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June 26, 2009

Ms. Kathy Pendleton P.E.
Texas Commission on Environmental Quality
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Dear Ms. Pendleton:

The Texas Commission on Environmental Quality ("TCEQ") has invited public comments on TCEQ's Staff Draft Section 185 Rule Language. 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, Dow, DuPont, Enterprise Products, ExxonMobil, Kinder Morgan, Lyondellbasell, NRG Texas, Reliant Energy, Shell and Valero.

The Section 185 Working Group appreciates the opportunity to comment on TCEQ's proposed Section 185 language.

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.

The Section 185 Working Group's specific comments on the proposed language are enclosed in bold italics.

If you have any questions regarding this letter, please do not hesitate to contact me.

Sincerely,



Matthew L. Kuryla

MLK/0032

COMMENTS OF THE SECTION 185 WORKING GROUP
ON
TCEQ STAFF DRAFT SECTION 195 RULE LANGUAGE
(Comments are in bold italics)

SUBCHAPTER B: FAILURE TO ATTAIN FEE AND EQUIVALENT ALTERNATIVE

OBLIGATION

DIVISION 1: FAILURE TO ATTAIN FEE

§§101.100, 101.110, 101.115, 101.120, 101.125, 101.127, 101.130, 101.140, 101.145, 101.147,
101.150, 101.160, 101.170

STATUTORY AUTHORITY

The new sections are proposed under

The proposed new sections implement the requirements of Sections 185 and 182(f) of the Federal Clean Air Act (FCAA).

§101.100. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

- (1) **Annual Emissions** – The actual emissions reported in tons in annual emissions inventory update, submitted to, and approved by, the agency for each calendar year. *[Comment: The rule is unclear as to whether regulated entities may use latest emissions data in calculating annual emissions. Under Section 185(b)(2), the defined term “actual” emissions calls for real, actual emissions based on latest and best techniques for calculating annual emissions, particularly baseline emissions. Especially where sources are using updated emissions factors or*

estimation techniques in the program year, it is important to have the baseline established on an equivalent estimation basis.]

(2) **Attainment Date** – The date an area is scheduled to attain the national primary ambient air quality standard for ozone, as documented in the state implementation plan.

(3) **Attainment year** – For the 1-hour ozone standard, the attainment year is calendar year 2007. For the 1997 8-hour ozone standard, the attainment year is the calendar year immediately preceding an ozone nonattainment area’s attainment date. *[Comment: Reference to the 1997 8-hour standard should be deleted. Per draft EPA guidance circulated on February 10, 2009, “areas that are nonattainment for the 1997 8-hour ozone NAAQS are to submit section 185 SIP revisions as applicable for the 1997 8-hour ozone standard to EPA by June 15, 2014.” It is therefore premature to promulgate Section 185 rules regarding the 8-hour ozone standard at this time. However, if the 8-hour standard must be addressed in the rule, this provision suggests a “prior calendar year” principle sometimes used in SIP control strategy planning. This principle is absent from Section 185. Under Section 185(a), the first program year for the 1997 8-hour standard is the calendar year after the attainment date, i.e. 2020]*

(4) **Baseline Amount** – The lower of actual or permitted emissions, calculated in tons, using data submitted to and approved by the commission *[Comment: The redundant phrase “approved by” should be deleted. Actual emissions are real, actual emissions (see above comment on Definition 1). The ED approves all baselines in sections 101.120(e), 101.125(d) and 101.127(e). Thus, the phrase is redundant.]*, emitted by the source in the attainment year, or an annual average based on 24-months of operation in the ten years preceding the attainment date or previous 5-years for electrical utility steam generating units.

(5) **Electrical utility steam generating units** - A unit that generates electric energy for compensation and is owned or operated by a person doing business in this state, including a municipal corporation, electric cooperative, or river authority. *[Comment: This definition appears to be broader than the definition of electrical utility steam generating units in TCEQ's NSR Reform rules, which limits the definition to those units "constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale." (See 30 TAC 116.12(13)). This definition should conform to the definition in 30 TAC 116.12(13).]*

(6) **Extension year** – A year as defined in section 181(a)(5) of the Federal Clean Air Act.

§101.110. Applicability.

The provisions of this rule apply to all regulated entities that are major sources of volatile organic compounds (VOC) or nitrogen oxides (NO_x) in a severe or extreme nonattainment area that has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date. For purposes of this section, an affected regulated entity shall have met any of the following conditions:

(a) For sources in a severe ozone nonattainment area that has failed to demonstrate attainment:

(1) The regulated entity has the potential to emit, at maximum operation or design capacity, 25 tons per year (tpy) of VOC ;

(2) The regulated entity has the potential to emit, at maximum operation or design capacity, 25 tons per year (tpy) of NO_x.

(b) For sources in an extreme ozone nonattainment area that has failed to demonstrate attainment:

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Subchapter B. Failure to Attain Fee

(1) The regulated entity has the potential to emit, at maximum operation or design capacity, 10 tons per year (tpy) of VOC;

(2) The regulated entity has the potential to emit, at maximum operation or design capacity, 10 tons per year (tpy) of NO_x.

§101.115. New Source Exemption.

Any major source meeting the applicability requirements of §101.110 that was not in operation on or before the attainment date is exempt from the requirements of this subchapter.

§101.120. Baseline Amount Calculation. *[Comment: This section is redundant of the definition of "Baseline Amount" and could cause unnecessary confusion. Therefore, this section should merely reference the definition of "Baseline Amount," which makes clear that entities have the flexibility to calculate baseline emissions either during the attainment year or during the two-year period that EPA has specified in its March 21, 2008 guidance. In the event this language is retained, the comments below should be addressed.]*

(c) For purposes of this section, the baseline amount shall be computed as the lower of either of the following:

(1) *the lower of the* total amount of actual emissions in the attainment year *or* total emissions allowed under the permit applicable to the source in the attainment year; or

(2) total emissions as calculated under subsection (b) of this section.

[Comment: This section should be clarified to state that the baseline amount is the lower of either the permitted or actual emissions in the attainment year, or the two-year period that EPA specified in its March 21, 2008 guidance.]

(d) if the regulated entity's emissions are irregular, cyclical, or otherwise vary significant from year to year, then the baseline amount may be computed using any single

24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute an average actual annual emissions rate (tons per year) for the site. If used, the historical period must be: *[Comment: Section 185 Working Group members in the Houston-Galveston-Brazoria area have irregular, cyclical and "otherwise" varied emissions. By the use of the term "if," the provision suggests that the agency will conduct a case-by-case review to determine if regulated entities qualify for the multi-year baseline approach that EPA specified in its March 21, 2008 guidance. No such determination is needed or appropriate, under the approach established by EPA's March 2008 guidance. EPA's approach is modeled on NSR reform, which specifically eliminated a case-by-case baseline approval process. EPA's approach is founded on a nationwide business cycle study performed by ERG, and was specifically upheld by the D.C. Circuit.*

(3) ten years for non-utilities

(4) five years for electrical utility steam generating units

(e) Calculation. A baseline amount, reported in units of tons, must be calculated separately for VOC and for NO_x.

(f) Baseline Amount Reporting. Within **180** days of the effective date of this section, the owner or operator of each regulated entity in an area meeting the requirements of Section 101.100 shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director. *[Comment: 90 days is insufficient time to allow regulated entities to calculate their baseline amounts with more accurate historical data. The rule should provide that regulated entities should provide their baseline reports within 180 days of the effective date]*

(g) Approval. The baseline amount calculation is subject to approval by the executive director. After approval, it will be fixed and not be changed without the approval of the executive director.

§101.125. Aggregated Pollutant Baseline Amount.

(a) Notwithstanding the requirements of § 101.120, major sources meeting the applicability requirements of section § 101.110 may choose to combine emissions for both VOC and NO_x into a single baseline amount for a site after calculating each pollutant's emission baseline amount in accordance with this Subchapter.

(b) Major sources choosing to combine emissions for both VOC and NO_x into a single baseline amount for a site shall not aggregate emissions from multiple sites as allowed under § 101.126.

(c) Baseline Reporting. Within **180** days of the effective date of this section, the owner or operator of each regulated entity in an area meeting the requirements of Section 101.100 shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director. *[Comment: 90 days is insufficient time to allow regulated entities to calculate their baseline amounts with more accurate historical data. The rule should provide that regulated entities should provide their baseline reports within 180 days of the effective date]*

(d) Approval. The baseline amount calculation is subject to approval by the executive director. After approval, it will be fixed and not be changed without the approval of the executive director, until the failure to attain fee no longer applies for the area.

(e) If a major source elects to aggregate pollutants as allowed in this section, then the major source shall also aggregate pollutants to calculate the failure to attain fee.

§ 101.127. Multiple Site Aggregation Baseline Amount.

(a) Notwithstanding the requirements of § 101.120, Major sources meeting the applicability requirements of § 101.110, who are subject to Subchapter H, Division 3 may aggregate NO_x emissions from multiple sites to calculate the baseline amount.

(b) Notwithstanding the requirements of § 101.120, major sources meeting the applicability requirements of § 101.110, who are subject to Subchapter H, Division 6 may aggregate VOC emissions from multiple sites to calculate the baseline amount. *[Comment: This section would only allow entities subject to HECT to aggregate VOCs. Whereas Section 185 addresses all VOCs, HECT addresses only HRVOCs. Multiple Site Aggregation should be available for sources of all VOCs in Harris County. Moreover, entities in HGB counties other than Harris County (which could become subject to HECT based on an ED determination embedded in the rule) should also be able to use the VOC aggregation tool.]*

(c) If a major source elects to aggregate emissions from multiple sites as allowed in this section, then the major source may not also elect to aggregate pollutants as allowed under § 101.125.

(d) Baseline Reporting. Within **180** days of the effective date of this section, the owner or operator of each regulated entity in an area meeting the requirements of Section 101.100 shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director. *[Comment: 90 days is insufficient time to allow regulated entities to calculate their baseline amounts with more accurate historical data. The rule should provide that regulated entities should provide their baseline reports within 180 days of the effective date.]*

(e) Approval. The baseline amount calculation is subject to approval by the executive director. After approval, it will be fixed and not be changed without the approval of the executive director, until the failure to attain fee no longer applies for the area.

(f) If a major source elects to aggregate emissions from multiple sites as allowed in this section, then the major source shall also aggregate emissions from multiple sites to calculate the failure to attain fee

(g) The same period of time shall be used as a basis for the baseline amount calculation for all aggregated sites.

§101.130. Adjustment of Baseline Amount for Sources With Less than 24 months of operation at attainment date

(a) The baseline amount may be adjusted for certain regulated entities if they experienced less than 24-months of consecutive operation by the area's attainment date. The adjusted baseline amount shall be computed as the lower of the following:

- (1) amount of actual emissions in the attainment year; or
- (2) emissions allowed under the permit applicable to the source in the attainment year.

(b) Baseline Reporting. Within 60 days of completing 24-months of operation, the owner or operator of each regulated entity in an area meeting the requirements of Section 101.100 shall submit to the executive director a report establishing its adjusted baseline amount emissions on a form published by the executive director.

(c) Approval. The adjusted baseline amount calculation is subject to approval by the executive director. After approval, it will be fixed and not be changed without the approval of the executive director until the failure to attain fee no longer applies for the area.

§101.140. Failure to Attain Fee Obligation. *[Comment: This section would apply to non-aggregated sites. As currently written, the differentiation between non-aggregated and aggregated sites for purposes of a fee obligation is overly complex and confusing. We recommend one unified aggregation formula which would be simpler and easier to follow.]*

(a) Pollutant Applicability. The total fee shall be applicable to and calculated for each pollutant - VOC or NO_x – for which the regulated entity meets the requirements of § 101.110.

(b) Obligation. The owner or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (c) of this section. The fee shall be assessed on actual emissions exceeding 80 percent of the baseline amount during the attainment year.

(c) Calculation of fee. The fee will be calculated by:

$$\text{VOC Fee} = \text{FCAA185FeeRate} * (\text{VOCActual} - 0.8 * \text{VOCBaselineAmount})$$

$$\text{NO}_x \text{ Fee} = \text{FCAA185FeeRate} * (\text{NO}_x \text{ Actual} - 0.8 * \text{NO}_x \text{ BaselineAmount})$$

Definitions:

$$\text{FCAA 185 Fee Rate} = \$5000(\text{CPI}/122.15)$$

CPI = The annual Consumer Price Index (CPI) adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI

which is most consistent with the CPI for calendar year 1989 in accordance with Sections 502(b)(3)(B)(v) and 185(b)(3) of the CAA.

VOC Actual = Total annual VOC in units of tons reported on the annual Emissions Inventory (EI) for the regulated entity

NO_x Actual = Total annual NO_x reported in units of tons on the annual EI for the regulated entity

VOC Baseline Amount = Baseline for VOC calculated per § 101.120

NO_x Baseline Amount = Baseline for NO_x calculated per § 101.120

§101.145. Failure to Attain Fee Obligation for Aggregated Pollutant Baseline.

(a) Pollutant Applicability. The fee shall be applicable to both pollutants, VOC and NO_x, as combined, emitted from the regulated entity meeting the requirements of § 101.110, that chooses to aggregate VOC and NO_x as allowed under § 101.125.

(b) Obligation. The owner or operator of each regulated entity to which this rule applies shall remit to the commission a fee, computed in accordance with subsection (c) of this section. The fee shall be assessed on actual emissions exceeding 80 percent of the baseline during the attainment year.

(c) Calculation of fee. The fee will be calculated by:

$$\text{TotalFee} = \text{FCAA185FeeRate} * [(\text{VOCActual} + \text{NO}_x\text{Actual}) - 0.8 * \text{BaselineCombined}]$$

Definitions:

FCAA 185 Fee Rate Per Ton = \$5000(CPI/122.15)

CPI = The annual Consumer Price Index (CPI) adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the

fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with Sections 502(b)(3)(B)(v) and 185(b)(3) of the CAA.

VOC Actual = Total annual VOC in units of tons reported on the annual Emissions Inventory (EI) for the regulated entity

NO_x Actual = Total annual NO_x reported in units of tons on the annual EI for the regulated entity

BaselineCombined = Baseline amount for combined VOC and NO_x calculated per § 101.125.

§101.147 Failure to Attain Fee Obligation for Multiple Site Aggregation

(a) Pollutant Applicability. The total fee shall be applicable to and calculated for each pollutant - VOC or NO_x – for which the regulated entity meets the requirements of §101.110. Actual VOC and NO_x emissions may be combined for multiple sites and limited to emissions from:

- (1) Sites allowed to aggregate NO_x per §101.127 (a)
- (2) Sites allowed to aggregate VOC per §101.127 (b)

(b) Fee obligation from VOC or NO_x emission sources not qualified for baseline aggregation under § 127 will remain separate and due from each site.

(c) Obligation. The owner or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (d) or (e) of

this section. The fee shall be assessed on actual emissions exceeding 80 percent of the baseline amount during the attainment year.

(d) Calculation of fee for sources not aggregated. The fee will be calculated by the method described in § 140.

(e) Calculation of fee for emissions from aggregated site. The fee will be calculated by:

$$\text{VOC Fee} = \text{FCAA Fee Rate} * (\text{VOC Aggregated Actual} - 0.8 * \text{VOC Aggregated Baseline Amount})$$

$$\text{NO}_x \text{ Fee} = \text{FCAA 185 Fee Rate} * (\text{NO}_x \text{ Aggregated Actual} - 0.8 * \text{NO}_x \text{ Aggregated Baseline Amount})$$

Definitions:

$$\text{FCAA 185 Fee Rate} = \$5000(\text{CPI}/122.15)$$

CPI = The annual Consumer Price Index (CPI) adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with Sections 502(b)(3)(B)(v) and 185(b)(3) of the CAA.

VOC Aggregated Actual = Total annual VOC in units of tons reported on the annual Emissions Inventory (EI) for the regulated entities combined per §101.127

NO_x Aggregated Actual = Total annual NO_x reported in units of tons on the annual EI for the regulated entities combined per §101.127

VOC Aggregated Baseline Amount = Aggregated baseline for VOC calculated per §101.127.

NO_x Aggregated Baseline Amount= Aggregated baseline for NO_x calculated per §101.127.

§101.150. Failure to Attain Fee Payment.

(a) Payment. Fees must be paid by check, certified check, electronic funds transfer, or money order made payable to the TCEQ, and sent to the TCEQ address printed on the billing statement.

(b) Due date. Payment of the fee is due within 30 days of the invoice date.

(c) When Failure to Attain Fee Begins. The first fee is due and calculated for actual emissions from the first full calendar year following the attainment year. *[Comment: According to this section, the first fee is calculated based on 2008 emissions, thereby making the rule retrospective. Retrospective application of a fee program is legally impermissible. Given the history of this rule (the revocation of the 1-hour standard, the subsequent litigation, and the proposed implementation under anti-backsliding authority), this rule should be prospective only.]*

§101.160. Cessation of Program.

The failure to attain fee shall continue to apply until one of the following actions is final:

(a) Redesignation of the nonattainment area by EPA;

(b) Finding of attainment by EPA; or

(c) Three years of quality assured ambient monitoring data demonstrating attainment have been accepted by EPA. *[Comment: Given the purpose of Section 185, and the anti-backsliding authority on which this rule is premised, the program should be suspended upon*

reaching the relevant standard --here, the first year that quality-assured federal reference monitor data shows that the HGB area meets the 1-hour standard.]

§101.170. Exemption from Fee Obligation

No major stationary source shall be required to pay a fee during any year that has been determined by the EPA to be an extension year under section 181(a)(5) of the Federal Clean Air Act.

DRAFT Failure to Attain Rule Language

**SUBCHAPTER B: FAILURE TO ATTAIN FEE AND EQUIVALENT ALTERNATIVE
OBLIGATION**

DIVISION 2: EQUIVALENT OBLIGATION

§§ 101.200, 101.210

§101.200 Eligibility for Equivalent Alternative Obligation.

Notwithstanding any requirement in Division 1 of this Subchapter, a major stationary source that is obligated to pay a failure to attain fee may submit a request to the Executive Director to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements of this subchapter.

§101.210 Equivalent Alternative Obligation.

(a) A major stationary source subject to this Subchapter may submit a request to fulfill its failure to attain fee obligation by substituting emission reductions, on a pollutant specific basis, *[Comment: The phrase “on a pollutant specific basis” suggests that the entities will be limited to speciated crediting. Given that entities will be allowed to aggregate pollutants under the rule, they should be allowed to aggregate HECT and MECT credits for purposes of satisfying their fee obligation.]* in an amount equivalent to the tons on which the failure to attain fee has been assessed by retiring either:

- (1) an equivalent amount of emissions reduction credits;
- (2) an equivalent amount of discrete emission reduction credits;
- (3) an equivalent amount of current or banked Highly Reactive Volatile

Organic Compound Emissions Cap and Trade (HECT) program allowances; or

(4) an equivalent amount of Mass Emissions Cap and Trade (MECT) program allowances. *[Comment: Additional alternatives should be added to provide entities more flexibility in complying with the fee obligation. For example, the rule should allow entities to satisfy their fee obligations through payments toward emissions reductions at the subject source site, in adjacent communities, and at other sources under common control in the nonattainment areas, as well as payments toward reduction in emissions from mobile sources and other air quality improvement projects. A full suite of such options was provided in our earlier comments, posted on the TCEQ's website.]*

(b) A major stationary source that aggregated pollutants for purposes of establishing its emission baseline amount must provide for equivalent emission reductions from the aggregated multiple sites when requesting an equivalent alternative obligation.

(c) A major stationary source that aggregated multiple sites for purposes of establishing its emission baseline amount must provide for equivalent emission reductions from the aggregated multiple sites when requesting an equivalent alternative obligation.