

**United States Environmental Protection Agency  
Clean Air Act Advisory Committee**

May 15, 2009

The Honorable Elizabeth Craig  
Acting Assistant Administrator  
Office of Air and Radiation  
U.S. EPA  
Ariel Rios North  
1200 Pennsylvania Avenue, N.W.  
Mail Code 6101A  
Washington, DC 20460

Re: Clean Air Act Sections 185 and 172(e)

Dear Assistant Administrator Craig:

At the May 14, 2009 meeting of the US EPA Clean Air Act Advisory Committee, on a unanimous vote, the Committee resolved to urge the Agency to provide prompt guidance to the States regarding the following question arising under the Clean Air Act:

*Is it legally permissible under either section 185 or 172(e) for a State to exercise the discretion identified in Options A-J?*

The Clean Air Act Section 185 Task Force, a work group established under the Clean Air Act Advisory Committee, identified ten areas (A-J) of potential state discretion. These options are listed in the attachment to this letter. The Committee took no position on the reasonableness or legal permissibility of any option.

As several States are in the process of developing their section 185 nonattainment fee programs, time is of the essence in providing appropriate legal and policy guidance.

Thank you sincerely,

Co-Chairs of the Section 185 Task Force:

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A. Aggregation of Emissions Among Commonly-Owned Facilities

At its option, a State may authorize multi-facility operators to aggregate emissions from commonly-owned and –operated facilities within a single nonattainment area for the purpose of calculating the fee.

B. Aggregation of VOC and NOx Emissions

At its option, a State may permit major sources to aggregate their VOC and NOx emissions on a site-wide basis in calculating the fee to the extent such aggregation is consistent with attainment modeling previously submitted by the State for the applicable air quality control region. Such aggregation is not to be used for the purpose of avoiding a “major source” applicability finding (e.g., by spreading emissions over multiple sources so as to render the average facility emissions less than the major source threshold).

C. Consideration of Pre-Attainment Year or Attainment Year Installation of BACT or LAER

At its option, a State may consider to an appropriate extent pre-attainment or attainment year emission control investments by major sources. Without intending to define the precise boundaries of a State’s discretion to recognize the degree of control already achieved by a source, the participants determined that sources that had recently (e.g., within five (5) years of the year for which the fee would be imposed) undergone new source review and, as a result, installed BACT or LAER, should not be required to include emissions from such equipment in calculating the fee.

D. Consideration of Pre-Attainment Year or Attainment Year Installation of Retrofit Controls.

In addition, at its option under appropriate circumstances, a State may designate emission performance standards that it has determined represent well-controlled (e.g., in the range of or superior to BACT or LAER) units for a given period of time and authorize a facility to demonstrate what portion of its emissions should be excluded from the fee calculation on that basis.

E. Consideration of Market-Based Programs

At its option under appropriate circumstances, a State may determine that purchases of emission reduction credits, or allowances, as part of a State’s market-based attainment control measure may reduce the amount of emissions upon which the fee is based or constitute an investment that should be credited against the fee.

F. Credit Sources for Post-Attainment Year Emissions-Reducing or Air Quality Investments

At its option, a State should recognize and appropriately credit qualifying post-attainment year emissions-reducing or air quality-beneficial investments by major sources. These investments should be credited to such sources in a manner that reduces or eliminates fees that otherwise would be due under the program. States should identify the qualifications for such investments based on their unique attainment needs.

G. Post-Attainment Year New Sources

There was agreement that new sources constructed after the attainment year would not have a baseline; would already have installed BACT or LAER, would already have provided offsets, and therefore should not be subject to the fee for such equipment.

H. Use of Program Revenues

States retain full discretion regarding the use of collected revenues. Participants encouraged States to tailor strategies to their unique attainment challenges and to consider ways to address under-regulated sources (e.g., legacy vehicles and engines and certain area sources).

I. Equivalent Programs

Under section 172(e), a State should have the option of collecting equivalent or greater fees, or of requiring equivalent or greater emission reductions, by shifting the program target in part or in whole to under-regulated sources (e.g., legacy vehicles and engines, under-regulated area sources) or by applying the program in a manner that addresses other attainment gaps. Likewise, the task force envisioned that any recommended strategy not directly approvable under section 185 should be considered as an equivalent alternative program under 172(e). In such circumstances, the state may need to shift the fee burden among sources to demonstrate equivalency.

J. Program Sunset

EPA needs to clearly indicate the conditions under which the collection of fees may be terminated. Some members of the taskforce would like the authority to terminate the section 185 fee program upon the first year in which an area achieves the relevant standard.