

BAKER BOTTS LLP

ONE SHELL PLAZA
910 LOUISIANA
HOUSTON, TEXAS
77002-4995

TEL +1 713.229.1234
FAX +1 713.229.1522
BakerBotts.com

ABU DHABI	HOUSTON
AUSTIN	LONDON
BEIJING	MOSCOW
BRUSSELS	NEW YORK
DALLAS	PALO ALTO
DUBAI	RIYADH
HONG KONG	WASHINGTON

January 14, 2013

Charlotte Horn
MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
512.239.4808 (fax)

Zachary L. Craft
TEL +1 713.229.1133
FAX +1 713.229.7933
zachary.craft@bakerbotts.com

**Re: Rule Project Number 2009-009-101-AI
Comments of the Section 185 Working Group**

Dear Ms. Horn:

The Texas Commission on Environmental Quality ("TCEQ") has invited public comments on its proposed Chapter 101 "Failure to Attain Fee" rule, published at 37 Tex. Reg. 9468 (Nov. 30, 2012) (the "Proposed Rule"). These comments are submitted on behalf of the Section 185 Working Group, a coalition of industrial companies that own and operate major stationary sources that are subject to the Proposed Rule.¹ The Working Group appreciates the opportunity to comment on the proposal.

The Proposed Rule, which is designed to implement federal Clean Air Act Section 185, could impose substantial new financial burdens on the Houston/Galveston/Brazoria ("HGB") area's economy, hindering economic growth. Key issues for the Proposed Rule are as follows:

- *Evaluating HGB's Attainment Status:* Fees should not be imposed until the HGB area's attainment status is confirmed. Under the federal Clean Air Act, applicable regulations, and EPA's Clean Data Policy, the fees would not be required if: (1) the area attains the 1-hour ozone standard in 2013; (2) ozone levels on 1-hour ozone exceedance days affected by wildfires can be confirmed and excluded as exceptional events; or (3) the area would have attained the 1-hour ozone standard but for emissions emanating from outside the United States.
- *Termination:* The fee program should provide for expeditious termination in the event of attainment, taking account of exceptional events and international emissions.

Working Group members are Albemarle, BASF, BP America, Chevron Phillips Chemical, Dow Chemical, Entergy Texas, Enterprise Products, ExxonMobil, Kinder Morgan, Lyondell Chemical Company, Magellan Midstream Partners, Marathon Petroleum Corporation, NRG Texas Power LLC, Oiltanking North America, Phillips 66, Shell Oil Company, TPC Group, and Valero.

OFFICE OF LEGAL SERVICES

JAN 14 2013

RECEIVED

- *Equivalent Program Features:* If the Section 185 fee obligation cannot be terminated or suspended, Texas should apply the greatest flexibility for equivalent program options allowed by the statute and embraced by EPA for other areas. These flexibilities include use of mobile source fees to replace stationary source fees and flexible methods for calculating stationary source fee baselines. The Working Group supports the equivalent program features included in the Proposed Rule, as further elaborated below.
- *Prospective Application:* Section 185 fees should only be collected prospectively. The Working Group supports TCEQ's proposal not to calculate Failure to Attain Fees for periods before the most currently available emissions inventory at the time of the rule's final adoption.
- *New Units:* New units should be accommodated commensurately with other sources in the Section 185 fee program. The Working Group supports TCEQ's proposal to provide a baseline derived from the first year of operation for certain new units, subject to suggested changes described below.
- *Newly Authorized Emissions:* Facilities and activities that were permitted as maintenance, startup, and shutdown ("MSS") or otherwise permitted after the attainment date should be integrated into the affected sites' baselines. The Working Group supports the relevant features of the Proposed Rule that address these scenarios, subject to suggested changes described below.
- *Rule Language Recommendations:* The Working Group offers additional comments to address specific issues, as detailed below.

1. Evaluating HGB's Attainment Status

Ozone monitors in the HGB area show that measured air quality is within 1 part per billion ("ppb") of meeting the 1-hour ozone standard, based on the most recent 2010-2012 averaging period. If an area attains the 1-hour standard, then it is not subject to Section 185 fees. *See, e.g.,* 76 Fed. Reg. 39,775 (Jul. 7, 2011) (EPA final Section 185 "termination determination" rule for Baton Rouge area based on attainment of the 1-hour ozone standard); 77 Fed. Reg. 36,163 (June 18, 2012) (EPA finding that the New York City area is currently attaining the 1-hour ozone standard, rejecting comments asking for imposition of Section 185 fees for periods before EPA's finding of attainment); 74 Fed. Reg. 18,641 (Apr. 24, 2009) (determination that the Milwaukee-Racine area attained the 1-hour ozone standard by its attainment date and therefore was not subject to Section 185 fees).

Before any Failure to Attain Fees are collected, the Working Group requests that TCEQ evaluate all avenues to determine that the area has attained the 1-hour ozone standard and

that the fees do not apply. This could take the form of a fee abeyance feature in the proposed rule; an "exceptional events" demonstration submitted to EPA; and an analysis that the Houston area would have attained but for emissions emanating from outside the United States. Each is discussed below.

A. Fee Abeyance

TCEQ has proposed, at section 101.118, that the Failure to Attain Fee may be placed in abeyance if data are submitted to EPA indicating that the Houston area has attained the 1-hour ozone standard. The Working Group supports this feature of the proposal.

As of 2010-2012, only one regulatory ozone monitor in Houston exceeds the 1-hour standard, and only by 1 part per billion ("ppb"). It is possible that all monitors in the region will reflect attainment of the standard based on the 2011-2013 averaging period or further in the future. If this occurs, TCEQ should expeditiously submit the relevant data to EPA, place the fee in abeyance, and pursue a permanent termination of the Failure to Attain Fee program.

B. Exceptional Events

Under EPA's "exceptional events rule," air quality data may be excluded from regulatory consideration if they are caused by an exceptional event, such as a wildfire. *See* 40 C.F.R. § 50.14.

TCEQ has "flagged" 1-hour ozone readings that exceed the standard at the Houston East air quality monitor on August 26 and 29, 2011 as potentially influenced by exceptional events. *See* Letter from David Brymer, Director, Air Quality Division, TCEQ, to Maria Martinez, Air Quality Analysis Section Chief, EPA Region 6, Re: Proposed PM2.5 Exceptional Event Flags for 2011 (June 29, 2012). If either reading were excluded under the exceptional events rule, the Houston East monitor (and the entire HGB area) would be considered to attain the 1-hour ozone standard.

The Working Group therefore requests that TCEQ pursue EPA concurrence on the August 26 and 29, 2011 data, and other data flags, and that TCEQ not impose Failure to Attain Fees pending EPA action on the data flags.

C. Emissions Emanating From Outside the United States

The federal Clean Air Act provides that an area is exempt from Section 185 fees if it would have attained the ozone standard by the applicable attainment date but for international emissions:

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the [EPA] Administrator that, with respect to an ozone nonattainment area in such State, such State would have attained the national ambient

air quality standard for ozone by the applicable attainment date, but for emissions emanating from outside the United States, shall not be subject to the provisions of . . . section 7511d [Clean Air Act Section 185] of this title.

42 U.S.C. § 7509a(b).

Houston's 1-hour ozone standard attainment date was in 2007. *See* 42 U.S.C. § 7511(a)(1)-(2); 40 C.F.R. § 81.344. A federal court has determined that, despite the 3-year averaging period for 1-hour ozone attainment, an area attains by the attainment date if it attains in the attainment year, without regard to the immediately preceding years:

[I]t is inconsistent with the statutory scheme to require attainment effectively by 2005. First, such a construction runs counter to the plain language of the Act, which sets the attainment date as November 15, 2007. Indeed, *given that clarity of statutory language, if there were in fact a conflict between the statute and EPA's regulations, it would be the regulation that would have to yield and not . . . the statute.* Second, other provisions of the Act envision incremental progress up until the attainment date, suggesting that Congress expected attainment by the attainment date and not sooner.

Environmental Defense v. EPA, 369 F.3d 193, 207 (2d Cir. 2004) (emphasis added; internal citations omitted).

Ozone monitoring data in HGB show that the area was within 3 ppb of attaining the 1-hour ozone standard in 2007.² Other than the Northwest Harris County monitor, all regulatory monitors had at most 1 exceedance during 2007, which is consistent with attainment. *See* 40 C.F.R. § 50.9(a) (providing that an area attains when there is no more than 1 expected annual exceedance). The Northwest Harris County monitor's 2 exceedances on September 17 and 18, 2007 were by 3 and 10 ppb, respectively. Thus, but for a small amount of ozone resulting from international emissions on either day, HGB would have attained in 2007. Without any further data adjustments, the area also would have fully attained over the 2007-2009 averaging period.

Substantial scientific data and new studies suggest that, but for emissions emanating from outside the United States, the HGB area would have attained the 1-hour ozone standard. The 3 to 10 ppb difference is within published findings on the ozone impacts from international emissions. *See, e.g.,* Lin, M., et al. (2012), *Transport of Asian ozone pollution into surface air over the western United States in spring*, *J. Geophys. Res.*, 117, doi:10.1029/2011JD016961 (estimating that 53% of exceedances of the 2008 75 ppb ozone standard would not have occurred in the absence of Asian anthropogenic emissions); L. Zhang et

² *See* http://www.tceq.state.tx.us/cgi-bin/compliance/monops/ozone_exceedance.pl.

al., *Transpacific transport of ozone pollution and the effect of recent Asian emission increases on air quality in North America: an integrated analysis using satellite, aircraft, ozonesonde, and surface observations*, *Atmos. Chem. Phys.*, 8, 6117-6136 (2008) (5-7 ppb ozone impact from Asian pollution on surface ozone concentrations in western North America in Spring 2006); H. Wang et al., *Surface ozone background in the United States: Canadian and Mexican pollution influences*, *Atmos. Env.* 43, 1310-1319 (2009) (estimated average 3-4 ppb ozone contribution in the United States from Mexican and Canadian emissions); O.R. Cooper et al., *Increasing springtime ozone mixing ratios in the free troposphere over western North America*, *Nature* 463, 344-348 (Jan. 21, 2010) (international emissions estimated to contribute to 0.6 ppb median annual increase in western North American ozone from 1995 to 2008).

Accordingly, before imposing any Failure to Attain Fees, TCEQ should seek a determination from EPA that the Houston area would have attained the 1-hour ozone standard by the attainment date but for emissions emanating from outside the United States. If such a determination can be made, no Section 185 or equivalent program is necessary.

2. Termination

Under the Proposed Rule, the fee program will cease to apply when the HGB area is redesignated to attainment or when EPA makes a finding of attainment for the area. TCEQ has further proposed that the fees will be calculated but not invoiced if quality-assured data demonstrate that the HGB area has attained the ozone standard. The Working Group supports these features of the proposal.

TCEQ should also confirm that the fees can be put in abeyance or the rule program terminated based on other appropriate circumstances. As discussed above, the federal Clean Air Act and EPA regulations provide that an area need not be subject to Section 185 fees if it would have attained but for exceptional events or emissions emanating from outside the United States. TCEQ should clarify that it will consider the Failure to Attain Fee program to terminate based on attainment status, taking into account data adjustments as appropriate for exceptional events and international emissions.

Further, EPA has indicated that it may initiate rulemaking to terminate Section 185 fee obligations separately from a redesignation or a finding of attainment. The Working Group recommends that TCEQ include rule language to terminate the Failure to Attain Fee program based on any EPA rulemaking to stop the Section 185 fee obligation.

3. Equivalent or "Not Less Stringent" Program Features

The Proposed Rule reflects the implementation of a program that is not less stringent than, or equivalent to, the fee program contemplated by Section 185 of the federal Clean Air Act, 42 U.S.C. § 7511d. Under Section 185, fees are owed when a severe or extreme ozone nonattainment area fails to meet the federal ozone standard by the applicable attainment date. However, the only relevant ozone standard for which the HGB area's attainment date has passed is the 1-hour ozone standard, which was revoked by the EPA. See 40 C.F.R. §§ 50.9(b),

81.344. Section 185 fees therefore only remain relevant to the extent necessary to implement another provision of federal law, which provides that EPA must promulgate requirements "not less stringent" than, or equivalent to, those that applied under the earlier ozone standard. *See* 42 U.S.C. § 7502(e). This not less stringent criterion allows substantial flexibility in how fees are calculated and from whom the fees are assessed.

Application of a not less stringent, equivalent program (as TCEQ has proposed) is clearly appropriate in an area such as Houston. Ozone levels have fallen dramatically, and are at most 1 ppb above the 1-hour ozone standard based on the most recent 2010-2012 averaging period.³ Much of this progress is the result of major stationary sources' mandates under TCEQ regulations to achieve a substantial reduction in ozone precursor emissions (NO_x and VOC), in combination with a targeted cap on highly-reactive VOC emissions. Members of the Section 185 Working Group have invested billions of dollars to implement this control strategy. Few opportunities remain for further emission reductions from major sources in the HGB area. Thus, the Working Group supports TCEQ's approach of establishing a Section 185-equivalent, not less stringent program that allows baseline calculation flexibilities and credits the Section 185 fee obligation with mobile source fees and programs.

A. Multi-Year Baseline

Section 185 provides that EPA may issue guidance authorizing use of a multi-year baseline for calculating Section 185 fees. 42 U.S.C. § 7511d(b)(2). In March 2008, EPA released the guidance and determined that sources could use a baseline calculation method such as that in EPA's Prevention of Significant Deterioration rules, which allow a baseline to be developed as an annual average of emissions based on a 24-month period over 10 years (or 5 years, for electric generating units ("EGUs")). *See* Memorandum from William T. Harnett, Director, Air Quality Policy Division, EPA, to Regional Air Division Directors, Regions I-X, Subject: *Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment [Date]* (Mar. 21, 2008).

Consistent with this legal authority, proposed subsection 101.106(b) allows sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year to determine their baseline amount from a 24-month average over a 5- or 10-year period preceding the attainment date, or 1997-2006 for non-EGUs and 2002-2006 for EGUs. The Working Group supports this feature of the proposal.

B. Fee Equivalency Accounting

Proposed sections 101.102 and 101.104 would establish a fee equivalency accounting mechanism under which revenue collected for the Texas Emissions Reduction Plan ("TERP") and for the Vehicle Inspection and Maintenance Program ("I&M") would be used to

³ As discussed elsewhere in these comments, there appears to be a basis for concluding that the HGB area has in fact attained the 1-hour ozone standard and need not be subject to Section 185 or an equivalent program.

satisfy the Failure to Attain Fee obligation for all sources in the HGB area. Subsection 101.104(c)(3) provides that, if these mobile source fee revenues are insufficient, each stationary source's fee will be prorated to supply the balance of the fee obligation.

The Working Group supports the fee equivalency accounting concept and the use of TERP and I&M revenues. Similar features appear in EPA-approved Section 185-equivalent programs in the San Joaquin Valley and South Coast districts in California. In addition, TCEQ's most recent attainment demonstration for the HGB area includes data indicating that, by 2006, point source emissions were only 31% of the NOx and 26% of the VOC emitted in the HGB area. See TCEQ, *Houston-Galveston-Brazoria Attainment Demonstration State Implementation Plan Revision for the 1997 Eight-Hour Ozone Standard*, at ES-2 & Tbl. ES-1 (Mar. 10, 2010). It is therefore reasonable to focus the area's Section 185-equivalent program, to the extent practical, on other source categories such as the mobile sources for which fees are paid into the TERP and I&M programs. Further, a substantial portion of the fees paid into TERP and I&M are used to reduce emissions, leading to improved air quality in the Houston region.

C. Multi-Site and Multi-Pollutant Baseline

Section 101.107 of the Proposed Rule would allow one or more major stationary sources subject to the Failure to Attain Fee to develop a combined baseline of NOx and VOC, of more than one site, or of more than one site and of NOx and VOC. The Working Group supports these aspects of the Proposed Rule for reasons including the following:

- These provisions are important to help prevent unfairly penalizing sources that reduced emissions under past control strategies, such as the NOx-focused Mass Emissions Cap and Trade ("MECT") program.
- A multiple site baseline and a combined NOx and VOC baseline are similar in concept to TCEQ's proposals to allow use of various marketable emission credits—emission reduction credits, discrete emission reduction credits, HRVOC cap and trade allowances, and MECT allowances—to fully or partially satisfy sources' fee obligations. A multiple site baseline and combined NOx and VOC baseline, however, do not require the involvement of TCEQ staff in generating, certifying, and managing trades of the various credits and allowances.
- EPA has indicated through guidance that states have the discretion to allow sources to use a combined NOx and VOC baseline. See EPA, *Response to CAAAC Task Force Options*.⁴

⁴ Attachment C to Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, EPA, to Regional Air Division Directors, Regions I-X, Subject: *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS* (Jan. 5, 2010).

- Applicable California regulations require a multiple site baseline option if Section 185 fees are assessed against major stationary sources by the South Coast Air Quality Management District. See South Coast Air Quality Management District, Rule 317, § (c)(6)(B).

4. Prospective Application

TCEQ has requested comment on the appropriateness of assessing Failure to Attain Fees for emissions that occurred during 2012. As proposed, section 101.116(b) would have the effect of requiring fees to be paid based on the most recent emissions inventory year available at the time the Proposed Rule is adopted as a final rule. Thus, fees would first be paid for emissions in 2012.

The Working Group supports the approach of not calculating or assessing Section 185 fees for periods before 2012. This approach is appropriate for the following reasons:

- It has not been clear, especially in the past, whether areas such as HGB would be subject to Section 185. In 2004, EPA issued a rule revoking Section 185 requirements that applied based on the 1-hour ozone standard. Even in 2010, after a court vacated the 2004 rule, EPA issued guidance indicating that areas attaining the 8-hour, 84 ppb ozone standard (which, at the time, included HGB) were not subject to Section 185 fees for the 1-hour ozone standard. Finally, as discussed above, 2013 clean data, exceptional events, or international emissions may yet provide a basis for Section 185 not to apply to HGB.
- Other severe and extreme ozone nonattainment areas have not been required to collect Section 185 fees for periods before a rulemaking action addressed their Section 185 fee obligations. See 77 Fed. Reg. 36,163 (June 12, 2012) (clean data determination for New York City area); 76 Fed. Reg. 39,775 (Jul. 7, 2011) (final Section 185 termination determination for Baton Rouge area).
- Section 185 no longer directly applies for the revoked 1-hour ozone standard. Any fee rule issued by TCEQ should be judged as a potential not less stringent, equivalent program.
- Collecting fees for earlier periods would be retroactive or *ex post facto* and therefore legally impermissible under federal and state law.

5. New Units

The Working Group supports TCEQ's proposal to allow baseline credit for new major stationary sources and for new emission units authorized by Nonattainment New Source Review ("NNSR") permits, at proposed section 101.110. These are important means of

providing a baseline for new sources and new emission units that is reasonably commensurate with the baseline allowed for existing sources and units.

The Working Group recommends that TCEQ make minor changes to the proposal language to address three potential issues with proposed section 101.110. These potential issues are as follows:

- The baseline for a new source or unit should be calculated based on one year of operations after the applicable shakedown period(s). As written, the Proposed Rule would include shakedown emissions in the baseline calculation. Shakedown emissions, which can last for up to 180 days and are generally accepted in the New Source Review context, may either exceed established permit limits or reflect operation levels below normal capacity. However, they do not reflect representative emissions from a source and should not be used to establish a baseline.
- The baseline for a unit modified through the NNSR process should be treated similarly to the baseline for a new NNSR-authorized unit. At an existing major source, it is possible that an NNSR-authorized project would also lead to increased emissions at an existing piece of equipment. For example, a new project might be tied into a flare or heater with unused capacity. The same reasons that justify allowing a year of normal operation as baseline for a new unit also justify allowing a year of normal operations as baseline for a unit modified through the NNSR process.
- New source baselines should be developed based on the first year of operation for each emission unit at the new source. New major sources may begin operations incrementally. For example, at a new storage terminal, some tanks may complete construction and begin operation while other tanks are still under construction. If new major source baselines are set by the first full year of the source's operation (as TCEQ appears to have proposed), then the baseline would not include later-operating units that are part of the new source.

The Working Group recommends that TCEQ modify proposed subsections 101.110(a)-(c) as follows to ensure that baselines are calculated based on normal emissions, accommodate NNSR-authorized changes to existing units, and accommodate incremental construction and operation of new major sources:

(a) Baseline amount. A baseline amount may be established for major stationary sources after the attainment date as follows.

(1) If a major stationary source did not meet the applicability requirements in § 101.101 of this title (relating

to Applicability) on the attainment date of November 15, 2007, a major stationary source may establish a baseline amount based on the first full year of operation of each emission unit in accordance with the requirements of this subchapter. The first full year of operation shall be considered to begin only after a reasonable shakedown period, not to exceed 180 days.

(2) A major stationary source may include emissions limits from new or modified emissions units authorized after the attainment date in its baseline amount determination if those emissions units were authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(b) Baseline amount reporting. Within 90 calendar days of completing one full calendar year of operation for all emissions units at a new source after the applicable shakedown periods, the owner or operator of each major stationary source in an area meeting the requirements of § 101.101 of this title shall submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amount is the lower of:

(1) the baseline emissions from the first full year of operation after the applicable shakedown periods for each emission unit baseline emissions; or

(2) emissions allowed under applicable authorizations.

~~(c) For purposes of this subchapter, the emissions considered for the baseline amount for a new unit or units are restricted to the emissions units without a previously established baseline amount.~~

Finally, the Working Group requests that TCEQ clarify whether, for a new source or unit, the baseline will be calculated based on the first 12 months of operation, or based on the first calendar year of operation. If the baseline is to be set on a calendar year basis, it should be set using the first full calendar year of representative operations (that is, the first full calendar year following the applicable shakedown period(s)).

6. Newly Authorized Emissions

TCEQ has proposed to allow inclusion in the baseline of permitted MSS emissions as well as emissions from permit applications in process by the attainment year. The

Working Group supports this feature of the Proposed Rule, which is similar in concept to the baseline treatment afforded to new major sources and certain new units.

TCEQ's preamble indicates that the agency intends to allow baseline credit for newly authorized emissions in conjunction with the other baseline flexibilities provided in proposed section 101.107, such as multi-site baselines and combined multi-pollutant baselines. The Working Group supports this feature of the proposal. However, proposed section 101.108 could be read to restrict this result. The Working Group therefore requests that section 101.107(a) be revised to clearly link multi-site and multi-pollutant baselines to section 101.108, as follows:

(a) Aggregation. Notwithstanding the requirements of §101.106 of this title (relating to Baseline Amount Calculation) and §101.108 of this title (relating to Alternative Baseline Amount), a major stationary source of emissions that meets the applicability requirements of §101.101 of this title (relating to Applicability) after calculating each pollutant's emission baseline amount in accordance with this subchapter may choose to combine . .

7. Additional Issues

The Working Group offers the following comments to address additional issues with the Proposed Rule. Included are corresponding rule language changes that the Working Group believes will address these issues.

A. Baseline Period for Aggregated Baseline Amount

The Working Group supports TCEQ's proposal to allow an aggregated baseline amount for multiple major stationary sources and/or for NO_x and VOC emissions, at proposed section 101.107. Multiple site and pollutant baseline aggregation mechanisms are important flexibility features to ensure that source owners and operators' emission reductions are fully accounted for in determining their Failure to Attain Fee obligations.

TCEQ has also proposed that an aggregated baseline amount must be based on the same time period and the same basis of either actual or authorized emissions for each source and pollutant, at proposed subsection 101.107(b). In other contexts, however, major stationary sources may have different baseline periods for different pollutants, and one source may use a different baseline period than another source. See 30 Tex. Admin. Code § 116.12(3) (allowing a multi-year baseline calculation for individual sources in the New Source Review context). The same approach should be followed in the Proposed Rule.

A requirement that the aggregated baseline amount be based on the same time period would also lead to complications for an owner or operator of major source EGUs and non-

EGUs. Under the current proposal, EGUs' baselines may be derived from a 5-year historical period, and non-EGU baselines may be derived from a 10-year historical period. Thus, it is unclear whether an owner or operator of both kinds of facilities would be able to use a multiple-site baseline and what the historical period would be.

Accordingly, the Working Group requests that TCEQ delete proposed subsection 101.107(b). If TCEQ does not delete proposed subsection 101.107(b), then the agency should at least confirm that owners and operators that choose to aggregate their baseline amounts for EGUs and non-EGUs would not be restricted to the shorter five-year historical period for their non-EGU sources.

B. Fee Credit for Voluntary PAMS Operation Costs

In a cooperative effort with TCEQ to gain more data to support SIP development, many companies agreed to voluntarily fund parametric ambient monitoring stations ("PAMS") beginning in June 2003. The PAMS monitor and report to TCEQ VOCs, NO_x, ozone, and meteorological data, and play a key role in measuring current air quality and studying ozone formation. Each PAMS costs approximately \$25,000 per month to operate.

TCEQ should allow companies credit against their Failure to Attain Fee obligations for costs incurred for voluntary PAMS operations. The costs could be credited on a dollar-for-dollar basis, similar to TCEQ's proposed crediting of supplemental environmental projects. This could be accomplished with rule language to the effect of the following, added as a new subsection to proposed section 101.122 or elsewhere:

The owner and/or operator of a Section 185 Account subject to this subchapter may partially or completely fulfill its Failure to Attain Fee obligation, on a dollar-for-dollar basis, by voluntarily funding the operation of parametric ambient monitoring stations. The funds shall not be discounted due to the passage of time. The funds shall be accumulated from year to year, and if a surplus exists in any given year, the funds may be used to offset the calculated Failure to Attain Fee as needed.

C. Major Stationary Source Definition

TCEQ has proposed to define the sources subject to the Proposed Rule as they are defined under the agency's major New Source Review ("NSR") rules. This approach is consistent with Section 185, which nominally applies to major stationary sources.

However, as currently proposed, a major stationary source would be defined as a "source" under the major NSR rules. The cross-referenced major NSR provision includes definitions for "stationary source" and "major stationary source." To prevent any possible

confusion over which definition is intended, the Working Group recommends the following change to proposed subsection 101.100(11):

(11) Major stationary source--A major stationary source as defined under §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

D. Identification of Sources Subject to the Proposed Rule

Proposed section 101.117 requires major stationary source owners and operators to submit baseline amount determination forms on a schedule. The Working Group requests that TCEQ clarify the process by which major stationary sources will be identified as subject to the Proposed Rule.

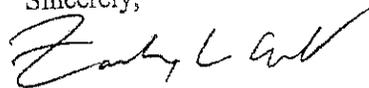
In some instances, determining whether a plant is a major stationary source is likely to involve an individualized determination. For example, some plants will qualify as minor sources because they exclude fugitive emissions in determining whether they are a major stationary source. See 30 Tex. Admin. Code § 116.12(17); 40 C.F.R. § 51.165(a)(1)(iv)(C). Nonetheless, some of these sources' emissions could exceed the standard 25 tons per year major stationary source threshold.

These individualized source status determinations are important both for assuring compliance by individual plants in the HGB area and for ensuring accurate equivalent fee accounting under proposed section 101.104. However, the Proposed Rule and the preamble do not indicate when or how sources that do not believe they are subject to the Failure to Attain Fee program will have the opportunity to confirm their status with the agency. Thus, TCEQ should clarify the process that such sources and the agency will follow to ensure proper source status determinations.

8. Conclusion

The Working Group appreciates the opportunity to comment on the Proposed Rule. Various materials cited in these comments or otherwise relevant have been attached as Exhibits A through U. If you have any questions, please do not hesitate to contact me.

Sincerely,



Zachary L. Craft

ZLC:
Attachments

List of Exhibits

- **Exhibit A** -- TCEQ, *Air Quality Successes - Criteria Pollutants* (<http://www.tceq.texas.gov/airquality/airsuccess/air-success-criteria>)
- **Exhibit B** -- South Coast Air Quality Management District, Rule 317
- **Exhibit C** -- EPA final rule approving South Coast Rule 317, 77 Fed. Reg. 74,372 (Dec. 14, 2012)
- **Exhibit D** -- San Joaquin Valley Unified Air Pollution Control District, Rule 3170
- **Exhibit E** -- EPA final rule approving San Joaquin Valley Rule 3170, 77 Fed. Reg. 50,021 (Aug. 20, 2012)
- **Exhibit F** -- Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, EPA, to Regional Air Division Directors, Regions I-X, Subject: *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS* (Jan. 5, 2010)
- **Exhibit G** -- EPA direct final rule finding that Milwaukee-Racine area attained 1-hour ozone standard, 74 Fed. Reg. 18,641 (Apr. 24, 2009)
- **Exhibit H** -- EPA final rule terminating Baton Rouge area's Section 185 fee obligation, 76 Fed. Reg. 39,775 (Jul. 7, 2011)
- **Exhibit I** -- EPA final rule finding that New York-Northern New Jersey-Long Island area attained 1-hour ozone standard, 77 Fed. Reg. 36,163 (June 18, 2012)
- **Exhibit J** -- Letter from John F. Steib, Jr., Director, Air Permits Division, TCEQ, to Guy Hagen, BP Products North America, Inc., Re: *Confirmation of Netting Reductions, Hydrogen Project, Amendment to Permit No. 19297* (Jan. 16, 2003)
- **Exhibit K** -- Draft Memorandum from John Steib, Director of Air Permits, to Permit Reviewers and Other Interested Parties, Subject: *The Effect of Emissions Standards for Attainment Demonstration on Netting Reductions* (undated)
- **Exhibit L** -- Memorandum from William T. Harnett, Director, Air Quality Policy Division, EPA, to Regional Air Division Directors, Regions I-X, Subject: *Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment [Date]* (Mar. 21, 2008)
- **Exhibit M** -- TCEQ, *Houston-Galveston-Brazoria Attainment Demonstration State Implementation Plan Revision for the 1997 Eight-Hour Ozone Standard* (Adopted Mar. 10, 2010) (excerpts)
- **Exhibit N** -- EPA final rule implementing exceptional events regulation, 72 Fed. Reg. 13,560 (Mar. 22, 2007)
- **Exhibit O** -- Letter from David Brymer, Director, Air Quality Division, TCEQ, to Maria Martinez, Air Quality Analysis Section Chief, EPA, Re: *Proposed PM2.5 Exceptional Event Flags for 2011* (June 29, 2012)

- **Exhibit P** -- Lin, M., et al. (2012), *Transport of Asian ozone pollution into surface air over the western United States in spring*, J. Geophys. Res., 117, doi:10.1029/2011JD016961
- **Exhibit Q** -- L. Zhang et al., *Transpacific transport of ozone pollution and the effect of recent Asian emission increases on air quality in North America: an integrated analysis using satellite, aircraft, ozonesonde, and surface observations*, Atmos. Chem. Phys., 8, 6117-6136 (2008)
- **Exhibit R** -- H. Wang et al., *Surface ozone background in the United States: Canadian and Mexican pollution influences*, Atmos. Env. 43, 1310-1319 (2009)
- **Exhibit S** -- O.R. Cooper et al., *Increasing springtime ozone mixing ratios in the free troposphere over western North America*, Nature 463, 344-348 (Jan. 21, 2010)
- **Exhibit T** -- Albert Hendler, URS Corporation, *08/26/11 and 08/29/11 Houston East (CAMS I) 1-Hour Ozone Exceedances* (Sept. 21, 2011)
- **Exhibit U** -- 8-Hour Ozone SIP Coalition, *Progress to Attainment: Achievements and Challenges* (Jan. 2009)

Exhibit A