

December 10, 2009

Devon Ryan
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087, MC-205
Austin, Texas 78711-3087

AIR PERMITS DIVISION
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Re: Proposed Section 185 Failure to Attain Fee Rule

Dear Ms. Ryan:

I am writing on behalf of the Greater Houston Partnership (“the Partnership”) regarding the Texas Commission on Environmental Quality’s (“TCEQ”) proposed Section 185 Failure to Attain Fee rule. As the primary advocate of Houston’s business community, the Partnership advocates on behalf of its members regarding the development of environmental regulation and legislation for our 10-county membership region.

Partnership members are proud of the air quality improvements achieved in the Houston-Galveston-Brazoria area. Our area has seen dramatic reductions in ozone and other pollutants, due in large part to substantial investments by our members in effective emissions reduction strategies. The Partnership supports continued air quality improvement through incentives and free markets, rather than new regulatory mandates, fees or taxes.

The Partnership understands that the proposed rule is aimed at implementing Section 185 of the federal Clean Air Act, by imposing penalty fees for failing to attain the revoked one-hour National Ambient Air Quality Standard for ozone. The fiscal note for the proposed rule states that it will cost area businesses up to \$124 million in the first year alone. The Partnership believes that the fiscal note, which includes only the amount of direct fees, underestimates the true economic impact of this proposed rule. A new fee obligation of this magnitude would direct scarce member resources away from job-creating investments, and will have compounding effects that will have a substantially greater impact on Houston’s economic vitality.

To the extent that any fee program must be imposed pursuant to Section 185, the Partnership urges the Commission to incorporate the maximum flexibility consistent with the Clean Air Act and U.S. Environmental Protection Agency (“EPA”) guidance. To that end, the Partnership is concerned with several specific aspects of the proposed rule. Three of our key concerns are outlined below.

I. If any fee is applied, it should only be applied prospectively.

The proposed rule calls for fees to be applied retroactively starting with 2008, the year after the 2007 attainment date for the revoked one-hour standard. Retroactive fee application is problematic because: (1) it is too late for sites to implement control strategies or make operational changes in time to affect the Section 185 fees owed for 2008 and 2009 emissions, and possibly even too late to make changes in time to

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affect 2010 emissions; and (2) it is too late for sources to account for such fees in their budgeting process. As noted above, the resulting fees would have a substantial economic impact on area businesses, and it is unfair to impose fees on these businesses without giving them advance notice or an opportunity to reduce their fee obligation. The retroactive application of Section 185 fees is also legally questionable and is unnecessary under the Clean Air Act's anti-backsliding authority to implement the fee program for the revoked one-hour standard.

If the Commission must impose this fee, the Partnership strongly urges the Commission to assess Section 185 fees prospectively only.

II. Any Section 185 rule should maximize the use of fee alternatives.

Given the magnitude of the potential economic impact of the proposed rule, any fee program should build in cost-effective alternatives for satisfying the fee obligation. Examples of such alternatives include allowing sources to retire emissions credits or fund emissions reduction programs in lieu of paying a monetary fee.

Other alternatives may be to impose a share of the fee on a broader group of emission sources including on-road and non-road mobile sources. We understand that EPA is developing guidance enabling states to use these alternatives. We urge TCEQ to integrate the full range of flexibility.

The proposed rule does contain several alternatives for satisfying the fee obligation, but constrains their use such that many of our members would not be able to use them. For example, the proposed rule: (1) prohibits sources that choose to aggregate ozone precursor emissions from satisfying the fee obligation by using the fee alternatives listed, (2) prohibits sources from aggregating both precursor emissions at a single site and aggregating emissions at multiple sites; and (3) prohibits sources from using the fee alternatives to partially satisfy a fee obligation.

The Partnership opposes these constraints on cost-effective alternatives for satisfying the Section 185 fee obligation. Maximizing the availability of fee alternatives would reduce the economic impact of the rule on area businesses, while still providing cost-effective tools to improve the region's air quality. Indeed, in many instances the fee alternatives will have a more lasting positive impact towards improving the environment.

III. The Partnership supports the full availability of a multi-year baseline period for all participating sources.

The proposed rule allows sources to compute their baseline emissions by relying on emissions in the highest two consecutive years out of the preceding ten years (five years for electric generating units) "if the regulated entity's emissions are irregular, cyclical, or otherwise vary significant from year to year." This language suggests that the multi-year baseline option may be available only upon a site-specific review of irregularity or cyclicity.

Consistent with EPA's programmatic approach for multi-year baselines, sources should not be required to demonstrate irregularity or cyclicity on an individual, site-specific basis to take advantage of the multi-year baseline option. Any fee program should incorporate the flexibility for the use of a national business cycle, as provided in EPA's rules and guidance.

In sum, the Partnership is greatly concerned by the disproportionate impact that this proposal will have on our region, despite our clear and sustained progress on air quality goals. To the extent any Section 185 fee rule is necessary, the Partnership urges the Commission to allow maximum flexibility to enable sites to pursue alternative ways of satisfying the fee obligation—and improving the area's air quality—while still preserving the region's economic vitality.

Thank you for the opportunity to comment on this issue.

Very truly,



John D. White
Chairman and CEO, Standard Renewable Energy Group LLC and
Chairman, Greater Houston Partnership Environmental Policy Advisory Committee

cc:

Dan Bellow, President-Houston, Jones Lang LaSalle Americas, Inc. and Chairman, Greater Houston Partnership
Pat Oxford, Chairman, Bracewell & Giuliani LLP and Vice Chairman, Greater Houston Partnership
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