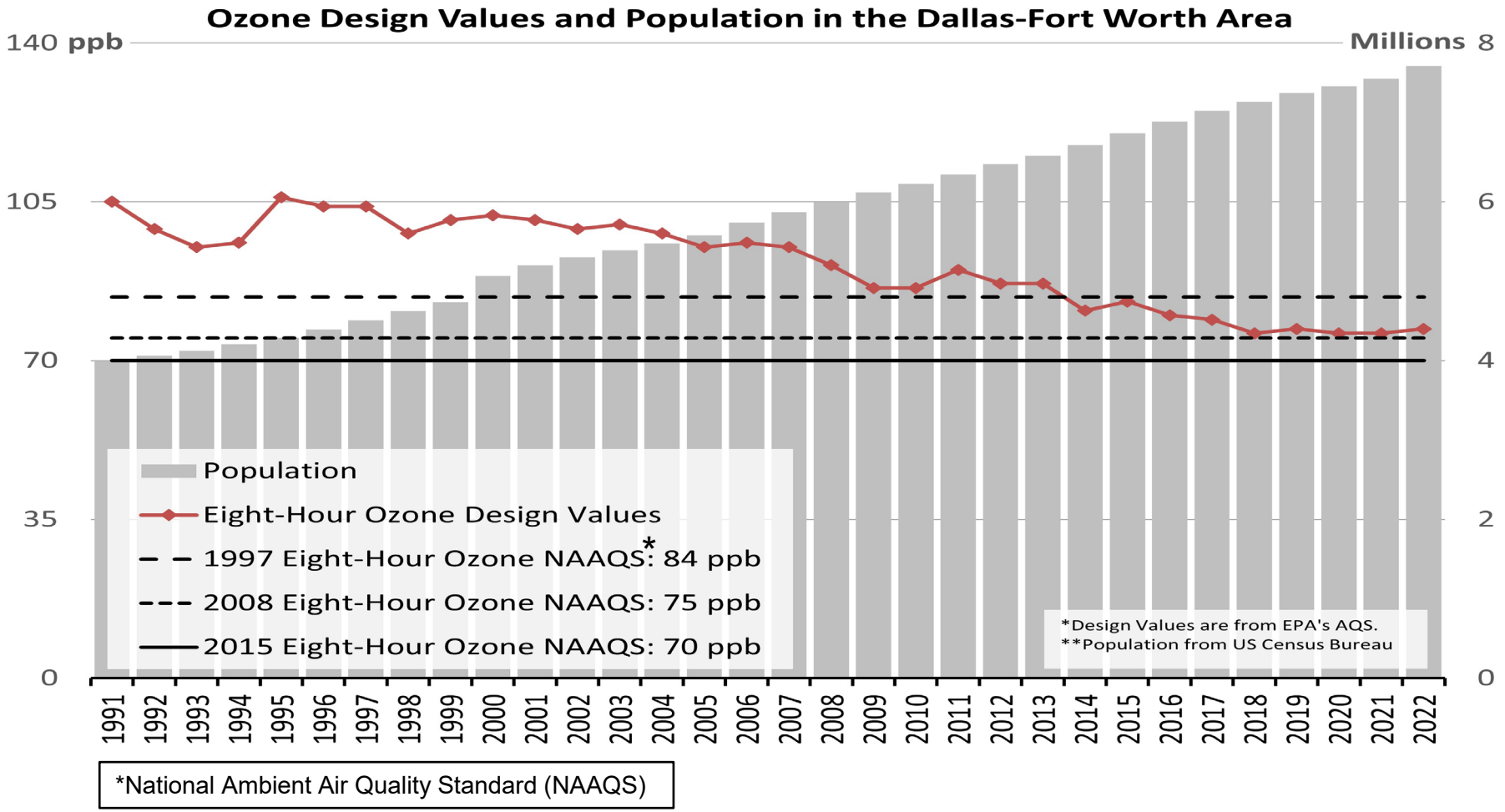
FCAA Section 185 Penalty Fee: Stakeholder Meetings

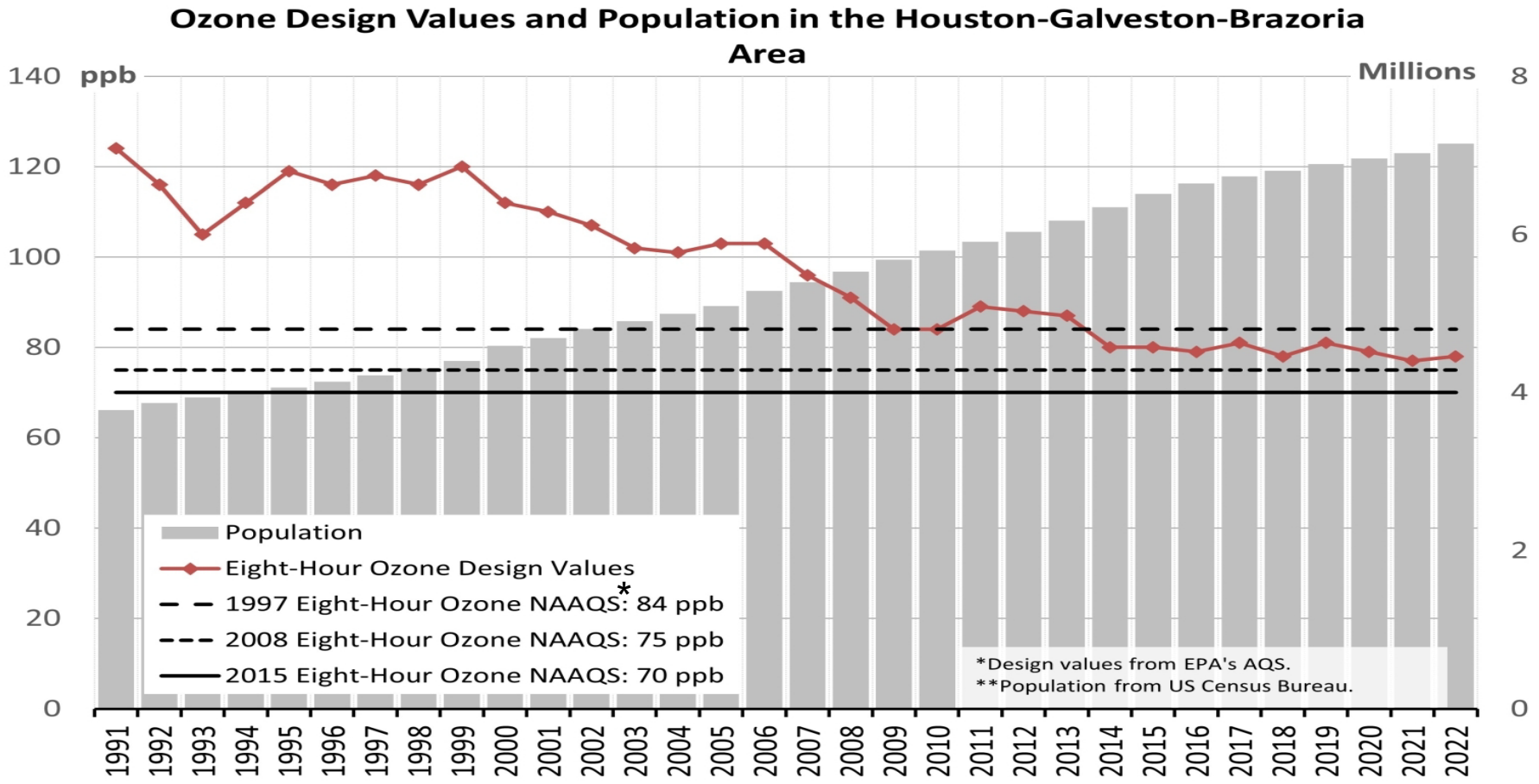
August 2024

Dallas-Fort Worth (DFW) Ozone Design Value Trends



*National Ambient Air Quality Standard (NAAQS)

Houston-Galveston-Brazoria (HGB) Ozone Design Value Trends



*National Ambient Air Quality Standard (NAAQS)

2008 Eight-Hour Ozone NAAQS Severe Reclassification

- DFW and HGB nonattainment areas were reclassified to severe, effective November 7, 2022.
  - Attainment demonstration and reasonable further progress state implementation plan (SIP) revisions were submitted to the U.S. Environmental Protection Agency (EPA) by the May 7, 2024 due date.
  - **FCAA Section 185 fee program rules are due to EPA by November 7, 2025.**
  - Attainment is required by the end of 2026 to meet the July 20, 2027 attainment date.
  - If an area **fails to meet** its severe attainment date for an ozone NAAQS, the FCAA requires a penalty fee to be imposed.

FCAA Section 185 Fee Requirements: Counties

DFW 2008 eight-hour ozone NAAQS nonattainment area counties:

- Collin
- Dallas
- Denton
- Ellis
- Johnson
- Kaufman
- Parker
- Rockwall
- Tarrant
- Wise

HGB 2008 eight-hour ozone NAAQS nonattainment area counties:

- Brazoria
- Chambers
- Fort Bend
- Galveston
- Harris
- Liberty
- Montgomery
- Waller

FCAA Section 185 Fee Requirements: Sources

- The fee applies to **major stationary sources** of ozone precursor emissions located in the severe ozone nonattainment areas.
- Major stationary sources are defined in 30 Texas Administrative Code (TAC) Section 116.12 and are based upon actual or potential emissions.
  - Typically includes larger **point sources** such as power plants, cement plants, petrochemical facilities, etc.
- The fee **does NOT apply** to minor stationary sources or mobile sources.

FCAA Section 185 Fee Requirements: Pollutants

- The major stationary source threshold in severe ozone nonattainment areas is 25 tons per year (tpy) of either actual or potential emissions of **ozone precursors, nitrogen oxides (NO_X) or volatile organic compounds (VOC).**
  - If a site is a major source for NO_X emissions, then the fee is assessed on NO_X.
  - If the site is major for VOC, then the fee is assessed on VOC.
  - If the site is major for both NO_X and VOC emissions, then the fee is assessed on both NO_X and VOC.

FCAA Section 185 Fee: Collection

- The fee is required each year after the missed attainment date until the area is **redesignated as attainment** by EPA.
- Redesignation to attainment is a lengthy process:
  - The area must attain the applicable NAAQS based upon three years of certified ambient air monitoring data.
  - EPA must approve all required SIP elements for the area under FCAA, Section 110(k).
  - TCEQ must develop, propose, and adopt a redesignation request and maintenance (RDM) SIP revision.
  - EPA must propose and approve redesignation of the area to attainment and the RDM SIP revision.

FCAA Section 185 Fee: Collection (continued)

- The Section 185 fee could be imposed as early as 2028, if one or both the areas fails to attain the 2008 ozone NAAQS.
  - The estimated Section 185 fee obligation for the DFW area could be as much as **$45 million** annually starting in 2028.
  - The estimated Section 185 fee obligation for the HGB area could be as much as **$154 million** annually starting in 2028.
- If the state does not collect the fee, **EPA is required** by the FCAA to impose the fee with interest.
  - The revenue is not returned to the state.

FCAA Section 185 Fee: Assessment

- To determine the Section 185 fee baseline amount:
  - First, choose the **lower** of either **actual** (in the emissions inventory [EI]) ozone precursor emissions (NO_X and/or VOC) or **permitted** emissions for the attainment year.
  - Second, take 80% of ozone precursor emissions reported in the EI or permit (the lower of the two chosen in the first step) to get the baseline amount.
- The fee is charged annually on the tonnage of actual ozone precursor emissions (in the EI) that exceed the baseline amount.
- If the actual ozone precursor emissions in the EI do not exceed the baseline amount, a fee is not assessed.

FCAA Section 185 Fee: Assessment (continued)

- The fee rate is $5,000 per ton of NO_X and VOC and is adjusted by inflation, using the Consumer Price Index.

- For calendar year (CY) 2023, the EPA-published fee rate was $11,922 per ton.

FCAA Section 185 Fee: Hypothetical Assessment

- For purposes of this example, assume:
  - Stationary source is major for NO_X emissions only
  - EI emissions lower than the permitted emissions
  - 2027 baseline year with 100 tpy of NO_X reported in the EI
  - 2028 is the first year the fee is assessed
  - CY23 Section 185 fee rate is used to estimate amount to be paid
- Baseline calculation:

$$100\ tpy\ * 80\% = 80\ tpy$$

- Fee will be paid on <u>2028</u> NO_X emissions emitted over 80 tpy reported in the EI.
- If NO_X emissions are 80 tpy or less, then no fee payment is due.

FCAA Section 185 Fee: Hypothetical Assessment (continued)

- In 2028, 125 tons of NO_X was reported in the EI.

$$(125 - 80) = 45$$

- Site would pay the fee on 45 tons of NO_X emissions in 2028.

- Using the CY23 fee rate for example purposes, the site would pay **$536,490.00** for NO_X emissions in 2028.

$$\$11{,}922.00 * 45 = \$536{,}490.00$$

FCAA Section 185 Fee: How Would the Money be Spent?

- If the DFW and/or the HGB 2008 eight-hour ozone nonattainment areas do not attain by July 20, 2027, and the fee is imposed, how will the collected money be spent?
  - If EPA collects the fee, the money goes into the U.S. Treasury.
  - If TCEQ collects the fee, the money goes into the Clean Air Act Fund.
    - The Legislature will provide direction on how to use the money **if** they appropriate the funds to TCEQ.

FCAA Section 185 Fee Rule Does Not Address Important Issues

- Baseline amounts for the following:
  - New major sources after the attainment date
  - Minor sources that existed on the attainment date but later became major sources
  - Equipment sold or transferred between companies
  - Aggregation of NO_X and VOC emissions for a baseline determination
  - Aggregation of sites under common control for a baseline determination

Section 185 Fee History in Texas

- Since the DFW area has not been previously classified as severe under a previous ozone NAAQS, a Section 185 Fee program has not been required before now.
- TCEQ developed a Section 185 fee program for the HGB area under the **revoked** one-hour ozone NAAQS that provided flexibilities in fee assessment.
- These flexibilities included:
  - site and pollutant aggregation to determine baseline amounts; and
  - mobile source funding credit from various grant programs, including the Texas Emissions Reduction Plan (TERP).

Section 185 Fee History in Texas (continued)

- Since the one-hour ozone NAAQS has been revoked, EPA approved these flexibilities as an “equivalent alternative program” allowed under FCAA, Section 172(e) in February 2020.
- Based on these approved flexibilities, TCEQ assessed the Section 185 fee, and the HGB one-hour ozone nonattainment area met the fee obligation based on TERP and other grant program revenue.
- Since the Section 185 fee obligation under the revoked one-hour ozone NAAQS was met, TCEQ did not issue invoices to HGB-area major stationary sources.

TCEQ Development of FCAA Section 185 Fee Program

- TCEQ is considering all options for the 2008 eight-hour ozone NAAQS.
- EPA decided not to issue guidance on Section 185 fee programs for eight-hour ozone NAAQS and directed states to consult with their EPA regional office.
- EPA regional staff have provided comments to California and Texas that an alternative Section 185 fee program for the 2008 eight-hour ozone NAAQS is not a SIP-approvable element at this time.

Opportunities to Provide Stakeholder Input

- We are soliciting stakeholder input on all aspects of rulemaking.
- Please email your informal comments to 185Rule@tceq.texas.gov by **September 9, 2024**.
- There will be a formal public comment period after the proposal agenda, tentatively set for April 2025.
  - The public comment period would tentatively be from end of April 2025 through the end of May 2025.
  - The rulemaking timeline will not allow time for an extension of the formal comment period due to the EPA rule submission deadline (November 7, 2025).

Section 185 Fee: Important Dates

- **September 9, 2024**: Due date for informal comments
- **April 2025**: Potential proposal of the TCEQ Section 185 fee program
- **April - May 2025**: public comment period and hearings
- **September 2025:** Potential adoption of the TCEQ Section 185 fee program
- **November 7, 2025**: TCEQ Section 185 fee program due to EPA (this date is final)
- Final dates will be posted on the Section 185 Stakeholder webpage.

Section 185 Fee: Important Dates (continued)

- **January 1 through December 31, 2026:** Areas must attain the 2008 eight-hour ozone NAAQS based on 2024 through 2026 monitoring data

- **2027**: Potential year for fee baseline determinations

- **2028:** Potential first year of fee assessment (if attainment is missed)

Helpful Information

- Section 185 Stakeholder webpage

- Email group to join the stakeholder group "*Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185*".

- Section 185 fee for the HGB revoked one-hour ozone NAAQS is located in 30 TAC 101 Subchapter B

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