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January 25, 2010

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Re: Proposed Nonattainment Fee Rule
TCEQ Rule Project No. 2009-009-101-EN

Dear Devon:

The Texas Commission on Environmental Quality ("TCEQ") has invited public comment on its proposed "Severe Ozone Nonattainment Area Failure to Attain Fee" rule (the "Proposed Rule"), which seeks to establish a fee program equivalent to that set forth in Section 185 of the federal Clean Air Act ("FCAA"). These comments are provided on behalf of the Section 185 Working Group (the "Group"). The Group is composed of 18 companies, including Albemarle, BASF, BP, Chevron, Chevron Phillips Chemical, Dow, DuPont, Entergy Texas, Enterprise Products, ExxonMobil, Kinder Morgan, LyondellBasell, Magellan, Marathon Petroleum Company, NRG Texas, Shell, Texas Petrochemicals, and Valero.

The Group appreciates the opportunity to comment on the Proposed Rule.

As an initial matter, we would note the dramatic progress made in Texas on ozone attainment goals. The Houston-Galveston-Brazoria ("HGB") area now has measured ozone levels that have reached the level of the current 84 parts-per-billion ozone standard. *See, e.g.* Exhibit 1 (HGB's 8-hour Ozone Status). 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 that have resulted in emissions reductions of all ozone precursors.

The U.S. Environmental Protection Agency ("EPA") recently acknowledged the HGB area's attainment of the current 8-hour ozone standard. On January 5, 2010, EPA issued a final action finding that California failed to submit a Section 185 program State Implementation Plan ("SIP") revision. [1] EPA specifically determined that no such finding is appropriate for the HGB area (and certain other areas) because current air quality data indicate that the HGB area appears to have attained the current 8-hour ozone standard.

Consistent with EPA's January 5 action and its guidance issued the same day, there is no need for a Section 185 fee program at this time. We understand that other areas, such as Baton Rouge, New York and New Jersey, that also have attained the 8-hour ozone standard are pursuing termination of any Section 185 fee obligation based on an EPA determination that these areas have attained the current ozone standard. Similarly, rather than proceed with a Failure to Attain Fee rule, we urge the Commission to pursue a determination by EPA that the

[1] Finding of Failure to Submit Certain State Implementation Plans Required fore the 1-Hour NAAQS, 75 Fed. Reg. 232, n. 1 (Jan. 5, 2010).

HGB area has attained the current 8-hour ozone standard and suspend further action on the Proposed Rule.

If at some point the Commission chooses to adopt a Section 185 fee program, the program should be structured effectively, equitably, and consistently with existing federally-approved programs. It should also incorporate the full amount of flexibility laid out in the FCAA and relevant EPA guidance.

Outlined below are the Group's key concerns with the Proposed Rule. The Group is also submitting section-by-section comments addressing specific concerns with the Proposed Rule, and proposed solutions to those concerns. *See* Attachment A.

I. The Proposed Rule is Unnecessary in Light of Houston's Attainment of the Current Ozone Standard

The Group recognizes that the Proposed Rule is being implemented pursuant to the anti-backsliding provisions in Section 172(e) of the FCAA, as required by the D.C. Circuit's ruling in *South Coast Air Quality Mgmt. Dist. v. EPA*.[2] In that case, the D.C. Circuit required the EPA to promulgate a rule not less stringent than the requirements under the revoked 1-hour ozone standard. However, EPA has yet to promulgate such a rule, although EPA recently issued guidance on this topic.[3] As a result, the only ozone standard currently in effect, and for which the HGB area is currently designated as a nonattainment area, is the 0.084 ppm 8-hour standard.[4]

In the HGB area, ozone ambient air monitoring data for calendar years 2007, 2008, and 2009 indicate that all regulatory monitors met the current 8-hour standard for this three-year period. An analysis of monitoring data supporting attainment is attached as Exhibit 1. As noted above, EPA recently confirmed that current data indicate that the HGB area has attained the 1997 8-hour ozone standard.[5]

The HGB area's attainment of the current 8-hour ozone standard renders the Proposed Rule unnecessary. As outlined below, the Group therefore urges the Commission to confirm the attainment data and pursue an attainment determination from EPA in lieu of finalizing the Proposed Rule at this time.

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[2] 472 F.3d 882 (D.C. Cir. 2006); *see also South Coast Air Quality Management District v. EPA*, 489 F.3d 1245 (D.C. Cir. 2007).

[3] Memorandum from Stephen Page, Director of Air Quality Planning and Standards, regarding Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS (Jan. 5, 2010) ("Page Memo").

[4] In 1997, EPA implemented an 8-hour ozone standard of 0.084 ppm, and the HGB area has been designated as nonattainment of the 1997 8-hour standard. In 2005, EPA revoked the 1-hour 0.12 ppm ozone standard. In 2008, EPA revised the 8-hour standard to 0.075 ppm. The HGB area's designation for the 2008 8-hour standard is not yet due. Consequently, the 1997 8-hour standard is the only active ozone standard for which the HGB area has a designation.

[5] Finding of Failure to Submit Certain State Implementation Plans Required fore the 1-Hour NAAQS, 75 Fed. Reg. 232, n. 1 (Jan. 5, 2010).

A. The Proposed Rule would terminate, by its own terms, once TCEQ submits monitoring data indicating that the HGB area has attained the ozone standard

Section 101.118(3) of the Proposed Rule provides that the fee program ceases upon "three consecutive calendar years of certified monitoring data submitted to the EPA demonstrating that the monitors did not exceed the National Ambient Air Quality Standards" ("NAAQS").

As noted above, current available monitoring data for 2007, 2008 and 2009 indicate that the HGB area has attained the current 8-hour ozone standard. Monitoring data for 2007 and 2008 have already been certified and submitted to EPA. The available monitoring data for 2009 indicate that the area attained the current 8-hour standard that year as well, but the data have not yet been certified and submitted to the EPA.

Because available data for the past three years indicate that the HGB area has attained the current ozone standard, the Proposed Rule would terminate as soon as the 2009 data is certified and sent to EPA. The Proposed Rule is therefore unnecessary by its own terms. Instead of proceeding with the Proposed Rule, the Commission should expedite the process by which monitoring data for 2009 is certified and submitted to the EPA. As discussed further below, this data set would also enable the Commission to seek a determination from EPA that the HGB area has attained the 8-hour ozone standard, terminating any need for a Section 185 program pursuant to recent EPA guidance.

B. Recent EPA guidance confirms that no Section 185 program is necessary once EPA determines that an area attains the 8-hour standard

On January 5, 2010, EPA issued guidance confirming that no Section 185 fee program is necessary for areas that have attained either the revoked 1-hour ozone standard or the current 8-hour standard.[6] Specifically, the guidance states:

> EPA believes that for an area that we determine is attaining either the 1-hour or 1997 8-hour ozone NAAQS, based on permanent and enforceable emissions reductions, the area would no longer be required to submit a fee program SIP revision to satisfy the anti-backsliding requirements associated with the transition from the 1-hour standard to the 1997 8-hour standard. In such cases, an area's existing SIP should be considered an adequate alternative program.[7]

1. TCEQ should request that EPA make a determination that the HGB area has attained the current 8-hour ozone standard

EPA has acknowledged that current available data indicate that the HGB area has attained the current 8-hour ozone standard. Pursuant to EPA's recent guidance, the HGB area's existing SIP should therefore be considered an adequate alternative to a Section 185 fee program.

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6 *See* Page Memo at 3.
7 *Id.*

As a result, there is no need for a Section 185 fee program. Instead of finalizing the Proposed Rule, the Commission should request that EPA expeditiously make a determination that the HGB area has attained the current 8-hour ozone standard, thereby negating any need for a Section 185 fee program in accordance with EPA's recent guidance. We understand that the Baton Rouge, New York and New Jersey nonattainment areas are taking a similar approach, *i.e.* pursuing termination of any Section 185 fee obligation by seeking an attainment determination by EPA.

EPA has made findings of attainment for other nonattainment areas based solely on reviews of air quality data. *See, e.g.* Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; Finding of Attainment for 1-Hour Ozone for the Milwaukee-Racine, WI Area, 74 Fed. Reg. 18,641 (Apr. 24, 2009); Determination of Attainment for the Ozone National Ambient Air Quality Standards for Nonattainment Areas in Delaware, District of Columbia, Maryland, Pennsylvania, and Virginia, 73 Fed. Reg. 43,360 (Jul. 25, 2008). In each of these cases, we are not aware of any state notice-and-comment rulemaking required to seek an attainment finding from EPA. Instead, state and/or district officials merely submitted letters requesting that EPA make determinations of attainment.[8]

In light of the foregoing, we do not believe any notice-and-comment rulemaking is required to seek an EPA attainment determination, thereby terminating the need for the Proposed Rule under EPA's recent guidance. Pursuant to that guidance, the Commission need only submit a letter to EPA that includes the certified attainment data, along with a request that EPA make a determination that the area has attained the current standard.

2. Available data confirm that the HGB's attainment of the ozone standard is due to permanent and enforceable emissions reductions

In its January 5 guidance, EPA informally suggested that, when seeking an attainment determination, states should submit some demonstration that attainment of the ozone standard is due to "permanent and enforceable emissions reductions." Monitoring and other data confirm that the HGB area's attainment of the 8-hour ozone standard is due to permanent and enforceable emissions reductions, including reductions in both ambient ozone and ozone precursors.

For example, TCEQ included a robust weight of evidence demonstration as part of its Proposed Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard.[9] That weight of evidence demonstration provided a thorough and up-to-date analysis of ambient ozone and precursor levels and trends, all of which support the conclusion that the

[8] *See, e.g.* Letter from John H. Melby, Jr., Director, Bureau of Air Management, Wisconsin Department of Natural Resources, to Cheryl Newton, Division Director, Air and Radiation Division, EPA Region 5 (Jul., 28, 2008); Letter from Nancy Floreen, Chair, Metropolitan Washington Air Quality Committee, to Judith Katz, Director, Air Protection Division, EPA Region 3, regarding Findings of attainment for the 1-hour ozone nonattainment areas in Washington, DC-MD-VA Nonattainment Area (Feb. 28, 2007); Letter from James E. Sydnor, Director, Division of Air Quality, Virginia Department of Environmental Quality, to Judith Katz, Director, Air Protection Division, EPA Region 3, regarding Findings of attainment for the 1-hour ozone nonattainment areas in Virginia (Feb. 22, 2007).
[9] Rule Project Number 2009-017-SIP-NR.

HGB area attained the 8-hour ozone standard via permanent and enforceable emissions reductions.

As TCEQ's proposed attainment demonstration shows, the HGB area has continued to experience improving air quality since 2002 in regards to 8-hour ozone with apparent acceleration in air quality improvement since 2006, when the main control strategies were phased in under the 1-hour SIP . While emission reductions have occurred in all sectors, the large majority of the reductions in ozone precursors to date have been made by the industrial source sector via the installation of new control technologies, the manufacture of clean fuels, and the use of innovative technologies. *See, e.g.* Exhibit 4 (Ozone and Precursor Trends). Indeed, regulated entities in the HGB area have spent over $3 billion since 2001 on clean air technologies in the region.

As a result, annual 90th percentile and annual average NOx values have decreased markedly over the 1991 to 2008 period, falling 64 percent and 68 percent, respectively. Though still variable from month to month, pervasive decreases in the ambient concentrations of ethylene and propylene suggest that overall industrial emissions of these compounds have also decreased considerably since 1995. This finding agrees with early reports from TexAQS II that ethylene emissions along the Houston Ship Channel have decreased approximately 40 percent from 2000 to 2006 (TCEQ SIP, 2009). Accordingly, it is apparent that ozone reductions correlate closely with precursor reductions mandated by the existing SIP.

Table 1 contains a partial list of programs that have been employed by the stationary source sector in the HGB area that have resulted in dramatic ozone precursor reductions, which are evident in the ambient air record.

Table 1. Partial list of emissions control programs implemented by the stationary source sector in the Houston region.

Implementation Year(s)	Point Source Emission Reduction Program
2001-2007	80% NOx Reduction Program
2001-2005	Industry Voluntary Episodic Emissions Reduced
2002	HRVOC Reportable Quantities Lowered
2004-2019	TERP Accelerates Off-Road Diesel NOx Reductions
2004	NOx CEM's
2004	Federal Cleaner Gasoline Delivered by Houston Refiners
2005	Texas Low Emission Diesel Delivered by Houston Refiners
2005	HRVOC Flare, Cooling Tower, Vent, Safety Valve Monitoring
2005	Voluntary Use of Newly Commercial VOC Imaging Camera Begins
2006	HRVOC Hourly Limit Program Begins
2006	Federal On-Road Cleaner Diesel Delivered by Houston Refiners

2007	HRVOC Annual Cap Program Begins
2007	Participation in DIAL and Other Cooperative Emissions Studies
2008	Continuing Regionally Focused VOC Emission Reduction Programs

Moreover, available scientific information indicates that the ozone reductions in the HGB area were not due to favorable weather patterns. Although ozone concentrations are a function of both precursor emissions and meteorology, extensive research conducted for TCEQ by the University of Texas at Austin has concluded that favorable meteorology does not explain the downward trend in ozone concentrations in the Houston area since the 1990s. *See* Sullivan, *Effects of Meteorology on Pollutant Trends* (Final Report Mar. 16, 2009), at 43. Thus, reductions in precursor emissions—the result of the aggressive control strategies instituted in Texas—have been responsible for the observed improvements in air quality.

3. In the event of a negative EPA attainment determination, the Commission would have an opportunity to revisit a Section 185 rule

Should EPA deny a TCEQ request for an attainment demonstration, EPA would likely follow the procedure it established in its recent action regarding California's SIP. As noted above, on January 5, 2010, EPA published in the Federal Register a final action finding that California failed to submit a Section 185 program. That finding was predicated on California's failure to attain either the revoked 1-hour ozone standard or the current 8-hour standard.

As the California notice states, under the FCAA California has 18 months from the date of EPA's failure-to-submit finding to submit a Section 185 program and avoid sanctions:

> In addition, this action simply starts a "clock" that will not result in sanctions against the states for 18 months, and that the state may "turn off" through submissions of complete SIP submittals.[10]

EPA explicitly chose not to issue a failure-to-submit finding for the Houston area because our area appears to have attained the current 8-hour ozone standard. As a result, no sanctions "clock" is active as to Texas. Should EPA eventually deny a TCEQ request for an attainment determination, EPA would follow the same procedure as with California and issue a finding that the HGB area has failed to submit a Section 185 rule SIP revision.

Under the FCAA, the Commission would than have 18 months from the date of EPA's finding to submit a Section 185 SIP revision and avoid sanctions. Given that the timeline for the current rulemaking is six months from rule proposal to adoption, the Commission would have more than sufficient time to promulgate a new Section 185 rule and submit it to EPA without incurring sanctions.

[10] Finding of Failure to Submit Certain State Implementation Plans Required fore the 1-Hour NAAQS, 75 Fed. Reg. 232, 234 (Jan. 5, 2010).

The fiscal note to the Proposed Rule estimates that regulated entities in the HGB area would owe up to $124 million in Failure to Attains Fees for the first year alone. Given the magnitude of this fiscal impact to the region's economy, the Commission should not move forward with the rulemaking if it is not required under the FCAA and EPA guidance and should instead pursue an attainment determination.

II. The Proposed Rule is Also Unnecessary to the Extent that Failure to Attain is Due to Internationally Transported Emissions

FCAA section 179B[11] also renders the Proposed Rule unnecessary to the extent that any failure to attain an ozone standard is due to internationally transported emissions. Section 179B(b) provides that a state is relieved from its obligations under Section 185 if the state can demonstrate that an ozone nonattainment area "would have attained the national ambient air quality standard for ozone by the applicable attainment date, but for emissions emanating from outside of the United States."

An area attains the revoked 1-hour ozone standard when the average number of exceedance days per year, after adjusting for missing data, is less than or equal to 1.0 at every one of the area's monitors. For the purpose of determining whether an area has attained the standard, the number of exceedance days per year at each monitor is averaged over the most recent three years. Thus, an area attains the 1-hour ozone standard when all of its monitors record less than or equal to three exceedance days in a 3-year period, assuming insignificant data loss.

Available data suggest that the HGB area would have attained the ozone standards earlier, but for internationally transported emissions. For 2007-2009, all but one of the 22 monitors in the HGB area reported in the EPA Air Quality System (AQS) database recorded less than or equal to three exceedance days. *See* Exhibit 2 (HGB 1-Hour Ozone Attainment Status). Only TCEQ monitor CAMS 26 (Northwest Harris Co.) recorded four exceedance days. Since the maximum 1-hour ozone level measured at CAMS 26 was 127 ppb in 2007 and 128 ppb in 2009, Houston would have attained the 1-hour ozone standard those years but for emissions emanating from outside the U.S. of just 3-4 ppb.

As demonstrated in the attached report by Al Hendler at URS, available data suggest that the HGB area would have attained the revoked 1-hour ozone standard but for emissions emanating from wildfires in Canada. *See* Exhibit 5 (Al Hendler, URS Corporation, *Influence of Canadian Wild Fires on Houston Ozone Nonattainment*).

In addition, a 2008 study by researchers at Harvard University and elsewhere concluded that "Asian pollution enhanced surface ozone concentrations by 5-7 ppbv over western North America in the spring of 2006." *See* L. Zhang et al., *Transpacific transport of ozone pollution and the effect of recent Asian emission increases on air quality in North*

[11] 42 U.S.C. § 7509a.

America: an integrated analysis using satellite, aircraft, ozonesonde, and surface observations, Atmos. Chem. Phys., 8, 6117-6136 (2008).

Similarly, in a 2009 study, researchers concluded that pollution from Mexico and Canada enhances ozone concentrations in the United States by an average of 3-4 ppb in the summer and can increase ozone concentrations "much higher in downwind regions of the northeast and southwest." *See* H. Wang et al., *Surface ozone background in the United States: Canadian and Mexican pollution influences*, Atmos. Env. 43, 1310-1319 (2009).

A recent study conducted for the National Oceanic and Atmospheric Administration concluded that spring ozone levels above western North America are rising primarily due to air flowing eastward from the Pacific Ocean. *See* O.R. Cooper at al., *Increasing springtime ozone mixing ratios in the free troposphere over western North America*, Nature 463, 344-348 (Jan. 21, 2010). The study showed that international emissions, particularly from south and east Asia, accounted for an overall *increase* in the median ozone rate in western North America of more than 0.6 ppb per year between 1995 and 2008.

These studies' conclusions with respect to the contribution of international emissions to ozone levels in North America suggest that any delay in HGB's attainment of the applicable ozone standard was due to internationally transported emissions.

If the above findings are confirmed, under the clear language of Section 179B, Texas is relieved from complying with Section 185's requirements. Accordingly, rather than proceeding with a burdensome new fee program, TCEQ should evaluate and confirm the findings as to the effect of internationally transported emissions, and confirm with EPA that the HGB area would have attained the 1-hour standard by the attainment date but for internationally transported emissions.[12]

There is precedent in Texas for this approach. In 2004, EPA accepted an international transport demonstration for the El Paso area. According to the Federal Register notice announcing EPA's approval, "[u]nder Section 179B of the Act, the EPA approved the 1-hour ozone standard attainment demonstration SIP for El Paso County on June 10, 2004 (see 69 FR 32450). TCEQ established to the EPA's satisfaction that implementation of the plan would achieve timely attainment of the 1-hour ozone NAAQS but for emissions emanating from Ciudad Juarez."[13] The Commission should pursue a similar demonstration for the HGB area.

III. If the Commission Proceeds with this Rulemaking, It Should Incorporate the Mobile Source Flexibility in Recent EPA Guidance

[12] *See* Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard - Phase.2, 70 Fed. Reg. 71,612, 71,624 (Nov. 29, 2005) ("We continue to recommend that States confer with the appropriate EPA Regional Office to establish on a case-by-case basis the technical requirements for analyses to support showings under section 179B.").

[13] *See* Approval and Promulgation of Air Quality Implementation Plans; Texas Approval of the Section 110(a)(1) Maintenance Plan for the 1997 8-hour Ozone Standard for El Paso County, 74 Fed. Reg.2387-88 (Jan. 15, 2009) (codified at 40 C.F.R. pt. 52).

As set forth above, the Group does not believe a Section 185 fee program is necessary at this time. Should the Commission eventually decide to revisit a Section 185 fee program, it should incorporate the additional flexibility in EPA's recent guidance.

Specifically, EPA's guidance sets out new flexibility for shifting the burden of a Section 185 fee program from major stationary sources to mobile and area sources. The guidance states:

> Under this concept, states could develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to section 185, to other non-major sources of emissions, including owners/operators of mobile sources. This could allow states to recognize through reduced fees those major sources of emissions that have already installed the latest technology, and assess the remainder of the total required fees on other sources that are not already as well controlled.

Emissions from mobile sources are a major contributor to ozone levels in the HGB area and should therefore share the burden of any Failure to Attain fee program consistent with EPA's recent guidance. The current Proposed Rule appears not to provide any flexibility for shifting the Failure to Attain Fee burden to mobile or area sources. If the Commission chooses to proceed with the current rulemaking, the Commission should withdraw the current Proposed Rule and propose a revised rule that incorporates the full amount of flexibility regarding mobile sources as set forth in EPA's guidance.

IV. Any Application of the Rule should be Prospective Only

Sections 101.112(b), 101.114(b), 101.115(c), and 101.116(b) of the Proposed Rule would impose fees for emissions during the "first full calendar year following the attainment date." The attainment date for the revoked 1-hour standard was 2007. Consequently, the Proposed Rule appears to assess Section 185 fees retroactively, starting with 2008.

On a practical level, retroactive fee application is problematic for at least two reasons: first, it is too late for sources to implement control strategies or make operational changes in time to affect the Section 185 fees owed for 2008 and 2009. Second, it is too late for sources to account for such fees in their budgeting process for 2008 and 2009. Sources face considerable uncertainty and adverse economic effects from the proposed fee obligation. The fiscal note to the Proposed Rule suggests an economic impact of between $73 million and $124 million for the first year alone, illustrating both the magnitude and uncertainty of the problems associated with retroactive fee application. Moreover, the fiscal note, which only includes the amount of direct fees, likely underestimates the potential economic impact of the Proposed Rule. Any fees paid under the rule would also divert scarce resources for capital improvements and other projects designed to increase efficiency, minimize emissions, and create jobs. Thus, the Proposed Rule would have compounding effects that substantially impact the region's economic growth.

The Group understands that Section 185 is being invoked for the revoked 1-hour standard because of a court decision calling on EPA to impose requirements "no less stringent than" Section 185 as an anti-backsliding measure. The regulated community has not had adequate notice of the nature and amount of the "equivalent" program that EPA was called upon to impose under anti-backsliding provisions. EPA recently issued guidance on equivalence, but the guidance does not address retroactive application of Section 185 fees or other aspects of an "equivalent" program. It is fundamentally unfair to impose a substantial new fee obligation retroactively in these circumstances.

On a legal level, the retroactive application of fees is unnecessary under the FCAA's anti-backsliding provision for the 1-hour ozone standard.[14] EPA revoked the 1-hour standard in 2004. In its December 2006 *South Coast* decision, the D.C. Circuit required EPA to "promulgate" a rule no less stringent.[15] EPA has not yet promulgated a rule. In light of the revocation of the 1-hour standard, the EPA rule removing any Section 185 obligation, the court decision requiring EPA to "promulgate" a rule imposing "equivalent" anti-backsliding requirements, and the delay in any EPA rule, it is unreasonable to apply the Section 185 fee obligation retroactively.

Finally, as detailed in Exhibit 3 (Legal Analysis of Retroactive Laws), the retroactive imposition of fees pursuant to Section 172(e) of the FCAA is legally impermissible. Among other authorities outlined there, the Texas Constitution flatly prohibits any "retroactive law." TEX. CONST. art. I, § 16.

The Group suggests that, in light of the uncertain status of EPA's rule, the magnitude of potential impacts, and the legal concerns with retroactive laws, any Section 185 rule should only apply prospectively.

V. A Multi-Year Baseline Period should be Available to all Participating Sources

As detailed above, the Proposed Rule is unnecessary for multiple reasons, and the Commission should not finalize the rule at this time. If the Commission adopts the Proposed Rule, the rule should include the full suite of flexibility options approved by EPA. For example, the Group suggests that the Commission allow all participating sources to use the multi-year baseline calculation in Section 101.103(b) of the Proposed Rule.

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[14] The fees for the 1-hour standard are being applied under FCAA § 172(e)'s anti-backsliding provision (The "Administrator . . . shall promulgate" control requirements not less stringent than the relaxed standard (*i.e.* the 1-hour standard). *See* FCAA § 172(e). In December 2006, the D.C. Circuit reversed EPA's transition rules implementing EPA's revocation of the 1-hour standard, requiring EPA to comply with Section 172(e)'s requirements, *i.e.* to *promulgate* a not less stringent standard under FCAA § 172(e). EPA has not promulgated any Section 172(e) control requirements not less stringent. In fact, EPA has for years been considering what constitutes "not less stringent."

[15] With its remand to EPA following vacatur of parts of the Phase 1 transition rule, the *South Coast* court did not offer specific direction concerning implementation of the anti-backsliding requirements. However, the court in its Opinion on Petitions for Rehearing "urged" EPA "to act promptly in promulgating a revised rule." *South Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248-49 (D.C. Cir. 2007).

As currently written, Section 101.103 allows a regulated entity to use a multi-year baseline "[i]f the regulated entity's emissions are irregular, cyclical, or otherwise vary significant[ly] from year to year," implying that the multi-year baseline option may only be available upon a site-specific review of irregularity or cyclicality.

In contrast, EPA's 2008 baseline guidance was developed as a programmatic approach to the statutory provision for a multi-year baseline. This programmatic approach was founded on a nationwide business cycle study performed by ERG and was specifically upheld in the D.C. Circuit's 2005 decision in *New York v. EPA*.[16] While noting that business cycles differ markedly by industry, the D.C. Circuit recognized and approved of EPA's choice of a multi-year baseline "to lend clarity and certainty to the process and to avoid the administrative burden of determining 'representativeness' baselines on a case-by-case basis."[17] Thus, the multi-year baseline stands on a strong, litigation-tested statutory foundation.

If a Section 185 fee rule is ultimately adopted, consistent with EPA's programmatic approach, the multi-year baseline option should be available without the need for a demonstration of irregularity or cyclicality.

With respect to calculating the multi-year baseline, the preamble to the Proposed Rule states that regulated entities may review, and, if necessary, modify data submitted in annual emissions inventories for purposes of calculating the baseline. However, the preamble notes that such corrections may only be made in the attainment year (*i.e.*, 2007) and the immediately preceding year (*i.e.*, 2006). To accurately establish a multi-year baseline, data corrections may be required up to ten years prior to the attainment year. The Group therefore suggests that TCEQ clarify in the preamble that historical data corrections are allowed when establishing a multi-year baseline.

In addition, under the Proposed Rule, a source's baseline amount must be computed as the lower of (1) actual emissions in the attainment year, (2) authorized emissions in the attainment year, or (3) the average baseline emissions as calculated using the multi-year baseline provision. Requiring sources to compute their baseline based on the lower of actual emissions, authorized emissions or the multi-year baseline average would effectively remove the multi-year baseline option for many Group members. We do not believe this was the intent for this provision.

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[16] *State of New York v. United States Environmental Protection Agency*, 413 F.3d 3, 24-25 (D.C. Cir. 2005).
[17] *Id.* at 26 (internal quotations omitted).

Accordingly, the Group suggests clarifying that the baseline amount must be computed as:

(1) the lower of:

(a) actual emissions in the attainment year;

(b) authorized emissions in the attainment year; or

(2) the multi-year average baseline emissions as calculated under section (b) of this section.

This approach is consistent with the preamble to the Proposed Rule, which indicates that TCEQ intends the baseline amount to be computed as (1) the lower of actual or authorized emissions in the attainment year, or (2) the multi-year average baseline. This approach is also consistent with the FCAA and EPA guidance regarding the use of multi-year baselines.

VI. All Participants should be Allowed to Use the Equivalent Fee Alternatives

The Proposed Rule offers several good alternatives – such as retirement of emissions credits and payment into Supplemental Environmental Projects – for satisfying the fee obligation. Authority for these fee alternatives was recently confirmed in EPA guidance. However, the Proposed Rule constrains the use of these alternatives such that many Group members would not be able to use them. The constraints have the effect of sending fees to the state rather than encouraging actual emissions reductions or investing the money directly into the community affected by the emissions.

Such constraints include a prohibition on the use of equivalent alternative obligations in combination with precursor aggregation, and a prohibition on the use of an equivalent alternative obligation to partially satisfy a fee obligation. The Group is not aware of any legal basis for these constraints, which were added after the initial draft rule was circulated for public comment.

If a Section 185 fee rule is ultimately adopted, as an alternate way to address the accounting of aggregated emissions on a ton-for-ton basis without prohibiting the use of alternatives, the relevant provisions could be modified to require that alternatives be aligned on a ton-for-ton basis with the pollutants generating the fee obligation. Such language is included in the Group's detailed comments on Section 101.104(d).

VII. Participants should not be Penalized because of Extenuating Circumstances.

The Group believes that 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.

This exclusion would be similar to the extenuating circumstances provision in the Mass Emissions Cap and Trade ("MECT") Program, which has been fully approved by EPA into the Texas SIP.[18]

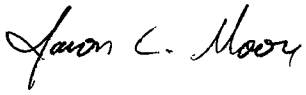
An extenuating circumstances provision would, at the executive director's discretion, prevent facilities from being penalized for increased emissions due to an event, such as a hurricane, that is not reasonably controllable or preventable by the facility. An example might include an event whereby a site was required to increase fuel or electricity output to make up for a widespread storm-related outage at other facilities in the airshed.

VIII. Detailed Comments

The Group has identified a number of other issues with the Proposed Rule, which are outlined in the detailed comments in **Attachment A**.

We appreciate the opportunity to present these comments. Please call me or Matt Kuryla at 713.229.1114 if you have questions about any aspect of them.

Sincerely,



Jason C. Moore

Attachments (6)

[18] *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).