Registry database. Sites under common control are determined by TCEQ. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the Failure to Attain Fee, as addressed under circumvention requirements of 30 TAC §101.3.

§101.708, Adjustment of Baseline Amount for Major Sources with Less than 24 Months of

Operation

Major stationary sources with less than 24 months of consecutive operation as of December 31 of the baseline year or that began operation after the baseline year would not have sufficient data to initially determine if emissions are irregular, cyclical, or otherwise vary significantly from year to year to establish baseline emissions. This adjustment option provides a major source with less than 24 months of consecutive operation an opportunity to adjust the established baseline amount after establishing the emissions and operation history. If the emissions qualify as irregular, cyclical, or otherwise varying significantly from year to year, after completing 24 months of consecutive operations, the major stationary source may request that the baseline amount be adjusted using the average rate during the first 24 months of consecutive operation for the baseline emissions. If the total annual authorizations used to calculate the initial baseline amount were still lower than the adjusted baseline emissions, then an adjustment may not be requested. If emissions varied significantly during the 24 months of consecutive operation, the emissions may be considered as irregular, cyclical, or otherwise varying significantly. A major stationary source will be allowed to request an adjustment to its established baseline amount within 90 calendar days of completing 24 months of consecutive operation. EPA published approval for a similar approach for new major stationary sources for the HGB Failure to Attain Fee in February 2020. A rule language update was made at adoption to clarify and improve readability by splitting §101.708(a) into §101.708(a)(1) and (2).

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.709, Adjustment of Baseline Amount for New Construction

This adopted new section would allow an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction and comply with emissions limits that achieve the lowest achievable emissions rate. The newly constructed emissions units would not have been included in the previously established baseline amount. A major stationary source may request an adjustment to its established baseline amount within 90 calendar days of completed construction of the new emissions units.

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.710, Adjustment of Baseline Amount for Ownership Transfers

This adopted new section outlines when an established baseline amount may be adjusted because of ownership transfers. Emissions units may not always be under the same common ownership or control. Owners or operators of major stationary sources, as part of normal business, may transfer ownership of some or all emissions units at a major stationary source or Section 185 Account to another major stationary source or Section 185 Account. The commission recognizes that a change in ownership or control of emissions units could change

the Failure to Attain Fee owed for both major stationary sources or Section 185 Accounts. The change in control of emissions units does not change the historical operation, reported emissions of the emissions units, or previously invoiced amounts before the ownership transfer occurred. The ownership transfer must first be approved by and/or reported to the TCEQ Air Permits Division before adjustments of the baseline amounts may be requested.

A change in control or ownership, such as with an emissions unit transfer, does not affect the already established time period or baseline amounts on the remaining emissions units not impacted by the ownership transfer at either major stationary source or Section 185 Account. The already established baseline amounts are transferred from one major stationary source or Section 185 Account to the other major stationary source or Section 185 Account.

In a manner similar to transferring other obligations such as emissions authorizations, the affected major stationary sources or Section 185 Accounts may transfer the baseline amounts and Failure to Attain Fee associated with each emissions unit having a change in control. There is no change for the calculated baseline amounts for the transferred emissions units or remaining emissions units.

Major stationary sources that transfer ownership of an emissions unit from one major source or Section 185 Account to a minor source(s) will not have their baseline amounts adjusted to prevent circumvention of the Failure to Attain Fee, as addressed under 30 TAC §101.3. As a result of a comment received, the commission updated the term “equipment” to “emissions unit” in the context of ownership transfers in this Section by Section and in rule language for §101.710.

To qualify for an ownership transfer baseline amount adjustment, the ownership transfer must

occur between major stationary sources or Section 185 Accounts of the same pollutant, or aggregated pollutants, located within the same nonattainment area. For example, if an ownership transfer occurred between a major source located in the 10-county DFW nonattainment area under the 2008 eight-hour ozone standard and the eight-hour HGB nonattainment area under the 2008 eight-hour ozone standard, then the baseline amounts could not be adjusted.

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

Once finalized, the recipient major stationary source or Section 185 Account that received the ownership-transferred emissions units adds the unaltered baseline amounts from those units to their existing major stationary source or Section 185 Account baseline amount. There is no baseline amount adjustment for the remaining emissions units that were not ownership transferred at the originating or recipient major source. The originating major stationary source or Section 185 Account that transferred the emissions units subtracts the transferred emissions units' baseline amounts from their major stationary source or Section 185 Account baseline amount. While baseline amounts may increase or decrease at a major stationary source or Section 185 Account resulting from ownership transfers, the overall number of emissions units subject to fee assessment within the nonattainment area does not change.

To transfer the baseline and the Failure to Attain Fee, the new owner or operator of each major

stationary source or Section 185 Account affected by the change in common control will be required to submit a request to the executive director within 90 days of the ownership change for the executive director's approval.

§101.711, Adjustment of Baseline Amount for Final Emissions Inventory Data

This adopted new section addresses the situation when baseline emissions may need to be adjusted upon the availability of final quality assured and TCEQ-approved emissions inventory data as allowed under the Emissions Inventory Guidelines. The Failure to Attain Fee will be implemented upon the effective date of EPA's finding of failure to attain notice published in the *Federal Register* for a severe or extreme ozone nonattainment area under the 2008 eight-hour ozone standard that fails to attain by the attainment date. It is unknown when EPA will issue the finding of failure to attain; therefore, the specific dates to establish an initial baseline amount are unknown. Because of implementation timing, final quality assured and TCEQ-approved emissions inventory data could occur after the baseline amount is established. If a major stationary source used emissions inventory data to establish the baseline amount, then TCEQ may request adjustments based on the final quality assured emissions inventory data.

Additionally, major stationary sources may initiate emissions inventory revisions that require baseline amount adjustments. Due to limited staff resources, approval of regulated entity-initiated requests would be based on the revisions guidance in the Emissions Inventory Guidelines published annually and posted on the Point Source Emissions Inventory webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/psei.html).* Emissions inventory data are used extensively for air quality planning purposes, such as SIP revisions and rule development, submitting to required federal programs, such as the NEI, and assessment of other applicable fees such as the Title V fees. For these reasons, emissions inventory revisions are allowed for specific circumstances. Emissions inventory revisions submitted solely for the

purpose of adjusting a baseline amount will not be accepted.

Regulated entities, including major sources, are provided an opportunity to review and if necessary, revise emissions data submitted for the current emissions inventory reporting year and for one year immediately prior. Major stationary sources will have 90 days or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, to submit adjusted baseline amount requests due to final, quality-assured emissions data. Revisions to historical emissions inventory data outside of this timeframe are evaluated on a case-by-case basis, usually as the result of a TCEQ-directed emissions inventory improvement project or TCEQ's compliance and enforcement process.

All adjusted baseline amounts will be reviewed by the executive director's staff to ensure consistency with final emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts will apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years will not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.712, Failure to Establish a Baseline Amount

This adopted new section outlines the procedures for the executive director to establish a baseline amount. Timely and accurate baseline amounts are required from each applicable major stationary source to implement the FCAA-required Section 185 fee program. If a major stationary source does not submit an approvable baseline amount by the due date specified by the executive director, then the executive director will determine baseline amount(s) for that major stationary source. In accordance with the requirements of FCAA, §185, the lower of actual emissions (reported in the emissions inventory as described in §101.705) or allowable

emissions (permits or authorizations) from the attainment year (referenced as baseline year in this rulemaking), will be used, if both were available, to determine separate baseline amounts for each pollutant that determined major source applicability. Since the executive director would not have sufficient information, aggregation by pollutant or sites under common control and any adjustments allowed under this adopted rulemaking will not be used.

If available, emissions inventory data reported under 30 TAC §101.10 will be used for determining the baseline emissions. However, if only permit allowable data are available, a baseline amount will be established as 12.5 tons for VOC and/or 12.5 tons for NO_x (depending on the pollutant(s) that determined major source applicability) until the major stationary source submitted an approvable baseline amount. Allowable (permits or authorizations) emissions are typically higher than the actual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or allowable emissions, so the executive director will establish the baseline emissions from the unavailable emissions inventory as 12.5 tons, which represents one-half of the major stationary source threshold of 25 tons. If the executive director used the allowable emissions from the permit to establish the baseline amount, then the non-compliant major stationary source would gain the advantage of a higher baseline amount by not reporting their actual emissions.

If the executive director establishes the baseline amounts, then those baseline amounts will be applicable until the major stationary source submits a verifiable and complete emissions inventory according to the Emissions Inventory Requirements of §101.10 and baseline amount. The proposed rule language was missing the proposal preamble provision that the executive director established baseline amount is applicable until the major stationary source submits a verifiable and complete emissions inventory. To correctly reflect this proposal preamble provision in rule language, updates were made at adoption by adding §101.712(6)(A). After the

major stationary source submits a baseline amount and the executive director reviews the baseline amount to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division, the final baseline amount will apply starting with the next fee assessment year. Adjustments to previous fee invoices based on baseline amounts established by the executive director would not be allowed.

§101.713, Failure to Attain Fee Assessment

The adopted new section outlines the method used to assess the Failure to Attain Fee (total fee) for VOC or NO_x emissions, or both. If the stationary source is major for just one pollutant, the total fee will be assessed for just the one pollutant, VOC or NO_x. If the stationary source is major for both VOC and NO_x emissions, the total fee will be based on an assessment of both pollutants.

This adopted new section also provides for the total fee assessment for owners or operators of major stationary sources or Section 185 Accounts. Fee assessments must follow the same method chosen for the baseline amount determination. The total fee from VOC and/or NO_x emissions from a major stationary source that is major for one pollutant and does not have multiple sites under common control, does not choose to aggregate baseline amounts, or does not comply with the provisions of §101.707 will remain separate and due from each major stationary source or Section 185 Account. The total fee for owners or operators of major stationary sources that choose to aggregate VOC and/or NO_x emissions will also be due according to the provisions of this section. The aggregation of VOC with NO_x emissions may occur at one major stationary source or across multiple major stationary sources under common control. Because both pollutants were used to aggregate a baseline amount, the total fee will be due on actual emissions of both VOC and NO_x emissions. Consistency between the baseline amount determination and the total fee assessment would be maintained with this

approach. An owner or operator of multiple sources under common control who chooses to aggregate a single pollutant from multiple major stationary sources in a baseline amount must aggregate actual emissions of that single pollutant in the total fee payment. If an owner or operator opted to aggregate VOC with NO_x emissions at a major stationary source, both VOC and NO_x emissions must be aggregated for the total fee payment. Similarly, owners or operators who choose to aggregate VOC and NO_x emissions in a baseline amount and to aggregate those pollutants across more than one major stationary source must aggregate actual VOC and NO_x emissions from all aggregated major stationary sources to determine the total fee. For example, if five major stationary sources of both VOC and NO_x emissions elect to aggregate into one Section 185 fee account to determine the NO_x baseline amount, then the total NO_x portion of the fee payment would be based on all actual reported NO_x emissions from those five major stationary sources. Since the five major stationary sources did not elect to aggregate VOC emissions into one baseline amount, then the total fee payment for VOC emissions would be assessed separately for the five different Section 185 fee accounts using actual reported VOC emissions for these major stationary sources. Similarly, if owners or operators choose to aggregate multiple major stationary sources into one baseline amount for VOC and NO_x emissions, then the total fee payment will be due from the aggregated major stationary sources for both pollutants together. A rule language update was made at adoption to align with this preamble Section by Section by adding the missing phrase “must be conducted” and missing word “and” to §101.713(b).

The total fee will be applicable to and calculated for each pollutant (VOC or NO_x) for which the major source meets the applicability requirements of this rulemaking from the actual emissions reported in the emissions inventory for each fee assessment year. The fee amount assessed, calculated, and invoiced will be based on the actual emissions from the fee assessment year’s emissions inventory that exceeded 80% of the baseline amount, rounded up to the nearest

whole number. If the actual emissions reported in the emissions inventory are less than 80% of the baseline amount, then the fee will be assessed at $0.00 dollars and no fee payment will be due from that major stationary source or Section 185 Account for that fee assessment year for that pollutant. For future fee assessment years, the fee will be due if the actual emissions reported in the emissions inventory exceeded 80% of the baseline amount.

Rounding up to the nearest whole number is standard practice for fee assessment since assessing fees on fractional amounts creates fee amounts with several decimal places that can cause errors in the fee invoice data systems, which accept only two decimal places. An example of rounding up to the nearest whole number would be the fee assessment amount calculated as 10.0319 tons, rounding up to the nearest whole number, the fee would be assessed and invoiced on 11 tons.

The total fee for a pollutant aggregated under multiple major stationary sources for a baseline amount will be calculated based on the aggregated actual emissions from all the affected major stationary sources minus 80% of the aggregated baseline amounts for all major stationary sources, rounded up to the nearest whole number.

While baseline amounts exclude unauthorized emissions, fee assessments will be based on actual emissions, as defined in 30 TAC §101.10, which includes emissions from annual routine operations, MSS operations, and other events not otherwise authorized (emissions from emissions events or MSS activities). The inclusion of unauthorized emissions in fee assessment is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the fee assessment year. Inclusion of unauthorized emissions in fee assessment is also required in TCEQ's emissions fee rule in 30 TAC §101.27, which requires all MSS and emissions event emissions to be included in fee calculations.

FCAA, §185 requires the annual fee to be adjusted by the consumer price index (CPI) and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502 requires the fee to be adjusted annually per the CPI for all-urban consumers published by the United States Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. FCAA, §185 requires these fees to be assessed on a calendar-year basis, and the inflation factor based on the CPI is applied in September for the fiscal year (based on the previous September through August data). Therefore, the calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January through August and one third of the fee associated with September through December). For example, a 2028 calendar-year fee would span the 2027 fiscal year and the 2028 fiscal year. Thus, a calendar-year 2028 fee requires two thirds of the annual CPI ending in August 2027 and one third of the annual CPI ending in August 2028. This methodology is used to calculate the fee from EPA's guidance memo (Page 10, available at: *https://www.epa.gov/sites/default/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf*). The fee calculation uses the 40 CFR Part 70 Presumptive Minimum fee basis from EPA's guidance memo. The Part 70 fee rate is published annually by EPA on the Title V webpage (available at: *https://www.epa.gov/title-v-operating-permits/permit-fees*). The Part 70 fee is the rate used to calculate emissions-based fees for Part 70 permit programs. Rather than calculating the rate directly from the CPI, this method uses the Part 70 fee rate published by EPA. The Part 70 fee already has the required CPI adjustment incorporated into it.

The timing of the fee assessment depends on the effective date of EPA's finding of failure to attain. For the 10-county DFW and eight-county HGB 2008 eight-hour ozone nonattainment areas, 2028 is the first year after the attainment date of July 20, 2027. Since the 2027 emissions

inventories would be due in 2028, TCEQ staff would have until the end of 2028 to complete the quality assurance reviews of the 2027 annual emissions inventories that would be used to determine the baseline amount. Major sources would require time to establish the baseline amounts based on final emissions reported in the 2027 emissions inventory. TCEQ staff would require time to quality assure the baseline amounts submitted by each major source. To establish and quality assure the baseline amounts, the fee collection year would generally be adopted as two calendar years following the fee assessment year. A potential scenario could include regulated entities submitting the 2027 emissions inventories by the March 31, 2028, due date, and TCEQ staff completing the quality assurance reviews of the 2027 emissions inventories by the end of calendar year 2028. If the area(s) fail to attain the 2008 eight-hour ozone standard, and EPA finalizes a failure to attain notice in October 2027, then, following EPA's effective date of the failure to attain notice, TCEQ could provide a courtesy electronic notification to regulated entities that major sources must submit their baseline amount to TCEQ by March 31, 2028. TCEQ staff would quality assure the 2027 baseline amounts during calendar year 2028. The 2028 emissions inventories are due by April 2, 2029 (since March 31, 2029, falls on a Saturday), and TCEQ staff would complete the quality assurance process for the 2028 emissions inventories by the end of calendar year 2029. TCEQ would implement the calendar-year 2028 Section 185 fee rate once EPA publishes it, typically by the end of October each year. Assuming EPA publishes the 2028 Section 185 fee rate in October 2028, TCEQ would then assess the calendar-year 2028 fees in late 2029 and prepare and send invoices in early calendar-year 2030. As a result, calendar year 2030 becomes the first fee collection year for the first fee assessment year of 2028, based on the actual emissions reported in the 2028 emissions inventory.

A major stationary source subject to the requirements of this adopted rulemaking will also be required to submit an annual emissions inventory according to §101.10. The annual fee

assessment requires the submission of the emissions inventory by the due date to invoice the source on actual emissions of VOC, NO_x, or both for that fee assessment year. Regulated entities subject to the Section 185 fee that do not submit an emissions inventory by the due date will be subject to enforcement.

§101.714, Failure to Attain Fee Payment

The fee is due for each pollutant for which the source is major beginning with the calendar year following the baseline year until the nonattainment area is no longer subject to the fee as provided by §101.718. If the major stationary source chose to aggregate by pollutant, then the fee is due based on that aggregation. This adopted new section also stipulates that payment of the Failure to Attain Fee must be made by check, certified check, electronic funds transfer, or money order made payable to TCEQ. Payment must be sent to the TCEQ address provided on the billing statement by the date specified on the invoice. Generally, sites will have a minimum of 30 days to pay the invoice.

This rule would impose interest and penalties in accordance with 30 TAC Chapter 12 to owners or operators of major stationary sources subject to the applicability provisions of this subchapter who fail to make full payment of the Failure to Attain Fees by the due date.

§101.715, Eligibility for Other Failure to Attain Fee Fulfillment Options

This adopted new section allows major stationary sources or Section 185 Accounts required to pay a Failure to Attain Fee to partially or completely fulfill the fee owed by relinquishing emissions credits or by participating in the SEP program instead of issuing full payment. These other fulfillment options could be considered individual fee offsets for major stationary sources or Section 185 Accounts. If relinquishing emissions credits or participating in the SEP program does not completely fulfill the entire fee owed by a major stationary source or Section

185 Account, the remaining portion of the Failure to Attain Fee remains due according to §101.713 and §101.714 of this rulemaking.

A rule language clarification was made at adoption to §101.715(c) by adding “dollar-for-dollar” to the list of required information on the form that a major stationary source or Section 185 Account must submit to the agency to request one of the other fulfillment options. This update was necessary to align with the SEP program practice of tracking funds and not the tons of emissions reductions generated by a SEP. If a SEP is requested to be a fulfillment option for all or a portion of the Failure to Attain Fee, then the dollar-for-dollar amount must be provided on the request form.

As explained previously in this preamble, the implementation of the Section 185 fee program depends on several future factors, including the effective date of EPA’s finding of failure to attain action. According to §101.714, the invoice due date will be provided by the executive director after the program is implemented. The commission must be timely informed if other options will be requested to fulfill the Failure to Attain Fee. Rule language updates were made at adoption to §101.715(d) to change the due date for a major stationary source or Section 185 Account to provide notification of intent to use alternative Failure to Attain Fee fulfillment option(s) as described in §101.716 and §101.717. Specifically, the due date for these notifications was changed from the emissions inventory due date (typically March 31) of the first fee assessment year to 90 days after the executive director requests this information to be submitted. Changing the due date for a major stationary source or Section 185 Account to submit other fee fulfillment notifications allows more time and flexibility to complete required actions to participate in a SEP or generate an emissions reduction credit.

A rule language update was made at adoption to §101.715(d)(1) and (2) to specify that other Failure to Attain Fee fulfillment options must be completed during or after the baseline year to be considered for partial or complete fulfillment of the Failure to Attain Fee. Using January 1 of the baseline year as the starting point for other fulfillment options is appropriate because the baseline year is the starting point that fee assessments will be based upon, making it a logical starting point for other fulfillment options. Any emission reductions during or after the baseline year would assist in achieving attainment, even if they do not actually result in attainment. It also allows sufficient time to complete the necessary actions required by the other fulfillment options. Providing a specific date was not possible, as the implementation date of the fee program is not known, as discussed elsewhere in this preamble. Also discussed elsewhere in this preamble, while the plain language of FCAA, §185 does not require emissions reductions, emissions reductions that are achieved as a result of the Section 185 Fee program would further improve air quality, consistent with EPA's 2010 guidance.

If other fulfillment options under §101.716 (relating to emissions credits) are not approved and funded, exercised, or completed during or after the baseline year, these other fulfillment options will not be eligible to be applied to the Failure to Attain Fee. If the other fulfillment option under §101.717 (relating to SEPs) is not approved and completed during or after the baseline year, then this other fulfillment option will not be eligible to be applied to the Failure to Attain Fee. A rule language update was made at adoption to §101.715(d)(2) to align with the SEP program and clarify that to be eligible to partially or completely fulfill the Failure to Attain Fee, the SEP must be "completed" instead of "funded." For the purposes of this rulemaking, a SEP that has been "approved and completed" means it has gone through the required SEP processes, been approved by the Commission, and the enforcement respondent has completed all its required actions under the SEP. All requests to use a SEP as an option to fulfill the Failure to Attain Fee will be subject to the executive director's approval.

§101.716, Relinquishing Credits to Fulfill a Failure to Attain Fee

This adopted new section allows major stationary sources or Section 185 Accounts to request to fulfill all or a portion of their Failure to Attain Fee (total fee) 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 total fee reduction purposes, on a ton-for-ton basis, will only be allowed for use as a fulfillment option for the pollutant (VOC or NO_x) specified on the credit. VOC credits or HECT allowances must only be used as a fulfillment option for VOC tons in excess of the baseline; NO_x credits must only be used as a fulfillment option for NO_x tons. The use of allowances will be similarly restricted such that MECT allowances will only be used as an equivalent for NO_x tons. HECT allowances will only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for major stationary sources or Section 185 Accounts located in the 2008 eight-hour ozone nonattainment area. Significant digit rounding of the emissions reduction must be limited to one-tenth of a ton. Removing these emissions, represented as allowances, on a ton-per-ton basis furthers the goals of reducing ozone-causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

§101.717, Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee

This adopted new section allows major stationary sources or Section 185 Accounts to request to fulfill all or part of their Failure to Attain Fee by participating in the SEP program within the 2008 eight-hour ozone nonattainment area where the major stationary source or Section 185 Account is located. A major stationary source subject to enforcement that also chooses to participate in the SEP program may choose to partially or completely fulfill their Failure to

Attain Fee according to the provisions of this new section. A rule language update was made at adoption to clarify this concept by updating "contributing to a SEP" to "participating in the SEP program" in §101.717(a). A rule language update was made at adoption to align with the SEP program's process of tracking funds and not the tons of emissions reduced by a SEP. The references to VOC and NO_x emissions were removed from §101.717(a), and §101.717(a)(1) and (2) were removed from the rule language as they were unnecessary.

SEPs are environmentally beneficial projects that a respondent agrees to undertake in settlement of an enforcement action. Since SEPs are projects designed to prevent or reduce pollution by meeting or exceeding regulatory requirements, performing or contributing to a SEP that directly reduces VOC and/or NO_x emissions in the nonattainment area will provide cost-effective opportunities for emissions reductions. These opportunities, as opposed to the imposition of a fee, will more directly benefit air quality in the affected area. Only SEPs that achieve VOC and/or NO_x emissions reductions implemented within the same 2008 eight-hour ozone nonattainment area are allowed to partially or completely fulfill the Failure to Attain Fee.

The SEP must be enforceable through an Agreed Order or other enforceable document to ensure compliance with the SEP program's objectives.

After further consideration of the SEP program and to correct conflicting and outdated language and clarify intent as well as in response to comments received, §101.717(d) and (e) were added at adoption to specify how SEP program participation may be used to partially or completely fulfill the Failure to Attain Fee. The SEP Offset Amount is the portion of an enforcement case's assessed administrative penalty approved for use in the performance of, or contribution to, a SEP, instead of being paid to the commission as a penalty. For the purposes of this remaining section by section discussion references to "performance of, or contribution

to, a SEP" has been shortened to "contribution to a SEP."

Section 101.717(d) was added at adoption to clarify the proposal's intent that any amount paid in excess to the SEP Offset Amount may be used to partially or completely fulfill the Failure to Attain Fee. For example, a major stationary source located in the HGB nonattainment area must pay a Failure to Attain Fee, is also a respondent in an enforcement case, and chooses to participate in the SEP program. For purposes of the enforcement case, the total required cost of participation in the SEP that reduces VOC emissions in the HGB nonattainment area is $100,000. If the major stationary source respondent contributes $105,000 to that SEP, then the $5,000 in excess of the required $100,000 could be used to fulfill their Failure to Attain Fee. If the assessed Failure to Attain Fee is $200,000, then the Failure to Attain Fee is reduced to $195,000.

After further consideration of the SEP program and in response to comments received, §101.717(e) was added at adoption to allow the total amount paid to the SEP (both the SEP Offset Amount and the excess to the SEP Offset Amount) to partially or completely fulfill the Failure to Attain Fee if the total payment to the SEP is greater than or equal to 110% of the SEP Offset Amount. Allowing the crediting of the SEP Offset Amount in this circumstance should incentivize larger compliance projects (or larger amounts paid to third-party pre-approved SEPs) with ozone precursor emissions reductions that directly benefit the nonattainment area. A major stationary source respondent is required to pay at least 110% or more of the SEP Offset Amount to use the total payment to the SEP to partially or completely fulfill the Failure to Attain Fee. In the example above, the major stationary source respondent could not credit the $100,000 contributed to the SEP toward their Failure to Attain Fee since the total amount paid to the SEP was below 110%. For that same major stationary source respondent to credit the entire SEP Offset Amount of $100,000, they would be required to contribute at least $110,000

toward the SEP. In this refined example, the major stationary source respondent may credit a total of $110,000 (SEP Offset Amount of $100,000 and the excess amount of $10,000) toward their Failure to Attain Fee. If the assessed Failure to Attain Fee was $200,000, then the Failure to Attain Fee is reduced to $90,000.

A rule language update was made at adoption to the re-lettered §101.717(f) to remove unnecessary repeated language and instead refer to the appropriate subsections (c) and (d), while specifying that amounts must be credited on a dollar-for-dollar basis. The rule would also allow a major stationary source or Section 185 Account to use surplus credits from the use of SEPs from year to year. The credits would not be discounted or depreciated over time. The credits cannot be used more than once to partially or completely fulfill the Failure to Attain Fee. Once the approved credits from the use of SEPs have been applied toward a Failure to Attain Fee in a given assessment year, they may not be used in subsequent fee assessment years.

Re-lettered §101.717(g) was changed at adoption to remove the conflict with newly added subsection (d) since crediting of the SEP Offset Amount is allowed if the criteria of subsection (d) are met. Section 101.717(g)(1) and (2) were added at adoption to specify that no amount of an enforcement administrative penalty paid to the commission and no amount of an expedited settlement deferral for early acceptance of an enforcement action settlement may be used to partially or completely fulfill the Failure to Attain Fee. This ensures that only amounts paid to SEPs are creditable to offset the Section 185 fee.

The use of a SEP to partially or completely fulfill the Failure to Attain fee is subject to the approval by the executive director.

§101.718, Cessation of Program

This adopted new section outlines the circumstances that will end the Failure to Attain Fee for an applicable nonattainment area. FCAA, §185 requires the penalty fee to be collected until redesignation of the nonattainment area to attainment by EPA. After EPA redesignates an area to attainment and publishes the final approval of the attainment redesignation in the *Federal Register*, the Failure to Attain Fee is no longer applicable to that ozone nonattainment area as of the effective date specified in the *Federal Register*. In addition to this, any final action or final rulemaking by EPA to end the Failure to Attain Fee requirement, or a finding of attainment by EPA could also end the fee program. A rule language update in §101.718(a)(2) was made at adoption by adding "requirement" to clarify if EPA ended the Failure to Attain Fee requirement TCEQ's fee program could also end. Rule language was added at adoption to clarify that FCAA, §179(B) provides relief from Section 185 fees for ozone nonattainment areas that are impacted by international emissions. New §101.718(a)(4) was added to align with §101.718(b) and FCAA, §179(B), which states that an area is not subject to the provisions of FCAA, §185 if the nonattainment area would have attained the ozone standard but for emissions emanating from outside the United States.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the Failure to Attain Fee will be assessed, but the fee collection will 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 2008 eight-hour ozone standard are submitted to EPA. In determining the design value, days that exceeded the 2008 eight-hour ozone standard because of exceptional events from within or outside the United States (exceptional event days submitted to EPA) may be excluded.

Final Regulatory Impact Analysis

The commission reviewed the adopted rulemaking considering the regulatory impact analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted

rulemaking does not meet the definition of a “Major environmental rule” as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. 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 adopted 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 specific intent of the adopted rules is to comply with the requirements of 42 U.S.C. §7511a and §7511d (FCAA, §182 and §185) for the DFW and HGB 2008 ozone nonattainment areas, as discussed further elsewhere in this preamble. Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. 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 42 U.S.C. §7511d(d) (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 adopted rules will not require emission reduction.

States are required to adopt State Implementation Plans (SIPs) with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. As discussed in the FISCAL NOTE portion of the proposed rule, the adopted rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is necessary to comply with federal law on 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. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410 (FCAA, §110(c)).

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely adopts and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule adopted by the commission to meet a federal requirement was a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis contemplated by SB 633. Requiring a full regulatory impact analysis for all federally required rules 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 that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the adopted rules do not impose burdens greater than required to comply with federal law, as discussed elsewhere in this preamble. For these reasons, the adopted rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, 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." (*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 applying the standard of "substantial compliance" specified in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard.

As presented in this analysis and elsewhere in this preamble, the evidence supports the conclusion that the commission has substantially complied with the requirements of Texas Government Code, §2001.0225. The adopted rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble. The adopted rules were determined to be necessary to comply with federal law and will not exceed any standard set by state or federal law. These adopted rules are not an express requirement of state law. The adopted rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the adopted rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The adopted rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017. Therefore, this adopted rulemaking action is not subject to the regulatory analysis

provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period, but no comments were received.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission completed a takings impact analysis for the adopted rulemaking action under the Texas Government Code, §2007.043.

The primary purpose of this adopted rulemaking action, as discussed elsewhere in this preamble, is to meet federal requirements for the inclusion of penalty fee programs for major stationary sources in State Implementation Plans (SIPs) as mandated by 42 United States Code (USC), §§7410, 7511a, and 7511d (Federal Clean Air Act (FCAA), §§110, 182 and 185). Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. 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 42 U.S.C. §7511d(d) (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 adopted rules will not require emission reduction.

States are required to adopt SIPs with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410(c) (FCAA, §110(c)).

The adopted rules will not create any additional burden on private real property beyond what is required under federal law, as the adopted rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The adopted rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adoption also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the commission concludes that the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

The commission invited public comment regarding the consistency with the CMP during the public comment period, but no comments were received.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101, Subchapter K will not require revisions to existing Federal Operating Permits under 30 TAC §122, Federal Operating Permits Program.

Public Comment

The commission held a virtual public hearing on June 12, 2025 at 2:00 p.m. The comment period closed on June 18, 2025. The commission received comments from the following: Air Alliance Houston; Ash Grove Cement Company, a CRH Company (Ash Grove); CEMEX; Earthjustice on behalf of Air Alliance Houston and Downwinders at Risk (Earthjustice Group One); Earthjustice on behalf of Air Alliance Houston, Downwinders at Risk, and Lone Star Chapter of Sierra Club (Earthjustice Group Two); a group including Earthworks, Environment Texas, Environmental Defense Fund, Liveable Arlington, and Public Citizen (Environmental Groups); Fenceline Watch; GREEN Environmental Consulting, Inc. (Green Consulting); Harris

County Attorney Christian D. Menefee (Harris County Attorney's Office); Holcim (US) Inc. (Holcim); Lone Star Legal Aid on behalf of Better Brazoria – Clean Air & Clean Water (Better Brazoria); North Central Texas Council of Governments (NCTCOG); Public Citizen; Smith Jolin on behalf of Gerdau Ameristeel, US Inc. (Gerdau), and Texas Lime Company (Texas Lime); Summitt Next Gen LLC (Summitt); a group including Texas Chemical Council, Texas Oil and Gas Association, and Texas Pipeline Association (Industry Groups); the Honorable Brian Harrison, District 10, Texas House of Representatives (Hon. Brian Harrison); and 47 individuals.

Ten commenters expressed support for the proposed rule, and 67 commenters expressed opposition for the proposed rule. Generally, the majority of commenters who opposed the proposed rule requested that TCEQ implement a fee program that directly follows the language of FCAA, §185 without flexible alternatives. Commenters requested rule language changes related to baseline amounts, baseline amounts for new major sources, adjustment of baseline amounts for new construction at existing major sources, and the type of TERP funding available to offset the fee on major stationary sources.

Response to Comments

Health Effects and Environmental Impacts

Comment

Better Brazoria, Earthjustice Group Two, Public Citizen, and two individuals commented that the rule proposal does not protect public health. Earthjustice Group Two, Environmental Groups, and Air Alliance Houston provided HGB health-related statistics from the American Lung Association's 2025 "State of the Air" report. Earthjustice Group Two, Environmental Groups, and five individuals commented on the adverse health impacts from pollution, including industrial pollution, on residents of severe ozone nonattainment areas, listing respiratory impacts on children and other vulnerable populations, cancer, chronic obstructive

pulmonary disease, heart disease, and other life-altering medical conditions. Better Brazoria listed various and numerous health impacts on environmental justice areas located in Brazoria County (in the HGB nonattainment area) and included a list of Brazoria County stationary point sources with their recently reported VOC and NO_x emissions and air toxics emissions of some sites with their contribution to increased cancer rates. In addition to adverse health impacts, four individuals commented on how living in severe ozone nonattainment areas impact their daily lives, including poor air quality alerts that limit outdoor activities for adults and children, and that Dallas Fort-Worth (DFW) communities have suffered enough under industries. Fenceline Watch stated that the fee program fails to address harm done to human health and the environment because it does not directly impact the industry violators. Public Citizen asserted Texans are suffering from real-world air quality and public health problems while the TCEQ proposes imaginary solutions on paper.

Response

The purpose of this rulemaking is to develop a Failure to Attain Fee program (referred to as fee program or Section 185 fee program in this response to comment section) as required by FCAA, §182(d)(3) and (e) and §185 for 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment areas in Texas with a severe or extreme classification (currently, the HGB and DFW nonattainment areas) in the event that EPA issues a finding of failure to attain the 2008 ozone standard by the attainment date. Comments regarding health and environmental impacts of ozone precursor emissions are outside the scope of this rulemaking.

No changes were made in response to these comments.

Comment

An individual commented that low-income and minority populations in DFW communities are disproportionately impacted from the air pollution the area continues to experience. Fenceline Watch and an individual stated that the fee program does not properly protect those most impacted communities from industry. Better Brazoria commented that an alternative program leaves Brazoria County, an already vulnerable area, subject to dangerous ongoing pollution. Earthjustice Group Two commented that a conventional fee program could improve air quality quickly by transferring the social burdens of ozone pollution onto the major ozone creators.

Response

No federal or state statute, regulation, or guidance provides a process for evaluating or considering the socioeconomic or racial status of communities within an ozone nonattainment area. In its proposed approval of a TCEQ submittal for El Paso County, which did not include an environmental justice evaluation, EPA stated that the FCAA "and applicable implementing regulations neither prohibit nor require such an evaluation" (88 *Federal Register* (*FR)* 14103). Further, TCEQ's jurisdiction is limited by statute; for example, it may not consider location, land use, or zoning when permitting facilities. TCEQ continues to be committed to protecting Texas' environment and the health of its citizens regardless of location.

TCEQ provided the public with equal access in accordance with Title VI. This rulemaking was developed in compliance with the policies and guidance delineated in TCEQ's Language Access Plan (LAP) (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/language-access-plan-gi-608.pdf*) and TCEQ's Public Participation Plan (PPP) (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/public-participation-plan-gi-607.pdf*). The LAP helps ensure individuals with limited English proficiency may

meaningfully access TCEQ programs, activities, and services in a timely and effective manner; and the PPP identifies the methods by which TCEQ interacts with the public, provides guidance and best practices for ensuring meaningful public participation in TCEQ activities, and highlights opportunities for enhancing public involvement in TCEQ activities and programs.

TCEQ translates the Plain Language Summaries, GovDelivery notices, and newspaper publications into Spanish for all projects. Additionally, a Spanish interpreter was available at the virtual public hearing to verbally provide hearing instructions, and the notices included a statement that Spanish translation of hearing instructions would be available at the hearing.

No changes were made in response to these comments.

Comment

Fenceline Watch commented that various recent extreme weather events around Texas that are caused by industrial pollution, the sinking of the Houston area, and the phase out of the Federal Emergency Management Agency all add more disaster response responsibility to local and state governments. An individual commented industry should not be able to dodge responsibility for carbon dioxide pollution and provided a link to a greenhouse gas study.

Response

The Section 185 fee program is applicable to major stationary sources of ozone precursor emissions (volatile organic compounds (VOC) and oxides of nitrogen (NO_x)), not carbon dioxide, which is a greenhouse gas. Comments regarding disaster response, climate change, greenhouse gases, and the administration of federal agencies are outside the scope of this

rulemaking.

No changes were made in response to these comments.

General Comments

Comment

Air Alliance Houston, Environmental Groups, Public Citizen and two individuals commented that TCEQ is not fulfilling its mission and adhering to its responsibility by proposing an alternative fee that prioritizes industry and private interests over protection of human health and the environment to ensure clean air. Ten individuals also commented that DFW residents deserve clean air. Five individuals requested that TCEQ follow its mission to protect the environment and air quality. Three individuals commented that TCEQ should be better at enforcing laws and fees and holding polluters accountable. An individual commented that TCEQ is just a prop that does not do anything substantial.

Response

The commission takes its commitment to protect the environment and public health seriously. The commission prepares and implements air quality plans and administers and enforces rules in accordance with both state and federal law.

The purpose of this rulemaking is to develop a Section 185 fee program as required by FCAA, §182(d)(3) and (e) and §185 for 2008 eight-hour ozone standard nonattainment areas with a severe or extreme classification. If adopted, TCEQ will have the authority to enforce these rule provisions if EPA determines the severe ozone nonattainment areas fail to attain

the 2008 eight-hour ozone standard by their attainment dates.

The commission followed all relevant federal and state statutes, regulations, and guidance in the development of this rule and evaluated all appropriate information and measures necessary to establish this rulemaking. The commission interprets the FCAA, §172(e) to allow states to adopt equivalent fee programs to fulfill the requirements of FCAA §182(d)(3) and (e) and §185.

No changes were made in response to these comments.

Comment

Fenceline Watch stated that this rule did not adequately address any of the community concerns from the informal comment period.

Response

TCEQ solicited informal comment during the August 2024 stakeholder meetings on all aspects of the rulemaking and received comments from seven organizations or industry representatives. TCEQ reviewed these informal comments in detail, posted these comments on its public webpage, and referred to these comments during its rule development. The received comments encompassed all aspects of the rulemaking and expressed opposing views on various aspects of the Section 185 fee program, such as whether TCEQ should incorporate flexibilities within its fee program, including fee offsets and baseline aggregation by pollutant and/or site. Ultimately, the rulemaking could not simultaneously include and prohibit program flexibilities, and the commission chose to develop the rule as adopted for reasons discussed throughout this preamble.

No changes were made in response to this comment.

Comment

Public Citizen noted that for the duration of the public hearing conducted on June 12, 2025, TCEQ displayed the incorrect date in Spanish for the end of the public comment period and should do more to comply with Title VI requirements on providing accurate and timely access on public comment opportunities.

Response

The commission met all Title VI requirements for this rulemaking and disagrees that the incorrect date was displayed for the duration of the public hearing. The public hearing officially started at 2:00 p.m. and concluded at approximately 2:30 p.m. on June 12, 2025. After the conclusion of the public hearing portion, a second opportunity for informal questions began, and the slide indicating June 31, 2025, as the end of the public comment period in Spanish (the same slide provided the correct date in English) appeared on screen for less than 3 minutes before TCEQ staff noted the error. Once noted, the Spanish date was immediately corrected and the corrected slide displayed until the hearing concluded. This informational slide was never posted on TCEQ's webpage, either before or after the public hearing. The instructions for the public hearing were verbally translated into Spanish and the correct Spanish date was verbally stated at the start and conclusion of the public hearing. There were two GovDelivery notifications regarding the public hearing and public comment period sent on May 6, 2025, and May 22, 2025, that both included Spanish translation with the correct end date of the public comment period in Spanish.

The Section 185 Stakeholder webpage (available at: *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee*) contains a link that

automatically translates the page, including the proposed rule's comment deadline, into Spanish. Additionally, this webpage includes a link to a Spanish-language rulemaking summary that contains the correct end date for the public comment period. A public involvement plan accompanies the rule package and is also posted on this webpage.

This rulemaking was developed in compliance with the policies and guidance delineated in TCEQ's LAP (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/language-access-plan-gi-608.pdf*) and TCEQ's PPP (available at: *https://www.tceq.texas.gov/downloads/agency/decisions/participation/public-participation-plan-gi-607.pdf*). The LAP helps ensure individuals with limited English proficiency may meaningfully access TCEQ programs, activities, and services in a timely and effective manner; and the PPP identifies the methods by which TCEQ interacts with the public, provides guidance and best practices for ensuring meaningful public participation in TCEQ activities, and highlights opportunities for enhancing public involvement in TCEQ activities and programs.

In accordance with the PPP, U.S. Census data was used to conduct a preliminary analysis of the population in the DFW and HGB nonattainment areas, which was then used to plan public engagement efforts for this rulemaking. Specifically, TCEQ translated the Plain Language Summaries, all GovDelivery notices, public hearing notices, and State Implementation Plan (SIP) Hot Topics notices into Spanish for all projects. Newspaper publications were also in Spanish.

Additionally, stakeholder meetings held in August 2024 included simultaneous Spanish interpretation provided the opportunity for informal comment in addition to virtual public

hearing on June 12, 2025.

No changes were made in response to these comments.

Comment
Better Brazoria commented that the rule failed to comply with the FCAA public participation requirements (and citing specifically the federal rules for Prevention of Significant Deterioration permitting) since primarily virtual options were offered and affected areas of Brazoria County (located in the HGB nonattainment area) may have been unable to access information or participate in the rulemaking due to low rates of internet access.

Response

The commission disagrees that public participation requirements were not met for this rulemaking and notes that commenters citations to federal rules concerning Prevention of Significant Deterioration permitting are inapplicable. Federal requirements for public participation for SIPs are found in 40 CFR §51.102, which requires notice, an opportunity to submit written comments, and allow the public to request a hearing amongst other requirements, which were met or exceeded in this rulemaking. The commission encourages public participation in the rule development process and makes every effort to hold hearings in locations and at times that are accessible and convenient to the public. In addition to providing the opportunity to comment at a virtual public hearing, TCEQ also provides the public with the option to submit written comments by mail, fax, or electronically through TCEQ's Public Comment system. Instructions for the submittal of written comments were provided in the proposed rulemaking documents and public notices.

The commission strives to give all citizens of Texas appropriate prior notification and

opportunity to comment on proposed rules. This rule was filed with the TCEQ Chief Clerk's Office and made available to the public on the TCEQ website on April 22, 2025. Listserv subscribers received an e-mail notification on May 6, 2025, notifying the public that the commission had approved publication of, and hearing on, the proposal. These notices also directed the public to the TCEQ's website, where all rulemaking documents and the hearing notice were posted. A hearing notice for this rulemaking was published in English in the *Houston Chronicle* on May 6, 2025, and in Spanish in *La Voz* on May 14, 2025. A hearing notice for rulemaking was published in English in the *Dallas Morning News* and in Spanish in *Al Dia* on May 7, 2025. The hearing noticed was published in English in the *Texas Register* on May 16, 2023 (50 *Texas Register (TR)* 2925). This detailed public hearing participation information was also published on the commission's publicly available events calendar webpage at least 30 days prior to the hearing date.

The public comment period was open from May 6, 2025 through June 18, 2025, providing an additional 14 days beyond the required 30-day comment period. During this time, the public had the opportunity to provide both written and oral comment regarding this rulemaking to TCEQ. A virtual public hearing was offered on June 12, 2025, and a Spanish interpreter attended to ensure public hearing access for attendees with limited English proficiency.

No changes were made in response to these comments.

Comment

Better Brazoria stated that for the fee program to be approvable, the mobile source fee design must be specifically explained in a public-facing rulemaking process.

Response

The commission disagrees that the mobile source aspects of the Section 185 fee program relating to TERP were not explained in its public rulemaking process. The Section 185 fee program uses grants provided by TERP, administered through the TERP Trust, as a credit mechanism to offset an area's entire Section 185 fee obligation. Since the Section 185 fee program does not change how the TERP program operates, an explanation of TERP operation is outside the scope of this rulemaking.

A public explanation on how TERP revenue relates to this specific rulemaking is detailed in this preamble. TERP revenue that is collected and expended in a nonattainment area is documented in a Fee Equivalency Account for each nonattainment area. The Fee Equivalency Account documents the availability of TERP revenue used to offset the Section 185 fee for each fee assessment year. There is no exchange of money between the TERP and the Fee Equivalency Account. Annually, TCEQ staff determines a nonattainment area's total fee obligation by summing the Section 185 fee due from each major stationary source (Area §185 Obligation) for a fee assessment year and if the TERP revenue in the Fee Equivalency Account exceeds an Area §185 Obligation, then major stationary sources are assessed but do not pay a fee. If the TERP revenue in the Fee Equivalency Account is less than the Area §185 Obligation, then major stationary sources are assessed and pay a prorated fee to ensure the full Area §185 Obligation is annually met.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification.

Comment

Better Brazoria requested continued public participation for rule development.

Response

The commission agrees that public participation is required for TCEQ rulemaking and provides multiple avenues for stakeholders to become involved in its decision-making process. An overview of TCEQ rules and rulemaking process is provided on the Rules and Rulemaking webpage (available at: *https://www.tceq.texas.gov/rules/rules_rulemaking.html*). A general overview of participating in TCEQ's decision-making processes is available on the Public Participation in TCEQ Decision-Making webpage (available at: *https://www.tceq.texas.gov/agency/decisions/participation*). However, this rulemaking is concluded with the commission's adoption, so no further public participation will be available for this rulemaking project.

No changes were made in response to this comment.

Comment

Two individuals commented that industries are not complying with environmental regulations. One individual commented that industries refuse to reduce emissions unless subject to enforcement or bankruptcy and stressed that industry should comply with the FCAA and pay penalties or shut down.

Response

The commenters provided no information to support their generalized allegation about the "non-compliant" industries. The commission notes that the FCAA, §185 does not single out individual major stationary sources or types of industry and it does not address the compliance status of major stationary sources.

No changes were made in response to these comments.

Comment

Earthjustice Group Two commented on the stagnant nature of the ozone design values in the Houston-Galveston-Brazoria (HGB) 2008 eight-hour ozone NAAQS nonattainment area and the recent increase in ozone design values in the DFW 2008 eight-hour ozone NAAQS area that led both areas to the severe nonattainment classification. An individual commented that DFW has not attained the ozone NAAQS.

Response

The commission acknowledges that the DFW and HGB areas have been reclassified to severe nonattainment for the 2008 eight-hour ozone standard, which is the reason for this Section 185 fee rulemaking as detailed in this preamble.

As shown on TCEQ's Air Quality Success webpage, (available at: *https://www.tceq.texas.gov/airquality/airsuccess/airsuccessmetro*), both the one-hour and eight-hour ozone design values have decreased in the DFW and HGB areas over the past 23 years despite rapid economic growth. From 2000 through 2023, the HGB population increased by 59%, while the eight-hour ozone design value decreased by 26%. Similarly, from 2000 through 2023, the DFW population increased by 56%, while the eight-hour ozone design value decreased by 21%. The DFW and HGB areas have monitored attainment of the 1997 eight-hour ozone standard of 84 ppb since 2014. Existing control strategies implemented to address the 1979 one-hour, 1997 eight-hour, and 2008 eight-hour ozone standards are expected to continue to reduce emissions of ozone precursors in these areas and positively impact progress toward attainment of the ozone standard.

Since 1991, air quality in the DFW and HGB areas has improved dramatically due to state, local, and federal air pollution control measures, such as federal emissions standards for mobile source engines, TCEQ Chapter 117 rules pertaining to control of NO_x emissions, and TCEQ Chapter 115 rules pertaining to control of VOCs. TCEQ remains committed to working with area stakeholders to attain the 2008 eight-hour ozone standard as expeditiously as practicable and in accordance with EPA rules and guidance under the FCAA.

No changes were made in response to these comments.

Comment

The Harris County Attorney's Office commented that the HGB area is designated a severe nonattainment area under the 2008 eight-hour ozone NAAQS and faces potential reclassification which would trigger Section 185 fee requirements.

Response

The HGB area is currently classified as a severe nonattainment area under the 2008 eight-hour ozone standard and therefore the state is required to develop and adopt a Section 185 fee program per EPA's final notice reclassifying the HGB area to severe nonattainment for the 2008 eight-hour ozone standard, effective November 7, 2022 (87 *FR* 60926). If the HGB nonattainment area fails to attain the 2008 eight-hour ozone standard by July 20, 2027, and EPA issues notice that HGB failed to attain by the attainment date, the FCAA, §185 requires TCEQ to implement its Section 185 fee program. However, the HGB nonattainment area would not automatically be reclassified as an extreme nonattainment area in the event of failure to attain the 2008 eight-hour ozone standard by its severe nonattainment deadline, since the FCAA, §181(b)(2)(A) expressly prevents reclassification by operation of law for such areas.

No changes were made in response to this comment.

Comment

Earthjustice Group Two stated that the previous Section 185 fee program for HGB under the one-hour ozone standard failed to bring Houston into attainment which directly led to this required rulemaking for the 2008 eight-hour ozone NAAQS.

Response

The commission disagrees with this comment. EPA determined that the HGB nonattainment area attained the one-hour ozone standard in a final rule published in the February 14, 2020, *Federal Register* (85 *FR* 8411). The one-hour ozone standard has no bearing on the HGB nonattainment area's reclassification to severe under the 2008 eight-hour ozone standard, which is the reason this Section 185 fee program is required for the HGB nonattainment area.

No changes were made in response to this comment.

Comment

NCTCOG offered their assistance in the event the proposed rule does not proceed to credit grant revenue from TERP offsets and begins assessing fees on major sources.

Response

The commission appreciates the offer to assist.

No changes were made in response to this comment.

Comment

An individual commented that industry is polluting the air and water, and that Texas is listed as the number one polluted state. Better Brazoria stated that major stationary sources are the largest contributors to NAAQS violations.

Response

The commission disagrees that major stationary sources are the largest contributors to ozone NAAQS violations. Mobile sources account for 65% of 2023 NO_x emissions in the DFW 2008 ozone standard nonattainment area and 55% of 2023 NO_x emissions in the HGB 2008 ozone standard nonattainment area.

The commission also disagrees that Texas is the most polluted state. In terms of ozone pollution, while Texas does have multiple ozone nonattainment areas, California also has multiple ozone nonattainment areas, some of which are classified as "extreme" with higher ozone concentrations. According to EPA's Greenbook for the 2008 eight-hour ozone NAAQS (available at: *https://www.epa.gov/green-book/green-book-8-hour-ozone-2008-area-information*), California has the most polluted counties for ozone.

No changes were made in response to these comments.

Comment

An individual commented that engine manufacturers need to meet better standards. An individual noted Texans bear the financial brunt of natural gas operators that lack weatherization after past winter storms and those operators should have accepted responsibility for their lack of action.

Response

TCEQ does not have the authority to regulate engine standards or plant weatherization for winter storms. Additionally, these comments are outside the scope of this rulemaking.

No changes were made in response to these comments.

Comment

Eight individuals commented that Arlington residents and about a million Tarrant County residents have their homes, employment, and schools near fracking locations that have VOC and NO_x pollution. An individual commented that they hold mineral rights in Arlington and if they had the ability, they would trade their royalties to prevent industrial fracking on their land.

Response

Comments on fracking, including concerns about pollution from fracking, are outside the scope of this rulemaking.

No changes were made in response to these comments.

Applicability and Definitions

Comment

Fenceline Watch commented that the FCAA is clear that all major sources are subject to the fee program.

Response

The commission agrees with this comment. As discussed in this preamble, all major

stationary sources of ozone precursor emissions located in an area designated as nonattainment and classified severe or extreme under the 2008 eight-hour ozone standard nonattainment that failed to attain by its attainment date are subject to the Section 185 fee program upon the effective date of EPA's failure to attain notice in the *Federal Register*.

No changes were made in response to these comments.

Comment

Fenceline Watch commented that the fee should be implemented expeditiously.

Response

The fee program will become applicable upon the effective date of EPA's failure to attain notice in the *Federal Register* as discussed in this preamble.

No changes were made in response to these comments.

Comment

Better Brazoria commented that major stationary sources should not be exempt from fees even if they are required to implement Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER).

Response

The commission agrees with this comment and notes that these sources are not exempt from the fee program.

No changes were made in response to this comment.

Comment

One individual requested a list of businesses applicable to the rule and the amount of fees those businesses will be required to pay.

Response

A definitive list of major stationary sources to which this fee program would apply cannot be determined until program implementation and may change with each year of program implementation.

A fee estimate for each major source cannot be provided since it is predicated on several unknown factors such as how industry will choose to exercise the baseline amount flexibilities, the future fee rate adjusted for inflation annually by EPA, and the amount of TERP or future grant program's revenue available to offset the fee on major stationary sources.

No changes were made in response to these comments.

Comment

Green Consulting requested that an Inapplicability Notification Letter submitted to TCEQ's point source emissions inventory certifying that the site-level emissions of NO_x and VOC are below 10 tons per year (tpy) be included with annual routine emissions reported to the TCEQ point source emissions inventory. Green Consulting noted that this would allow sites to use their actual certified emissions as the baseline instead of having to rely on the total emissions authorized by permits or APD-CERT.

Response

The commission disagrees with this comment. As provided by FCAA, §185, the penalty fee applies to major stationary sources of ozone precursor emissions. Major stationary sources cannot submit the Inapplicability Notification Letter to the point source emissions inventory because §101.10 requires all major stationary sources (as defined in §116.12) to submit either a full point source emissions inventory update, or for qualifying sites, an Insignificant Change Notification Letter.

No changes were made in response to this comment.

Comment

Better Brazoria commented that the attainment date should be defined as the EPA-approved date by which the area must meet the NAAQS so that proper fees are assessed for the appropriate periods of time.

Response

The commission agrees with this comment and defines the attainment date as the EPA-specified date an area is required to attain the 2008 eight-hour ozone standard under the FCAA. The baseline year is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in the rulemaking (e.g. for new major sources after the baseline year).

The severe classification attainment date for the DFW and HGB nonattainment areas under the 2008 eight-hour ozone standard is July 20, 2027; therefore, the 2027 calendar year from January 1, 2027, through December 31, 2027, determines both the attainment year and baseline year of 2027, unless EPA approves an attainment date extension under FCAA,

§181(a)(5).

No changes were made in response to this comment.

Comment

Better Brazoria commented that Texas should not be afforded additional extension years under FCAA, §181(a)(5) and if an extension year is provided by EPA, it must meet the qualifications of and be approved under FCAA, §181(a)(5).

Response

The commission disagrees that Texas should not be afforded an extension of the attainment date under FCAA, §181(a)(5) if the DFW and/or HGB nonattainment areas qualify. Whether the DFW and/or HGB nonattainment areas qualify for an extension to the 2008 eight-hour ozone standard severe classification attainment date under FCAA, §181(a)(5) and future hypothetical EPA actions for extension date requests cannot be predicted.

The commission agrees that an extension of the attainment date is only applicable to this rulemaking if EPA approves such requests. As discussed in this preamble, no fee payment is due for a year determined by EPA to be an extension year under FCAA, §181(a)(5) for the 2008 eight-hour ozone standard. For any area granted an extension, the fee will be applicable if the severe or extreme nonattainment area does not attain by the extension attainment date specified by EPA based on the effective date of EPA's finding of failure to attain notice in the *Federal Register*.

No changes were made in response to these comments.

Comment
Better Brazoria requested the broadest definition of actual and allowable emissions to determine baseline amounts and baseline amount exceedances for annual fee assessment, including combinations of permitted emissions, regulated emissions, fugitive emissions, unregulated emissions, and/or maintenance, startup, and shutdown (MSS) emissions. Better Brazoria stated that for a source that only operated a portion of either the baseline year or another time period as allowed by this rule, the actual and permitted emissions should be extrapolated using the most recently available representative data for the relevant period.

Response

The commission includes the broadest definition of actual and allowable emissions in this adopted rulemaking and clarifies that there are necessary differences between actual and allowable emissions used for baseline amount determination and the annual fee assessment as described below.

As discussed in this preamble, for baseline amount determination, FCAA, §185(b)(2) requires that the "lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source". For this rulemaking baseline emissions represents the "actual emissions" referenced in FCAA, §185(b)(2) and excludes unauthorized emissions. Baseline emissions are reported in the annual point source emissions inventory and include reported annual emissions that are authorized by permit or rule from routine operations. This includes authorized MSS activities during the baseline year or another time period as allowed by this rule. For baseline emissions, unauthorized emissions are excluded. This includes emissions events and MSS activities not authorized by permit or rule because they are not authorized or representative of routine operations.

As discussed in this preamble, for a baseline amount determination, the major stationary source's authorized emissions or emissions pending authorization include emissions allowed under any TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders. Fugitive emissions are required to be included for the purposes of the baseline emissions calculations and fee assessments. As provided by 40 CFR §70.2, fugitive emissions of VOC or NO_x for major stationary sources belonging to one of the categories listed in paragraph 2 of the definition of major sources may be excluded from counting toward major source applicability. However, once the source meets the major stationary source applicability requirements of §116.12, fugitive emissions are required to be reported in the emissions inventory, and the fugitive emissions must be used for both baseline emissions calculations and fee assessments for Section 185 fee purposes.

As discussed in this preamble, annual fee assessments are based on actual emissions, as defined in §101.10, which includes emissions from annual routine operations, MSS operations, and emissions from emissions events or MSS activities.

The commission disagrees that actual or permitted emissions should be extrapolated for partial years. Emissions extrapolation for a partial year is not as accurate or representative as using the reported baseline emissions or permitted emissions during a consecutive 12-month timeframe, regardless of whether the 12 months constitutes a calendar year.

As discussed in this preamble, partial calendar years may be applicable for baseline amount determination of sources that qualify as irregular, cyclic, or otherwise varying significantly from year-to-year to select a 24-month consecutive period to average the baseline emissions from a specified historic look-back period. Also, new major stationary sources may use their

first year (12 consecutive months) operating as a major stationary source to determine the baseline amount. The baseline amount must be the lower of the baseline emissions during the first year of operation as a major source or the total annual authorized emissions during the first year of operation as a major source, which is consistent with FCAA, §185 requirements.

No changes were made in response to these comments.

Comment

Better Brazoria requested that TCEQ provide explicit definitions for facility, emissions units, and equipment because of differences between the terms for federal, Texas Clean Air Act (TCAA), and TCEQ guidance to ensure major stationary sources do not benefit from interchanging terms to obscure emissions data.

Response

The commission disagrees that further definitions are necessary and notes that definitions needed for this rulemaking were appropriately included. Emissions units are consistent with the definition in §101.1. The definition of facility is consistent with what EPA has approved in the SIP. Additionally, the term facility is not necessary to be specifically defined in this rulemaking because the definition of a major stationary source is consistent with the §116.12 and that definition appropriately reflects the term facility. The term equipment is appropriately used in the preamble in the context of mobile sources in the TERP program.

However, the commission agrees that emissions unit is the appropriate term when used to describe specific equipment at a major stationary source. Therefore, in the adopted version of this rule, the term "equipment" was updated to "emissions units" in §101.710(a)(1)(2) rule

language; similar updates were made to the preamble Section by Section Discussion for §101.710.

Intention of FCAA, §185

Comment

Air Alliance Houston and Public Citizen commented that the NAAQS were established by Congress to protect human health and improve air quality, and the proposed fee program fails to accomplish both objectives. Better Brazoria commented that the TCAA mandates TCEQ to attain and maintain NAAQS in ways that are consistent with the FCAA. Since the TCEQ Section 185 fee program offsets the direct fees on major sources using TERP revenue, this conflicts with the TCAA's requirement (consistent with the FCAA) to attain and maintain NAAQS to protect human health. An individual commented that this rule delays progress toward meeting the 2008 eight-hour ozone NAAQS. Air Alliance Houston, Public Citizen, Earthjustice Group One and Earthjustice Group Two, and NCTCOG asserted the goal of FCAA, §185 is to bring severe and extreme nonattainment areas into attainment which this fee program fails to accomplish. Better Brazoria echoed Public Citizen's statements and added that the FCAA, §185 is also designed to penalize major offenders that do not reduce emissions in areas with repeated failures to comply with the NAAQS. Two individuals commented that the rule doesn't meet the spirit or intent of the FCAA to hold polluters accountable. Public Citizen and Environmental Groups noted that an alternative fee program provides no real-world benefits to the nonattainment areas. Better Brazoria, Earthjustice Group One, Earthjustice Group Two, Environmental Groups, Harris County Attorney's Office, Public Citizen, and twenty individuals commented that the fee program will not improve air quality in DFW or HGB because the use of TERP to offset the fees on major stationary sources shields major stationary sources from penalties, does not reduce emissions, removes the economic incentive to reduce emissions, and removes the incentive to invest in meaningful operational changes, including installing

advanced control strategies. Better Brazoria, Earthjustice Group One, and Earthjustice Group Two commented that the use of TERP to offset fees undermines and violates the FCAA goals since emissions are not directly reduced from major sources. Air Alliance Houston stated that TERP funds will be converted as credit to pay the fees ("fines") for industry that contributes significantly to ozone formation, especially around fenceline communities. An individual commented that the rule does not reduce pollution but increases VOC emissions. Harris County Attorney's Office expressed concern that the fee program will prolong the region's nonattainment status by removing the pressure to drive improvement. Ash Grove and Holcim stated that reductions in NO_x emissions from point sources would have little impact on achieving attainment and argued that the mandated fee imposed on a single category source does not guarantee that ozone precursor emissions will automatically decrease.

Response

The commission agrees that the overall intent of both the FCAA and TCAA is to attain and maintain the NAAQS. However, the commission disagrees that FCAA, §185 requires a fee program that achieves emissions reductions or operational improvements sufficient to bring a nonattainment area into attainment.

While the FCAA, §185 may incentivize major stationary sources to reduce emissions, an incentive is not the same as a requirement. FCAA, §185 does not require emissions reductions by major stationary sources and the commission agrees with the comment that the Section 185 fee program cannot guarantee that emissions reductions will occur. A major stationary source subject to this rule could choose to pay the assessed fee for each fee assessment year, resulting in no emissions reductions in the nonattainment area, or the source may choose to reduce emissions based on economic considerations and the site's ability to further control emissions. Since this rule does not require ozone precursor

emissions reductions, the attainment of the 2008 eight-hour ozone standard cannot be guaranteed due to this rule alone. If this rule is adopted and EPA approves this rule, it will become part of the Texas SIP, which includes multiple economic incentive programs and control strategies designed to bring areas into attainment. FCAA, §185 contains no language regarding the use of penalty fees by States.

The commission also disagrees that the Section 185 fee program does not hold major stationary sources accountable since these sources are assessed a penalty fee. The Section 185 fee program assesses a fee on each major stationary source in a nonattainment area, and the total of those fees constitutes the nonattainment area's total fee obligation (Area §185 Obligation). If TERP revenue or revenue from a future grant program does not cover the entire Area §185 Obligation, major stationary sources will owe a prorated fee.

The Section 185 fee program would increase VOC emissions as it does not and cannot alter requirements for emissions authorizations under the TCAA.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Environmental Groups commented that the penalty fee may not result in emissions reductions from point sources, as those emitters may choose to pay the fee instead of investing in emissions reduction measures.

Response

The commission agrees with this comment. The purpose of this rulemaking is to establish a program for the 2008 eight-hour ozone standard to implement FCAA, §185, which does not require emissions reductions.

No changes were made in response to this comment.

Comment

The Harris County Attorney's Office asserted that the FCAA has a graduated regulatory design, in which more stringent compliance mechanisms are levied the longer an area remains in nonattainment and that allowing TERP to offset major sources' penalty fees is inconsistent with this regulatory design.

Response

The commission agrees that the FCAA increases regulatory requirements over time for the ozone NAAQS, as an area that fails to attain the ozone NAAQS is reclassified into more stringent classifications. However, as discussed in this preamble, the commission disagrees that allowing the use of TERP to offset penalty fees as provided in this rulemaking is inconsistent with the FCAA.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Public Citizen and Harris County Attorney's Office commented that since TERP on its own has not brought the areas into attainment, then it cannot be proposed as an alternative to a penalty

fee charged directly on major sources.

Response

As discussed elsewhere in this Response to Comments, the commission disagrees that Section 185 fee programs are intended to bring areas into attainment and further disagrees that TERP was required to bring the areas into attainment to be an alternative to a penalty fee.

No changes were made in response to these comments.

Comment

Earthjustice Group Two, Harris County Attorney's Office, Public Citizen, and fourteen individuals commented that Section 185 fee program revenue could create new funding for air quality improvement programs and projects. Four individuals commented that the state can reinvest Section 185 fee revenue into administration of the FCAA, with one individual indicating that the fee revenue could exceed $200 million. Another individual asked TCEQ to adopt a Section 185 fee program that reinvests funds into air quality improvement projects. Better Brazoria, commented that these reinvested funds should focus on projects that would improve air monitoring, expand or create public health initiatives, and create pollution mitigation projects in environmental justice areas. Fenceline Watch commented that the funds could be used for preventive health programs and to create programs to make Texas more resilient to disaster by improving infrastructure. Another individual commented that if there are groups of people with severe health problems in polluted areas (air, water, etc.), then Section 185 fees ("fines") can help protect the public or help adversely impacted individuals with their healthcare costs. Better Brazoria and Public Citizen also commented that revenue lost from EPA's potential disapproval of TCEQ's Section 185 fee program could have gone toward the

benefit of communities impacted by poor air quality. Environmental Groups stated that since Texas is not attaining the ozone standard, more money is needed for clean air programs, which can be obtained through collecting penalty fees from point sources. Environmental Groups commented that a fee collected from major stationary point sources which could generate more than $200 million annually, could be used to fund additional TERP grants, which would further reduce emissions from mobile sources. An individual commented that the fees ("fines") from industry can help protect the public. Fenceline Watch stated that a Section 185 fee program must provide material resources to the community forced to endure health, environmental, and safety concerns imposed by industry. Harris County Attorney's Office also noted that new supplemental programs are needed to build on existing air quality improvement efforts. Ash Grove, Cemex, and Holcim supported using the annually collected Section 185 fees for mobile source emissions reductions in DFW and HGB nonattainment areas. Ash Grove stated Section 185 fees will go to the Texas Clean Air Fund that TCEQ administers to safeguard air resources in Texas, and the collected Section 185 fees under the draft rule will be used to improve air quality in the state.

Response

The scope of this rulemaking is the establishment, assessment, collection, and termination of the Section 185 fee for the 2008 eight-hour ozone standard. The authority to allocate funds from any Section 185 fee program revenue to TCEQ falls under the authority of the Texas Legislature. Additionally, FCAA, §185 does not identify any purpose for penalty fee revenue. Therefore, the creation of new air quality programs funded by Section 185 fee revenue or how such revenue could be spent is outside the scope of this rulemaking.

The Legislature establishes the funding structure for TERP, and comments regarding the additional funding for TERP is outside the scope of this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that to ensure long term compliance and emissions reductions, the Section 185 fee program should include ongoing evaluations of the fee program's effectiveness, including periodic assessments of emission reductions and health improvements and increasing fees for repeated non-compliance.

Response

The purpose of this rulemaking is to develop a Section 185 fee program as required under FCAA, §185. FCAA, §185 does not require an evaluation such as specified by the commenter. As discussed elsewhere in this Response to Comments, while the FCAA, §185 may incentivize major stationary sources to reduce emissions, an incentive is not the same as a requirement and emissions reductions are not guaranteed because of this fee program. Health improvements are not required by FCAA, §185 and are outside the scope of this rulemaking. As specified under FCAA, §185(b)(1) and (3), EPA sets the annual sets the fee by adjusting for inflation. An increase in fees for repeated non-compliance is not provided for in FCAA, §185.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Offsetting Failure to Attain Fee Area Obligation

Comment
Twenty individuals expressed opposition to the alternative fee provisions of the rule. Air Alliance Houston, Better Brazoria, Earthjustice Group One, Earthjustice Group Two, Environmental Groups, Harris County Attorney General's Office, Public Citizen, and an individual stated that instead of an alternative fee program, the agency must implement a fee program that follows the plain language and specific directives of the FCAA as Congress intended to directly assess and collect an annual fee on major stationary sources on a per-ton basis of each ozone precursor pollutant without any alternative options. Better Brazoria commented that TCEQ cannot place fees on mobile sources to satisfy Section 185 fee program requirements. Earthjustice Group Two further stated FCAA, §185 does not provide alternative methods to calculate, impose, or collect fees, or the ability to replace fees on individual sources with on-paper credits from another funding source. Better Brazoria and two individuals commented that targeting mobile sources deviates from FCAA, 185 as Congress intended a direct fee on major stationary sources. Two individuals commented that TCEQ must adopt a fee program that directly assesses fees to hold polluters accountable, improve air quality, and protect public health.

Response

The commission disagrees that the Section 185 fee program does not follow FCAA requirements. FCAA, §172(e) provides that if EPA relaxes a standard, EPA should promulgate requirements that are not less stringent than the controls applicable before the relaxation. EPA has interpreted FCAA, §172(e) to also apply when a NAAQS is strengthened, which has been upheld by federal courts as discussed in this preamble, in the Background and Summary of Factual Basis for the Adopted Rules. Since EPA strengthened the 2008 eight-hour ozone standard of 75 parts per million (ppm) with the promulgation of the 2015

eight-hour ozone standard to 70 ppm, then FCAA, §172(e) can be applied to the 2008 eight-hour ozone standard. TCEQ interprets FCAA, §172(e) to allow an equivalent or better Section 185 fee program to implement FCAA, §185 requirements when a NAAQS is strengthened.

EPA has not provided states with Section 185 fee program development guidance under the 2008 eight-hour ozone standard. Therefore, to develop this Section 185 fee program, TCEQ relied on EPA's 2010 guidance memo that was vacated on procedural grounds for Section 185 fee programs under the one-hour ozone standard and EPA's approval of Section 185 fee program for HGB nonattainment area under the one-hour ozone standard. Relying on EPA's 2010 guidance memo continues to be appropriate for the 2008 eight-hour hour ozone standard since EPA proposed approval of an equivalent alternative fee program under the one-hour ozone standard for Antelope Valley and Mojave Desert on April 22, 2024 (89 *FR* 29277) which relied on the principles identified in EPA's 2010 guidance memo. As part of the Section 185 fee program, the fee on major stationary sources is offset based on TERP revenue or future grant program's revenue collected and expended in the nonattainment area. Using TERP to offset the fee on major stationary sources is equivalent or better than a conventional fee program since TERP programs are targeted to obtain NO_x emissions reductions primarily from mobile sources, which are the largest source of NO_x emissions in the DFW and HGB nonattainment areas.

The commission disagrees that the Section 185 fee program will not collect any direct fees on major stationary sources. As proposed, TCEQ would assess the full Section 185 fee due from each major stationary source and then sum all assessed fees to determine the entire fee obligation for the nonattainment area (Area §185 Obligation). If there is not enough TERP revenue or revenue from a future grant program to cover the entire Area §185

Obligation for a nonattainment area, then major stationary sources will be assessed a prorated fee to ensure the entire Area §185 Obligation for a fee assessment year is collected in full.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria and Environmental Groups commented that alternative fee programs, including the use of mobile sources to offset a direct fee on major stationary sources cannot be used for an active ozone NAAQS. Better Brazoria and Environmental Groups further stated that an alternative program under revoked standards may be appropriate since they concentrate on anti-backsliding and because of a reduced regulatory priority have been replaced with more stringent and updated standards. Better Brazoria noted that the EPA's previous support for alternative options to a fee-based program were limited to the revoked one-hour ozone standard and none of the approvals cited by the TCEQ apply to an active standard. Better Brazoria commented that FCAA, §172(e) does not create a loophole to avoid penalties assessed against major stationary sources of ozone precursors in active ozone standard severe nonattainment areas.

Response

The commission disagrees that an equivalent alternative fee program may not apply to active ozone NAAQS. As discussed elsewhere in this Response to Comments, TCEQ interprets FCAA, §172(e) to allow an equivalent program when a NAAQS is strengthened.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that FCAA, §172(e) cannot be relied upon for the alternative fee program because it does not identify how a regulating body would provide alternative options, waivers, or equivalency to statutory requirements. Better Brazoria commented that FCAA, §172(e) focuses on preservation of otherwise required controls and according to the D.C. Circuit Court of Appeals that the penalty provision of FCAA, §185(a) are "controls" that FCAA, §172(e) "requires to be retained."

Response

The commission acknowledges that the D. C. Circuit Court held that FCAA, §185 penalty fee programs were an anti-backsliding "control" required to continue to apply for revoked NAAQS; however, the plain language of FCAA, §185 does not require fee programs to result in emissions reductions. As discussed elsewhere in this Response to Comments, EPA has approved equivalent alternative fee programs under the one-hour ozone standard citing FCAA, §172(e). There is no statutory language that would exclude equivalent alternative programs for currently active and effective strengthened ozone standards and allowing such programs for currently active strengthened ozone standards promotes consistency.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that TCEQ's fee program may indirectly interfere with emissions reductions required under the FCAA, §172(c)(2) rate of (*sic*) further progress (RFP) mandate since the fee program may disincentivize major sources from reducing emissions and this may impede RFP requirements, create more RFP requirements, and prolong nonattainment. Better Brazoria stated that if TCEQ prioritizes its alternative fee program over strengthening mobile source controls in RFP SIP revisions, it may limit the effectiveness and scope of the RFP reductions. Diverting focus to a future fee program may delay or weaken more proactive mobile source controls which would impede RFP compliance and violate the FCAA. Better Brazoria also stated that an alternative fee program must reduce emissions in such a way that indicates compliance and progress toward attainment ("RFP"). Better Brazoria stated that if the alternative fee program relies on measures already credited in the RFP SIP revision contingency plans, it may reduce the effectiveness of those measures. Better Brazoria explained that EPA prohibits emissions reductions from being used more than once and each SIP requirement (e.g. RFP, attainment, contingency, and penalty programs) relies on distinct and enforceable reductions that cannot be reused for other FCAA obligations such as the Section 185 alternative fee program.

Response

The commission disagrees that FCAA, §185 requires a fee program that achieves emissions reductions in the same manner as FCAA-required RFP SIP revisions. The purpose of this rulemaking is to develop a penalty fee program as required under FCAA, §185 which is separate from the FCAA, §182(b) RFP SIP requirements. Since these are separate, distinct, and unrelated requirements, the commission disagrees that this Section 185 fee program is required to be implemented in a manner that would assist in compliance with the RFP requirement; nor does it impede the commission's ability to meet RFP in any way.

The commenter incorrectly indicates emissions reductions from TERP programs are used more than once in Texas SIP revisions. Mobile source control measures that have been used to demonstrate RFP are the federally required engine and fuel standards measures, which are not related to TERP or this fee program. If the Section 185 fee program is adopted and implemented due to failure to attain, TCEQ will take appropriate action regarding the use of TERP emissions reductions in other SIP-related activities.

The commission also disagrees that using TERP revenue to offset the fee on major stationary sources weakens mobile source control measures in the RFP SIP or will inhibit RFP compliance. States have limited authority to regulate mobile source emissions under Title II of the FCAA and cannot develop engine standards. The TERP program is an innovative state-specific measure used to obtain voluntary mobile source emission reductions since the state has limited authority.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Fenceline Watch commented that TCEQ's position on its equivalent Section 185 fee program is contradictory: an equivalent fee is necessary to not excessively penalize industrial emissions, yet the program would assess major stationary sources a prorated fee if the TERP credit could not cover the area's entire fee obligation. Fenceline Watch contended that TCEQ cannot state that a conventional fee is not the proper tool and then still include a direct fee option in the rule.

Response

The commenter misunderstands the commission's position regarding the adoption of an equivalent fee program. The commission disagrees that an equivalent Section 185 fee program is contradictory or prohibits fee assessment. As discussed elsewhere in this Response to Comments, the commission's position is that an equivalent fee program is allowed by the FCAA, §172(e). The Section 185 fee program uses TERP grant revenue that funds primarily mobile source emissions reductions since mobile sources are the largest contributors to NO_x emissions in the DFW and HGB nonattainment areas.

Additionally, a conventional fee program would cause significant economic cost burden by impacting the nonattainment areas and the rest of the country. Such costs would likely be passed on to consumers in the form of higher prices and would likely have ripple effects throughout the country due to the concentration of energy, petrochemical, and refining companies in the HGB 2008 ozone NAAQS nonattainment area. According to the Greater Houston Partnership, in 2021 the Houston Metropolitan Statistical Area (MSA) accounts for 44% of the nation's base petrochemical capacity with many of the top employers in the energy, petrochemical, or refinery related fields (available at: ***https://d9.houston.org/sites/default/files/2021-05/16H%20W001%20Chemical%20Industry%20Overview%20.pdf*** **and** ***https://hcoed.harriscountytx.gov/docs/largest_100_employers.pdf*****). The Greater Houston Community Foundation stated that as of 2023, the Houston MSA's gross domestic product (GDP) was the seventh highest in the country and 26% of the GDP for Texas (available at:** ***https://www.understandinghouston.org/blog/houstons-economic-paradox/*****). In the U.S. Census Bureau Metropolitan and Micropolitan Statistical Areas Population Totals: 2020-2024, the Houston MSA is the fifth largest in the county as of 2024 (available at:** ***https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-metro-and-micro-***

***statistical-areas.html*).**

The same amount of fees will be assessed, regardless of whether TERP revenue collected and expended in a nonattainment area can cover the total fee obligation (Area §185 Obligation) for a nonattainment area. To ensure that the fee program is equivalent for fee assessments, it is appropriate to assess a prorated fee on major stationary sources in case TERP revenue is not sufficient to cover the Area §185 Obligation. This prorated fee ensures the entire Area §185 Obligation is collected each year the fee is applicable.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented that previous non-attainment fee programs have considered placing fees on mobile sources in mistaken attempts to pursue Section 185's objectives.

Response

The commission disagrees that a fee is being placed on mobile sources for Section 185 fee program purposes. TERP revenue that is already collected (as long as any revenue is expended) in a nonattainment area is used to offset the fee on major stationary sources. There is no exchange of money between TERP and the Fee Equivalency Account for a nonattainment area. The Section 185 fee program does not change how the TERP program operates.

No rule changes were made in response to these comments, but additional information was

added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Better Brazoria commented TCEQ cannot use mobile source fees to satisfy the requirements of a Section 185 fee because the TERP program only reduces NO_x emissions and cannot serve as a surrogate to reduce major source's VOC emissions as required by FCAA, §185. Since FCAA, §182(f) extends the requirement to NO_x emissions, then a Section 185 Fee Program must equally penalize both ozone precursor emissions. Better Brazoria supported this comment by stating that stationary sources dominate emissions in the HGB nonattainment area and account for 84% of the VOC emissions. Better Brazoria noted that EPA predicts that stationary sources will continue to contribute more VOC emissions as mobile source emissions decline.

Response

The commission disagrees that the TERP program revenue cannot be used as part of the Section 185 fee program since it does not primarily reduce VOC emissions. While not the primary focus of TERP grants, VOC emissions reductions can occur when upgrading or replacing equipment using TERP grants. As discussed elsewhere in this Response to Comment, FCAA, §185 may incentivize, but does not require emissions reductions. This rulemaking meets the requirements of FCAA, §185 and FCAA, §182(f) by assessing a fee on major stationary sources of both VOC and NO_x emissions. Since mobile sources are the largest category of NO_x emissions in the HGB nonattainment area then the use of TERP to offset the fee on major stationary sources has an additional benefit of reducing NO_x emissions from the most significant source of NO_x emissions in the area.

The commission also disagrees with the commenter's characterization of the amount of

stationary source VOC emissions. The commenter combines the 68% contribution from area stationary sources VOC emissions with the 16% point source stationary source contribution to arrive at an 84% total VOC emissions contribution for "stationary sources" in the HGB nonattainment area for the 2020 reporting year, which incorrectly implies major stationary sources are responsible for the 84% contribution. The 2020 emissions inventory pie charts are provided on the Texas Emissions Sources: Graphics webpage (available at: *https://www.tceq.texas.gov/airquality/areasource/emissions-sources-charts*). At 16%, point sources, which include the major stationary sources referenced by the commenter, are not the most significant source of VOC emissions in the HGB nonattainment area. Instead, area stationary sources are the largest contributor to VOC emissions in the HGB nonattainment area at 68%. Area stationary sources are minor sources and not subject to this fee program. The point stationary source category contains major stationary sources and is the only relevant statistic when discussing major stationary source's contribution to VOC in the HGB nonattainment area.

The referenced EPA emissions predictions for point and area sources and are not relevant for this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Fenceline Watch commented that the state legislature currently mandates TCEQ to transfer 35% of TERP funds to the Texas Department of Transportation (TxDOT) for congestion and mitigation (CMAQ) in air quality improvement projects located in nonattainment areas.

Fenceline Watch noted that this transfer occurs without regard as to whether mobile sources are the primary contribution to ozone precursors in the nonattainment areas.

Response

The commission acknowledges that currently, Texas Health and Safety Code §386.252, requires that 35% of TERP funds be transferred to TxDOT for CMAQ purposes and that this transfer occurs without consideration of mobile sources' contribution to ozone precursor emissions in nonattainment areas.

If this fee program is required to be implemented, then TCEQ will do so in accordance with TERP's funding structure and revenue disbursement.

No changes were made in response to this comment.

Comment

Fenceline Watch commented that the TERP credit used for the fee program creates a "self-dealing" problem since TERP provides grants to industries like trucking, farming, and construction to replace old machinery and upgrade to cleaner technology. Fenceline Watch stated this process gives industry bad actors that exceed their regulatory limits a credit into a fund to reinvest back into their non-compliant facilities and infrastructure.

Response

The commission disagrees that the Section 185 fee program poses a conflict of interest or is "self-dealing." Trucking, farming, and construction industries are not major stationary sources and are not subject to this fee program; similarly, mobile source equipment at stationary sources are not subject to Section 185 fees. Additionally, TERP funds upgrades to

mobile source equipment that meets or exceeds federal emissions requirements, so funding of non-compliant infrastructure does not occur.

The commission also disagrees that the penalty fee program allows any major stationary source to exceed regulatory limits, as the penalty fee program does not, and cannot, alter requirements for emission authorizations under the TCAA.

The commenter provided no information to support its generalized allegation about the "non-compliant" facilities and infrastructure of major stationary sources, and the commission disagrees that the penalty fee program implies that this is true. FCAA, §185 requires a penalty fee for emissions that exceed 80% of a major stationary source's baseline amount, regardless of whether those emissions were authorized or not. The commenter incorrectly assumes that such emissions are not authorized.

No changes were made in response to these comments.

Comment

Earthjustice Group One and Earthjustice Group Two stated that the fee program appears to follow the FCAA by assessing the fee but will not result in the collection of a fee from any major stationary sources. Similarly, Fenceline Watch stated that not one major stationary source of VOC emissions will pay a penalty fee to the state under this fee program.

Response

The commission disagrees that the Section 185 fee program will not lead to the collection of fees. The Section 185 fee program assesses a fee on each major stationary source in a nonattainment area, and the sum of those fees constitutes the nonattainment area's total fee

obligation (Area §185 Obligation). If TERP revenue or revenue from a future grant program does not cover the entire Area §185 Obligation, major stationary sources owe a prorated fee to ensure the entire Area 185 Obligation is collected for each fee assessment year.

No changes were made in response to these comments.

Comment

Better Brazoria commented that EPA emphasized that the program must result in "enforceable" emissions reductions to comply with the FCAA and that TCEQ's fee program is not an equivalent alternative because it does not require any new enforceable measures. Better Brazoria also commented that the 2010 EPA guidance contemplates that mobile sources should only be assessed fees where major sources have "well controlled" emissions. They stated that an area classified in severe nonattainment, which indicates perpetual NAAQS compliance problems, does not have "well controlled" emissions.

Response

The commission disagrees that FCAA, §185 requires a fee program that achieves enforceable emissions reductions. Additionally, EPA's 2010 Guidance memo is clear that Section 185 fee program equivalency is demonstrated through quantification of fee assessments and/or emissions reductions, not through demonstrating the enforceability of any emissions reductions.

The commission also disagrees that the major stationary sources in the DFW and HGB nonattainment areas are not well controlled. Major stationary sources of ozone precursor emissions located in a severe ozone nonattainment area are subject to the highest level of regulation including 1:1.3 emissions offsets and LAER control technology required for major

modifications at, or new construction of, major stationary sources. EPA's 2010 guidance memo stated "EPA recognizes that section 185 is not strategic in imposing emissions fees on all major stationary sources, including already well-controlled sources that have few, if any, options for avoiding fees by achieving additional reductions. States can be more strategic by crafting alternative programs that exempt or reduce the fee obligation on well-controlled sources ...."

The commission further does not agree that a severe classification implies the area's major sources are not well-controlled. As stated above, these sources are subject to more stringent permitting offset requirements and the requirement to install LAER. Furthermore, as discussed in this preamble, mobile sources make up a larger proportion of NO_x emissions in the DFW and HGB nonattainment areas. Additionally, area stationary sources are the largest portion of VOC emissions in the DFW and HGB nonattainment areas. Thus, it does not follow that a severe classification is a result of major stationary sources not being well-controlled.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Earthjustice Group One commented that TERP must be equivalent to FCAA, §185 to be lawfully used in an equivalent alternative fee program. Earthjustice Group One contended that since FCAA, §185 requires a direct penalty and incentive program and TERP is indirect by offering grants money to replace older equipment, TCEQ's Section 185 fee program is not equivalent to a conventional fee program and TERP cannot be used to offset the fee on major stationary sources. Harris County Attorney General's Office stated that the Section 185 fee is a direct

regulatory penalty imposed on major stationary sources as a source-specific economic consequence for emissions. Since the TERP program is an indirect incentive program for voluntary emission reduction projects, not a direct penalty for non-compliance or economic incentive for source-specific emission modifications, then TERP should not serve as a legal substitute for the Section 185 penalty fee. Better Brazoria stated that even if an equivalent alternative fee program was allowed, TCEQ's fee program does not follow EPA's 2010 guidance requirement for an alternative program to be equivalent, since the TCEQ Section 185 fee program must result in the same amount of emissions reductions and/or fee revenue collected from a conventional Section 185 fee program. More specifically, Better Brazoria stated that TERP revenue cannot be used to offset the fee on major stationary sources because the emissions reductions from TERP were not quantified and demonstrated to provide equivalent or better emissions reductions when compared to a conventional fee program. Since emissions reductions are required by FCAA, §185, TCEQ has not demonstrated its program is equivalent without directly assessing a fee on major sources. Earthjustice Group Two stated that TCEQ's fee program is not an equivalent alternative program.

Response

The commission disagrees that the fee program is not an equivalent to the FCAA, §185 requirements. The commission developed its Section 185 fee program to meet the requirements of the FCAA, §185 and EPA guidance. EPA's 2010 guidance memo provides options for equivalent Section 185 fee programs and stated that it is appropriate for states to focus on achieving similar fee revenue. Therefore, this rulemaking focuses on achieving the same amount of fee assessments to fulfill the equivalency requirement. Additionally, the commission disagrees that emissions reductions are required under a conventional or equivalent Section 185 fee program; emissions reductions are not guaranteed under FCAA, §185.

The adopted Section 185 fee program is designed to be an equivalent fee program using the fee assessment option. As described in this preamble, TERP revenue that is collected and expended in a nonattainment area is documented in a Fee Equivalency Account for each nonattainment area. The Fee Equivalency Account documents the amount of TERP revenue available to offset the fee for each fee assessment year. There is no exchange of money between the TERP and the Fee Equivalency Account. Annually, TCEQ staff determines a nonattainment area's total fee obligation (Area §185 Obligation) and if the TERP revenue in the Fee Equivalency Account exceeds the Area §185 Obligation, then major stationary sources are assessed but do not pay a fee. If the TERP revenue in the Fee Equivalency Account is less than the Area §185 Obligation, then major stationary sources are assessed and pay a prorated fee to ensure the entire Area §185 Obligation is annually met. The TCEQ's process of calculating the annual Area §185 Obligation, applying the credit from applicable TERP revenue, and determining whether assessing a prorated fee on major stationary sources is necessary to meet the annual Area §185 Obligation guarantees assessment of equivalent revenue each fee assessment year.

Since the commission is adopting a Section 185 fee program that is equivalent based on fee assessments, TERP emissions reductions are not quantified. However, the commission disagrees that TERP represents an indirect emissions reduction. The TERP grants result in actual emissions reductions of ozone precursor emissions. These reductions are quantified and reported to the Legislature biennially in reports available on the TERP webpage (*https://www.tceq.texas.gov/airquality/terp/leg.html*).

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the

intent of this rulemaking.

Comment
Better Brazoria, Earthjustice Group Two, Environmental Groups, and Public Citizen commented that since the proposed fee program violates the FCAA, an EPA disapproval means the state is at risk for losing delegation of the program to EPA and the millions of dollars in revenue it could create. Environmental Groups stated that the fee program's risk of EPA disapproval would prolong meaningful action in these severe nonattainment areas. Earthjustice Group Two stated that the FCAA is unambiguous and plain and does not contain language that provides EPA with authority to approve alternative fee programs, and that EPA Region 6 confirmed its lack of authority to approve nonconforming plans in public meetings. Similarly, Better Brazoria stated that EPA indicated that an alternative program with flexibilities would potentially not be allowed for the 2008 eight-hour ozone standard. Earthjustice Group Two also stated that EPA did not provide guidance for fee program development under the 2008 eight-hour ozone standard, so TCEQ inaccurately relied on inapplicable guidance for the revoked one-hour ozone standard. Earthjustice Group Two further commented that TCEQ's inappropriate reliance on the inapplicable EPA 2010 guidance document and EPA approvals of other similar programs for the revoked one-hour ozone standard do not provide TCEQ with the authority to propose or EPA the authority to approve an alternative fee program for the 2008 eight-hour ozone standard. Earthjustice Group Two stated that EPA's requested remand of its approval of TCEQ's similar HGB Section 185 fee program for the revoked one-hour ozone standard as further evidence on lack of authority. Earthjustice Group Two asserted that EPA recognized that the baseline amount flexibilities in the HGB one-hour fee program may not be lawful in its requested remand. Environmental Groups commented that EPA indicated that components of the HGB one-hour fee program may not be approvable for the 2008 eight-hour ozone NAAQS, such as the use of TERP.

Response

The commission acknowledges that if the state does not submit a fee program to EPA or if EPA does not approve a state's fee program, FCAA, §185(d) requires EPA implementation of the Section 185 fee program with federal collection of the revenue, with interest, and that the revenue is not returned to the state. However, the commission does not agree that the Section 185 fee program violates FCAA, §185. As discussed elsewhere in this Response to Comments, TCEQ interprets FCAA, §172(e), to allow equivalent Section 185 fee programs when a NAAQS is strengthened. The commission disagrees that reliance on the EPA's 2010 guidance memo and approval of one-hour ozone standard Section 185 fee programs is inappropriate because EPA did not provide states with Section 185 fee program development guidance for the 2008 eight-hour ozone standard. Based on the FCAA, §172(e) interpretation in EPA's 2010 guidance memo, this Section 185 fee program is similar to the equivalent alternative fee programs developed for the one-hour ozone standard and therefore the commission is relying on the same guidance and approvals. Additionally, EPA recently proposed approval of an equivalent alternative fee program under the one-hour ozone standard for Antelope Valley and Mojave Desert (89 *FR* 29277) which relied on the principles identified in EPA's 2010 guidance memo.

The commission also disagrees that TCEQ does not have the authority to propose (or adopt) or that EPA does not have the authority to approve the fee program. The commission has the authority to adopt rules as well as authority to adopt and implement required air quality control plans for the proper control of the state's air. Furthermore, the commission does not agree with the assertion that EPA's voluntary remand of the Section 185 fee program under the one-hour ozone standard approval is evidence that the FCAA does not allow states to adopt an alternative fee program. Instead, EPA's recent proposed approval for Antelope Valley and Mojave Desert (discussed elsewhere in this Response to Comments) supports

TCEQ's adoption of an alternative fee program.

Regarding EPA's potential action on this rulemaking, informal statements during stakeholder meetings are not official responses or actions on behalf of EPA decision-makers. The commission expects that EPA's determination regarding the approvability of an equivalent alternative program for the 2008 eight-hour ozone standard will be determined through federal Administrative Procedure Act rulemaking.

Lastly, the commission disagrees that the risk of an EPA disapproval would prolong meaningful action in these nonattainment areas, since the Section 185 fee program would be implemented upon an EPA determination of failure to attain, which, if necessary, would likely occur while EPA action on this rule was pending. Additionally, as discussed elsewhere in this Response to Comments and in this preamble, FCAA, §185 does not require emission reductions.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Fenceline Watch commented that for TCEQ to submit an alternative fee program, EPA regulatory oversight is needed because of the various court battles that occurred for alternative fee programs under the one-hour ozone standard.

Response

The commission notes that EPA has regulatory oversight for all FCAA programs, including

this Section 185 fee program. EPA is also required to review and take action on all revisions to the SIP.

No changes were made in response to this comment.

Comment

Twelve individuals commented that TCEQ's proposal shows favoritism towards industry and funds should come from companies and not the public. Three individuals similarly noted that industry should not escape consequences for polluting. An individual commented that if there are not any fees ("fines"), the industry pollution will become worse. Two individuals commented that industry makes money from activities that produce pollution so they should pay Section 185 fees instead of the public. Two individuals added that these large polluters have ample money to pay their fees. Better Brazoria and an individual commented that the use of the mobile sources fees which shifts the financial burden from major polluters to taxpayers. An individual stated they expect industry to accept responsibility and not add to individual Texan's economic burdens. Better Brazoria and two individuals stated that by transferring fees between mobile sources and major stationary sources the burden is improperly placed on the broader population. Three individuals added that this transfer of fees allows industry to get away with causing damage and rewards corporate negligence and urged TCEQ to make industry pay their fees. An individual stated that this rule is a transfer of wealth from taxpayers to corporations and allows private corporations to pollute without paying fees ("fines") they already ignore. Environmental Groups further stated that funds deposited into the General Revenue-Dedicated TERP Account No. 5071 are not derived from any fees from point-source polluters, noting that it is fundamentally unfair that fees collected from mobile sources would "forgive" fees on industrial pollution. Air Alliance Houston and one individual questioned how paying or offsetting the fee ("fines") to subsidize industry using citizen's taxes involves the

prevention and reduction of pollution. Seven individuals opposed having Texas drivers and taxpayers pay annual vehicle registration fees that would offset fees that industry is responsible for and want the fees collected from industry. Public Citizen and Environmental Groups noted that using publicly funded TERP money to offset or prorate penalties of private industry is a paper game. Harris County Attorney's Office stated that the use of TERP funds shifts the ongoing costs of nonattainment from private entities to public funding. Eleven individuals commented that the intention of the TERP program is to decrease vehicle emissions and not subsidize industrial emissions. An individual opposed TERP funds paying for federal penalties. Nine individuals commented that industry not paying the fee means that the financial burden shifts to taxpayers and this amounts to taxpayers providing subsidies for major polluters. Better Brazoria commented that the cost-shifting imposes fees on one group, drivers, to finance exemptions for another group—polluters. Two individuals stated that TCEQ protects private interest over public interests. The individual further stated that the proposed rule protects industry polluters. Two individuals stated that it does not reflect the interests of the public or the environment. One individual stated TCEQ's proposed rule weakened federal regulations in favor of industries. Ten individuals commented that TCEQ's proposal excuses polluters from FCAA requirements. Air Alliance Houston and two individuals questioned why large industry were not being held responsible for their contribution to ozone pollution.

Response

The commission disagrees that using TERP revenue expended and collected in a nonattainment area to offset the fee on major stationary sources constitutes a tax or fee on the public, improperly shifts the TERP fee from private companies to citizens or creates any public economic burden. The Section 185 fee program does not change how TERP operates. The same amount of TERP revenue is available to fund projects in the nonattainment area.

There is no exchange of money or conversion of money between TERP and the Fee Equivalency Account for a nonattainment area. The amount of TERP revenue for a severe or extreme ozone nonattainment area for a given year is recorded as a credit in a TCEQ database. This credit is used to offset the fee assessed on major stationary sources as allowed by the Section 185 fee program.

TERP revenue is funded from fees and surcharges on obtaining a certificate of vehicle title for all vehicles, the purchase or lease of heavy-duty vehicles and equipment, and registration and inspection of commercial vehicles. The primary purpose of TERP is to obtain emissions reductions from mobile sources, which constitutes the largest portion of NO_x emissions in the DFW and HGB nonattainment areas, and the reduction of emissions does not change because of the Section 185 fee program. As discussed elsewhere in this Response to Comments, the economic burden of a conventional fee could be significant to both the nonattainment area and the country.

The commission has no information regarding the ability of major stationary sources to pay the Section 185 fee.

The commission disagrees that the fee program does not collect fees from major stationary sources and therefore subsidizes industry's fees. Annually, TCEQ will assess the full Section 185 fee due for each major stationary source and sum all of the major stationary sources' fee to determine the entire fee for the nonattainment area (Area §185 Obligation). If there is not enough TERP revenue or revenue from a future grant program to cover the entire Area §185 Obligation for a nonattainment area, then major stationary sources will pay a prorated fee to ensure the entire required fee assessment amount for a given fee assessment year is collected in full.

Using TERP to offset the fee on major stationary sources is equivalent or better than a conventional fee program since emissions reductions by major stationary sources are incentivized but are not required by FCAA, §185. TERP results primarily in NO_x emissions reductions from mobile sources, which are the largest source of NO_x emissions in the DFW and HGB nonattainment areas, but could also result in VOC emissions, depending on the emission reduction project.

The commission does not agree that if major stationary sources do not pay the fee that pollution will worsen. Ozone concentrations are affected by numerous factors that drive ozone formation: meteorology, background ozone, presence of precursors, and emissions.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Earthjustice Group One stated that the fee program cannot lawfully use public funds to avoid imposing fees on private industry since it constitutes a gift from the State to industry which is unconstitutional under the Texas State Constitution's gift clause. The Texas Constitution's gift clause does not allow the State to cover a private liability and by statute the Texas Emissions Reduction Plan's funding comes from Texas residents' titling and purchasing fees on motor vehicles. Earthjustice Group Two stated that TCEQ would aggregate the TERP funds and use them to pay for the Section 185 penalties and then use the Section 185 penalties to fund TERP grants. Harris County Attorney's Office asserted that by using publicly funded TERP resources to offset Section 185 fee obligations, TCEQ's proposed program was effectively converting

public environmental funds into subsidies for private regulatory penalties, which may be an unconstitutional use of public funds. One individual commented that using TERP funds for federal penalties may not be legal, as those taxpayer funds are not intended to be used to pay for federal penalties. Air Alliance Houston stated that it was unprecedented for a regulatory body to pay fines or credit on behalf of a regulated entity.

Response

The commission disagrees that the Section 185 fee program's offset mechanism constitutes a gift to industry or that TCEQ uses the fees paid by Texas residents to pay for the Section 185 fee because actual funds are not transferred from TERP to the Section 185 fee program.

The Section 185 fee program does not change how TERP program operates. There is no exchange of money or conversion of money between TERP and the Section 185 Fee Equivalency Account for a nonattainment area. The amount of TERP revenue for a severe or extreme ozone nonattainment area for a given year is recorded as a credit in a TCEQ database. Specifically, this accounting mechanism is called the Section 185 Fee Equivalency Account and is a documentation mechanism to verify the amount of TERP revenue collected in the 2008 eight-hour ozone nonattainment area available to offset the total Section 185 fee obligation from all major stationary sources located in that area. A gift clause violation requires an expenditure or transfer of public funds to a private entity. As stated above, TERP funds are not expended, transferred, or appropriated to a private entity to cover the penalty fee obligation. Additionally, even if there were an expenditure, as discussed in this preamble, the commission has determined that the offsetting of the penalty fee provides public benefits and achieves a legitimate public purpose (environmental benefits from further incentivizing emission reductions as well as limiting potential economic burden). Therefore, the fee program is not in violation of the Texas Constitution's gift clause.

The commission disagrees that Section 185 fee revenue is used to pay for TERP grants and projects. There are no proposed changes to how TERP operates because of the Section 185 fee program. The same amount of TERP revenue will be available for TERP grants used to reduce NO_x emissions in the nonattainment area. TERP related fees paid by the public are deposited toward the intended use to fund the TERP program. The TERP revenue collected and expended in a nonattainment area funds TERP projects in the nonattainment area.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

An individual suggested a tax on natural gas as another funding source to pay this fee. Another individual commented that if it is for the public good that taxpayers pay for the pollution as well as pay for their health, then have it be fair and tax all industry products and not just gasoline.

Response

The commission appreciates the additional fee revenue options to offset the fee; however, the commission does not have the authority to propose new taxes.

No changes were made in response to these comments.

Comment

The Hon. Brian Harrison supported the DFW and HGB 2008 eight-hour ozone nonattainment area's Section 185 fee obligation to be partially satisfied by crediting TERP revenue spent on

point source projects. Similarly, Ash Grove, Cemex, and Holcim supported the use of TERP funds to satisfy the Section 185 fee since mobile sources are the single largest combined contributor of NO_x emissions in Texas. The Hon. Brian Harrison requested any effort to meet the federal requirements without unnecessary regulations, taxes, or fees on his already overtaxed constituents.

Response

The commission appreciates the support. To clarify, the TERP program provides grants intended to reduce primarily NO_x (an ozone precursor) emissions primarily from mobile sources, for example replacing older equipment with newer cleaner equipment.

No changes were made in response to these comments.

Comment

Ash Grove and Holcim supported the use of TERP and recommended additional offsets through TERP-funded mobile source reductions and offsets that target area sources. Ash Grove and Holcim argued that this approach directly benefits regional air quality by addressing a larger share of the emissions inventory compared to point sources alone, and referenced a presentation given on June 10, 2025, by NCTCOG. Ash Grove and Holcim highlighted the 2006-2026 projections for NO_x emissions from area sources compared to those of point sources within the DFW area from the presentation and stated that area sources and population growth are the main drivers of emissions increases and non-attainment in the DFW area. Ash Grove also stated that mobile sources are projected to be a significant contributor to 2026 emissions in the DFW nonattainment area.

Response

The commission appreciates the support. The commission clarifies that currently there are no additional grant programs for mobile sources or grant programs that target area stationary sources, but as discussed in this preamble, future TCEQ-administered grant programs that reduce one or more ozone precursor emissions in the applicable nonattainment area could be evaluated for fee offsets. As discussed elsewhere in this Response to Comments, there are no changes to how TERP operates because of this rulemaking. Comments regarding area sources and population growth's future impact on the DFW area's emissions are outside the scope of this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Ash Grove provided the following understandings that the DFW and HGB nonattainment areas Section 185 fee obligation could be partially satisfied from TERP or future TERP grants, and that credits applied toward each area's fee obligation would only be equal to TERP grants for reducing emissions in the non-attainment areas. Ash Grove also commented that the fee program would not result in an increase to TERP fees already levied.

Response

The commission clarifies that TERP revenue collected and expended in a nonattainment area is used to offset or credit the fee on major stationary sources, not the specific TERP grants. The TERP revenue may fully or partially offset the total area's fee obligation (Area §185 Obligation) for a fee assessment year. If TERP revenue as documented in the Fee Equivalency Account could not offset the entire Area §185 Obligation, then major stationary

sources would be assessed a prorated fee for that fee assessment year.

The commission notes that nothing in this rulemaking directly regulates TERP fees or surcharges. Several different state agencies are responsible for assessing the fees and surcharges that fund TERP, and speculation on whether these fees will increase is outside of the control of TCEQ and outside of the scope of this rulemaking.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Industry Groups supported the crediting of TERP funds to satisfy Section 185 fees in order to facilitate mobile source emissions reductions due to TCEQ's limited ability to regulate mobile source emissions which are the largest source of NO_x in Texas. Gerdau and Texas Lime also favored the use of TERP revenue noting that a significant portion of TERP funding comes from surcharges on heavy-duty diesel equipment purchased by industries subject to Section 185.

Response

The commission appreciates the support and agrees that mobile sources are the primary driver of NO_x emissions in the DFW and HGB nonattainment areas. Although emissions reductions are not required by, and are therefore not the intent of FCAA, §185, based TCEQ's interpretation of FCAA, §172(e), the use of TERP provides an equivalent or better program. TERP is designed to reduce NO_x emissions from a source category in the nonattainment areas for which the commission has limited authority to otherwise regulate under Title II of the FCAA.

TERP's funding mechanisms have no bearing on this Section 185 fee program because TERP's operations do not change because of this Section 185 fee program. There is no exchange of money between TERP and the Fee Equivalency Account for a nonattainment area.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

While NCTCOG supported the use of TERP to offset the 185 Fee obligation, they disapproved of the offsets coming from the TERP Trust which is currently being fully expended to fund emissions-reducing projects in the region. Instead, they suggested that additional money should be withdrawn from the TERP Fund Balance, so that existing and future projects will continue to be funded in addition to the 185 fee offsets and therefore achieve air quality improvements.

Response

This rulemaking did not propose any changes to TERP and any changes to TERP are beyond the scope of this rulemaking. TERP is funded from revenue deposited to the TERP Trust established under THSC Section 386.250 as an account outside the state treasury. Use of the revenue deposited to the TERP Trust is authorized by the Texas Legislature and must be utilized as prescribed.

No changes were made in response to this comment.

Comment

Gerdau and Texas Lime requested that TCEQ work with the Texas Legislature to increase TERP revenues to ensure a full offset of the Section 185 fee obligation in the DFW area due to the significant contribution of ozone precursor emissions from mobile sources. NCTCOG also requested that TCEQ work with the Texas Legislature to award additional TERP funds to the DFW area, specifying the amount should be no less than the area's Section 185 fee obligation.

Response

The commission remains neutral on legislative matters as state government agencies may not legally engage in lobbying activities.

No changes were made in response to these comments.

Comment

Industry Groups commented that they understand FCAA, §172(e) anti-backsliding requirements to allow equivalent alternative programs for the Section 185 fee program under revoked ozone standards and that there is no authority excluding equivalent alternative programs for strengthened ozone standards. Industry Groups noted that EPA has interpreted FCAA, 172(e) to apply when an ozone standard is strengthened and cited several legal cases.

Response

The commission appreciates the support and agrees that FCAA, §172(e) allows equivalent Section 185 fee programs when an ozone standard has been strengthened.

No changes were made in response to this comment.

Baseline Amount

Comment

Fenceline Watch commented that TCEQ is incorrect that FCAA, §185 does not address baseline emissions for major stationary sources permitted after the attainment date and listed three options for setting the emission baseline: using the lower of: the actual emissions, allowable emissions under the permit, or allowable emissions under the SIP. Fenceline Watch stated that TCEQ must set an initial baseline as the major source permit allowable for minor sources that existed on the attainment date but later became major sources.

Response

The commission disagrees that the baseline amount must be the permit allowable for minor sources that transitioned to major source status after the attainment year (referenced as baseline year in this rulemaking). As discussed in this preamble, new major stationary sources that started operating during or after the baseline year, which includes minor sources that transitioned to major source status, choose between the lower of their baseline emissions (actual emissions in the emissions inventory) or permit allowable emissions during the first 12 consecutive months operating as a major stationary source. The choice of the lower of actual emissions and allowable emissions follows FCAA, §185(b)(2). The requirement of the first 12 consecutive months as the baseline timeframe is necessary since these new major stationary sources did not operate during the baseline year or only operated for a portion of the baseline year.

No changes were made in response to these comments.

Comment

Better Brazoria commented that new major sources after the attainment date that were

permitted but not operational and delay operations until after the attainment year must not be exempt from the fee. For new major sources that were recently permitted, Better Brazoria suggested baseline amount approaches that depend on when the source became major. Better Brazoria's proposed categories would all be subject to allowable emissions from permits, plans, applicable rules, and/or implementation plans, and for actual emissions, an extrapolation of emissions over the first year operating as a major source was suggested. Better Brazoria commented that for an existing minor source that transitioned to a major source after the attainment year, the baseline emissions could be calculated as the lower of either: (1) emissions allowable by permits, or rules, for the source, extrapolated over a year from the first operational period as a major source; or (2) actual emissions for the source extrapolated over a year from the first operation period as a major source.

Response

The commission agrees that new major stationary sources permitted as a major source but were not operational until after the attainment year (referenced as baseline year in this rulemaking) are not exempt from the fee.

While this rulemaking did not categorize new major stationary sources in the same manner as suggested by the commenter or include an emissions extrapolation option, §101.706 includes baseline amount determination for new major stationary sources during or after the baseline year, which includes minor sources that transitioned to major source status during or after the baseline year. These major stationary sources use the first full year (12 consecutive months) operating as a major source and choose the lower of the actual emissions or the permitted emissions during that timeframe to set the baseline amount. The use of actual emissions during the first 12 months after the start of operation is more accurate than either relying on permits, plans, rules, implementation plans, or an

extrapolation of a few months of emissions data to 12 months.

No changes were made in response to these comments.

Comment

Better Brazoria commented that a major stationary source must have a Title V permit per §§182(d), 182(e), 182(f) and 185 and pending or untimely Title V permits renewals should not be exempt from the fee. The fee for these pending or late Title V permits should be based on previous years' actual emissions or extrapolated for recent operational periods, if necessary.

Response

The commission agrees that major stationary sources with a pending Title V permit or late Title V renewal are subject to this rulemaking. This rulemaking uses the definition of a major stationary source as defined §116.12. A Title V permit is one indicator of a major stationary source; however, regardless of whether a major stationary source has a Title V permit, a pending Title V permit, or did not renew its Title V permit in a timely manner, it is still subject to this rule.

The commissions disagrees that a different baseline amount determination is needed for the provided Title V permit scenarios. Any major stationary source with a late or untimely Title V permit will follow the provisions of this rulemaking to set the appropriate baseline amount.

No changes were made in response to these comments.

Comment

Green Consulting approved of sources that become major (either by increased emissions or by classification change) to use their actual emissions or total authorized emissions as the baseline.

Response

The commission appreciates the support. The commission notes that new major stationary sources may choose the *lower of* their baseline emissions during the first year (12 consecutive months) of operation as a major or the total annual authorized emissions during the first year (12 consecutive months) of operation as major source.

No changes were made in response to this comment.

Comment

Summitt requested a rule language update to allow for different timelines to establish baseline emissions for new major sources constructed after the attainment date due. For new sources, during startup and shakedown periods, emissions units are not typically operating at full load; therefore, using the first 12 consecutive months of operation to set the baseline amount would lead to artificially low baseline emissions. Summitt mentioned that permit conditions historically allowed for up to 180 days before requiring testing so that a unit can reach full operating levels. To be more comparable with existing sources, Summitt recommended three alternative timelines to determine baseline emissions for new major sources including (i) any consecutive 12 month period within the first 24 months of operations, (ii) a 12 month period beginning after the unit has achieved 90% of designed operating levels averaged over 30 days, or (iii) the 12 month period after one year of operating as a new major source. Summitt contended that since the adjustment of baseline emissions for new major sources with less than 24 months operation is limited to the first consecutive 24 months of operations, it does

not address their concerns about including unrepresentative emissions from startup or shakedown periods in the baseline emissions.

Response

The commission disagrees that the current rule language does not allow flexibility to exclude initial startup and shakedown periods from the baseline amount. §101.705 allows a new major stationary source that started operating during or after the baseline year to use the first 12 consecutive months operating as a major source as the timeframe to determine the baseline amount. Federal regulations such as 40 Code of Federal Regulations §72.2 typically define "start of operation" for EGUs as the date when the unit begins supplying power for sale or use (i.e., to the grid or for industrial site use). This rule language provides flexibility that these initial startup and shakedown periods are not included in the first 12 consecutive months of operation as a major stationary source since the source typically has not begun its regular operations until the completion of this initial startup and shakedown period.

Additionally, these sources could request adjustment of baseline emissions once 24 months of consecutive operation has occurred. The start of the 24 months of consecutive operation as a major source could begin after the completion of the initial startup and shakedown periods providing this is consistent with federal and/or state regulations.

No changes were made in response to these comments.

Comment

Summitt requested an exemption for new major stationary sources that have installed the LAER controls which limit the ability to generate more emissions reductions and that have offset

their emissions from the retirement of emissions reduction credit which means that contributions of greater than 20% net emissions reductions have already been made in the nonattainment area. They suggested that including these sources in the Section 185 fee program establishes long-term costs for not meeting unattainable goals for sources that have already contributed to attainment. Summitt also recommended excluding individual emissions units that have been fully offset by emissions reductions credits from the calculations of baseline emissions and actual emissions.

Response

The commission recognizes that these sources are well controlled and that all major stationary sources in nonattainment areas are subject to LAER and emission offset requirements for major modifications and/or new construction. However, the FCAA, §185 does not allow for the exclusion of any major stationary source from the Section 185 fee program or individual emissions units located at a major stationary source from baseline amount determinations.

No changes were made in response to these comments.

Comment

Ash Grove provided specific details and estimated future contributions of NO_x emissions from its plant based on the photochemical modeling performed in DFW Severe Area Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone Standard. Ash Grove stated that this Section 185 rule does not allow it to use the baseline NO_x emissions level from the conservative maximum emissions assumption in the photochemical modeling which included emissions prior to their 2014 modernization.

Response

The commission disagrees that an additional baseline emissions option is needed to account for the photochemical modeling timeframe used in the DFW Severe Area Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone Standard. The requirements of photochemical modeling for attainment demonstration SIP revisions are outside the scope of this rulemaking. Additionally, the FCAA, as well as EPA guidance, does not allow major stationary sources to establish baseline emissions in this manner for the purposes of the Section 185 fee program.

No changes were made in response to these comments.

Comment

Industry Groups, Gerdau, and Texas Lime supported the use of EPA's PSD guidelines to calculate baseline emissions for major sources that are irregular, cyclic, or otherwise vary significantly from year to year using an average calculated over more than one calendar year.

Response

The commission appreciates the support and notes that for sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year, PSD guidelines allow for a source to choose a representative 24-consecutive month period within a specific historic look-back period to calculate average emissions for baseline determination. For EGUs, the specific historic look-back period is limited to a representative 24-month period within the last 10 years prior to the baseline year and for non-EGUs the historic look-back periods is the last 5 years prior to the baseline year

No changes were made in response to these comments.

Comment

Ash Grove, Cemex, and Holcim commented that the fee program allows the use of baseline emissions established using data from a 10-year period for all existing major sources of NO_X and VOCs. They argued that cement producers who invested in emission reductions prior to this baseline window are penalized for taking early action to lower their emissions and this rule creates an inequitable system for facilities that made these early air quality improvement investments compared to those that delayed improvements. As a result of this limited baseline window, the cement facilities would owe significant additional fees as compared to using a baseline window that extends further than 10 years to account for plant improvements that reduced emissions. They urged TCEQ to allow facilities to credit reductions achieved prior to the 10-year baseline window or allow additionally flexibility to determine baseline emission levels. Ash Grove also requested a baseline amount determination option as the highest annualized average emission since 2008, the promulgation year for the 2008 eight-hour ozone standard.

Response

The commission clarifies that not every existing major stationary source is allowed to use a historic 10-year look-back period to establish the baseline amount. This option is only available to sources with emissions that qualify as irregular, cyclic, or otherwise significantly varying. If a major stationary source meets those criteria, then a 24-month consecutive period within a specific historic look-back period may be chosen to average the baseline emissions. The historic look-back period for non-EGUs is the last 10 years prior to the baseline year. For the DFW and HGB nonattainment areas the PSD allowed look-back period for a non-EGU stationary source would be 2017-2026 provided the attainment date does not change.

The commission disagrees that additional years for look-back periods are allowed either under PSD guidance. The commenters provided no regulatory or legal basis to allow additional timeframes to account for higher emissions in the baseline amount. If the sites qualify as sources with irregular, cyclic, or otherwise significantly varying emissions, then a 10-year historic look-back period would be allowed. There are no other statutory provisions or guidance that allow for either additional look-back years or the highest average annualized emissions rate to account for the higher emissions that occurred before the installation of control equipment or plant modernization. Doing so would artificially inflate the baseline amount so that future fee assessment years are more likely to be 20% or more below the baseline amount which would violate circumvention requirements in requirements of §101.3.

No changes were made in response to these comments.

Comment

Better Brazoria commented that a major stationary source with emissions demonstrated as irregular, highly variable, or cyclical is allowed to choose a different timeframe from the attainment year to set the baseline amount. Since the purpose of this flexibility is to allow representative emissions in the baseline amount, documentation on process variability must be provided for approval, qualifying major stationary sources must not be allowed to cherry-pick the timeframe for their benefit, and this option must not be extended to all major stationary sources.

Response

The commission agrees with these comments. As discussed in this preamble, if the major

stationary source has emissions that qualify as irregular, cyclical, or otherwise vary significantly from year to year, an alternate method following PSD guidance may be used to determine baseline emissions. The same baseline determination option is also provided for in the Texas New Source Review Program.

The PSD guidance requires sources to provide documentation on the variability of their operations for the selected 24-month period to qualify for this alternate baseline amount so that representative data is selected. TCEQ will evaluate this documentation to ensure the source qualifies for the alternate baseline amount. Additionally, for the selected 24-month period the emissions must be adjusted downward to account for all legally enforceable emissions limitations, so a qualifying source is not allowed to choose a look back period with the highest emissions. EPA's PSD regulations also prevent artificial inflation. If the baseline emissions from the selected 24-month timeframe are higher than the sources' allowable emissions during the baseline year, then the allowable emissions must set the baseline amount.

Since the PSD guidance is specific to sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year, the averaging option is not available for sources with steady-state operations.

No changes were made in response to this comment.

Baseline Amount Aggregation

Comment

Public Citizen, Environmental Groups, and an individual opposed baseline amount aggregation by ozone precursor emissions ("by pollutant") since it would allow industry to exceed the

threshold of one pollutant but avoid fees by balancing against the lower levels of the other pollutant. Better Brazoria stated the reliance on the HGB fee program under the one-hour ozone standard for baseline amount aggregation is not justified since EPA indicated concerns with allowing flexibilities for the 2008 eight-hour ozone NAAQS. Earthjustice Group Two requested an update to the proposed fee program to include separate baseline amount calculations NO_x and VOC to comply with FCAA, §185. Earthjustice Group Two and Better Brazoria opposed the aggregation of NO_x and VOC to determine the baseline amount stating that FCAA, §185 states that the fee applies to each major stationary source of VOCs and FCAA, §182(f) separately extends the coverage of major stationary sources of VOC to major sources of NO_x. Better Brazoria asserted that FCAA, §182(f) did not intend for VOC controls to be replaced by NO_x-equivalent controls and the NO_x requirement is in addition to, not in lieu of, required VOC controls. Earthjustice Group Two asserts that the silence on intermingling language speaks to the intent for the pollutants to have separate baseline amounts and they cited examples of when the FCAA expressly allowed NO_x to be substituted for VOC. Better Brazoria stated that NO_x and VOC may not equally contribute to ozone formation as another reason to not allow pollutant aggregation. Environmental Groups further stated that aggregation could weaken enforcement and undermine ozone reduction goals and urged TCEQ to maintain separate baselines in accordance with EPA precedent. Earthjustice Group Two stated that TCEQ's reasoning for aggregating pollutant baseline amounts is that both pollutants contribute to ozone formation, which is inconsistent with TCEQ's statements that the intent of FCAA, §185 is not emissions reductions.

Response

The commission disagrees that baseline amount aggregation of VOC and NO_x is not allowed or that it is inconsistent with the commission's interpretation that FCAA, §185 does not require emissions reductions. Attachment C of EPA's 2010 guidance memo acknowledged

that pollutant aggregation could be approvable. The plain language of FCAA, §182(f), does not require that SIP rules apply *separately* to VOC and NOx but instead requires that the rule apply to VOC and *also* NO_x. Thus, there is no requirement to calculate the baseline amounts separately. This rule requires major stationary sources of NO_x to also be subject to the Section 185 fee program, and this requirement meets the provision of FCAA, §182(f). The commission's interpretation that FCAA, §185 does not require emissions reductions is not relevant to baseline aggregation for the purposes of Section 185 fee assessment.

The commission disagrees that pollutant aggregation should also not be allowed because of the potential ozone formation differences between VOC and NO_x. As discussed in this preamble, VOC and NO_x emissions reductions have the potential to lower ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas. Based on this information, major stationary sources can aggregate both VOC and NO_x emissions into one baseline amount.

Comments about implementing flexible Section 185 fee programs are addressed elsewhere in this Response to Comments.

No changes were made in response to these comments.

Comment

Better Brazoria also stated that allowing pollutant aggregation may disincentivize sources from applying for a major source application.

Response

The commission disagrees with this comment since a major stationary source is required to

first determine its major source applicability for both VOC and NO_x emissions under §116.12, which is not impacted by this rulemaking. A major stationary source cannot use pollutant aggregation to avoid applicability of this rule or major source status.

No changes were made in response to this comment.

Comment

Industry Groups supported the aggregation of VOC and NO_x for baseline determination and suggested it is consistent with FCAA, §182(f).

Response

The commission appreciates the support and concurs that FCAA §182(f) allows for the aggregation of ozone precursor emissions for baseline determination.

No changes were made in response to this comment.

Comment

Earthjustice Group Two requested an update to the proposed fee program to include separate baseline amount calculations for each major stationary source to comply with FCAA, §185. Earthjustice Group Two opposed the aggregation of sites under common control to determine the baseline amount stating that FCAA, §185 states that the fee applies to each major stationary source of VOCs and the fees are calculated per ton of VOC emitted by the source. Earthjustice Group Two contends that the terms “each” and “the” source intend source-specific baseline amounts. By allowing aggregation of sites under common control, one source’s emissions increase could be offset by another source’s emissions decrease from planned renovations or permanent shut-down. Earthjustice Group Two contends that since according to

TCEQ, the goal of FCAA, §185 is not emissions reductions, then there is no reason to allow site aggregation. Earthjustice Group Two stated that TCEQ used EPA's 2010 guidance memo and an inapplicable securities and exchange commissions (SEC) rule as support for the definition of sites under common control. EPA's 2010 guidance memo contradicted a 2018 guidance memo for NSR permitting purposes from EPA. The 2018 guidance memo states that separately permitted facilities' emissions streams would not be aggregated for NSR purposes to determine whether a source is major or minor. Better Brazoria opposed aggregation of emissions across sources in different locations, but under common control, since it conflicts with the FCAA requirement for penalties to incentivize emissions reductions by assessing a penalty on each major source that fails to achieve emissions reductions. Better Brazoria asserted that aggregation of sites under common control disincentivizes a major source from decreasing its emissions because it could reduce emissions at another source included in the aggregated group to eliminate the fee owed and may adversely impact overburdened communities. Better Brazoria provide the example that if there was an emissions decrease at the source(s) located outside the overburdened community, then this could result in an emissions increase at source(s) located in the overburdened community with no fee assessed.

Response

The commission disagrees that sites under common control are not allowed to aggregate to determine a baseline amount. EPA's NSR guidance establishes when a source is major or minor for permitting purposes, the Section 185 fee program applies to sources that are already determined to be major stationary sources. Site aggregation for these Section 185 fee major stationary sources is appropriate for determining baseline amounts, as reflected in Attachment C of EPA's 2010 guidance memo and previously approved by EPA in the Section 185 fee program for the HGB nonattainment area under the one-hour ozone standard.

The commission disagrees that it incorrectly relied on the SEC rule for definition of control. As discussed in this preamble, EPA stated that it would utilize the definition of control used by the SEC and EPA generally continues to assess common control in relation to this definition.

The commission also disagrees that aggregating sites under common control does not follow the intent of FCAA, §185. While the FCAA, §185 may incentivize major stationary sources to reduce emissions in the form of an imposed penalty fee, an incentive is not the same as a requirement and emissions reductions are not required by FCAA, §185.

No rule changes were made in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

Comment

Industry Groups approved of aggregation of sites under common control for baseline determination.

Response

The commission appreciates the support. No changes were made in response to this comment.

Comment

Better Brazoria, Fenceline Watch, and an individual commented that flexibilities like baseline amount aggregation are not allowed since it violates the plain language of FCAA, §185. Better Brazoria opposes baseline amount aggregation since aggregation is not representative of the

required actual emissions and stated that the rule must assess penalties based on the "actual emissions" of a major source for limited prescribed periods of time. Better Brazoria asserted that if a source selects the highest emissions to total from major sources (either increased or decreased emissions) without providing a cumulative measure and without considering distribution or centrality, it creates an artificial sum of the source's emissions. Better Brazoria also noted that EPA disapproved of portions of Section 185 Fee Programs that average baseline emissions over 2-5 years.

Response

The commission disagrees that fee assessments following the same aggregation option chosen for the baseline amount determination is not representative of actual emissions. This rulemaking follows the same principles of baseline amount aggregation by pollutant and/or sites under common control as approved by EPA in a final rule published in the February 14, 2020, *Federal Register* (85 FR 8411) for the Section 185 Fee Program in the HGB nonattainment area under the one-hour ozone standard.

To be considered a site under common control, the major stationary sources requesting to aggregate must share a Customer Reference Number in TCEQ's Central Registry Database. Sites under common control are determined by TCEQ. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the fee, as addressed under circumvention requirements of §101.3.

If a major stationary source chooses to aggregate by pollutant and/or sites under common control, then the fee is required to be assessed in the same manner. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for the annual fee assessment. Sources are not allowed to artificially inflate baseline amounts

for fee assessment purposes, since the baseline year, same 24-month consecutive period, or other timeframe used to establish baseline amounts are required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation.

The commenter included a reference to an EPA disapproval of another Section 185 fee program that averaged baseline emissions over 2-5 years. The commission did not include this averaging timeframe as an option in this rulemaking.

The commission disagrees that baseline aggregation is not allowed under FCAA, 185. FCAA, §185 allows the administrator to provide guidance for determining baseline amounts and Attachment C of EPA's 2010 guidance memo acknowledged that aggregation could be approvable.

No changes were made in response to these comments.

Comment

Texas cannot engage in source or emission aggregation which allow industry to circumvent fee payment.

Response

The commission disagrees that baseline aggregation by pollutant and/or sites under common control allows the major stationary source to circumvent fee payment. Baseline amounts are first required to be calculated separately for each individual major stationary source for VOC or NO_x emissions, or for both. The separate initial baseline amounts for each pollutant at an individual major stationary source must also be submitted in a format specified by the executive director with supporting documentation. Providing the separate

initial calculations of baseline amounts is intended to provide transparency and consistency and to assist with quality assurance of baseline amount determinations with any subsequent aggregation. After establishing separate baseline amounts, then the baseline amount could be aggregated by multiple pollutants, multiple stationary sources under common control, or both. If an aggregation route is chosen, then that same aggregation method is required for the annual fee assessment.

Additionally, prevention of fee payment circumvention is addressed in the preamble and rule language. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with the intention of circumventing the fee, as addressed under circumvention requirements of §101.3. Major stationary sources that transfer ownership of emissions unit(s) from one major source to a minor source(s) cannot have their baseline amounts adjusted to prevent circumvention of the fee, as addressed under circumvention requirements of §101.3. §101.713(g) relating to Enforcement states that a major stationary source that fails to submit an emissions inventory to circumvent assessment of the fee is subject to enforcement account under Texas Water Code (TWC), Chapter 7.

No changes were made in response to these comments.

Adjustment of Baseline Amount

Comment

Green Consulting approved baseline amount adjustments for newly regulated sites to adjust their baseline emissions after 24 months of consecutive operations.

Response

The commission appreciates Green Consulting's support. The commission clarifies that after completing 24 months of consecutive operations, the major stationary source may request that the baseline amount be adjusted using the average actual emissions during the first 24 months of consecutive operation for the baseline emissions. If the total annual authorizations determined the initial baseline amount were still lower than the adjusted baseline emissions, then an adjustment may not be requested. If during the 24 months of consecutive operation the emissions were irregular, cyclical, or otherwise vary significantly then a baseline amount adjustment may be requested.

No changes were made in response to this comment.

Comment

Green Consulting and Industry Groups requested a rule language update to §101.709 to include emissions authorized outside of Nonattainment New Source Review (NNSR) permits after the baseline year to adjust the baseline amount because permits can be issued outside of Chapter 116, Subchapter B, Division 5.

Response

The commissions disagrees that permits issued under authorizations outside of Chapter 116, Subchapter B, Division 5 for NNSR permits should be allowed to request a baseline amount adjustment. As discussed in this preamble, adjusting a major stationary source's established baseline amount for new construction that occurred after the baseline year is a flexibility. The commission intended that this baseline amount adjustment flexibility only be extended to construction of equipment that went through NNSR since that process requires a netting analysis to determine whether a source is required to use the LAER and emissions offsets. As a result, adjustment of the baseline amount for new construction at an

existing major source could not be requested for other authorization types including but not limited to Permit by Rule and Standard Operating Permits.

No changes were made in response to these comments.

Comment

Better Brazoria commented that selling or transfer of "equipment" between companies should not be allowed when there is credible evidence that an owner is transferring equipment to circumvent the fee. Better Brazoria requested inclusion of objective factors to evaluate whether equipment sold of transferred near or around the attainment date may have been used to avoid the fee.

Response

The commission agrees that ownership transfers of emissions units must ensure no circumvention of the fee. This rulemaking requires that all emissions units located at the major stationary source as of December 31 of the baseline year be included in the baseline amount determination. If a 24-month consecutive period is chosen for a major stationary source that operated the entire baseline year, then all emissions units located at the major stationary source as of December 31 of the baseline year must be included, regardless of whether they were located at the major stationary source during the period chosen. An owner or operator of a major stationary source may not exclude new emissions units added by the baseline year from the 24-month consecutive historical period.

As discussed in this preamble, there are additional safeguarding requirements to ensure ownership-transferred emissions units do not circumvent the fee. A change in control of emissions units does not change the historical operation, reported emissions from the

emissions units, or previously invoiced amounts before the ownership transfer occurred. The ownership transfer must first be approved by and/or reported to the TCEQ Air Permits Division and be appropriately reflected in all related permits before adjustments of the baseline amounts can be requested. The originating major stationary source may transfer (subtract) the baseline amounts and fee associated for each emissions unit having a change in control to the recipient major stationary source who will add the baseline amount for the transferred emissions unit to their baseline amount. There is no change for the calculated baseline amounts for the transferred emissions units or remaining emissions units that were not involved in the ownership transfer. Major stationary sources that transfer ownership of emissions units from one major source to a minor source(s) will not have their baseline amounts adjusted to prevent circumvention of the fee, as addressed under §101.3. To qualify for an ownership transfer baseline amount adjustment, the ownership transfer must occur between major stationary sources of the same pollutant, or aggregated pollutants, located within the same nonattainment area. All adjusted baseline amounts are reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years are not processed based on the final adjustments to ensures accounting stability for the Section 185 fee program.

No changes were made in response to this comment.

Fee Assessment and Payment

Comment

Green Consulting requested clarification that "recorded in the annual emissions inventory" includes TCEQ's non-applicability letter with the total sitewide NO_x and volatile VOC certified in

the letter.

Response

It appears that the commenter refers to the definition of actual emissions in Figure 30 TAC §101.713(f) regarding emissions that must be included for annual fee assessment. The commission disagrees that a clarification is needed since it never intended that Inapplicability Notification Letters with certified emissions totals be used for Section 185 fee program purposes. Since all major stationary sources located in a 2008 eight-hour ozone standard nonattainment area classified as severe or extreme meet the VOC and NO_x emissions reporting thresholds for the TCEQ's point source emissions inventory, these sources may not submit an Inapplicability Notification Letter to TCEQ.

No changes were made to this rule in response to these comments.

Comment

Earthjustice Group Two asserted that assessing and collecting a prorated fee on industry, if TERP funds are insufficient to cover the entire nonattainment area's fee obligation, creates ambiguity on the amount and timing of the fee collection. They mentioned that TERP collections vary by consumer behavior from year to year which means the fee paid by industry will also depend on consumer behavior. Earthjustice Group Two claimed that a conventional fee program allows industry to anticipate its fee and either set aside funds or reduce emissions by 20% after the baseline year to avoid the fee.

Response

The commission disagrees that allowing for prorated fees when TERP funds are insufficient creates ambiguity regarding the amount and timing of fee collection. Static (the same

amount every year) annual fee assessment and collection is not possible, given that emissions may vary every year and the fee rate must be adjusted annually for inflation. Regardless of the Section 185 fee program, EPA does not release the annually adjusted fee rate for inflation until the fall of the fee assessment year (e.g., the 2024 fee rate was released in October 2024). TCEQ and major stationary sources cannot assess the fee until this final fee rate is released by EPA.

With the exception of the first fee collection year, which is dependent on the effective date of EPA's finding of failure to attain notice in the *Federal Register*, TCEQ anticipates annually performing the Fee Equivalency Demonstration in December and if required, would invoice major stationary sources on a prorated fee. Major stationary sources would be invoiced on the prorated fee amount and provided with enough time to pay according to the provisions of §101.714 on Fee Payment.

No changes were made to this rule in response to these comments.

Comment

Better Brazoria commented that to ensure the fees are effective, the regulations should set the fees high enough to compel business to invest in cleaner technologies rather than simply absorb costs as a business expense.

Response

As specified under FCAA, §185(b)(1) and (3), EPA, and not TCEQ, is tasked with setting the fee rate and adjusting it annually for inflation. EPA typically releases the updated fee rate every fall. As discussed in this preamble, the fee calculation appropriately uses EPA's annually provided fee rate.

The commission notes that major stationary sources of ozone precursor emissions have a choice to annually pay the fee or reduce emissions to below 80% of their baseline amount. The business decisions of sources impacted by the fee, such as installing control equipment or curtailing production to reduce emissions, or paying the fee instead of reducing emissions, depend on multiple factors and cannot be predicted.

No changes were made in response to this comment.

Comment

An individual commented that TCEQ should adopt a Section 185 fee program that provides transparency and accountability with fees. Better Brazoria requested a regulatory framework to provide transparency in funding allocation.

Response

The commission disagrees that this rulemaking has not established a Section 185 fee that provides transparency and accountability. Public participation in the rule development process provided transparency and accountability, and the regulatory framework establishing the Section 185 fee program (including baseline emission setting and fee assessment) is clear. In addition to providing the opportunity to comment at a virtual public hearing, TCEQ also provided the public with the option to submit written comments by mail, fax, or electronically through TCEQ's Public Comment system. Instructions for the submittal of written comments were provided in the proposed rulemaking documents and public notices.

No changes were made in response to these comments.

Comment

Ash Grove stated that if point sources reduce their future emissions to less than 80% of the baseline amount then costs increase at each site.

Response

The commission acknowledges the potential business impacts of the Section 185 fee program and the choices facing major stationary sources, such as potential cost increases to either reduce emissions or pay the fee. As discussed in this preamble, the provisions of FCAA, §185 require a penalty fee on major stationary sources of ozone precursor emissions located in a severe or extreme nonattainment area that fail to attain an ozone standard by the attainment date. TCEQ is required to implement these penalty provisions if a severe ozone nonattainment area, such as the HGB or DFW nonattainment areas, after EPA determines that the areas failed to attain the 2008 eight-hour ozone standard by the attainment date.

However, TCEQ has adopted a Section 185 fee program that will allow the partial or full offset of fees owed by utilizing TERP revenue. As discussed in the Fiscal Note of the proposal preamble, "During the first five years, the proposed rule should not impact positively or negatively the state's economy, particularly if TERP revenue is sufficient to offset the Section 185 fee obligation."

No changes were made in response to this comment.

Other Failure to Attain Fee Fulfillment Options

Comment

Environmental Groups commented that supplemental environmental projects (SEPs) are not an appropriate mechanism to offset the Section 185 fee. They stated that SEPs are designed to reduce and remediate pollution, with preference given to communities impacted by the pollution resulting from violations, as part of agreed resolutions for such violations. They explained that per the Legislature, only local governments are entitled to use SEPs to remedy noncompliance. Absent resolution of violations and enforcement actions in the context of the Section 185 fee, they assert that TCEQ does not have the statutory authority to allow major sources to fulfill Section 185 liability via contributions to SEPs. Lastly, they commented that the commission should consider creating a structure within TERP or other agency programs where major stationary sources could contribute actual funds to satisfy Section 185 fee liability.

Response

The commission disagrees that contributions to SEPs are not appropriate to offset the fee as SEPs provide environmental benefits to communities, as prescribed by TWC, §7.067, and such benefits are an important element of the commission's determination that allowing offsets of any required Section 185 fee amount is appropriate. The commission also disagrees that it lacks authority to allow Section 185 fees to be offset using SEPs as the commission has broad authority granted by the legislature in the Texas Clean Air Act, Texas Health and Safety Code, Chapter 382 and the Texas Water Code, Chapter 5 to adopt and implement a plan to rules to safeguard air quality and control the state's air. As discussed elsewhere in this preamble, the commission has determined that allowing the offset of Section 185 fees is appropriate.

This adopted rule provides an option for major stationary sources owing Section 185 fees to offset those fees if the major source is an enforcement respondent that chooses to participate in the SEP program, meets the criteria specified in the rule, and obtains approval

for the Section 185 fee offset. Utilizing the SEP program is voluntary, and participation in SEPs to offset Section 185 fees must conform to criteria, performance, and oversight as required by the SEP program as well as this adopted rule. Further, the commission notes that local governments are not the only entities that are entitled to use SEPs.

The commission appreciates the support for adding funding mechanisms that could be used to achieve environmental benefits but has identified no additional programs that could be used to offset Section 185 fee liability. The commission also agrees that incentivizing additional environmentally beneficial projects is desirable and, in response to this comment and after further consideration of the SEP program, has adopted a rule change that would allow money contributed to SEPs to offset administrative penalties in an enforcement action to also be used to offset the Section 185 fee if the respondent spends at least 110% or more of the SEP Offset Amount. Allowing the crediting of the SEP Offset Amount in this circumstance should incentivize larger compliance projects (or larger amounts paid to third-party pre-approved SEPs) with ozone precursor emissions reductions that directly benefit the nonattainment area. Additionally, the commission has further clarified that no enforcement administrative penalty paid to the commission, or any amount deferred (not paid) as incentive for early resolution of the enforcement action may be used to partially or completely fulfill the Failure to Attain Fee to ensure that only amounts paid to SEPs are creditable to offset the Section 185 fee.

Cessation of Fee Program

Comment

Better Brazoria commented that the fee program should only end according to the FCAA requirement of program termination upon EPA's redesignation of HGB to attainment. For the HGB fee program under the one-hour ozone standard, additional options were provided to end

that fee program, but EPA only explicitly approved the portion of these rules that is consistent with the FCAA. EPA took no action on the other provisions included in the SIP submittal that did not correspond to the FCAA. Fenceline Watch commented that the FCAA is clear that all major sources are subject to the fee program for the entire period of nonattainment.

Response

The commission disagrees that additional provisions beyond an EPA redesignation to attainment are not appropriate for the 2008 eight-hour ozone standard. EPA did approve an additional provision to end the Section 185 fee program relating to EPA otherwise terminating the Section 185 fee requirement in its approval of the Sacramento's Section 185 fee program under the one-hour ozone standard and have proposed approval of this additional provision for Sacramento's Section 185 fee program under the 1997, 2008, and 2015 eight-hour ozone standards (88 *FR* 86870).

No rule changes were in response to these comments, but additional information was added to the preamble for clarification regarding the requirements of FCAA, §185 and the intent of this rulemaking.

SUBCHAPTER K: FAILURE TO ATTAIN FEE FOR THE 2008 EIGHT-HOUR OZONE STANDARD

§101.700 – 101.718

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act.

The new sections are also adopted under TWC, §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also adopted under 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; and 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; and THSC, §382.0622, concerning Clean Air Act Fees, specifying that any fees collected as required by Federal Clean Air Act (FCAA), §185 are clean air act fees under the THSC. The new sections are also adopted to comply with FCAA, 42 United States Code (USC), §7511a(d)(3), (e), and (f) (FCAA, §182(d)(3), (e), and (f)) regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d (FCAA, §185) regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

The adopted new sections implement the requirements of THSC, §§382.002, 382.011, 382.012, 382.017 and 382.0622; TWC, §§5.102, 5.103, 5.105, 5.701 - 5.703 and 5.705 – 5.706; as well as FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d (FCAA, §182(d)(3), (e), and (f), and §185).

§101.700. Definitions.

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

(1) Actual emissions--As defined in §101.10 of this title (relating to Emissions Inventory Requirements).

(2) Area §185 Obligation--The total annual amount of Failure to Attain Fees due from all applicable major stationary sources or Section 185 Accounts in a severe or extreme ozone nonattainment area that failed to attain the 2008 eight-hour ozone National Ambient Air Quality Standard by its applicable attainment date.

(3) Attainment date--The U.S. Environmental Protection Agency-specified date that a severe or extreme nonattainment area must attain the 2008 eight-hour ozone National Ambient Air Quality Standard.

(4) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data submitted to and reviewed by the executive director. The baseline amount is the lower of baseline emissions (actual emissions) or total annual authorizations or pending authorizations emissions at a major stationary source during the baseline year or timeframe as otherwise specified under this subchapter.

(5) Baseline emissions--Emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title. The emissions must include all annual routine emissions associated with authorized normal operations, which includes reported emissions from authorized maintenance, startup, and shutdown activities and excludes all unauthorized emissions. The timeframe options are as follows:

(A) reported emissions from the baseline year; or

(B) reported emissions as an average of any single consecutive 24-month period as allowed under §101.705(b)(2) of this title (relating to Baseline Amount) for major stationary sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year.

(6) Baseline year--The baseline year is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in this subchapter.

(7) Electric utility steam generating unit--As defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

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

(9) Equivalency credits--An amount equivalent to the revenue collected, as long as any revenue is also expended within a nonattainment area, in accordance with §101.703 of this title (relating to Fee Equivalency Account) for accumulation in the Fee Equivalency Account.

(10) Extension year--A year as defined in FCAA §181(a)(5).

(11) Failure to Attain Fee--The fee assessed and due from each major stationary source or Section 185 Account based on actual emissions whether authorized or unauthorized of volatile organic compounds, nitrogen oxides, or both pollutants that exceed 80% of the baseline amount.

(12) Fee assessment year--Calendar year used to calculate and assess the Failure to Attain Fee under the provisions of this subchapter.

(13) Fee collection year--Calendar year in which the Failure to Attain Fee is invoiced.

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

(15) Section 185 Account--The TCEQ-assigned account number for one major stationary source or a group of two or more major stationary sources under common control located within the same severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

(16) Supplemental Environmental Project (SEP) Offset Amount--The portion of an enforcement case's assessed administrative penalty approved for use in the performance of, or contribution to, a SEP, instead of being paid to the commission as a penalty.

§101.701. Applicability.

(a) The provisions of this subchapter will become applicable in an area designated nonattainment and classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) when the U.S. Environmental Protection Agency (EPA) determines that the area has failed to attain the standard by its applicable severe or extreme attainment date. The determination will be the effective date of EPA's finding of failure to attain notice published in the Federal Register.

(b) Except as otherwise provided in §101.702 of this title (relating to Exemption), the provisions of this subchapter apply to all regulated entities that meet the definition of major stationary sources of volatile organic compounds or nitrogen oxides located in a nonattainment area classified as severe or extreme for the 2008 eight-hour ozone standard.

§101.702. Exemption.

No major stationary source subject to the Failure to Attain Fee under this subchapter is required to remit the fee during any calendar year for which the U.S. Environmental Protection Agency has finalized an extension of the attainment date for the nonattainment area applicable to the major stationary source under the 2008 eight-hour ozone National Ambient Air Quality Standard.

§101.703. Fee Equivalency Account.

(a) Fee Equivalency Account. The executive director will establish and maintain a Fee Equivalency Account to document the equivalency credits ~~revenue collected and available for use in demonstrating equivalency with the Area §185 Obligation~~. No actual money will be deposited into the Fee Equivalency Account. The Fee Equivalency Account will reflect equivalency credits based upon revenue collected and made available for programs of the Texas Emissions Reduction Plan (TERP) under authority of the Texas Health and Safety Code, Chapter 386.

(b) Revenue eligibility. The revenue eligible for credits to the Fee Equivalency Account must be from the severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area and cannot be transferred between nonattainment areas.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account will be credited for the years TERP funding is expended in a severe or extreme 2008 eight-hour ozone standard nonattainment area beginning with the first fee assessment year until the Failure to

Attain Fee no longer applies to the nonattainment area as described under §101.718 of this title (relating to Cessation of Program).

(d) Other revenue sources. The executive director may credit revenue from other emissions reductions grant programs as funds become available. The executive director will apply revenue from such grant programs to the Fee Equivalency Account according to the requirements of this section and §101.704 of this title (relating to Fee Equivalency Accounting).

§101.704. Fee Equivalency 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 Area §185 Obligation determination.

(b) Area §185 Obligation determination. Annually, the executive director will calculate the applicable Area §185 Obligation for all major stationary sources or Section 185 Accounts in a severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area by summing the Failure to Attain Fee for each major stationary source or Section 185 Account. The summed amount will represent the calendar year Area §185 Obligation for the severe or extreme 2008 eight-hour ozone standard nonattainment area. The annual Area §185 Obligation will be calculated using actual emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year.

(c) Annual demonstration of equivalency. The executive director will annually determine the amount of equivalency credits available in the Fee Equivalency Account to determine the

Area §185 Obligation calculated under this subsection. This demonstration will continue annually until the 2008 eight-hour ozone standard nonattainment area is no longer subject to the fee according to the provisions of §101.718 of this title (relating to Cessation of the Program).

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

Figure: 30 TAC §101.704(c)(1)

$$FeeBalance = AreaObligation - FeeEquivAcct$$

Definitions:

AreaObligation = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the Failure to Attain Fee from all major stationary sources or Section 185 Accounts in the severe or extreme 2008 eight-hour ozone standard nonattainment area for a fee assessment year.

FeeEquivAcct = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.703 of this title (relating to Fee Equivalency Account).

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

(2) If the Fee Equivalency Account balance is calculated to be less than or equal to zero in paragraph (1) of this subsection, sufficient equivalency credits were available to

offset the Area §185 Obligation. The executive director will not assess a Failure to Attain Fee on major stationary sources or Section 185 Accounts for the fee assessment year.

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

Figure: 30 TAC §101.704(c)(3)

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

Definitions:

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

AreaObligation = The Area §185 Obligation calculated under this subsection for the fee assessment year.

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

ProratedFee = The reduced Failure to Attain Fee each major stationary source or Section 185 Account to be assessed if insufficient equivalency credits are available in the Fee Equivalency Account.

§101.705. Baseline Amount.

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

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under authorizations, including authorized emissions from maintenance, shutdown, and startup activities, applicable to the source in the baseline year. Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year may be included in the total annual emissions allowed under authorizations.

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

(1) the baseline year; or

(2) a historical period, if the major stationary source's or Section 185 Account's emissions are irregular, cyclical, or otherwise vary significantly from year to year. Any single 24-month consecutive period within a historical period preceding January 1 of the baseline year

may be used to calculate an average baseline emissions amount in tons per year for the major stationary source as the historical period. 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) Historical period. If a major stationary source or Section 185 Account uses a historical period as defined in subsection (b)(2) of this section, the baseline amount will:

(1) use adequate data for calculating the ~~equivalent alterative fee~~ baseline emissions;

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

(3) be adjusted downward to exclude any emissions during the consecutive 24-month period that would have exceeded an emissions limitation that was legally enforceable in effect by December 31 of the baseline year. ~~for rules and regulations with which the source had to comply during the baseline year.~~

(d) Adjustments. The baseline amounts must be adjusted downward to exclude any emissions that exceeded an emissions limit that was legally enforceable ~~for rules or regulations~~ in effect by December 31 of the baseline year.

(e) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of December 31 of the baseline year. When control or ownership of emission units changes during the baseline year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emissions unit on December 31 of the baseline year.

(f) Calculations. A baseline amount, reported in units of tons per year, must be calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides, for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(g) Compliance schedule. The owner or operator of each major stationary source meeting the requirements of §101.701 of this title must submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amounts forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120 days after the effective date of a finding of failure to attain, whichever is later.

(h) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions. After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.706. Baseline Amount for New Major Stationary Sources.

(a) Baseline amounts. A baseline amount must be established for major stationary sources or Section 185 Accounts that begin operating during or after the baseline year. The baseline amount must use the first full year of operation as a major source and be the lower of:

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under applicable authorizations, including emissions from maintenance, startup, and shutdown activities. Emissions from pending authorizations with administratively complete applications as of the last day of the full first calendar year of operation may be included in the total annual emissions allowed under authorizations.

(b) Adjustments. The baseline amount must be adjusted downward to exclude any emissions that exceeded an emissions limit for rules or regulations in effect by the last day of the one-year period used to determine the baseline amount.

(c) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of the last day of the one-year period used to determine the baseline amount. When control or ownership of emission units changes during the calendar year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on the last day of the one-year period used to determine the baseline amount.

(d) Calculations. A baseline amount, reported in units of tons per year, must be

calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(e) Compliance schedule. Within 90 calendar days of completing the first full year operating as a major stationary source, the major stationary source or Section 185 Account must submit to the executive director a report establishing the baseline amount on a form published by the executive director.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as allowed under this subchapter.

§101.707. Aggregated Baseline Amount.

(a) Aggregation. After determining separate baseline amounts for each pollutant at each major stationary source or Section 185 Account according to the requirements of §101.705 of this title (relating to Baseline Amount) or §101.706 of this title (relating to Baseline Amount for New Major Stationary Sources), an owner or operator of a major stationary source or Section 185 Account may choose to combine baseline amounts as follows:

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

(2) nitrogen oxides (NO_x) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(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 under common control.

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

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

(2) the same basis of baseline emissions or total annual authorized emissions to calculate the baseline amount.

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

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

(e) Compliance schedule. The owner or operator of each major stationary source or

Section 185 Account must submit to the executive director a report establishing its aggregated baseline amount on a form published by the executive director.

(1) For major stationary sources or Section 185 Accounts that operated the entire baseline year, the aggregated ~~equivalent alternative~~ baseline amount forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120 days after the finding of failure to attain effective date in the Federal Register, whichever is later.

(2) For major stationary sources or Section 185 Account that began operating during or after the baseline year, the aggregated baseline amount forms must be submitted within 90 calendar days of completing the first full year operating as a major stationary source.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permit data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions. After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.708. Adjustment of Baseline Amount for Major Stationary Sources with Less Than 24 Months of Operation.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of the baseline amount established under this subchapter:

(1) if the major stationary source or emissions units at the major stationary source experienced less than 24 months of consecutive operation by December 31 of the baseline year, and~~:~~

(2) if~~If~~ the emissions were irregular, cyclical, or otherwise vary significantly from year to year, then the baseline amount may be adjusted as the lower of the following:

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

(B) ~~(2)~~ total annual emissions allowed under authorizations applicable to the major stationary source during the first year operating as a major stationary source. Emissions from pending authorizations with administratively complete applications as of the last day of the one-year period used to determine the baseline amount may be included in the total annual emissions allowed under authorizations.

(b) Compliance schedule. Within 90 calendar days of completing 24 consecutive months of operation, the owner or operator of the major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as

allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.709. Adjustment of Baseline Amount for New Construction at a Major Stationary Source

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter to include emissions limits from new construction of authorized emissions units not included in baseline amounts previously established by the executive director. Adjustments to the baseline amount are limited as follows.

(1) The emissions units must have been authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(2) The emissions considered for the adjusted baseline amount for new emissions units are restricted to emissions units without a previously established baseline amount.

(b) Compliance schedule. Within 90 calendar days of completed construction of the new emissions units, the owner or operator of the major stationary source or Section 185 Account

must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.710. Adjustment of Baseline Amount for Ownership Transfers.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter if ownership and operation of emissions units are 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 emissions units ~~equipment~~ no longer under common ownership or control, will be transferred from the original reporting major stationary source or Section 185 Account to the new major stationary source or Section 185 Account without modification to the reported amount; and

(2) The baseline amount for remaining emissions units ~~equipment~~ at the originating and recipient major stationary source or Section 185 Account will not be adjusted based on a change of ownership or control of emissions units to or from a major stationary source or Section 185 Account.

(b) Adjustment qualification. To qualify for this baseline amount adjustment, the ownership transfer of the emissions units must take place between major stationary sources of the same pollutant or aggregated pollutants, volatile organic compounds and/or nitrogen oxides located within the same nonattainment area.

(c) Compliance schedule. Within 90 calendar days of the effective date of a change of ownership or control of emissions units, the owner or operator of each major stationary source or Section 185 Account affected by the change in ownership or control of emissions units must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(d) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(e) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no

longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.711. Adjustment of Baseline Amount for Final Emissions Inventory Data

(a) Baseline amounts. Baseline amounts established under this subchapter may be adjusted based on final quality assured emissions inventory data.

(b) Compliance schedule. Within 90 calendar days of receipt of final quality assured emissions inventory data or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, the owner or operator of each major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of the reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.712. Failure to Establish a Baseline Amount.

The executive director will determine baseline amounts for any major stationary source subject to §101.701 of this title (relating to Applicability) that fails to submit a baseline amount by the due date specified by the commission as follows:

(1) If information is available to determine a baseline amount for each pollutant for which the source meets major source applicability requirements, the executive director will determine the baseline amount to be the lower of:

(A) baseline emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements); or

(B) total annual emissions allowed under authorizations, including authorized emissions from maintenance, startup, and shutdown activities.

(2) If no emissions inventory information required to determine baseline amount information is available, the executive director will establish the baseline amount as:

(A) 12.5 tons of volatile organic compounds (VOC) emissions for major stationary sources of VOC emissions;

(B) 12.5 tons of nitrogen oxides (NO_x) emissions for major stationary sources of NO_x emissions; or

(C) 12.5 tons of VOC emissions and 12.5 tons of NO_x emissions for major stationary sources of VOC and NO_x emissions.

(3) The executive director will not aggregate baseline amounts under §101.707 of this title (relating to Aggregated Baseline Amount) or adjust baseline amounts as provided in this subchapter to determine a baseline amount under this section.

(4) A major stationary source will pay the Failure to Attain Fee according to §101.714 of this title (relating to Failure to Attain Fee Payment).

(5) If the major stationary source submits a complete and verifiable emissions inventory according to §101.10 of this title, the major stationary source may then submit a baseline amount to the executive director on a form published by the executive director.

(6) After the executive director finalizes the baseline amount based on demonstrated compliance with the criteria in this subchapter, the baseline amount will be applied starting with the fee assessment year after finalization and will continue until:

(A) a baseline amount is established by the major stationary source or Section 185 Account in accordance with paragraph (5) of this section and reviewed by the executive director to ensure alignment with the emissions inventory database or air permit systems; or

(B) the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.713. Failure to Attain Fee Assessment.

(a) Pollutant applicability. The executive director will annually assess the Failure to Attain Fee for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO_x), or both, for which the major stationary source or Section 185 Account meets the requirements of §101.701 of this title (relating to Applicability) at any time during a calendar year.

(b) Aggregation. The fee will be assessed and calculated using the same Failure to Attain Fee determination method used under this subchapter. 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 VOC and NO_x emissions may both be aggregated together across multiple major stationary sources. Aggregation must be conducted as described under §101.707 of this title (relating to Aggregated Baseline Amount) and is limited to emissions from:

(1) major stationary sources that aggregated VOC baseline amounts;

(2) major stationary sources that aggregated NO_x baseline amounts; or

(3) major stationary sources that aggregated VOC with NO_x baseline amounts.

(c) Assessment. The owner or operator of each major stationary source to which this rule applies must annually pay the Failure to Attain Fee to the commission calculated in accordance with either subsection (d) or (e) and subsection (f) of this section. The Failure to Attain Fee will be assessed on actual emissions of VOC and/or NO_x as recorded in the emissions

inventory under §101.10 of this title (relating to Emissions Inventory Requirements), that exceed 80% of the pollutant baseline amount, rounded up to the nearest whole number.

(d) Fee assessment for separate pollutants. The Failure to Attain Fee from major stationary sources that did not aggregate baseline amounts under §101.707 of this title will remain separate and due from each major stationary source or Section 185 Account for each pollutant for which the source meets the major source applicability requirements. The fee will be calculated separately by the formula in subsection (f) of this section.

(e) Fee assessment for aggregated pollutants. The Failure to Attain Fee will be calculated in accordance with subsection (f) of this section and the method used for an aggregated baseline amount determination as described under §101.707(a) of this title.

(1) If VOC emissions are aggregated, 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 emissions are aggregated, 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 emissions are aggregated with NO_x emissions at one major stationary source, VOC and NO_x emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC emissions are aggregated with NO_x emissions 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.

(f) Fee calculations. The fee will be calculated for VOC, NO_x, or both pollutants' emissions, as follows.

Figure: 30 TAC §101.713(f)

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

Definitions:

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

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

Actual = All quantifiable emissions of VOC and/or NO_x from the major stationary source or Section 185 Account; as recorded in the annual emissions inventory for the fee assessment year. Actual emissions include all authorized and unauthorized emissions in units of tons per year. Pollutants and/or sites aggregated under §101.707 of this title will be combined for fee assessment in the same manner.

BA = Baseline amount in tons per year from a major stationary source or Section 185 Account as calculated under this subchapter.

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

(g) Enforcement. Failure to submit an emissions inventory according to the provisions of §101.10 of this title (relating to Emissions Inventory Requirements) to circumvent assessment of the Failure to Attain Fee is also subject to enforcement account under Texas Water Code (TWC), Chapter 7.

§101.714. Failure to Attain Fee Payment.

(a) Fee timeframe. The Failure to Attain Fee is assessed, invoiced, and paid for each pollutant for which the source is major, volatile organic compounds and/or nitrogen oxides, starting the calendar year following the baseline year and continuing each year until the area is no longer subject to the Failure to Attain Fee as described under §101.718 of this title (relating to Cessation of Program).

(b) Payment. Payment of Failure to Attain 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.

(c) Fee payment due date. The Failure to Attain Fee payment is due by the due date

specified on the invoice. The invoice due date will be a minimum of 30 days after the invoice mail date.

(d) Nonpayment of fees. Each emissions Failure to Attain Fee payment must be paid at the time and in the manner and amount provided by this subsection. Failure to pay the full Failure to Attain Fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178.

(e) Late payments. The agency will impose interest and penalties on owners or operators of a major stationary source or Section 185 Account who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.715. Eligibility for Other Failure to Attain Fee Fulfillment Options.

(a) Alternative fulfillment options. Notwithstanding any requirement in this subchapter, the owner or operator of a major stationary source or Section 185 Account required 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 in compliance with §101.716 (relating to Relinquishing Credits to Fulfill a Failure to Attain Fee and §101.717 of this title (relating to Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee).

(b) Unfulfilled portions. If a Failure to Attain Fee cannot be completely fulfilled using alternate fulfillment options, then the unfulfilled portion of the Failure to Attain Fee is required to be calculated, assessed, and paid according to the provisions of this subchapter.

(c) Reporting. The owner or operator of a major stationary source or Section 185

Account must inform the executive director if they choose an alternative fulfillment option for all or a portion of the Failure to Attain Fee as described in §101.716 and §101.717 of this title. The request must be submitted on a form specified by the executive director and include a list of the emissions in tons of volatile organic compounds and/or nitrogen oxides or the dollar-for-dollar amount requested from alternative fulfillment options, payment, or combination to cover the entire Failure to Attain Fee.

(d) Compliance schedule. No later than 90 days after the executive director requests submission of the form specified in subsection (c) of this section ~~the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the first fee assessment year~~ and continuing annually, the owner or operator of a major stationary source or Section 185 Account must submit the form ~~request~~ specified in subsection (c) and ensure the following conditions are met:

(1) all emissions credits under §101.716 of this title must be approved, exercised, or ~~otherwise~~ completed during or after the baseline year; and

(2) all Supplemental Environmental Projects under §101.717 of this title must be approved and completed during or after the baseline year ~~funded~~.

(e) If the executive director does not receive the form specified in subsection (c) of this section by the due date specified in subsection (d) of this section ~~notification request to use alternative fulfillment options for all or a portion of the Failure to Attain Fee or the alternate fulfillment options are not approved and funded, exercised, or otherwise completed as required by this subsection~~, the Failure to Attain Fee payment will be due in full as described under §101.714 of this title (relating to Failure to Attain Fee Payment).

§101.716. Relinquishing Credits to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by substituting emissions 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 emissions reduction credits;

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

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

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

§101.717. Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by participating in the ~~contributing to a~~ Supplemental Environmental Projects (SEPs)

program. ~~Project (SEP), on 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 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

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

(d) Any amounts paid in excess of the SEP Offset Amount may be used to partially or completely fulfill the Failure to Attain Fee.

(e) If the total amount paid to the SEP is greater than or equal to 110% of the SEP Offset Amount, then both the SEP Offset Amount and the amount paid in excess of the SEP Offset Amount may be used to partially or completely fulfill the Failure to Attain Fee.

(f) Amounts as specified in subsection (d) or subsection (e) of this section must be credited on a dollar-for-dollar basis and will not be discounted due to the passage of time. Those credits may be accumulated from year to year, and if a surplus exists in any given year, the credits may be used to partially or completely fulfill the Failure to Attain Fee as needed.

(g) The following cannot be used to partially or completely fulfill the Failure to Attain Fee:

(1) any amount of the enforcement administrative penalty paid to the commission; or

(2) any amount deferred to expedite settlement of an enforcement administrative penalty.

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

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

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

§101.718. Cessation of Program.

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

(1) the effective date of redesignation of the area classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) to attainment by the U.S. Environmental Protection Agency (EPA);

(2) any final action or final rulemaking by EPA to end the Failure to Attain Fee requirement; ~~fee; or~~

(3) finding of attainment by EPA; or ~~.~~

(4) a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States.

(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 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS), or a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States, are submitted to EPA. The design value may exclude days submitted to EPA by the executive director that exceeded the standard because of exceptional events. Fee collection will remain in abeyance until EPA takes final action on its review of the certified monitoring data and any demonstration(s).