



ENVIRONMENTAL DEFENSE FUND

finding the ways that work

April 14, 2009

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

Re: Section 185 Fees and Implementation Plan

Dear Ms. Pendleton,

Environmental Defense Fund respectfully submits these comments on the 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 a draft February 10, 2009 Memorandum from Steve Page circulated to EPA's Clean Air Act Advisory Committee Workgroup and various business responses thereto.

Honoring a Covenant Forged with the American People: Assigning Responsibility for Unhealthy Air

When it adopted section 185, Congress forged a covenant with the American people. In some of the nation's most polluted communities, identified as "Severe" and "Extreme" due to extraordinarily high ozone pollution levels, Congress gave industry a prolonged time to achieve compliance with the nation's health standards. But Congress also 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.

The law expressly provides that the fee shall be paid "as a penalty." CAA §185(a). Congress thereby intended the fee to penalize the large covered sources in an area out of compliance. It would turn this penalty provision on its head were the sources singled out for penalties to use the fees to pay for reduced emissions. Such an inverted outcome would mean that such sources not only benefit from postponing critical clean air investments but that delayed action pays. Such sources should not be allowed to do an end-run around long-standing control requirements by using the fees to do at a later date what they should have done already. 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 NO_x 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.

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. 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 that live and work in Houston must be certain that the penalties are devoted to measures that protect the public that has for far too long born the heavy burden of ozone air pollution.

We respectfully urge Texas and EPA to carry out section 185 consistent with the law to impose penalty fees for each covered major stationary source of VOCs and NO_x – without aggregation – and to impose the penalties promptly until timely attainment of the 1-hour ozone NAAQS is achieved.

Bedrock Principles: Protecting Human Health from Ozone Pollution in the Nonattainment Area

The core statutory purpose of section 185 is to protect human health from ozone pollution by imposing a penalty for covered sources in the nonattainment area and thereby hastening the restoration of healthy air.

The imposition of penalty fees under section 185 of the Clean Air Act is required for “each major stationary source” of VOCs and NO_x in an area failing to timely attain the health-based 1-hour ozone NAAQS (and, later, subsequent health-based ozone NAAQS) for Severe and Extreme ozone nonattainment areas. The statute provides that the fee is a “penalty” for failure to achieve timely compliance and must be paid “for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone.” CAA §185(a).

It could not be clearer that the nonattainment area impacted by noncompliance is intended to benefit from the penalties. Congress repeatedly prescribed these protections for the affected nonattainment area. In section 185(a), Congress commanded that the protections are keyed to “the area to which such plan revisions applies,” directed that the penalty apply to major source “located in the area” and apply until “the area is redesignated as an attainment area for ozone.” Texas and EPA must heed Congress' steadfast commitment to tightly anchor the section 185 protections to the affected nonattainment area.

There are myriad proposals and recommendations that stretch this bedrock statutory protection well beyond its elasticity by recommending that the penalty fees be used for measures outside of the nonattainment area or deployed for purposes that have only a marginal connection to reducing emissions and securing healthier air quality or be used by covered sources within the nonattainment area.

We urge Texas and EPA to work constructively with states to ensure that the penalty fees are directed to the vital purpose of securing emission reductions in ozone-forming pollutants in the nonattainment area. We also support cost-effective measures that secure multi-pollutant benefits in directly and primarily cutting VOCs and NO_x – the core ingredients of tropospheric ozone – while also reducing other airborne contaminants.

We respectfully request that Texas and EPA honor the commitment forged in law nearly two decades ago by ensuring that penalties are singularly devoted to clean air measures in the nonattainment area with a sharp focus on expeditiously restoring healthy air. Accordingly, we vigorously oppose the suggestion by some that fees be utilized for ancillary purposes or for activities outside of the nonattainment area. The law could not be clearer that the fees must be imposed as a penalty in order to restore compliance with the ozone NAAQS in the face of a failure to achieve timely attainment.

The Baseline is Set Forth by Statute

The amount of the penalty fee is prescribed by statute and “shall equal \$5,000 [inflation adjusted]” per ton of VOCs and NO_x emitted in excess of 80 percent of a delineated baseline. CAA § 185(b)(1), (b)(3). The baseline is prescribed by statute as follows:

For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the Administrator may provide, as the lower of the amount of actual VOC emissions (“actuals”) or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation plan (“allowables”)) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year. Such guidance may provide that such average calculation for a specific source may be used if that source’s emissions are irregular, cyclical, or otherwise vary significantly from year to year.

CAA §185(b)(2).

The statutory text expressly commands that the “baseline amount shall be computed” in accordance with a baseline that is the lower of actuals or allowables (permitted or SIP limits) “during the attainment year.” *Id.* EPA may issue guidance consonant with this mandatory command.

The statute also authorizes EPA to include in its guidance provision for determination of a “baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year.” CAA §185(b)(2). The average calculation “for a specific source may be used if that source’s emissions are irregular, cyclical, or otherwise vary significantly from year to year.” *Id.*

Accordingly, the statute establishes two distinct standards. As a general matter, specific sources must use the lower of actual or allowable emissions during the appropriate attainment year. In Houston, for example, that would mean 2007 emissions.

In exceptional cases – where the source’s emissions are demonstrated to be irregular, cyclical or to vary significantly from year to year – EPA may authorize a baseline that considers the lower of actuals or allowables over more than one calendar year. EPA must hew the plain language of the statute in issuing any baseline guidance for extraordinary cases. EPA’s 2008 guidance

provides that for facilities that operate on an intermittent, irregular, or non-continuous cycle (clear guidelines should be set for this determination), the baseline is presumed to be calculated from the last consecutive 24 months' worth of data that represents their normal operating conditions. The most recent emissions data should be used to calculate the baseline in these circumstances.

Finally, in all instances, the baseline emissions should be comprehensive, encompassing direct and fugitive emissions from the source.

EPA May Not Invoke Section 172(e) to Re-Write Clear Statutory Commands

Section 172(e) is important in evincing congressional intent that EPA provide anti-backsliding protections when it relaxes a primary NAAQS and, by logical extension, when it strengthens a NAAQS. So while section 172(e) is an unmistakable expression of congressional intent to prevent backsliding, it is not a grant of authority for EPA to supersede and re-write statutory commands.

As noted above, section 185 is clear in its protections, requirements, and purpose. Section 172(e) does not in any way delegate to EPA the power to alter or revise the statutory provisions set forth in section 185.

We appreciate your consideration of our comments. We looking forward to working with staff and other stakeholders to create a solid rule that will help the region attain this important ozone standard. We are committed to working with state and federal officials to ensure that Houstonians and all Americans affected by prolonged violations of the 1-hour ozone health standard in the most polluted communities across our nation realize the protections forged in law nearly twenty years ago.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'E.Craft'.

Elena Craft, Ph.D.
Air Quality Specialist
Environmental Defense Fund