

# 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.<sup>1</sup> 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<sub>x</sub>) 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.

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<sup>1</sup> The attainment year ozone season is the ozone season immediately preceding a nonattainment area's attainment deadline.

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**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.<sup>2</sup>

The FCAA, §185 penalty fee is assessed on each ton of NO<sub>x</sub>, 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<sub>x</sub> is subject to the fees on NO<sub>x</sub> emissions; a major stationary source for VOC is subject to the fees on VOC emissions; and a major stationary source for both NO<sub>x</sub> 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<sub>x</sub>, 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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<sup>2</sup> [https://www.epa.gov/system/files/documents/2024-10/memorandum-sec-185-penalty-fees-for-year-2024\\_0.pdf](https://www.epa.gov/system/files/documents/2024-10/memorandum-sec-185-penalty-fees-for-year-2024_0.pdf)

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- 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<sub>x</sub> 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

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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](https://www.tceq.texas.gov/airquality/point-source-ei/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.

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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;

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- 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;<sup>3</sup>
- 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.

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<sup>3</sup> The proposed rule prohibited the use of the SEP Offset Amount to partially or completely fulfill the Failure to Attain Fee.

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**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

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**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  
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