

January 14, 2013

VIA ELECTRONIC SUBMISSION & HAND DELIVERY

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

Re: Public Comments regarding Severe Ozone Nonattainment Area Failure to Attain Fee, Rule Project Number 2009-009-101-AI

Dear Ms. Horn,

Air Alliance Houston and Environmental Integrity Project are joined by Environmental Defense Fund and Sierra Club (collectively, “commenters”) in writing to object to Rule Project No. 2009-009-101-AI, which proposes rules §§ 101.100-101.102, 101.104, 101.106-101.110, 101.113, and 101.116-101.122 (proposed rules) for the Severe Ozone Nonattainment Area Failure to Attain Fee. We appreciate the opportunity to submit comments regarding the proposed rules.

The United States Congress created Clean Air Act (CAA) section 185, which requires states to establish rules assessing an annual fee against major stationary sources of air pollution in severe or extreme ozone nonattainment areas when those areas fail to achieve a primary National Ambient Air Quality Standard (NAAQS) by the designated attainment deadline. Section 185 fees provide a sharp incentive for major stationary sources to reduce emissions of ozone forming pollutants (NO_x and VOC) when reduction strategies in the state’s attainment plan fail to result in ambient ozone concentrations that comply with the standard and protect public health.¹ The fees penalize major stationary sources of air pollution for failing to make reductions necessary to attain the ozone standard and impose a significant financial burden on these sources to encourage emission reductions until the standard is attained. Thus, in order for state fee programs to achieve this purpose, they must create an economic incentive for major stationary sources of ozone pollution to reduce emissions of ozone forming pollutants. The rules that the Texas Commission on Environmental Quality (TCEQ) has proposed do not simply fail to give full effect to the letter and purpose of the section 185, they establish an “alternative” fee program that ensures no fees will ever be assessed against area polluters. In doing so, the TCEQ flouts its responsibility under the Clean Air Act and misses an important opportunity to reduce ozone pollution in the Houston area.

¹ Section 185 establishes fees for major stationary sources of VOC. Section 182(f) provides that SIP requirements, including section 185, shall also be applied to major stationary sources of NO_x. For convenience, these comments will often refer to section 185 requirements as applied to major stationary sources of NO_x as section 185 requirements.

If the TCEQ moves forward with a fee program that does not meet the requirements of federal law, or if the state fails to administer or enforce the fee, commenters caution that Texas risks the Environmental Protection Agency (EPA) stepping in and collecting the fee itself.² It is our fervent hope that the TCEQ will revise the proposed rules to fulfill the purpose of section 185, and ensure that nonattainment fees are collected by TCEQ and stay in Texas, rather than being collected by the EPA and remitted to the federal government.

I. The Fee Equivalency Account defeats the purpose of the statute

The TCEQ contends that its alternative fee program is no less stringent than section 185 requires, because annual revenue counted under the proposed rules will equal or exceed fee revenue from major stationary sources that would be collected under a section 185 program.³ However, the purpose of section 185 is not to collect revenue.⁴ This is apparent from the fact that the penalties are only collected until the area is redesignated to attainment or until major stationary sources reduce their emissions by 20 percent.⁵ Instead, the purpose of this section is to force major stationary sources to reduce emissions of ozone forming pollutants when other measures have failed to achieve pollution reductions necessary to comply with the NAAQS and protect public health. Section 185 does this by imposing a substantial penalty on stationary sources of ozone forming pollutants in the nonattainment area, creating a sharp incentive for them to reduce emissions.⁶ The TCEQ's proposed rules are designed to ensure that no fees will be assessed against HGB area polluters. Not only do the rules fail to properly incentivize reductions as section 185 requires, they erect a confusing and administratively burdensome bureaucratic accounting exercise the sole purpose of which is to render section 185 completely ineffective.

The proposed Fee Equivalency Account sits at the heart of the TCEQ's hollow accounting exercise. The Fee Equivalency Account counts taxpayer dollars collected through existing stationary source voluntary incentive programs, which are already part of the Texas State Implementation Plan (SIP) that has failed to result in attainment of the ozone standard, to offset major stationary source fee obligations under section 185.⁷ The proposed rules state that, "the Fee Equivalency Account will reflect equivalency credits based upon revenue *collected* for

² CAA § 185(d) ("If the Administrator has found that the fee provisions of the implementation plan do not meet the requirements of this section, or if the Administrator makes a finding that the State is not administering and enforcing the fee required under this section, the Administrator shall, in addition to any other action authorized under this subchapter, collect, in accordance with procedures promulgated by the Administrator, the unpaid fees required under . . . this section.").

³ (Attachment 1) Background and Summary for TCEQ, Chapter 101 – General Air Quality Rules, Rule Project No. 2009-009-101-AI at 13-14.

⁴ And, to be clear, no new revenue will actually be *collected* if the proposed rules are finalized. Rather, money collected under existing programs will be *counted* to offset are section 185 fee obligations. See (Attachment 1) at 55 ("Assuming that the EPA allows use of proposed credits for both TERP and I/M funds each year, no additional revenue would be collected under the proposed rules.").

⁵ See section 185(a) and (b)(1); see also H.R. Rept. No. 101-490, pt. 1, at 256 (May 17, 1990) (explaining that "[t]he fee applies only to the extent the source fails to reduce its emissions by 20 percent following the attainment date").

⁶ The TCEQ estimates that the average fee major stationary sources would have to pay for emissions in 2010 is \$350,000 and one source would have to pay as much as 7.4 million dollars. (Attachment 1) at 58.

⁷ Proposed § 101.102 ("The executive director shall establish and maintain a Fee Equivalency Account to document fees collected and available for use in demonstrating equivalency with the Area § 185 Obligation. No actual money will be deposited into the Fee Equivalency Account.").

[TERP and I/M]” in the HGB area.⁸ This revenue is not new revenue generated under the proposed alternative fee program. The TERP and I/M programs were both established well before the HGB attainment date. Many TERP and I/M program requirements, including fee collection requirements, are already a part of the Texas SIP.⁹ The proposed rules do not make any changes to the existing TERP and I/M programs that will increase the amount of revenue they generate. Thus, the proposed rules will not generate any new money. Conversely, the proposed rules also fail to require any increase in expenditures of TERP and I/M funds to reduce ozone pollution levels in the HGB area. In short, the proposed rules have no effect on the TCEQ’s obligation or ability to collect and spend TERP and I/M revenue.¹⁰ Instead, the TCEQ proposes to simply count up the revenue it collects under these existing programs to offset the fees that section 185 requires HGB area major stationary sources to pay.¹¹ This money is credited into a dummy account¹² after it is collected regardless of whether or how it is actually to be spent.¹³ In an interoffice memorandum discussing the section 185 fee rule proposal, TCEQ declares that “this [TERP and I/M] revenue could be used to fully offset the area’s fee obligation and no fee would be assessed on major stationary sources for a particular calendar year.”¹⁴ Indeed, the proposed rules ensure equivalency credits will fully offset the area’s fee obligation every calendar year.¹⁵ To the extent that the TCEQ’s proposed rules fail to assess fees and establish new incentives for area sources to reduce ozone pollution, they wholly fail to comply with section 185. To the extent that the proposed rules do not require any new revenue

⁸ Proposed § 101.102(a) (emphasis added).

⁹ See 40 C.F.R. § 52.2270(c) identifying TERP and I/M programs as part of the current Texas SIP. With respect to TERP, the TCEQ’s website explains that “a primary purpose of TERP is to replace, through voluntary incentive programs, the reductions in emissions of oxides of nitrogen that would have been achieved through two mandatory measures that SB5 directed the TCEQ to remove from the . . . SIP for the Dallas-Fort Worth (DFW) and Houston-Galveston (HGA) ozone nonattainment areas.” See, http://www.tceq.texas.gov/airquality/terp/program_info.html#what_is.

¹⁰ Nor do the rules affect the obligation and authority of other state agencies responsible for implementing provisions of the TERP and I/M programs.

¹¹ The fact that the TCEQ’s proposed rules count revenue generated from programs that are already part of the Texas SIP and do not require additional expenditures to reduce pollution in the HGB area distinguish them from the South Coast Air Quality Management District fee program, which EPA recently approved. See 77 Fed. Reg. 74,372, 74,378 (December 14, 2012) (Explaining that approved rule requires “that [credited] projects be ‘surplus to the SIP,’ designed to reduce VOC or NO_x emissions, as well as a requirement that ‘only monies actually expended from qualified programs during a calendar year shall be credited.’”)

¹² (Attachment 1) at 10 (“[N]o actual funding is transferred to the equivalent alternative program.”).

¹³ As Brandt Mannchen pointed out in his oral comments at the January 9, 2013 public hearing on the rule proposal, the TCEQ is not in control of TERP and I/M funds. The Texas Legislature controls those funds, and it has a habit of not spending them in order to artificially balance the state budget.

¹⁴ See (Attachment 2) “Commission Approval for Proposed Rulemaking; Chapter 101, General Air Quality Rules; Severe Ozone Nonattainment Area Failure to Attain Fee; Rule Project No. 2009-009-101-AI,” from Steve Hagel, P.E., Deputy Director, Office of Air, to TCEQ Commissioners (Oct. 26, 2012) (the “Interoffice Memorandum”) at 5.

¹⁵ For example, while the proposed rules start counting annual area fee obligations from the date the rules are finalized (no sooner than 2013), TERP and I/M credits counted to offset fee obligations will be counted beginning in 2007. Thus, there will be at least six years’ worth of TERP and I/M credits in the Fee Equivalency Account when the TCEQ begins calculating its alternative fee obligation. All credits remaining in the account after the fee obligation is deducted in any particular year will be carried forward to the next year. Thus, because TERP and I/M revenue collected in any particular year will likely exceed the fee obligation for that year and because the proposed rules create a six year credit cushion in case TERP and I/M revenue for a particular year are not sufficient to offset the entire annual fee obligation, the TCEQ’s alternative fee program ensures no fees will ever be assessed. Also, the proposed rules establish a flawed fee obligation calculation method, which will underestimate the amount of fees due.

collection, spending, or pollution reductions, they are also (by any reasonable measure) less stringent than section 185.

II. Alternative rules that do not comply with Clean Air Act Section 185 are not allowed

The TCEQ cites CAA section 172(e) as federal authority for establishing an alternative fee program that departs from the letter of section 185. Section 172(e), known as the “anti-backsliding” provision of the Clean Air Act, states that:

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.¹⁶

In proposing an alternative rule under this authority, the TCEQ is likely relying on EPA’s recent approval of two section 185 fee rule alternatives in California: SJVUAPCD Rule 3170 and SCAQMD Rule 317.¹⁷ EPA’s approval of these rules is still subject to judicial review and commenters are hopeful that EPA’s approval will yet be overturned, because section 172(e) does not provide states authority to promulgate alternative section 185 rules for the one hour ozone NAAQS.¹⁸ Moreover, even if section 172(e) may be read to authorize the TCEQ to promulgate an alternative fee program, the TCEQ’s alternative is, in every meaningful respect, less stringent than section 185 requires. Thus, the TCEQ’s alternative fee program fails to satisfy the “not less stringent” test of section 172(e).

A. Section 172(e) does not provide authority for an “equivalent alternative” section 185 fee rule

The TCEQ has no authority to promulgate—and the EPA has no authority to approve—a rule that does not comply with the requirements of section 185. Comments submitted by Earthjustice on proposed approval of the California rules illustrated why “equivalent alternative” rules are not permitted.¹⁹ EPA responded to Earthjustice’s comments, but its response was inadequate and mischaracterized relevant D.C. Circuit court holdings on the issue.²⁰

EPA’s response to Earthjustice’s comments amounts to a rehash of its original argument that it was applying the “principles” of section 172(e) by approving alternatives to the section 185 fee. The EPA response concludes, “we are following the D.C. Circuit’s holding that the

¹⁶ CAA section 172(e).

¹⁷ See respectively, (Attachment 3) 77 Fed. Reg. 50021 (Aug. 20, 2012) and (Attachment 4) 77 Fed. Reg. 74372 (Dec. 14, 2012).

¹⁸ Sierra Club and other groups have challenged EPA’s approval of the SJVUAPCD rule in federal court. See, (Attachment 5), Petition for Review. Petitions for judicial review of EPA’s approval of the SCAQMD rule may be filed until February 12, 2013. 77 Fed. Reg. 74,380.

¹⁹ (Attachments 6A & 6B).

²⁰ See 77 Fed. Reg. at 50026; 77 Fed. Reg. at 74375 (identical responses to Earthjustice comments).

principles of section 172(e) apply in full to implement 185 obligations.”²¹ However, EPA mischaracterized the D.C. Circuit’s holding, which was helpfully explained by the Court itself in a later case:

In sum, we ruled that pursuant to section 172(e)’s anti-backsliding principles, an area subject to section 185 penalties due to its classification under the now-defunct 1-hour standard *must apply those penalties* as an “applicable control” if the area missed its attainment deadline under the 1-hour standard.²²

The Court clearly states that applying the anti-backsliding principles of section 172(e) to section 185 “must” result in “apply[ing] those penalties.” The TCEQ’s proposed rules assures that no penalties will ever be assessed against any polluters and—by the standard set by the D.C. Circuit Court—do not meet anti-backsliding principles. If the TCEQ relies on EPA’s mischaracterization of the Court’s holding, the agency risks promulgating rules that will not withstand judicial scrutiny.

B. Proposed alternatives do not meet the section 172(e) stringency test

Even supposing that Texas may promulgate an equivalent alternative program under section 172(e) principles, the TCEQ’s alternative program exceeds what would be acceptable under those principles. Section 172(e) mandates that controls be “not less stringent” than controls applicable before the standard changed. There are many aspects of the proposed rule that do not meet this “not less stringent” test. As explained above, the purpose of section 185 is to achieve attainment of the NAAQS. Section 185 does this by imposing a penalty on polluters that serves as an incentive to reduce emissions. A program, like the TCEQ’s, that does not incentivize emissions reductions necessary to achieve attainment of the NAAQS at least as well as a penalty would does not pass the “not less stringent” test.

In the Background and Summary to the proposed rule, the TCEQ states that it, “proposes a program under CAA, §172(e) with flexibility aspects not directly described in the CAA, §185 rule, including but not limited to, alternative revenue, baseline aggregation, and timing of fees.”²³ None of these three aspects of the rule can pass the “not less stringent” test. The problems with the alternative revenue proposal are explained above. The problems with baseline calculation, including source and pollutant aggregation, and timing, are explained below.

III. The proposed rules fail to properly calculate baseline amounts or fee obligations

The TCEQ acknowledges that its proposed rules are inconsistent with section 185, but the Commission contends that it is not bound by the letter of the section so long as its alternative fee program is no less stringent than section 185.²⁴ Instead of requiring major stationary sources of ozone forming pollutants in the HGB area to pay an annual fee as section 185 requires, the

²¹ See 77 Fed. Reg. at 50026; 77 Fed. Reg. at 74375.

²² (Attachment 7) *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (discussing the holding in *SCAQMD v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) (emphasis added).

²³ (Attachment 1) at 5.

²⁴ *Id.* at 5, 8-9.

TCEQ proposes to credit revenue collected through existing mobile source incentive programs to offset section 185 fee obligations.²⁵ The TCEQ argues that this alternative program is no less stringent than section 185, in part, because it requires money collected from mobile source programs in the HGB area each year to equal or exceed the area's fee obligation under section 185.²⁶

To ensure that enough money is collected each year to offset the area's section 185 fee obligation, the proposed rules establish a system for annually calculating the area's section 185 fee obligation and comparing that amount to revenue generated from applicable mobile source programs.²⁷ The proposed method for calculating area fee obligations is inconsistent with section 185. This is problematic even if the TCEQ may implement an alternative program, because the primary purpose of the proposed fee obligation calculation rules is to demonstrate that area fee obligations under section 185 are offset by other revenue. Thus, because the TCEQ must demonstrate that revenue counted under its alternative program is sufficient to offset section 185 fee obligations, the TCEQ's method for calculating the area's fee obligation must be consistent with section 185 even if its alternative program may vary with the section in other respects.

Sections 185(b)(1) and 182(f) provide that annual fees for major stationary sources of VOC and/or NO_x in the HGB area must be assessed for each ton of VOC and/or NO_x emitted by the source in excess of 80 percent of a baseline amount. Section 185(b)(2) describes the straightforward method that must be used to determine source baseline amounts:

For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the Administrator may provide, as the lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation plan ("allowables")) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year. Such guidance may provide that such average calculation for a specific source may be used if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

The TCEQ's proposed rules establish a convoluted method for calculating baseline amounts that is inconsistent with and less stringent than section 185 requires. As described below, the TCEQ proposes to afford sources a great deal of flexibility to improperly inflate baseline amounts and minimize reductions that would otherwise be required to avoid emissions in excess of 80 percent of the baseline amount.

²⁵ *Id.* at 10 ("[T]he TCEQ proposes rules to allow funding collected for qualified programs . . . to offset the FCAA, § 185 fee obligation.").

²⁶ *Id.* at 13-14. ("The FCAA § 185 fee obligation would be fully met either through the demonstration utilizing the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees. This method of equivalency is no 'less stringent' than a direct fee program required by FCAA, § 185.").

²⁷ Proposed § 101.104.

A. Sources may not aggregate NO_x and VOC emissions as allowed by proposed § 101.107(a)(3)

Proposed § 101.107(a)(3) allows sources to combine emissions for both VOC and NO_x into a single aggregated pollutant baseline amount for single or multiple major stationary sources. This provision is inconsistent with section 185(b).

Because the HGB failed to attain the one-hour ozone standard by the attainment date, section 185(a) requires Texas to charge a fee to each major stationary source of VOCs located in the HGB area for each calendar year based on VOC emissions in excess of 80 percent of the source's baseline amount. Section 185(b)(2) establishes the method that must be used to calculate each source's baseline amount. Section 182(f) provides that plan provisions required under CAA Section 181-185B for major stationary sources of VOC shall also apply to major stationary sources of NO_x. Thus, Texas must also assess a fee to each major stationary source of NO_x in the HGB area for each calendar year based on NO_x emissions in excess of 80 percent of the source's baseline amount. The baseline amount for NO_x must also be calculated using the section 185(b)(2) methodology.

Proposed § 101.107(a)(3) allows sources to calculate baseline amounts for VOC and NO_x and then combine the amounts into an aggregated baseline amount. Aggregation of pollutants is not contemplated by section 185(b)(2), which only addresses VOC emissions. Thus, aggregation of pollutants is permissible, if at all, by virtue of section 182(f), which makes provisions that apply to major stationary sources of VOC, including section 185, apply to major sources of NO_x.²⁸ However, pollutant aggregation as allowed by proposed § 101.107(a)(3) does not properly apply section 185 fee requirements to major stationary sources of NO_x. Rather, it provides a method of calculating baseline amounts for major stationary sources of both VOC and NO_x that is inconsistent with the method section 185 establishes for calculating baseline amounts for VOC.

For example, consider a major stationary source of NO_x and VOC with a baseline VOC amount of 50 tons and a baseline NO_x amount of 50 tons. If these amounts are not aggregated, the source must calculate its annual fee amount by (1) multiplying the fee rate by the number of tons of VOC in excess of 40 tons (80 percent of the baseline amount) it emitted during the calendar year, (2) multiplying the fee rate by the number of tons of NO_x in excess of 40 tons it emitted during the calendar year, and (3) summing those numbers. If that same source is allowed to aggregate its VOC and NO_x baseline amounts (for a total of 100 tons), no fee obligation will accrue so long as the source's combined emissions of VOC and NO_x do not exceed 80 tons. Thus, if the source reduces its NO_x emissions by 40 tons from the baseline NO_x amount (to 10 tons) during a calendar year, it may increase its VOC emissions from the baseline amount by 20 tons without accruing any fee obligation. Allowing a source to offset its VOC fee obligation in this way is clearly inconsistent with section 185. Section 182(f) does not allow Texas to modify a source's section 185 VOC fee obligation in this way. Rather, it applies section 185 VOC fee requirements to major stationary sources of NO_x. Thus, because the proposed rule allows major stationary sources of NO_x and VOC to offset NO_x fee obligations by reducing VOC emissions in a way that is inconsistent with the section 185 baseline amount calculation requirements as

²⁸ And to be clear, aggregation is not allowed under section 182(f).

applied to NO_x, it is also inconsistent with section 182(f). The proposed rule does not develop a method for calculating VOC baseline amounts as section 185 requires and then establish identical provisions that apply to NO_x as section 182(f) requires. Instead, it allows major stationary sources of NO_x and VOC to calculate baseline amounts in a way that fails to comply with both sections 185 and 182.

The TCEQ's Background and Summary for the rules acknowledges that aggregating pollutants to calculate baseline amounts affords sources more flexibility than a program where NO_x and VOC baseline amounts are calculated separately and explains that such flexibility is important for various reasons. Nonetheless, the TCEQ also suggests that this flexibility isn't a big deal, arguing that because "[t]he per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC and NO_x . . . , there is no reason to require that a fee be assessed separately for each pollutant."²⁹ This argument makes little sense, because allowing sources to aggregate pollutant emissions is only important insofar as it may affect a source's fee obligation. Because pollutant aggregation will impact the calculation of source fee obligations, there *is* a good reason it should not be allowed: it is inconsistent with section 185. Thus, even if pollutant aggregation is good policy (and the TCEQ has not demonstrated that it is), the policy rationale is irrelevant because pollutant aggregation is not allowed by section 185.

B. Emissions from minor stationary sources may not be included in baseline amounts

The TCEQ's Background and Summary for the rules indicates that owners and operators may include emissions from non-major sources for aggregation purposes when calculating baseline amounts and fee amounts.³⁰ Section 185 and section 182(f) require "each major stationary source [in the HGB severe nonattainment area] . . . [to] pay a fee" . . . "per ton of VOC [and NO_x] emitted by the source during the calendar year in excess of 80 percent of the baseline amount[.]" Baseline amounts used to determine the fee amount for major stationary sources must be based on emissions from major stationary sources. Section 185 does not allow owners and operators to increase baseline amounts for major stationary sources by adding emissions from non-major sources. Likewise, section 185 does not allow owners and operators to make emission reductions at non-major sources to offset fee obligations for emissions from major stationary sources. Thus, the proposed rules are inconsistent with section 185.

C. Emissions may not be aggregated for multiple major stationary sources

Section 185(a) requires that "*each* major stationary source of VOCs located in the area shall . . . pay a fee to the State[.]"³¹ Proposed § 101.107 allows owners and operators to aggregate emissions across multiple major stationary sources in order to calculate a baseline amount. Owners and operators must identify all aggregated major stationary sources, but the rule is not drafted to ensure that fees obligations are calculated for or assessed against *each* major stationary

²⁹ (Attachment 1) at 15-17.

³⁰ (Attachment 1) at 26 and 31.

³¹ (emphasis added).

source.³² Aggregation across sources will lead to accounting tricks similar to the example described above for aggregation of pollutants. The proposed rules do not ensure that the fee obligation is calculated for each major stationary source. They will prevent a proper accounting of each source's penalty obligation, and they do not comply with federal law.

Furthermore, the failure to require each major stationary source to pay the fee will frustrate the statute's purpose of achieving emissions reductions. Section 185 fees are designed to encourage each major stationary source to reduce its emissions to below 80 percent of its baseline amount. Allowing major sources to aggregate baseline amounts and offset subsequent emissions across multiple sources will lead to accounting tricks.

D. Unauthorized MSS emissions may not be included in baseline amounts

Section 185 requires major stationary sources of NO_x and/or VOC to calculate baseline amounts for fees based on the lower of the amount of actual or allowable emissions. Proposed § 101.108 allows sources to treat *unauthorized* emissions from planned MSS activities as allowable emissions when calculating baseline amounts. This approach to calculating baseline amounts is facially inconsistent with and less stringent than Section 185 requires.³³ As the TCEQ acknowledges, “most owners and operators had not obtained an authorization . . . [for planned MSS emissions] by the scheduled attainment date for the HGB one-hour ozone nonattainment area[.]”³⁴ Unauthorized emissions are not “allowables”, as defined by section 185, i.e., they are not authorized under the permit applicable for a source and they are not allowed under the applicable SIP.³⁵ Accordingly, they may not be included in a source's baseline amount.

E. Proposed § 101.105(b)(2) regarding baseline amounts for sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year is inconsistent with Section 185

Section 185 generally requires major stationary sources to calculate baseline amounts to reflect the lower of the amount of actual emissions or allowable emissions during the attainment year. However, for sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year, the statute allows “baseline amount[s] to be determined in accordance with the lower of average actuals or average allowables, determined over a period of

³² See proposed § 101.108(c); see also proposed § 101.113(b) (imposing the payment obligation on owners/operators without regard to individual sources).

³³ The TCEQ's Background and Summary document concedes this inconsistency: “Because the FCAA, § 185, requires the baseline to be the lower of the actual emissions or authorized emissions limits for the attainment year, some major stationary sources that were compliant with these commission rules regarding permitting of . . . [planned MSS] activities *could* be restricted to using a lower permit allowable emissions level in their baseline amount determination than they otherwise would have been able to have authorized as a result of following the MSS permitting schedule.” (Attachment 1) at 34 (emphasis added).

³⁴ *Id.* at 34.

³⁵ See also 101.108(a)(1)(B)(i), indicating that a source may include resulting authorized emissions from permit applications in process by the attainment year in an “alternative” baseline amount: “The permit applications for these *unauthorized* emissions must have been administratively complete by December 31, 2007, and the permit issued by the adoption date of this section[.]” (emphasis added).

more than one calendar year *consistent with guidance issued by EPA*.³⁶ On March 21, 2008, EPA issued a guidance memo describing the method that states may use to establish baseline amounts for sources with irregular, cyclical, or significantly variable emissions.³⁷ The Harnett Memo provides that these sources may use the method for calculating “baseline actual emissions” found in EPA’s regulations for Prevention of Significant Deterioration at 40 C.F.R. § 52.21(b)(48) to calculate baseline amounts.³⁸

The PSD regulations require that baseline actual emissions be based on average actual emissions during a consecutive 24-month period within the past 10 years for all sources except electrical utility steam generating units (EUSGUs) and within the past 5 years for EUSGUs. As the Harnett Memo explains, the regulations also require:

adequate source information for the selected 24-consecutive month period. As indicated in the PSD rules, the data (needed to calculate the actual emissions factors, utilization rate, etc.) must adequately describe the operation and associated pollution levels for each emissions unit. Otherwise, another 24-consecutive month period must be selected (40 C.F.R. § 52.21(b)(48)(i)(d) and (ii)(e)). Once calculated, the average annual emissions rate must be adjusted downward to reflect (1) any noncompliant emissions (40 C.F.R. §§ 52.21(b)(48)(i)(b) and (ii)(b), and (2) for each non-utility emissions unit, the most current legally enforceable emission limitations that restrict the source’s ability to emit a particular pollutant or to operate at the level that existed during the 24-month period that was selected (40 C.F.R. § 52.21(b)(48)(ii)(c)).³⁹

Proposed §§ 101.106(b) & (c) establish a method for calculating baseline amounts for sources with irregular, cyclical, or significantly variable emissions that is inconsistent with the Harnett Memo and section 185.

To the extent that proposed §§ 101.106(b) & (c) allow sources to calculate baseline amounts based on *actual* emissions during an alternative 24-month period, they are inconsistent with EPA’s memo because (1) they do not require baseline actuals during the historical 24-month period to be adjusted downward to exclude “emissions that would have exceeded an emission limitation with which the major stationary source must *currently* comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period” as 40 C.F.R. § 52.21(b)(48)(ii)(c) requires and (2) the rules fail to ensure that baseline amounts from alternative periods will be supported by information sufficient to determine actual annual emissions from the source and to adjust this amount to exclude noncompliant emissions, consistent with 40 C.F.R. § 52.21(b)(48)(ii)(e). With respect to this second point, proposed § 101.106(c)(1) states that sources using an alternative baseline period to

³⁶ Section 185(b)(2) (emphasis added).

³⁷ (Attachment 8) Memorandum from William Harnett, Director of the Air Quality Policy Division, to the Regional Air Division Directors, “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) (Harnett Memo).

³⁸ (Attachment 8) at 2.

³⁹ *Id.* at 3.

calculate its baseline amount must “use adequate data for calculating the baseline emission units[.]” It is unclear what it might mean to calculate “the baseline emission unit.”⁴⁰ Whatever it might mean, the proposed rule does not require sources to support baseline actual emissions used to calculate baseline amounts with adequate information, consistent with the Harnett Memo and 40 C.F.R. § 52.21(b)(48)(ii)(e).

To the extent that proposed §§ 101.106(b) & (c) allow sources to calculate baseline amounts reflecting *allowable* emissions during an alternative 24-month period, they are inconsistent with the Harnett Memo. While section 185(b)(2) provides that EPA *may* issue guidance allowing sources with irregular, cyclical or significantly variable allowable emissions averaged over a period of more than one year, EPA has not issued such guidance. Instead, the Harnett Memo only provides that sources with irregular, cyclical or significantly variable emissions may use an alternative period for calculating *actuals*-based baseline amounts. Accordingly, section 185 requires baseline amounts for sources with significantly variable emissions to reflect: (1) the lower of actual or allowable emissions during the attainment year, or (2) baseline actual emissions calculated using EPA’s PSD regulations at 42 C.F.R. § 52.21(b)(48). Sources may not, as the proposed rules permit, use allowables during an alternative period to calculate baseline amounts.

IV. The Conditions for cessation of the program do not agree with federal law

Section 185(a) states that nonattainment fees must be paid “until the area is redesignated as an attainment area for ozone.” Under the Act, redesignation is the only way that an area can be relieved of the fee obligation. Proposed § 101.118(a)(2) is contrary to law insofar as it allows the obligation to be terminated upon either redesignation *or* “finding of attainment by the EPA.” A finding of attainment is not equivalent to a redesignation. In fact, a finding of attainment is only the first of five requirements for redesignation.⁴¹ Texas cannot suspend its fee program after a finding of attainment. To do so would violate the CAA.

The proposed rule also allows the executive director of the TCEQ to place the fee program in abeyance “if three consecutive years of quality-assured data resulting in a design value that did not exceed the National Ambient Air Quality Standard are submitted to the EPA.”⁴² Again, the only way to stop collecting section 185 fees is for the area to be redesignated as attainment.⁴³ There is no provision in the CAA that permits the abeyance of fee collection. Furthermore, if the EPA Administrator makes a finding that Texas is not administering and enforcing the section 185 fee, then the Administrator *must* collect the unpaid fees herself.⁴⁴ By arbitrarily placing the fee collection in abeyance, the executive director would risk having the EPA collect the fees itself.

⁴⁰ Proposed § 101.100(8) incorporates by reference the following 30 Tex. Admin. Code § 101.1 definition of “emissions unit”: “Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.”

⁴¹ See CAA § 107 (d)(3)(E).

⁴² Proposed § 101.118(b).

⁴³ Section 185(a).

⁴⁴ Section 185(d) (emphasis added).

V. The Schedule for fee collection is illogical and contradicts federal law

A. The proposed schedule for fee collection contradicts federal law

The CAA imposes the section 185 fee obligation “for each calendar year beginning after the attainment date[.]” For the HGB one-hour ozone nonattainment area, the attainment date was November 15, 2007.⁴⁵ This means that, under the CAA, the TCEQ should collect the section 185 fee for the HGB area for each year beginning with 2008.

Proposed § 101.116(b) states that “[t]he first payment of the fee is due...for the calendar year preceding the adoption date of this section.” Assuming that these rules are adopted in 2013, the first year for fee collection would be 2012. This means that Texas will leave four years of fees (2008-2011) uncollected in violation of federal law. We again note that any fees not collected by the state could be collected by EPA. The TCEQ acknowledges as much in its Interoffice Memorandum, which states that “[t]he EPA could still assess a fee in the gap period between 2008 and when the first fee is collected by the TCEQ.”⁴⁶ It is surprising that the TCEQ would openly risk allowing the federal government to collect fees that should stay in Texas, reducing air pollution in Texas.

B. Concern that the rule might be retroactive is misplaced

In the Interoffice Memorandum, TCEQ states that one reason for beginning the section 185 fee obligation in 2012 is that “[a]pplying the fee to past years could be challenged as a retroactive rulemaking.”⁴⁷ This concern is misplaced for several reasons.

First, simply calculating a penalty based on data that begins in 2008 is not retroactive rulemaking. This is evident from a close reading of the statute imposing the fee, which requires that:

[E]ach major stationary source...shall...pay a fee to the State as a penalty...for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone.⁴⁸

Crucially, the statute imposes the fee “for” each calendar year beginning after the attainment date, not “in” each such year. In other words, the time at which the penalty is assessed is irrelevant. Whether the penalty is paid in 2008, 2013, or 2018, it is still a penalty that is incurred due to the area’s status as nonattainment in 2008, and calculated based on emissions that occurred beginning in 2008. For this reason, the rule cannot be retroactive.

Second, even if the rule were retroactive, the exact circumstance presented here has been deemed permissible by the Supreme Court. In *Bowen v. Georgetown University Hospital*, the Supreme Court articulated the following circumstance in which retroactivity is permissible:

⁴⁵ See, e.g., proposed § 101.100(3).

⁴⁶ (Attachment 2) at 6.

⁴⁷ (Attachment 2) at 6.

⁴⁸ Section 185.

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.⁴⁹

In section 185 we find just such an express conveyance of power: the fee is assessed “for each calendar year beginning after the attainment date[.]” The only reason the rule has any potential to be read as retroactive is that the TCEQ is twelve years late in promulgating the rule.⁵⁰ Mere delay in promulgating a rule cannot render that rule retroactive. This situation was explicitly addressed by Justice Scalia in his concurrence to the *Bowen* opinion:

If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite the limitation of the [Administrative Procedure Act].⁵¹

For these reasons, a fee rule that imposed penalties beginning in 2008 would not be retroactive. The TCEQ should revise the rule to impose the penalties within the timeline expressly laid out by Congress in the statute.

C. The proposed schedule is inconsistent with other schedules in the rule

We also must point out that the decision to collect fees beginning in 2012 is not simply an oversight or a misreading of the federal statute. Above, we criticized the TCEQ’s decision to create a “Fee Equivalency Account” that will credit revenue gathered via the TERP and I/M programs—revenue generated by the people of Texas—against the section 185 fee obligation. We now note that the TCEQ begins crediting this revenue “from the calendar years subsequent to the scheduled attainment year.”⁵² In other words, although the TCEQ has deliberately ignored federal law by refusing to collect fees retroactively, it has used the concept of retroactivity to count money paid by citizens to forgive polluters their fee obligation.

If the intent of this hypocrisy is not clear enough on its face, we need only look at the Interoffice Memorandum’s discussion of the effect of the proposed rule. The TCEQ takes pains to explain in several paragraphs how its accounting exercise should eliminate any obligation imposed on polluters.⁵³ By contrast, the TCEQ dedicates one sentence to the proposed rule’s effect on the public:

⁴⁹ (Attachment 9) *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)(citations omitted).

⁵⁰ See CAA section 182(d)(3) (setting deadline for rule enactment of December 21, 2000).

⁵¹ *Bowen*, 488 U.S. at 225 (Scalia, J., concurring).

⁵² Proposed § 101.103(c).

⁵³ (Attachment 2) at 4-5.

Individuals living in the HGB ozone nonattainment area could be impacted as companies further reduce emissions to reduce fee obligations, raise prices for goods and services, or curtail or cease operations to account for CAA, §185 fee obligations.⁵⁴

This single sentence does not acknowledge the public health benefits of emissions reductions, nor does it mention that the TERP and I/M money used to forgive polluters their obligations comes out of the pockets of the public. We are disappointed with this lopsided treatment of the effects of environmental regulation.

VI. Accumulation of SEP funds should not be permitted

Proposed § 101.122(c) states that:

The use of SEP funds must be on a dollar-for-dollar basis and shall not be discounted due to the passage of time. SEP funds may 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.

The accumulation of SEP funds to offset fee obligations defeats the proper purpose of the rules: to incentivize emission reductions and lead to attainment of the ozone NAAQS. Anything that creates an incentive to not spend money on pollution reductions defeats the purpose of the rule. While we generally approve of the use of SEPs to fulfill the section 185 fee obligation, we do not approve of accounting tricks such as this.

VII. The rule should not be limited to the one-hour ozone standard

The Federal Clean Air Act requires a section 185 fee rule for all “Severe and Extreme ozone nonattainment areas[.]”⁵⁵ The HGB area is designated as Severe-15 under the 1997 eight-hour ozone standard. This means that federal law requires Texas to have a section 185 fee rule in place for both the one-hour and eight-hour ozone standards. The rules that the TCEQ proposed in 2009 and later withdrew applied to the eight-hour as well as the one-hour standard. The TCEQ has now proposed rules that only apply to the one-hour ozone standard.⁵⁶ This is probably due to the fact that the TCEQ wants to use CAA § 172(e) as authority to promulgate its “equivalent alternative” program, and it can only do so if the program only applies to a rescinded NAAQS.⁵⁷ But it is arbitrary and capricious for the TCEQ to approve a fee rule that applies only to the one-hour ozone standard when the HGB area also needs such a rule for the eight-hour standard. The TCEQ should revise the proposed rules to establish a fee program consistent with section 185 that applies to both the one-hour and the eight-hour ozone standards.

⁵⁴ *Id.* at 5.

⁵⁵ Section 185(a).

⁵⁶ *See, e.g.*, proposed § 101.101.

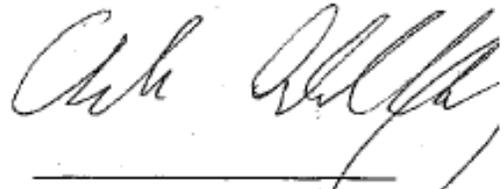
⁵⁷ Commenters do not concede that the TCEQ may apply section 172(e) principles to avoid section 185 requirements so long as its alternative program only applies to the rescinded one-hour standard. We simply note that even under the TCEQ’s reading of section 172(e), the Commission may not establish an alternative fee program for the eight-hour standard.

VIII. Conclusion

The proposed rules do not comply with the federal Clean Air Act. Congress intended section 185 to serve as an economic incentive to reduce emissions and attain the one-hour ozone standard. The TCEQ has ignored that intent in order to avoid imposing any obligation whatsoever on polluters. In fact, the TCEQ has deliberately and unabashedly drafted a rule that creates a significant administrative burden on the agency without doing anything at all to improve air quality in the HGB area. The TCEQ should take this opportunity to continue to reduce emissions and finally bring the Houston area into attainment of the one-hour ozone standard by promulgating fee rules consistent with Clean Air Act requirements that will actually force emission reductions.

We appreciate your attention to these comments. Please contact Adrian Shelley at Air Alliance Houston if you have any questions.

Respectfully Submitted,



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