



# City of Baytown

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Submitted by Fax: (512) 239-4808

Submitted by Electronic Upload: <http://www5.tceq.state.tx.us/rules/ecomments/>

Submitted by hard copy:

Devon Ryan

MC 205

Office of Legal Services

Texas Commission on Environmental Quality

P. O. Box 13087

Austin, Texas 78711-3087

Dear Mr. Ryan:

I am writing regarding the Texas Commission on Environmental Quality's ("TCEQ") proposed Section 185 Failure to Attain Fee rule (Rule Project Number 2009-009-101-EN).

As the Mayor of the City of Baytown, I am proud of the air quality improvements achieved in the Houston-Galveston-Brazoria area. Our area has seen dramatic reductions in ozone and other pollutants, due in large part to substantial investments by local industry in effective emissions reduction strategies. My office supports continued air quality improvement through incentives and free markets, in stead of additional regulatory mandates, fees and taxes.

I understand that the proposed rule is aimed at implementing Section 185 of the Clean Air Act by imposing penalty fees for failing to attain the now revoked one-hour National Ambient Air Quality Standard for ozone. The fiscal note for the proposed rule states that it could cost area businesses up to \$124 million in the first year alone. I believe that the fiscal note, which includes only the amount of direct fees, significantly underestimates the true economic impact of this proposed rule. A new fee obligation of this magnitude would direct local industry resources away from job-creating investments, and will have compounding effects that will have a substantially greater impact on our local economy.

Given the substantial fiscal impact of the proposed rule, I urge the Commission to reconsider the necessity of implementing such a rule at this time. Available data indicate that the Houston area has actually attained the current ozone standard. Consequently, I do not believe a Failure to Attain Fee rule is necessary given the Houston area's attainment of the

current ozone standard. Moreover, the U.S. Environmental Protection Agency ("EPA") recently issued guidance indicating that no Section 185 program is necessary for areas, such as the Houston area, that have met the current ozone standard.

To the extent that any fee program must be imposed pursuant to Section 185, I urge the Commission to incorporate the maximum flexibility consistent with the Clean Air Act and EPA guidance. To that end, I am concerned with several specific aspects of the proposed rule. Three of my key concerns are outlined below.

**I. Any Section 185 rule should only be applied prospectively.**

The proposed rule calls for fees to be applied retroactively starting with 2008, the year after the 2007 attainment date for the now revoked one-hour standard. Retroactive fee application is problematic because:

- It is too late for sites to implement control strategies or make operational changes in time to affect the Section 185 fees owed for 2008 and 2009 emissions, and possibly even too late to make changes in time to affect 2010 emissions.
- It is too late for sites to account for these fees in their budgeting process.

As noted above, the resulting fees would have a substantial economic impact on area businesses, and it is unfair to impose fees on these businesses without giving them advance notice or an opportunity to reduce their fee obligation. The retroactive application of Section 185 fees is also legally questionable and is unnecessary under the Clean Air Act's anti-backsliding authority to implement the fee program for the now revoked one-hour standard.

If the Commission must impose this fee, I strongly urge the Commission to assess Section 185 fees prospectively only.

**II. Any Section 185 rule should maximize the use of fee alternatives.**

Given the magnitude of the potential economic impact of the proposed rule, any fee program should build in cost-effective alternatives for satisfying the fee obligation that would actually impact future emissions. Examples of such alternatives include allowing sources to retire emissions credits or fund emissions reduction programs in lieu of paying a monetary fee.

The proposed rule does contain several alternatives for satisfying the fee obligation, but constrains their use such that many of the companies in our area would not be able to use them. For example, the proposed rule:

- (1) Prohibits sources that choose to aggregate ozone precursor emissions from satisfying the fee obligation by using the fee alternatives listed;
- (2) Prohibits sources from aggregating both precursor emissions at a single site and aggregating emissions at multiple sites; and
- (3) Prohibits sources from using the fee alternatives to partially satisfy a fee obligation.

I oppose these constraints on cost-effective alternatives for satisfying the Section 185 fee obligation. Maximizing the availability of fee alternatives would reduce the economic impact of the rule on area businesses and industry, while still providing cost-effective tools to improve the region's air quality. Indeed, in many instances the fee alternatives will have a more lasting positive impact towards improving the environment than payment of fees whose use may or may not be used to actually address the problem.

**III. Any Section 185 rule should include full availability of a multi-year baseline period for all participating sources.**

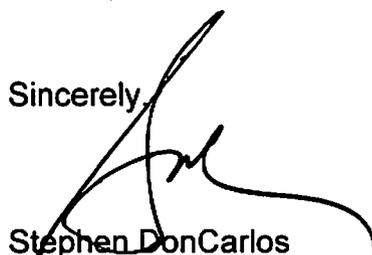
The proposed rule allows sources to compute their baseline emissions by relying on emissions in the highest two consecutive years out of the preceding ten years (five years for electric generating units) "if the regulated entity's emissions are irregular, cyclical, or otherwise vary significant from year to year." This language suggests that the multi-year baseline option may be available only upon a site-specific review of irregularity or cyclicity.

Consistent with EPA's programmatic approach for multi-year baselines, sources should not be required to demonstrate irregularity or cyclicity on an individual, site-specific basis to take advantage of the multi-year baseline option. Any fee program should incorporate the flexibility for the use of a national business cycle, as provided in EPA's rules and guidance.

In sum, I am greatly concerned by the disproportionate impact that this proposal will have on our region and on Baytown, despite our clear and sustained progress on air quality goals. To the extent any Section 185 fee rule is necessary, I urge the Commission to allow maximum flexibility to enable sites to pursue alternative ways to satisfying the fee obligation – and improving the area's air quality – while still preserving the region's economic vitality.

Thank you for the opportunity to comment on this issue.

Sincerely,



Stephen DonCarlos  
Mayor  
City of Baytown