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Rule: 2008-025-101-EN

Comments:

Brown McCarroll, LLP, respectfully submits the following comments on behalf of an interested client. Our client owns and operates one or more major sources of air contaminants (NOx or VOC) in the Houston-Galveston-Brazoria (HGB) ozone nonattainment area and would potentially be subject to the proposed rules.

CAA Section 185 requires states to implement requirements for the assessment and collection of a fee for major stationary sources of volatile organic compounds (VOCs) and nitrogen oxides (NOx) located in a severe or extreme nonattainment area if the area fails to attain the National Ambient Air Quality Standard (NAAQS) for ozone by the applicable attainment date.

On January 5, 2010, the Environmental Protection Agency (EPA) recently issued a Section 185 fee guidance document that raises the question whether it is necessary for TCEQ to implement this proposed rule at this time. The EPA guidance provides that if attainment is demonstrated for either the 1-hour standard or the 8-hour standard, then the existing SIP which resulted in attainment of the standard would serve as an equivalent alternative program in lieu of the fee program. We note that the most recent TCEQ monitoring data shows that, in the HGB ozone nonattainment area, the monitors demonstrate attainment with the 1997 8-hour ozone standard on average over the past three years (2007-2009). Therefore, rather than move forward with a fee program, TCEQ should submit a final demonstration of attainment with the 8 hour standard as an equivalent alternative program under the guidance citing the permanent and enforceable reductions in emissions under the existing SIP as equally effective in reaching attainment as a fee program.

If the TCEQ elects to proceed with promulgation of the proposed fee rulemaking, we support the proposal to allow use of the "2 years out of 10 years" to establish baseline for cyclical industries. This position is also consistent with the guidance document. One additional point is to that TCEQ should allow recalculation of the baseline not only upon sale of units but also under conditions where changes in emission calculation methodologies occur such as for tanks, wastewater treatment units or other such units. This is consistent with the plain language of the CAA which requires fees to be collected on "actual" emissions. Without this option, TCEQ would over collect fees and thereby punish sources whose emission factors have increased. If sources are required to use updated, higher emission factors to estimate actual emissions, these factors must be applied retroactively to calculate an accurate baseline.

Thank you for your favorable consideration of these comments. If you have any questions, please contact me at the provided address and telephone number.