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Re: Section 185 Equivalent Program

Dear Kathy:

The Texas Commission on Environmental Quality ("TCEQ") has invited informal public comments related to establishing Section 172(e) anti-backsliding requirements equivalent to Section 185 of the federal Clean Air Act ("FCAA") with respect to the revoked one-hour ozone standard. These comments are provided on behalf of the Section 185 Working Group, a group of companies consisting of: Albemarle, BASF, BP, ConocoPhillips, Chevron, Chevron Phillips Chemical, DuPont, Enterprise Products, ExxonMobil, Ineos, Kinder Morgan, Lyondellbasell, NRG Texas, Reliant Energy, Rohm and Haas, Shell and Valero.

The Group appreciates the opportunity to comment on TCEQ's rulemaking concepts.

As an initial matter, we would note the dramatic progress made in Texas on ozone attainment goals. Most Texas areas have now achieved the one-hour ozone standard. The Houston/Galveston/Brazoria area has come very close to one-hour attainment. These real, measured air quality gains are due in large part to the substantial investments made by Group members and other members of the regulated community generating emissions reductions of all ozone precursors. In light of this progress, we are hopeful that any Section 185 equivalent program will be short-lived, if it is needed at all. If such a program is needed, it should be structured effectively, equitably, and consistently with existing federally-approved programs. It should use the flexibility laid out in the FCAA and relevant Environmental Protection Agency ("EPA") guidance.

Outlined below are key features of an effective, equitable and consistent Section 185 equivalent program.

I. Multi-Year Baseline

- A. A multi-year baseline concept is consistent with the statutory language of Section 185(b)(2), which provides that “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.”¹
- B. Consistent with the statute, EPA has issued guidance establishing a high-2-year-in-10 (or high-2-in-5 for EGUs) baseline period as an acceptable period for determining the Section 185 baseline.²
- C. A simple, multi-year baseline would flexibly and efficiently satisfy the statutory language and intent. Such an approach would place the obligation appropriately on sources that have not contributed to attainment goals, while avoiding rewarding delays in the implementation of further emissions controls until after the attainment year.
- D. The high-2-in-10 year baseline was developed by EPA as a programmatic approach to the statutory provision for a multi-year baseline. First established as part of EPA’s 2002 NSR reform rules as a replacement to an unworkable case-by-case baseline review, EPA’s programmatic approach was specifically upheld in the D.C. Circuit’s 2005 decision in *New York v. EPA*.³ Thus, the multi-year baseline stands on a strong, litigation-tested statutory foundation.

II. Precursor Aggregation

- A. Nitrogen oxide (“NOx”) and volatile organic compound (“VOC”) emissions from the same major stationary source (or group of sources under common control) should be aggregated for baseline and fee calculation purposes.
- B. Precursor aggregation is consistent with the FCAA. Section 182(f)(1) states that “plan provisions required under this subpart [including Section 185] shall also apply to major stationary sources . . . of oxides of nitrogen.”⁴ Section 185(b)(1) contains a single formula that, when read in light of Section 182(f)(1), calls for the precursors to be summed in the baseline and program years.⁵

¹ 42 U.S.C. § 7511d(b)(2).

² Memorandum from William T. Harnett, Director, EPA Air Quality Policy Div. to EPA Regional Air Directors, Guidance on Establishing Emissions Baselines Under Section 185 of the Clean Air Act (Mar. 21, 2008).

³ *State of New York v. United States Environmental Protection Agency*, 413 F.3d 3, 24-25 (D.C. Cir. 2005).

⁴ 42 U.S.C. § 7511a(f)(1).

⁵ *See id.* § 7511d(b)(1).

- C. Aggregation of ozone precursors is consistent with the science of ozone formation. Reductions of NO_x along with targeted reductions of both highly-reactive VOCs and traditional VOCs have played an important role in recent successful control strategies. Both NO_x and VOC control strategies are likely to continue to play a meaningful role in achieving remaining air quality goals.
- D. Several other states and districts have promulgated EPA-approved Section 185 rules that allow precursor aggregation.⁶ This approach aligns with the statutory language, allows flexibility consistent with programs approved elsewhere, and would enable the regulated community to take account of the substantial investments they have made to achieve measured progress on ozone.

III. Site Aggregation, Drawn from the ‘Common Control’ Concept in Title V Rules

- A. The Section 185 baseline and the annual Section 185-equivalent obligation should be determined using the aggregate of NO_x and VOC emissions from all major stationary sources within the nonattainment area that are under the “common control” of the same person (or persons under common control).
- B. Site aggregation is a necessary component of a Section 185-equivalent program if the program is to be incorporated into existing airshed-specific cap-and-trade programs such as the successful programs in the Houston area.⁷ Such cap-and-trade programs afford the most cost-effective allocation of reductions required under control strategies regulating VOC and NO_x emissions.
- C. Participants in airshed-specific cap-and-trade programs have relied on site aggregation mechanisms to allocate the burden of emissions reductions efficiently across their operating assets in the area. To assess fees on cap-and-trade participants on a site-by-site basis would impose an unfair burden on companies with multiple sites who planned their emissions reductions to achieve the most cost-effective overall reductions in reliance on the cap-and-trade mechanism.

⁶ See, e.g., Sacramento Rule 307, federally-approved at 68 *Fed. Reg.* 51, 184 (Aug. 26, 2003); Washington, D.C. area rules, federally-approved at 70 *Fed. Reg.* 25,888 (May 13, 2005) (D.C. and Virginia) and 70 *Fed. Reg.* 69,440 (Nov. 8, 2005) (Maryland).

⁷ Key cap-and-trade programs in HGB include the Mass Emissions Cap and Trade Program (“MECT”), 30 TEX. ADMIN. CODE § 101.350 *et seq.*, the Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program (“HECT”), 30 TEX. ADMIN. CODE. § 101.390 *et seq.*; and the System Cap for Electric Generation Facilities, 30 TEX. ADMIN. CODE § 117.1220.

IV. An Emissions-Based Approach to Satisfying the Section 185 Obligation

- A. Each major stationary source's Section 185-equivalent obligation can be assessed in "emission-based" terms, expressed in tons rather than in dollars. Specifically, the Section 185-equivalent obligation would be the amount, in tons, of ozone precursors emitted by each source in a given year above 80% of the source's baseline.
- B. An emissions-based obligation would allow several compliance options that directly support the area's attainment effort. Options for satisfying an emissions-based obligation might include:
 - 1. Actual emissions reduction commitments including any additional NO_x or VOC reductions from point sources that advance the attainment goals.
 - 2. Retirement of Emissions Reduction Credits ("ERCs"), Discrete Emissions Reduction Credits ("DERCs") or current or banked cap-and-trade allowances.
- C. Should the state assess monetary fees in conjunction with or as an alternative to an emissions based obligation, the state should dedicate that revenue to the area's attainment effort. Options for doing so might include:
 - 1. Directing Section 185-equivalent revenue toward existing emission reduction programs in the area, such as the Clean School Bus Program.
 - 2. Development of new fee-based or incentive-based programs specifically dedicated to stationary source emission reductions. EPA has considered Section 185 equivalence options that include crediting the source's Section 185 obligation for new pollution control investment or returning escrowed Section 185 fees to stationary sources upon the completion of area-wide ozone goals.⁸

V. Discontinuation of the Section 185-Equivalent Obligation Upon Attainment

- A. When a Section 185-equivalent program is implemented under the FCAA's Section 172(e) "anti-backsliding" provision in an area that has failed to meet a previously-revoked standard, the Section 185-equivalent program should be discontinued when monitoring data in the area demonstrate the area's air has achieved the level of the previously-revoked standard.

⁸ See U.S. EPA, Conceptual Options for Equivalent Alternative Programs to Section 185 Fee Provision of CAA, (Draft, Apr. 24, 2008).

- B. A Section 185-equivalent program should be suspended for any “clean year” – *i.e.*, any year that monitored ozone levels in the affected area exceed the revoked 1-hour ozone standard one or fewer times at each monitor. The suspended obligation would be formally terminated upon three such “clean” years, thus rewarding prompt and successful efforts to bring an area’s air within the revoked standard.
- C. Suspension of requirements in a “clean year” is consistent with provisions of the FCAA enabling suspension of certain requirements in “extension years.”⁹

VI. Extenuating Circumstances Exclusion

- A. A Section 185-equivalent program should allow an owner or operator of a major stationary source, due to a declared disaster, emergency or other extenuating circumstances, to request an exclusion of program-year emissions quantities directly attributable to the event, as determined by the executive director.
- B. This exclusion would be similar to the extenuating circumstances provision in the Mass Emissions Cap and Trade Program (“MECT”), which has been fully approved by EPA into the Texas State Implementation Plan (“SIP”).¹⁰
- C. An extenuating circumstances provision would, at the executive director’s discretion, prevent facilities from being penalized due to increased emissions due to an event, such as a hurricane, that is not reasonably controllable or preventable by the facility. An example might include an event whereby a plantsite were required to increase fuel or electricity output to make up for a widespread storm-related outage at other facilities in the airshed.

We appreciate the opportunity to present these comments. Please call me or Jason Moore at 713.229.1723 if you have questions about any aspect of them.

Sincerely,



Matthew L. Kuryla

⁹ For example, Section 185(c) allows suspension of fees during an “extension year” as specified in FCAA § 181(a)(5).

¹⁰ See 30 TEX. ADMIN CODE § 101.353(g); *see also* 71 Fed. Reg. 172 (Sept. 6, 2006) (approving revisions to the Texas SIP relating to the MECT program).