



ghasp mfca
Galveston Houston
Association for Smog Prevention
Mothers for Clean Air

January 25, 2010

Ms. Kathy Pendleton
MC 164
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
kpendlet@tceq.state.tx.us

Re: Proposed Section 185 Fee Implementation Plan

Dear Ms. Pendleton,

Environmental Defense Fund (EDF) and Galveston Houston Association for Smog Prevention-Mothers for Clean Air (GHASP/MfCA) respectfully submit these comments on the proposed implementation of section 185 penalty fees for major stationary sources in Severe and Extreme ozone areas failing to timely attain the health-based ozone NAAQS. These comments respond to the Texas Commission on Environmental Quality's (TCEQ) draft 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, and 101.170 and Division 2: Equivalent Obligation, 101.200 and 101.210 to implement Section 185 penalty fees for volatile organic compounds and or nitrogen oxides emissions (VOC and or NOx) for the 1-Hour or 8-Hour Ozone National Ambient Air Quality Standards State Implementation Plan (SIP) revision as required by the Federal Clean Air Act Amendments (FCAA), and are in addition to previous comments submitted on March 18, 2009, April 14, 2009, and June 26, 2009.

As part of our comments today, we outline several issues concerning guidance issued on January 5, 2010 by the EPA with regard to the Section 185 fee program,¹ and we urge the TCEQ to develop a fee program that is both consistent with the Clean Air Act and that maximizes the opportunity of collecting fees and securing emission reductions in ozone-forming pollutants in the Houston region.

I. TCEQ cannot rely on recently issued EPA guidance as Basis for Failure to Implement a 185 Fee Collection Program.

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Failure to implement a Section 185 fee program would fail to meet the requirements outlined in the Federal Clean Air Act, §182(d)(3), (e) and (f), Plan Submissions and Requirements, and §185, Enforcement For Severe and Extreme Ozone Nonattainment Areas for Failure to Attain. TCEQ is required to collect the fees starting in calendar year 2008 and continue to collect fees until the region meets the standard. While recent guidance issued by EPA on Section 185 fee implementation might appear to suggest that no fee program is required if a region meets the 1997 8-hr ozone standard, TCEQ should not rely on this guidance in this regard for the following reasons:

- EPA guidance is inconsistent with the Clean Air Act, and with the law that expressly states that the fee shall be paid "as a penalty." CAA §185(a). Congress gave industry a prolonged time to achieve compliance with the nation's health standards, and established clear consequences for failure. If the health standards were not achieved by these extended deadlines, penalties were imposed on major emitters in these urban areas for their elevated emissions levels. Congress intended the fee to penalize the large covered sources in an area out of compliance. Indeed, the Senate Report that accompanied the final version of the bill that included section 185 described the purpose of the fee as "an incentive for sources to reduce VOCs further." Senate Report No. 101-228, 1990 USCCAN 2285, 3433 (Dec. 20, 1989). There is no incentive for sources to reduce VOCs or NOx sufficiently in order to meet an attainment deadline if they may do so after the date has passed and in lieu of paying a fine. Penalties will only incentivize clean air compliance if they are assessed as intended—as fines for noncompliance – not as a rebate for delayed progress.
- EPA guidance is inconsistent with the Clean Air Act, and with the ruling of South Coast Air Quality Management District vs EPA, 472 F.3d 882 (D.C. Cir. 2006), which clearly outlines the anti-backsliding requirements associated with the transition from the 1-hr standard to the 8-hr standard.
- Even if EPA guidance were consistent with the Clean Air Act, EPA guidance isn't applicable to the Houston region, as Houston failed to meet the 1997 1-hr ozone standard and failed to meet the 1997 8-hr ozone standard for 2008. Houston continues to fail to meet the 1-hr ozone standard, and while TCEQ is preparing for a 2009 ozone demonstration for the 1997 8-hr ozone standard, no official attainment demonstration for the 1997 8-hr ozone standard has been made to date. In addition, TCEQ has no precedent for an attainment demonstration for any ozone standard based on a weight of evidence argument. EPA themselves have expressed these same concerns, as outlined in their November 9, 2009 comments to TCEQ regarding TCEQ's own HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard, the HGB Reasonable Further Progress SIP Revision for the 1997 Eight-Hour Ozone Standard, Highly Reactive VOC Cap and Trade (HECT) Program Cap Reduction and Allowance Reallocation, and the Mass Emissions Cap and Trade (MECT) Program Cap Integrity for the HGB Eight-Hour Ozone Nonattainment Area¹¹.
- Even if EPA guidance were consistent with the Clean Air Act, EPA guidance states that TCEQ must demonstrate that reductions in ozone were the result of both permanent and enforceable

emission reduction efforts. As previously mentioned, TCEQ's last State Implementation Plan submission to EPA failed to convince EPA of these permanent and enforceable emission reductions.

II. Failure to implement a section 185 fee program based on EPA guidance would be gambling with millions of dollars' worth of funding that would go directly to improving the quality of air in the Houston region and would result in delays in bringing cleaner air to the region.

Section 185 was developed to protect the public health of millions of Americans and millions of Texans. If TCEQ fails to implement a fee collection program, then the Section 185 statute indicates that the EPA is required to collect the unpaid fees and may collect interest on any unpaid fees. Fees collected by EPA would not go to improving air quality in the Houston region. TCEQ themselves have calculated that the Section 185 program would generate \$73,134,000-\$124,269,292^{III}. Were TCEQ not to implement a Section 185 fee program, then EPA could collect the fees and interest and would deposit them into a special fund to the treasury that would not be returned to the state.

Precedent for EPA to take action against states that fail to submit SIP plans can be found in a recent federal register notice^{IV}. As a result of the federal register notice, and resulting sanction clock, South Coast risks losing any fees collected from the fee program as well as highway funding. In addition, there is no assurance that EPA would grant Texas any additional time to implement a fee collection program following federal register notification of failure to submit a fee program to the EPA. Given previous history of failure to operate an air permitting program that complies with the Clean Air Act, TCEQ cannot afford to take further chances with Section 185 program implementation.

III. Allowing for Alternative Programs to be Implemented in Lieu of Paying the Fines Increases the Costs Associated with Section 185 Fee Program Implementation and Would Result in Program Delays and Delays in Receiving Air Quality Benefits.

As outlined in EPA guidance, any alternative programs that get implemented must go through a notice and comment rulemaking and be published in the Federal Register before they can be adopted. Given limited resources and manpower, TCEQ would have minimal time to develop and prepare such alternative programs. Should TCEQ allow for alternative programs, then fees collected with the program would not be implemented as quickly or efficiently as possible, and as a result, air quality and public health benefits would be delayed.

IV. Ozone Continues to be a Serious Health Threat

Ozone has a cascade of human health impacts on children, the elderly, those who make a living through hard work in the outdoors, and many others in our community. Those who live and work in Houston must be certain that the penalties collected through a fee implementation program adopted by the TCEQ are devoted to measures that protect the public that has for far too long born the heavy burden of ozone air pollution. Denying the public of clean air afforded to them through

the Clean Air Act is negligent and irresponsible. In Houston, there is a vital opportunity to ensure these penalties are dedicated to clean air measures that benefit the community that suffers the adverse health effects of delayed compliance with the nation's health-based air quality standards.

We appreciate your consideration of our comments. We look forward to working with TCEQ staff and other stakeholders to create a solid program that will help the region attain this important ozone standard.

Sincerely,



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Galveston-Houston Association for Smog Prevention
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¹ US EPA, Stephen Page, Office of Air Quality Planning and Standards "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour ozone NAAQS" January 5, 2010.

² http://www.tceq.state.tx.us/assets/public/implementation//air/sip/hgb/Houston_Comments.pdf pg 219-228.

³ http://www.tceq.com/assets/public/legal/rules/rule_lib/proposals/09009101_pex.pdf

⁴ <http://www.gpo.gov/fdsys/pkg/FR-2010-01-05/html/E9-31173.htm>