Section 185 Failure to Attain Penalty Fee for the 2008 Eight-Hour Ozone Standard

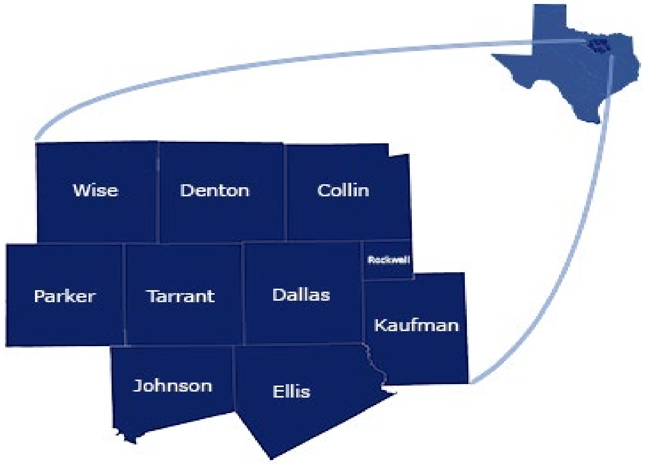
Jill Dickey-Hull
Air Quality Division
Environmental Trade Fair & Conference 2026

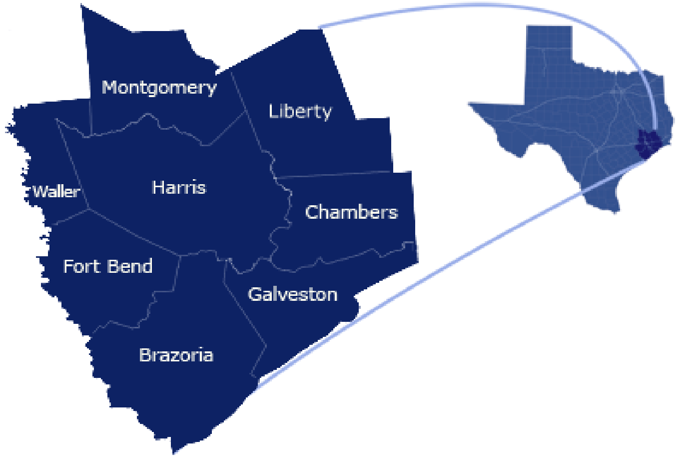
Overview

- Federal rule requirements
- Key points of adopted rule
- Rule flexibilities: baseline amounts and fee offsetting provisions
- Important potential fee milestones and timelines

Federal Requirements: Impacted Counties

- The penalty fee (fee, Section 185 fee, Failure to Attain Fee) is imposed if a severe or extreme area **fails to attain** an ozone standard by its attainment date.
  - The 10-county Dallas-Fort Worth (DFW) and eight-county Houston-Galveston-Brazoria (HGB) nonattainment areas are currently designated as severe under the 2008 eight-hour ozone standard.
  - The DFW and HGB severe attainment date is July 20, 2027.





Federal Requirements: Impacted Counties (cont.)

10-county DFW 2008 eight-hour ozone standard nonattainment area counties:

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

Eight-county HGB 2008 eight-hour ozone standard nonattainment area counties:

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

Federal Requirements: Impacted Sources

- **If implemented**, the fee applies to major stationary sources (major sources) of ozone precursor (volatile organic compounds (VOC) and nitrogen oxides (NO_X)) emissions in severe or extreme ozone nonattainment areas.
  - Major sources are defined by the amount of actual or potential emissions in a nonattainment area.
    - Major sources definition 30 Texas Administrative Code (TAC) Section (§) 116.12.
  - A major source in severe ozone nonattainment areas is 25 tons per year (tpy) of either actual or potential emissions of ozone precursors, VOC and/or NO_X.
  - The fee **does NOT apply** to minor stationary sources or mobile sources.

Federal Requirements

- The annual fee is based on each ton of ozone precursor emissions reported over a set baseline amount.
  - The Environmental Protection Agency (EPA) adjusts the fee rate for inflation.
  - **The current 2025 fee rate is $12,850.67 per ton of emissions.**
- The fee is required each year after the missed attainment date until the area is redesignated as attainment by EPA.
- If the state does not impose the fee, EPA is required to impose with interest, and the revenue is not returned to the state.
- Area(s) that fail to attain the standard but have an EPA-approved demonstration that the area did not attain because of international emissions (federal Clean Air Act (FCAA), §179B) are not subject to the fee.

Key Points: Fee Implementation

- On October 22, 2025, the commission adopted a rulemaking to implement the TCEQ Section 185 fee program and submitted it to EPA on November 7, 2025.

- The fee program was **NOT** implemented upon adoption.

- If the DFW and/or HGB nonattainment areas do not attain the 2008 ozone standard by July 20, 2027, then the fee would be applicable upon the **effective date**, as published in the *Federal Register,* of EPA's finding of failure to attain.

Key Points: Fee Implementation Outreach

- TCEQ plans to electronically distribute courtesy notifications to regulated entities if the fee is implemented. Examples include:
  - posting on the Stakeholder Group: Federal Clean Air Act Section 185 Fee; and
  - emailing the subscribers of Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185.
- Major sources of VOC and/or NO_X located in an applicable nonattainment area are responsible for self-reporting and submitting baselines and fee assessments.

Key Points: Attainment of Standard

- EPA will likely evaluate attainment of the 75 parts per billion (ppb) 2008 ozone standard based on 2024, 2025, and 2026 air monitoring data.
- This three-year average of air monitoring data is called a design value (DV).
  - *2025 and 2026 preliminary monitoring data as of March 11, 2026.
  - 2025 DVs will not be finalized until **May 2026.**
  - 2026 DVs will not be finalized until **May 2027.**

2024 DV	2025 DV*	2026 DV*
DFW: 83 ppb	DFW: 83 ppb	DFW: 74 ppb
HGB: 84 ppb	HGB: 85 ppb	HGB: 75 ppb

Key Points: Baseline Amounts

- Each major source sets an emissions baseline amount based on attainment year ozone precursor emissions.
  - For the DFW and HGB severe nonattainment areas, the current attainment year is 2027.

- For each year after the attainment year, the fee is determined by the amount of ozone precursor emissions reported in the point source EI that exceed the major source's baseline amount.

- The rule incorporates baseline amount flexibilities and the ability to adjust established baseline amounts under certain circumstances.

Key Points: Nonattainment Area Fee Offset Provisions

- After major sources establish their baseline amounts using allowed flexibilities, TCEQ would annually calculate the fee for each major source and then total these fees to determine the entire fee owed for each nonattainment area.

- The rule offsets each nonattainment area’s total fee obligation by crediting total annual grant revenue collected from that nonattainment area during the fee assessment year.

- If grant program’s revenue could not offset the entire fee obligation for a nonattainment area, then TCEQ would assess a prorated fee on major sources.

Key Points: Fee Offset Provisions for Major Source(s)

- If a prorated fee was assessed on major sources, additional offset provisions would be provided at the site (major-source) level.

- Major sources can use emissions reductions credits and/or certain portions of supplemental environmental projects to offset the fee owed for an individual site or group of sites.

Key Points: Fee Termination and Suspension

- The fee program ends upon:
  - redesignation of the nonattainment area to attainment by EPA (effective date specified in the *Federal Register*);
  - any final action or final rulemaking by EPA to end the fee;
  - a finding of attainment by EPA; or
  - a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the U.S.
- The Executive Director can suspend fee collection if either of the following is submitted to EPA:
  - three years of quality-assured air monitoring data resulting in a design value for the nonattainment area that does not exceed the 2008 eight-hour ozone standard (may exclude exceptional event days); or
  - a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the U.S.

Baseline Amounts: §§101.705 – 101.712

- TCEQ would use baseline amounts established under §§101.705 - 712 to assess the Section 185 fee.
  - **§101.705:** major sources that operated for the entire baseline year (e.g., operated on or before 1/1/27).
  - **§101.706:** major sources that began operating during the baseline year (e.g., 5/1/27) or after the baseline year (e.g., 7/12/28).
  - **§101.707:** allows both existing major sources and new major sources to aggregate emissions by pollutant and/or sites under common control.
  - **§§101.708 - 711:** provisions to adjust established baseline amounts initially established under §§101.705 - 707.
  - **§101.712:** failure to establish baseline amount.

Baseline Amount Timeframes: §101.705

- The **baseline year** is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in the rule.
  - Since the attainment date for the DFW and HGB severe nonattainment areas is July 20, 2027, the fee program baseline year is calendar year 2027 (barring any EPA approved extensions years).
- If a major source's emissions are irregular, cyclic, or otherwise vary significantly from year to year, then the source may select a historical, consecutive 24-month period prior to the baseline year:
  - five years for sites that are electric utility steam generating units (EGU): 2022 – 2026
  - ten years for non-EGUs: 2017 – 2026

Baseline Amount Calculation: §101.705

- For the baseline year (or other time period specified by rule), the **baseline amount** is the lower of:
  - total annual routine emissions reported in the EI (“baseline emissions”) or
  - total and pending authorized emissions (“permitted or allowable emissions”).
- The baseline emissions definition is consistent with federal and state requirements.
  - **Includes** emissions from annual routine emissions associated with normal operations as well as <u>**authorized**</u> and reported maintenance, startup, and shutdown (MSS) activities.
  - **Excludes** unauthorized emissions, including emissions from emissions events and unauthorized MSS activities.

Baseline Amount Calculation: §101.705 (cont.)

- If rules or regulations take effect during the baseline timeframe, then the baseline emissions and total annual authorized emissions must be adjusted downward to reflect those limits.

- The baseline amount calculation accounts for all emissions units located at the major source as of December 31 of the baseline year.
  - This would apply to all major sources, including major sources that qualify for a 24-month consecutive period to determine baseline emissions (sources with emissions that are irregular, cyclic, or otherwise vary significantly).

Baseline Amount Compliance Schedule: §101.705

- Major sources would submit the baseline amount data to TCEQ by the later of:
  - EI due date for the baseline year (defined in 30 TAC §101.10); or
  - 120 days after the effective date of EPA's finding of failure to attain (date cannot be predicted).

- Example: For a 2027 baseline year, the baseline amount is due the later of:
  - March 31, 2028 (2027 EI due date); or
  - 120 days after the effective date of EPA's finding of failure to attain (date cannot be predicted).

Baseline Amount for New Major Sources: §101.706

- A source that begins operating as major during or after the baseline year uses the **first full year (12 consecutive months) operating as a major source** to choose the lower of:
  - total amount of baseline emissions from the EI; or
  - total and pending annual authorized emissions.
- The baseline amounts:
  - are adjusted downward for emissions limitations in effect during the baseline timeframe;
  - account for all emissions units located at the major source as of the last calendar day of the baseline timeframe; and
  - are due to TCEQ **90 days** from the last calendar day of the first full year operating as a major source.

Aggregated Baseline Amount: §101.707

- After calculating separate baseline amounts for individual major sources and pollutants, major sources may choose to aggregate baseline amounts:
  - by pollutant (VOC and NO_X);
  - across sites under common control; or
  - a combination of pollutant(s) and site(s) under common control.

- Major sources use the same timeframe and basis (baseline emissions or total annual authorized emissions) for pollutant aggregation.

- Major sources use the same timeframe for commonly controlled site aggregation.

Aggregated Baseline Amount Scenarios: §101.707

Aggregation Scenario	Basis and Period
None. VOC and NO_X are not aggregated at one major source.	A separate basis and period can be used for each pollutant.
VOC is aggregated with NO_X at one major source.	The basis and the period must be the same for both VOC and NO_X.
VOC is aggregated with VOC at one or more other major sources. NO_X is <u>not</u> aggregated with NO_X at other major sources.	The basis and the period must be the same for the VOC at all major sources in the group. Each major source may maintain its own separate basis and period for the NO_X baseline amount.
VOC is <u>not</u> aggregated with VOC at other major sources. NO_X is aggregated with NO_X at one or more other major sources.	Each major source may maintain its own separate basis and period for the VOC baseline amount. The basis and the period must be the same for the NO_X at all major sources in the group.
VOC is aggregated with NO_X at more than one major source.	The basis and the period must be the same for both pollutants at all major sources in the group.

Baseline Amount Adjustments: §§101.708 – 101.711

- Major sources are allowed to request adjustments to established baseline amounts for the following scenarios:
  - If a major source operated less than 24 months when establishing the initial baseline amount;
  - New construction at major source;
  - Ownership transfers of emissions units **between major sources**; or
  - Revised EI data.
- Adjustment requests are due 90 days after completion of a scenario above.
- Once final, the adjusted baseline amount applies starting the next fee assessment year.
- Final adjusted baselines may not be used to process credits or refunds for prior fee assessment years.

Assessing the Section 185 Fee: §101.703 and §101.704

- For each year after the baseline year, TCEQ annually assesses the Section 185 fee for each major source.
  - The fee is based on VOC and/or NO_X emissions reported in the point source EI that **exceed 80 percent** of the baseline amount, rounded to the nearest ton.
  - If the VOC and/or NO_X emissions do not exceed 80 percent of the baseline amount, then no fee is owed for that fee assessment year.
- TCEQ sums the fee for each major source to determine an area's total fee obligation for the fee assessment year.

Determining a Nonattainment Area's Total Fee Obligation: §101.703 and §101.704

- The area's total fee obligation would be offset by crediting grant program revenue collected as long as any funds are expended within a nonattainment area, including revenue from:
  - Texas Emissions Reduction Plan (TERP); and
  - future emissions reduction grant programs created by the Legislature.
- A Fee Equivalency Account would be created for each nonattainment area to annually **document** the amount of revenue available to offset the area's total fee.
- The amount of revenue available for these programs would be annually recorded in the TCEQ Section 185 database.

Determining a Nonattainment Area's Total Fee Obligation: §101.703 and §101.704 (cont.)

- The Section 185 database applies this amount as a credit to offset the entire nonattainment area's annual fee.
  - There is no transfer of funds between TERP or future programs and the Fee Equivalency Accounts.
  - The use of TERP to offset the Section 185 fee does not impact or change how the TERP program operates.
    - Any TERP revenue available in the TERP Trust will continue to provide grants.

- If there is not enough revenue from TERP and/or other grant programs to offset the entire area fee obligation, then major sources will pay a prorated fee to fulfill the total fee owed for the area.

Historically Available TERP Revenue

Below are the historically available TERP revenues in the DFW and HGB 2008 eight-hour ozone standard severe nonattainment areas.

Year	DFW	HGB
2020	$50,037,358	$42,243,622
2021	$57,672,940	$47,602,746
2022	$58,211,197	$47,969,523
2023	$58,014,681	$49,239,138
2024	$69,759,041	$51,038,545
2025	$63,582,240	$53,158,430

Example: Partial Offset of a Nonattainment Area's Total Fee Obligation

$$(Area\ Obligation) - (Fee\ Equivalency\ Account) = Fee\ Balance$$

- **$210 million:** Nonattainment area total fee obligation (**area obligation**) for the 2028 fee assessment year as calculated by TCEQ.
- **$43 million:** Amount available in the nonattainment area's **Fee Equivalency Account** from TERP revenue for the 2028 fee assessment year.
- **$167 million**: **Fee balance** due for the 2028 fee assessment year that is not covered by TERP. This amount must be paid by major sources located in a nonattainment area.
- **20.48%:** TERP revenue percentage coverage of the area's obligation. Each major source's individual initial fee owed is **reduced** by this percent.

$$\left(\frac{Fee\ Equivalency\ Account}{Area\ Obligation} \times 100\right)$$

Example: Partial Offset of a Nonattainment Area's Total Fee Obligation (cont.)

$$\left(\frac{Fee\ Balance}{Area\ Obligation}\right) \times (Section\ 185\ Fee) = Prorated\ Fee$$

- **\$167 million:** Fee Balance
- **\$210 million:** Area Obligation
- **\$50,000:** Initial Section 185 Fee owed from one hypothetical major source **before** applying the 20.48% TERP reduction for the 2028 fee assessment year.
- **\$39,760:** Prorated Fee owed from one hypothetical major source **after** applying the 20.48% TERP reduction for the 2028 fee assessment year.

Offsetting a Major Source's Fee Obligation: §§101.715 – 101.717

- Section 185 fee could also be reduced for each major source that relinquishes credits (on a ton-for-ton basis) from the:
  - Emissions Reduction Credits;
  - Discrete Emissions Reduction Credits;
  - Mass Emissions Cap and Trade program; and/or
  - Highly-Reactive VOC Emissions Cap and Trade program.

- Certain portions of a supplemental environmental project (on a dollar-for-dollar basis) could be used to offset a fee obligation.

- If the major source were part of a group for baseline amounts, the credit would be applied to the group.

Important Potential EI Reporting Years for the Section 185 Fee

- The baseline year is determined by the attainment date (July 20, 2027).

- Reporting year (RY) 2027 EI would likely be the baseline year for most major sources, assuming:
  - the baseline emissions (VOC and/or NO_X reported in the 2027 EI) are lower than the permitted emissions, and
  - the major source operated on or before 1/1/27.

- RY 2028 EI would be the first fee assessment year for major sources that operated during the 2027 baseline year.

Section 185 Fee Hypothetical Calculation Example

- Hypothetical example assumptions:
  - Stationary source major for NO_X emissions only
  - EI emissions lower than the permitted emissions in 2027
  - 2027 baseline year reported 100 tpy of NO_X emissions in the EI
  - 2028 first fee assessment year
  - CY 2025 Section 185 fee rate to estimate amount to be paid
  - No offsets for the nonattainment area (e.g., TERP) or for this major source (e.g., relinquishing emissions reductions credits).
- Baseline amount calculation:

$$\mathbf{100}\ \boldsymbol{tpy} \ast \mathbf{80\%} = \mathbf{80}\ \boldsymbol{tpy}$$

- The NO_X emissions baseline amount is set at 80 tpy, so the fee would be paid on emissions reported over 80 tpy in the <u>RY 2028 EI</u>.

Section 185 Fee Hypothetical Calculation Example (cont.)

- RY 2028 NO_X emissions included 90 tpy of annual routine, 30 tpy of EE, and 5 tpy from unauthorized MSS.

$$((\mathbf{90} + \mathbf{30} + \mathbf{5})) - \mathbf{80}) = \mathbf{45}$$

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

- Using the CY 2025 fee rate for example purposes and assuming no offsets, the site would pay **$578,280.15** for NO_X emissions in 2028.

$$(\mathbf{12,850.67} * \mathbf{45}) = \mathbf{\$578,280.15}$$

- Fee collection would likely not occur until CY 2030.

DFW and HGB Potential Fee Assessment Timing

Date	Event
7/20/27	2008 eight-hour ozone standard severe attainment date based on 2024, 2025, and 2026 monitoring data.
~11/2027 (assumed for example purposes)	If EPA publishes the finding of failure to attain notice in the Federal Register within three months of the missed attainment date, then the effective date **could be** November 2027.
3/31/28	2027 EIs **and baseline amounts** would be due to TCEQ.
3/31/28-12/15/28	TCEQ would quality assure the 2027 EIs **and baseline amounts**.
~Fall 2028	EPA would publish the 2028 fee rate (typically occurs in October or November).
12/31/28	2027 EIs are due to EPA (baselines are not submitted to EPA).
4/2/29	2028 EIs are due to TCEQ (3/31/29 falls on a Saturday).
~Fall 2029	TCEQ would assess the fee for calendar year 2028, the first fee assessment year.
~Early 2030	2030 would be the first fee collection year, TCEQ would invoice 2028 fees based on final 2027 baseline amounts and final 2028 EI emissions.

Resources

- Stakeholder Group: Federal Clean Air Act Section 185 Fee
  - https://www.tceq.texas.gov/airquality/point-source-ei/185-fee

- TCEQ Rule: Failure to Attain Fee for the 2008 Eight-Hour Ozone Standard
  - https://texas-sos.appianportalsgov.com/rules-and-meetings?chapter=101&interface=VIEW_&part=1&subchapter=K&title=30

Contact Information

- Jill Dickey-Hull, Project Manager
    - jill.dickey@tceq.texas.gov

- Danielle Nesvacil, Emissions Assessment Section Manager
    - danielle.nesvacil@tceq.texas.gov

- Email: 185Rule@tceq.texas.gov