



April 30, 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 Termination Determination Proposal

Dear Ms. Pendleton,

Environmental Defense Fund (EDF) and Houston Air Alliance respectfully submit these comments on the proposed termination determination of the section 185 penalty fee program for major stationary sources in Severe and Extreme ozone areas failing to attain the 1 hour health-based ozone NAAQS. These comments are in addition to previous comments submitted on fee program itself that were submitted to TCEQ on March 18, 2009, April 14, 2009, June 26, 2009, and January 25, 2010.

We urge the TCEQ to abandon the termination determination and implement this fee program as outlined within the Clean Air Act, in order to secure important emission reductions in ozone-forming pollutants in the Houston region and improve air quality in the region.

I. Terminating the Section 185 fee program means that millions of dollars' worth of funding that would go directly to improving the quality of air in the Houston region will not be realized and will result in delays in bringing cleaner air to the region. A termination determination only makes attainment of the newly proposed, more stringent ozone standard even more illusive.

Section 185 was developed to protect the public health of millions of Americans and millions of Texans. TCEQ themselves have calculated that the Section 185 program would generate \$73,134,000-\$124,269,292¹. Failure to implement this program means that the public will not realize the health benefits that were afforded to them under the protection of the Clean Air Act.

II. EPA guidanceⁱⁱ that forms the basis upon which TCEQ is submitting the termination determination is currently under legal challenge. 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 under legal challenge in the DC Circuit court.
- 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 submitted a 2009 ozone demonstration for the 1997 8-hr ozone standard, the 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 Areaⁱⁱⁱ.

III. TCEQ has not demonstrated that the reductions in ozone area are a result of permanent and enforceable control measures implemented by the agency.

While TCEQ spent much time and effort in the proposed termination determination to demonstrate that the control measures that they have adopted are responsible for the attainment of the 1997 8-hour ozone standard and not simply a fluke of meteorology or the economic downturn, the proposal falls short of convincing for the following reasons:

- If the TCEQ were convinced that the control measures would lead to permanent and enforceable reductions in ozone, then why did the agency submit a report to the EPA that attainment of the 1997 8-hr ozone standard would not be realized until 2018^{iv}?
- In order to determine whether a control measure is permanent, it must be demonstrated that the reductions are maintained. Given that no ozone data past 2009 has been presented, there is no adequate foundation for the claim that the control measures implemented are truly permanent.
- TCEQ relies upon the years 2007-2009 in making comparisons regarding the economy. Given that the economic downturn didn't occur until the very end of 2008, and that much of the economic downturn wasn't realized until 2009, there is little evidence to support the assertion that there is enough data available to make a determination about the economy.
- TCEQ has not provided evidence that trends are related to causation as opposed to correlation.
- The economic indicators did not adequately reflect localized impacts in the region that could have impacted ozone formation. At the Port of Houston for instance, the following declines in activity (as compared to 2008) were realized^v: steel was down 2.7 million tons, or 58% in 2009; ship arrivals were down 10.5% in 2009; container tonnage was down 5.9% in 2009; and Port of Houston operating revenue was down \$27 million, or 34%.
- Reductions in vehicle miles travelled (VMT) are not reported for 2009. Adequate information regarding the influence of traffic in the region during this time fails to be demonstrated.

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. TCEQ has a responsibility to those who live and work in Houston to collect penalties through a fee implementation program afforded to them in the Clean Air Act. The program should be devoted to protecting the public that

has for far too long borne the heavy burden of ozone air pollution. Denying the rights 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 improve air quality and attain this important health-based standard.

Sincerely,



Elena Craft, Ph.D.
Toxicologist
Environmental Defense Fund

Matthew Tejada, Ph.D.
Executive Director
Air Alliance Houston

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

ⁱⁱ 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.

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

^{iv} http://www.tceq.state.tx.us/assets/public/implementation/air/sip/hgb/hgb_sip_2009/09017SIP_pex.pdf

^v http://www.portofhouston.com/pdf/pubaffairs/PHAMag_FebMar10.pdf