



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
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DALLAS, TX 75202-2733

January 14, 2013

Ms. Charlotte Horn (MC 205)
Office of legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Dear Ms. Horn:

Thank you for the opportunity to comment on proposed revisions to the State Implementation Plan (SIP) addressing Clean Air Act section 185 (Failure to Attain Fee, Rule Project Number 2009-009-101-A1). Our comments are enclosed.

We appreciate your agency's efforts to address this section of the Clean Air Act and look forward to continuing our work together. If you have any questions, please contact me at 214-665-7242 or Carl Young of my staff at 214-665-6645.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Guy R. Donaldson".

Guy R. Donaldson
Chief
Air Planning Section

cc: Kathy Pendleton
Texas Commission on Environmental Quality

Enclosure

Enclosure

**EPA Comments on Texas Failure to Attain Fee State Implementation Plan (SIP) Proposal
(Rule Project Number 2009-009-101-AI)**

General Comments

We have identified three types of alternative programs that could satisfy the Clean Air Act section 185 requirement for the 1-hour ozone standard. These are: (1) those that achieve the same emissions reductions; (2) those that raise the same amount of revenue and establish a process where the funds would be used to pay for emission reductions that will further improve ozone air quality; and (3) those that would be equivalent through a combination of both emission reductions and revenues. In order for us to approve the Texas alternative program as satisfying the 1-hour ozone section 185 fee obligation, the State must demonstrate that its alternative program is not less stringent than the otherwise applicable section 185 fee program. TCEQ should provide a detailed analysis and demonstration that the Texas Failure to Attain Fee program is not less stringent than the otherwise applicable section 185 fee program. Since Texas wants to establish an alternative program, you must also establish appropriate recordkeeping and documentation that the alternative program is equivalent and not less stringent than a 185 fee program. TCEQ should provide to the public, at a minimum, an annual report demonstrating that the program is equivalent to the otherwise applicable section 185 fee program.

The 1-hour ozone 185 fee obligation for major stationary sources may be satisfied by funds collected from other sources as part of an equivalent alternative program. The programs from which the funds will be collected must: (1) be surplus to what is required for the 1-hour ozone State Implementation Plan (SIP) and (2) have a process for expending the funds for emission reductions that benefit ozone air quality in the Houston-Galveston-Brazoria 1-hour ozone nonattainment area (HGB area). Additionally, the funds used to offset the 185 fee obligation need to be newly generated funding collected and expended beginning in the first year that 185 fees are to be collected, which under the proposed rule is 2012. As with the comment above, TCEQ should provide an analysis and documentation demonstrating that the funding used is surplus to the SIP and that the funds used for credit are expended to generate ozone-related emissions reductions in the HGB area. See, the South Coast 185 fee alternative program and our analysis of the South Coast program. (The documents are available from the regulations.gov website in docket EPA-R09-OAR-2011-0876).

The rule should include annual deadline dates by which the state will conduct an equivalency demonstration showing that adequate equivalency credits were available in the Fee Equivalency Account for the applicable calendar year to meet the area's section 185 obligations. The rule should also include an annual major source fee invoice and collection schedule to the extent necessary in any year to balance the Fee Equivalency Account. The proposal does not include such dates.

Several comments are being raised to your attention in this general comment section and details are provided later in this enclosure. One relates specifically to the baseline calculation. An interpretation of our guidance on establishing the baseline that does not include adjustment of the emissions baseline to account for the allowances held by the source in the attainment year could result in a zero fee outcome and a zero emission reduction relative to 2007 actual emissions and therefore would not be consistent with the intent of Clean Air Act section 185.¹

¹ The March 21, 2008 EPA guidance on establishing emissions baselines under section 185 is available on the internet at http://www.epa.gov/ttn/oarpg/t1/memoranda/20080321_harnett_emissions_baseline.pdf.

§101.100. Definitions

Section 101.100(6)(B) should be revised to read “emissions that vary *significantly*” in order to be consistent with language in §101.106 and Clean Air Act section 185.

§101.102. Equivalent Alternative Fee

As discussed above, programs and funds from other sources that are to be used to reduce the 185 fee obligation for major stationary sources must provide that: (1) the programs are surplus to the 1-hour ozone SIP and (2) funds are expended, (not just collected), for emission reductions that reduce ozone formation in the HGB area. The programs and funds identified in this section do not fully meet these conditions, thus not all of these funds can be used for the fee equivalency account.

Concerns regarding being surplus:

The Vehicle Inspection and Maintenance (I/M) program is a 1-hour ozone SIP requirement for the HGB area. As such, fees collected for the administration and implementation of the I/M program cannot be considered surplus and those fees cannot be credited. The approved SIP contains I/M rules that state that the maximum fee for an emission test in the HGB area is \$27. Most of the I/M fee goes to I/M program operation with \$2.50 going to the Department of Public Safety; \$8.50 from each onboard diagnostic test going to TCEQ; and the rest of the fee going to the test station. Fees collected and expended for the Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Repair Program (LIRAP) in the HGB area might be creditable to the extent that they are surplus to the 1-hour ozone SIP. The State will need to confirm that the LIRAP-related expenditures in the HGB area are in fact surplus to the 1-hour ozone SIP.

Similarly, the State has proposed that Texas Emissions Reduction Plan program (TERP) grants be credited toward the section 185 fee requirement. EPA believes that new TERP program grants could be surplus to the 1-hour ozone SIP. The State should explain how the grants that would be awarded under the TERP program are, in fact, surplus.

Concerns regarding whether the fees are used to reduce ozone-forming pollutant emissions:

In our January 5, 2010 guidance memo on developing 185 fee programs we stated that we anticipate (subject to notice-and-comment rulemaking) that we could approve a program that clearly raises at least as much revenue as the otherwise required 185 fee program if the proceeds are spent to pay for emissions reductions in the area.² In order for the alternative fee program to be at least as stringent as a section 185 fee program, the program must establish a process where the program revenues will be used to pay for emission reductions that will further improve ozone air quality in the HGB area. In Texas, fees collected from the TERP program and LIRAP program historically have not always been expended.

For example, it is our understanding that LIRAP funds generated from the I/M program are deposited in the General Fund, and LIRAP program funds are appropriated by the Texas Legislature from the General Fund. In a recent year the appropriated funds were only 12% of what was deposited into the General Fund. Likewise, not all TERP funds collected in the last biennium were appropriated by the legislature for use in air quality improvement projects. For the TERP program funds and the LIRAP funds to be used to offset section 185 fee obligations, Texas must be able to insure that the funds that are

² The January 5, 2010 EPA memorandum “Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS” is available on the internet at <http://www.epa.gov/glo/pdfs/20100105185guidance.pdf>.

credited toward the section 185 fee obligation are spent on air quality projects in the HGB area. The most straightforward way to address this issue is to track actual expenditure of TERP and LIRAP program funds in the HGB area each year and use expended funds to offset the fee requirement for that year.

As stated above, funds used for the fee equivalency account need to start with the year section 185 fees are to be collected.

§101.104. Equivalent Alternative Fee Accounting

Section 101.104(c) provides for an equivalency demonstration and an assessment of fees if necessary. As noted above, the rule should include an annual date by which the equivalency demonstration is completed and, if applicable, stationary source fee invoices would be issued and collected. Without these dates, the public and EPA cannot tell if the program will be implemented in a timely manner.

We note that using the formula in §101.104(c)(3) results in a negative prorated fee because the fee equivalency balance is a negative number (calculated to be less than zero). A simple fix may be to multiply the fee equivalency balance by negative one, i.e.:

$$\text{ProratedFee} = [(\text{FeeEquivBalance}) \times (-1) / \text{AreaObligation}] / \text{\$185Fee}$$

§101.106. Baseline Amount Calculation

We stated in our March 21, 2008 guidance on establishing emissions baselines under Section 185, that further discussion would be necessary regarding sources that are covered by emissions cap-and-trade programs. The HGB area is of course covered by the Mass Emissions Cap and Trade Program for NOx emissions and the Highly Reactive VOC Emissions Cap and Trade program. These programs were crucial pieces of the 1-hour ozone attainment plan for the HGB area and have resulted in considerable improvement in air quality. The structure of these programs is such that specific enforceable emission limits were not established for covered sources in the HGB area for the attainment year. Rather, the plan relied on sources receiving a declining set of emission allowances that could be transferred among sources in the area. It is also clear that these Cap and Trade programs are approved, enforceable provisions in the HGB area SIP.

EPA's guidance on establishing Emissions Baselines is designed to provide flexibility for sources to choose an average of other years besides the attainment year for their baseline if the source's emissions are irregular, cyclical or otherwise vary significantly from year to year. As provided in the guidance, EPA believes the annual average for a consecutive 24-month period within a 10-year look back period (or within a 5-year period for electrical utility steam generating units) provides flexibility to select a baseline emissions period that is more consistent with normal source operations than the attainment year. Note that if a source elects to use a baseline period other than 2007 to represent normal source operations, EPA believes that for purposes of section 185 the baseline period selected for each source should apply to both NOx and VOC emissions from that source, unless the VOC and NOx emissions result from independent operations that have separable "normal source operation" conditions.

The guidance also provides that if an earlier baseline period is chosen, emissions should be adjusted downward to reflect any legally enforceable emission limits that exist in the attainment year (2007). Accordingly, for sources covered by cap and trade programs, a source's legally enforceable emission limits in the attainment year are determined by the allowance system. Section 185 of the Act says that the baseline emissions must be the lower of actual emissions or the emissions allowed under the permit

applicable to the source (or if no such permit has been issued for the attainment year, the amount of emissions allowed under the applicable attainment plan). For NOx emissions and Highly Reactive VOC emissions that are covered by trading programs, the section 185 alternative program rule should be clear that the emissions limitation applicable in 2007 to all sources covered by the trading programs is the number of allowances held by the source in 2007. Therefore, the baseline emissions for NOx emissions and Highly Reactive VOC emissions that are covered by trading programs would be the lower of actual emissions or allowances held by the source in 2007. As noted above, the baseline period selected for each source should apply to both NOx and VOC emissions from that source, unless the VOC and NOx emissions result from independent operations that have separable "normal source operation" conditions.

§101.108. Alternative Baseline Amount

We note that 30 TAC §101.222(h) was disapproved by EPA (75 FR 68989, November 10, 2010). We cannot approve a portion of a rule that is dependent on an earlier State rule that we disapproved.

§101.110. Baseline Amount for New Major Stationary Sources, New Construction at a Major Stationary Source, or Major Stationary Sources with Less Than 24 Months of Operation

The approach for developing baseline emissions for the sources covered in this section appears reasonable, however, we note that new sources cannot be exempted altogether.

§101.113. Failure to Attain Fee Obligation

While the inflation adjustment method used by TCEQ to calculate the annual §185 fee rate is similar to the one used by EPA, we recommend that TCEQ follow the EPA method discussed in the January 5, 2010 EPA memorandum on developing section 185 fee programs (Attachment B, Inflation Adjustment for Section 185 Fees).

§101.118. Cessation of Program

Section 185 states that the fees would be paid each year until the affected area is redesignated to attainment for ozone. Accordingly, cessation of fees is dependent on EPA action. Because we are no longer redesignating areas to attainment for the 1-hour ozone standard we intend to take other action through rulemaking to stop the fee obligation. Fees must be paid to the State until EPA, through rulemaking, suspends the fee obligation. Fee collection may not be "placed in abeyance" as described in the section. EPA and TCEQ should work together in developing an approach consistent with the Clean Air Act to assure that equivalent action to redesignation is taken for the area to terminate the program.

§101.119. Exemption from Failure to Attain Fee Obligation

Section 101.119 states: "No owner or operator of a Section 185 Account shall be required to pay a fee during any year that has been determined by the United States Environmental Protection Agency to be an extension year under Federal Clean Air Act, §181(a)(5)." Given that the HGB area's 1-hour attainment year was 2007 and the area did not qualify for an exemption, we do not understand the reasoning for including this section. The extension year provision is no longer available for the 1-hour ozone NAAQS in the HGB area, and we suggest that this provision be removed to prevent confusion. Additionally, please confirm that the State intends to undertake separate rulemaking to address section 185 for the 1997 8-hour ozone standard. Note that EPA cannot approve alternatives to a section 185 fee program for obligations arising from the 1997 and 2008 ozone standards.

§101.121. Equivalent Alternative Obligation

Please clarify what is meant by “relinquishing” emission reduction credits or emission allowances. For example, does this mean that the credits or allowances cannot be used for other purposes like emission offsets or compliance with cap and trade programs?

Since emission reduction credits (ERCs) provide a multiyear credit and the section 185 fee requirement is an annual obligation, please clarify how relinquishing ERCs would be credited to the section 185 fee obligation.

§101.122. Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation

Money spent on Supplemental Environmental Projects (SEPs) used to offset enforcement penalties may not be used to offset the section 185 fee obligation. Crediting projects already required by enforcement actions toward section 185 program compliance is less stringent than would be required under the otherwise applicable section 185 fee program. EPA could approve the use of SEPs that do not offset enforcement penalties.