

# Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

**To:** Commissioners **Date:** October 30, 2009

**Thru:** LaDonna Castañuela, Chief Clerk  
Mark R. Vickery, P.G., Executive Director

**From:** Susana M. Hildebrand, P.E., Chief Engineer

**Docket No.:** 2009-1400-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 101, General Air Quality Rules  
Failure to Attain Fee  
Rule Project No. 2009-009-101-EN

**Reasons for the rule package:** The Federal Clean Air Act (FCAA), §§ 182(d)(3) and (e), Plan Submission and Requirements, and §185, Enforcement for Severe and Extreme Ozone Nonattainment Areas for Failure to Attain, requires each state implementation plan (SIP) for ozone nonattainment areas classified as severe or extreme to impose a penalty fee for major stationary sources of volatile organic compounds (VOC) located in the area if the area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. FCAA, §182(f), Plan Submissions and Requirements, requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO<sub>x</sub>). The fee is required to be imposed for each calendar year after the attainment date until the area is redesignated as an attainment area for ozone. The fee is \$5,000 per ton, as adjusted by the consumer price index, of VOC or NO<sub>x</sub> or both emitted in excess of 80 percent of the stationary source's baseline emissions. If the state does not collect the fees that are due, then the United States Environmental Protection Agency (EPA) must collect the fees and can collect interest. Fees and interest would not be returned to Texas.

**Under what authority are we proposing these changes?** State authority: Texas Clean Air Act, Texas Health and Safety Code, §382.011, relating to General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and Texas Water Code, §5.102, General Powers; and §5.105, General Policy.

Federal authority: FCAA, §182(d)(3), (e), and (f); and §185.

**Is this rulemaking required by federal rule or state statute? Yes. Which ones?** The rulemaking is required to implement FCAA, §182(d)(3), (e) and (f), Plan Submissions and Requirements, and §185, Enforcement For Severe and Extreme Ozone Nonattainment Areas for Failure to Attain.

**Are there any legal deadlines by which these rules must be proposed, adopted, or effective?** No deadline is specified. However, EPA may require such provisions as part of the 1997 eight-hour ozone SIP and future EPA rulemaking may specify how EPA interprets the applicability of the penalty fee requirement for future ozone standards. If the commission does not collect fees for the failure of the Houston-Galveston-Brazoria (HGB) area to attain the one-hour ozone standard, the FCAA requires EPA to collect the fees. The fees are collected for calendar year 2008 and continue until the HGB area is redesignated to attainment for the one-hour ozone standard.

**What issue(s) or problem(s) are we trying to solve?** The FCAA, §185 requires a penalty fee on emissions in excess of 80 percent of a baseline amount if an area fails to attain the NAAQS by the applicable attainment date. In addition to the required fee, the commission is proposing equivalent alternatives, under §172(e), Nonattainment Plan Provisions, as incentives to reduce ozone in the nonattainment area.

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**Why is it important that we do this rule package?** If the EPA makes a finding that Texas is not administering and enforcing a fee program required under FCAA, §185, then the EPA must collect the fees and can collect interest. Fees and interest collected by EPA would not be returned to Texas.

**Other important background or historical information.** The EPA has issued some guidance (*Harnett, March 2008*) allowing states to implement equivalent alternatives to the baseline amount and is considering guidance on equivalent alternatives to collecting the fee. The baseline amount alternative allows a historical perspective if the sources are irregular, cyclic, or have emissions that vary. Additionally, the Texas proposed rule includes equivalent alternatives as options to a basic fee collection program.

A recent court ruling (*South Coast v. EPA*) vacated EPA's rule that allowed areas to not implement the penalty fee requirement for the one-hour ozone standard. Additionally, although EPA did not require Texas to include a specific regulatory mechanism for implementing the FCAA, §185 penalty fee requirement in the HGB one-hour ozone SIP adopted by the commission in December 2000, EPA may require such provisions as part of the 1997 eight-hour ozone SIP and future EPA rulemaking may specify how EPA interprets the applicability of the penalty fee requirement for future ozone standards.

**Scope of the rulemaking:**

The rule reflects the FCAA, §185 fee-based calculation on emissions in excess of 80 percent of the stationary source's baseline emissions of VOC or NO<sub>x</sub> or both. The baseline amount may be calculated as the lower of the average baseline emissions or average allowable emissions. The rule reflects the FCAA, §185 required penalty of \$5,000 per ton, as adjusted by the consumer price index. The rule includes source applicability determination, emission baseline amount calculation methodology for each source and pollutant, determination of fee required, and due dates for fee payment. A provision to automatically end the fee program upon attainment of the standard would be included.

The proposed rule includes emissions-based alternatives to the §185 fee. Alternatives include credit for emissions reductions beyond current requirements relied upon in the attainment demonstration SIP, the ability to use emissions reduction credits, or the ability to fund Supplemental Environmental Projects. Alternatives to establishing a baseline amount on VOC and on NO<sub>x</sub> are proposed. Sites may aggregate their VOC with their NO<sub>x</sub> or, if the source is subject to the Highly-Reactive Volatile Organic Cap and Trade Program (HECT) or Mass Emissions Cap and Trade Program (MECT), may aggregate VOC or NO<sub>x</sub> from multiple source under common control.

The proposed new rules for the FCAA, §185 fee program would be created in new 30 TAC Chapter 101, Subchapter B. The rule would be organized to provide flexibility in satisfying the FCAA requirement as well as options for complying with the explicit FCAA, §185. This organization would allow EPA to approve all or part of the rule to prevent the possibility of FCAA, §185 fees being imposed and collected by the federal government.

**Changes required by federal rule:**

- Defines rule applicability as major stationary sources in a severe or extreme nonattainment area that has not demonstrated attainment by the applicable attainment date.
- Defines baseline amount as lower of baseline amount or authorized emissions on the attainment date.
- Provides formula reflecting FCAA, §185 language for estimation of the fee obligation.

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- Fees are due on the emissions of VOC or NO<sub>x</sub> or both emissions in excess of 80 percent of a site's baseline amount.
- Establishes end of fee program when area is redesignated attainment.

**Changes required by state statute:**

- None

**Staff recommendations that are not expressly required by federal rule or state statute:**

- VOC and NO<sub>x</sub> may be aggregated at a single site, or kept separate for determining the baseline amount and the fee obligation.
- Some site aggregation will be allowed for determining the baseline amount and the fee obligation. VOC can be aggregated if multiple sites are subject to HECT. NO<sub>x</sub> can be aggregated if multiple sites are subject to MECT.
- Allow a Supplemental Environmental Project (SEP) to reduce fee obligation (dollar for dollar or ton for ton).
- Allow retirement of allowances or credits on a ton for ton and pollutant by pollutant basis to reduce fee obligation.
- Major stationary sources not in existence at attainment date are exempted from a fee.
- Minor sources on the attainment date that subsequently become major, pay on emissions based on first year operating as a major source.
- Further defines end of fee program as three consecutive years of certified monitoring data submitted to the EPA demonstrating that the monitors did not exceed the NAAQS or a finding of attainment.
- Establishes due dates for baseline amount and fee obligation.
- For sources that are cyclic, irregular, or have varying emissions, a historical perspective may be used to determine a baseline amount, as allowed in a 2007 guidance memo from EPA.

**Impact on the regulated community:**

**Who will be affected?** Regulated entities that are major stationary sources of VOC and/or NO<sub>x</sub> in a severe or extreme ozone nonattainment area that has not demonstrated attainment by the attainment date. At this time, only the HGB eight county one-hour and eight-hour nonattainment area is subject to the rule.

**Does it create a group of affected persons who were not affected previously?** Yes, owners of major stationary sources in a severe or extreme nonattainment area that did not demonstrate attainment are subject to the fee. For the HGB area, this may impact 300 to 400 major stationary sources. **How?** This is a new fee.

**Will there be a fiscal impact? If so, estimate.** The proposed rule provides that the fee can be calculated using a baseline amount for VOC or NO<sub>x</sub> or both. The fee is due on emissions exceeding 80 percent of the baseline amount for each site. Baseline amounts are based on baseline emissions or potential emissions, or for sources that are cyclic, irregular, or have varying emissions, a historical perspective. Estimated fee revenue collections are very difficult to project without knowing the baseline amount determination for each site and on participation in an alternative obligation such as a SEP. The required penalty of \$5,000 per ton is adjusted annually by the CPI. At \$8,126 per ton, and depending upon the average number of tons of pollutants over the baseline amount, revenue could be between \$73,134,000 and \$124,269,292 the first year.

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**Impact on the public:**

**Who will be affected?** Individuals living in the HGB nonattainment area could be impacted as companies further reduce emissions to reduce fee obligations.

**Does it create a group of affected persons who were not affected previously? No. How?** EPA is obligated to collect the fee if the state does not collect the fee.

**Will there be a fiscal impact? If so, estimate.** No direct fiscal impact is anticipated to the public.

**Impact on agency programs:**

Staff will be reviewing and entering baseline amount information into a database. The most significant effort will be in the first two years to establish the initial baseline amount, develop reporting forms and processes, develop fee reporting processes, and develop database requirements. Most of this effort will be from the Emissions Assessment Section staff in the Air Quality Division. Additional effort will be required from the Banking and Trading Team staff in the Air Quality Division for verifying that sites have the allowances they claim. Once established, site baseline amounts should be relatively stable. An ongoing support effort from the Emissions Assessment Section staff will be required for verifying, updating, and maintaining baseline amount emissions data as well as for annual fee assessments, as long as an area remains subject to the fee. Fiscal support will also be needed for the fee billing process. Support from the Information Resources Division will be needed for the development of a new database or modification of an existing database to support the baseline amount data and fee assessments. Office of Legal Services, Office of Compliance and Enforcement, Office of Permitting and Registration, and Chief Engineer's Office staff may be required to review additional SEPs as an ongoing support effort.

**Stakeholder meetings:**

**Have any stakeholder meetings been held?** Two stakeholder meetings have been held, March 4 and June 12, 2009.

**With whom?** The meetings were open to the public; industry representatives from major stationary sources and environmental groups were the principal participants. Representatives from, Region 6, EPA also attended.

**What were the general sentiments?** Industry representatives supported flexibility in baseline amount determinations, fulfilling fee obligations with alternative methods such as SEPs or retirement of emissions credits or allowances, and aggregating pollutants for baseline amount determinations and fee obligations. Environmental groups support a fee-only program and were generally against the alternatives for fee obligation and baseline amount determinations. Some emphasized the penalty portion of the fee program.

**Were any changes made in response to stakeholder concerns?** The inclusion of SEPs, retirement of emissions credits or allowances, and site and pollutant aggregation for baseline amount determinations were included as a result of stakeholder input.

**Policy issues:**

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**What policy issues are affected?** None. Existing program policy will not be impacted.

**Are any policies that are not currently based on rule being made into a rule?** No.

**What are the consequences if this rulemaking is not approved to go forward?** If the EPA determines that the state has not implemented the requirements of the FCAA, §185 rule, they would collect any unpaid fees and may collect interest. Fees and interest collected by EPA would not be returned to Texas. Additionally, EPA could issue a finding of failure to submit a required element of the SIP, resulting in the start of sanctions and federal implementation plan clocks, which if implemented, would also have transportation conformity implications.

**Are there alternatives?** Not implementing a rule would result in noncompliance to FCAA, §185.

**Potentially controversial matters:** The EPA has not provided formal guidance on alternative methods to meet fee obligations or to calculate baseline amount determinations. The proposed rule implements “pay the fee” as outlined in FCAA, §185 and, additionally, includes equivalent alternatives, under FCAA, §172(e). All options are supported by staff; however, the following options are not expressly required by federal rule and could be denied by the EPA.

- VOC and NO<sub>x</sub> can be aggregated at a single site, or kept separate. The FCAA, §185 was originally written for VOC. NO<sub>x</sub> is included because of the SIP requirements of FCAA, §182(f). Staff supports allowing aggregation as an option because current SIP revisions target reductions in one ozone precursor pollutant in preference to the other. Maintaining the pollutants separately for baseline amount determinations and fees unfairly penalizes companies that supported the approach used in Texas’ SIP revisions.
- Some site aggregation is allowed. VOC can be aggregated if multiple sites are subject to HECT rules. NO<sub>x</sub> can be aggregated if multiple sites are subject to MECT rules. This aggregation, which is restricted to only those sources that can participate in these cap and trade programs, supports industry that used a cap and trade system to cost effectively reduce ozone emissions.
- Fee obligation (dollar for dollar or ton for ton) may be met with alternative methods. The use of SEPs for reducing the fee obligation are restricted to projects that have an actual air emissions reduction in the area. The rule also proposes relinquishing emissions allowances or credits to reduce fee obligation. Removing the allowance from the air shed would prevent future emissions.
- Major stationary sources not in existence at attainment date may be exempted from program. New major sources were subject to nonattainment new source review and have already offset their emissions. Additionally, these sources did not contribute to the nonattainment status at the attainment date. The EPA recently proposed limited disapproval of San Joaquin Valley's implementation of the FCAA, §185 fee rule submitted as Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District. One of the components disapproved was a similar exemption.
- Minor sources on the attainment date that subsequently become major pay on emissions based on first year operating as a major source. The FCAA, §185 rule language specifies applicability is for major sources. The rule proposes allowing a minor source that become major after the attainment date to use emissions from the first year of operation as a major source, rather than the lower level while operating as a minor source, to establish its baseline amount.

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**Key points in proposed rulemaking schedule:**

<b>Anticipated proposal date:</b>	<b>November 18, 2009</b>
<b>Anticipated <i>Texas Register</i> publication date:</b>	<b>December 4, 2009</b>
<b>Public hearing dates (if any):</b>	<b>January 5 and 6, 2010</b>
<b>Public comment period:</b>	<b>Jan 11, 2010</b>
<b>Anticipated adoption date:</b>	<b>April 28, 2010</b>

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