

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** April 11, 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 Proposed Rulemaking
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 0.75 parts per million, 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 2024 design value for the DFW nonattainment is 83 parts per billion (ppb) and for HGB is 84 ppb.

With the severe classification, the DFW and HGB areas are subject to FCAA, §182(d)(3), 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. The 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 the missed 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 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 not be returned to the state.

Scope of the rulemaking:

The rulemaking would 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.

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A.) Summary of what the rulemaking would do:

These proposed new rules would 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 proposed rulemaking includes applicability requirements, cessation of the program, exemption to the program, baseline amount determination options, fee assessment, calculation, compliance schedules, collection, and payment.

The proposed fee calculation reflects the FCAA, §185 penalty fee rate. As stated in FCAA, §185, the fee is \$5,000 per ton, as adjusted annually for inflation by the Consumer Price Index (CPI), of NO_x, VOC, or both emitted in excess of 80% of a major stationary source's baseline emissions. 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 EPA-specified adjusted fee rate for calendar year 2024 is \$12,476.67 per ton.² The major stationary source's baseline amount is determined as the lower of the actual emissions or allowable emissions during the attainment year.

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

B.) Scope required by federal regulations or state statutes:

The rulemaking would 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 proposed rulemaking:

- 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 attainment year.
- A major stationary source is annually assessed the Section 185 fee on emissions of NO_x VOC, or both pollutants (depending on a source's major source determination), as reported in the annual emissions inventory, 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 would not have to pay the Section 185 fee for that extension year, but the fee would be implemented upon failure to attain the extended attainment date.

C.) Additional staff recommendations that are not required by federal rule or state statute:

The proposed rule includes various Section 185 fee program elements not specifically addressed in FCAA, §185 provisions that staff recommend including. Examples include:

- 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 from the Texas Emissions Reduction Plan (TERP) expended within that severe nonattainment area;

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

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- provisions to fulfill an individual major stationary source's fee obligation by relinquishing emissions credits or investing in a supplemental environmental project specific to the severe nonattainment area;
- baseline amount determination flexibilities such as aggregation by pollutant and/or sites under common control;
- applicability and 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;
- determining baseline amounts for source's 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.

Statutory authority:

Texas Clean Air Act, §§382.011 382.012, 382.017 and 382.0622; and Texas Water Code, §§5.102, 5.103, 5.105 and 5.701

Effect on the:

A.) Regulated community:

Based on recent emissions inventory and Title V data, this rulemaking could impact as many as approximately 180 DFW-area and approximately 280 HGB-area major stationary sources emitting NO_x and/or VOC. The proposed rulemaking would require these sources to pay the penalty fee in 2028 for an area that 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 could offset the nonattainment's area fee obligation, and future fee rates; therefore, an accurate fee obligation for the nonattainment areas is not possible. Estimating a maximum potential fee obligation assuming no baseline amount flexibilities exercised, no emissions reductions from the baseline, no fee offsets from TERP revenue, and an estimated future fee rate, the annual DFW fee obligation could be as much as \$47 million per year, and the annual HGB obligation could be as much as \$171 million per year.

B.) Public:

Citizens may be impacted if companies raise prices for 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.

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

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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 Area Council of Governments 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 this 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.

Potential controversial concerns and legislative interest:

- **Alternative Methods to Meet Fee Obligation** - EPA has not provided guidance for FCAA, §185 fee development specific to the 2008 eight-hour ozone NAAQS, and it directed states to consult with the appropriate EPA Regional Office. During the informal comment period, stakeholders submitted comments in support of and in opposition to an equivalent alternative fee program.
- **Baseline Amount Flexibility** - Staff propose allowing baseline amount aggregation by pollutant and/or sites under common control for sites located in the same nonattainment area. During the informal comment period, stakeholders submitted comments in support of and in opposition to baseline amount determination flexibilities.
- **Baseline Amount Adjustments** - Adjustments to established baseline amounts are proposed for limited circumstances, which may not be considered approvable by EPA.
- **Cessation of Fee Program** - The FCAA requires the fee to be paid until the area is redesignated as attainment by EPA. The proposed rulemaking provides that fee collection could be held in abeyance with a finding of attainment by EPA or upon submission to EPA of three consecutive years of quality-assured ambient monitoring data showing that no monitors exceed the NAAQS. As proposed, 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. This provision was adopted in the Section 185 fee program under the revoked one-hour ozone NAAQS. EPA has not taken final action concerning these alternative criteria for the one-hour program, but its proposed disapproval action was published on December 19, 2024 (89 FR 103734).

Would 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 proposed rulemaking. Fiscal staff would invoice the affected major stationary sources when necessary and collect the revenue.

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.

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Key points in the proposal rulemaking schedule:

Anticipated proposal date: May 1, 2025
Anticipated *Texas Register* publication date: May 16, 2025
Anticipated public hearing date: June 12, 2025
Anticipated public comment period: May 6, 2025 - June 18, 2025
Anticipated adoption date: October 22, 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
John Minter, Staff Attorney, Environmental Law Division, (512) 239-0663
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
John Minter
Terry Salem
Gwen Ricco
Jamie Zech