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Submitted by Hard copy:

Devon Ryan
Office of Legal Services, MC 205
12100 Park 35 Circle
Office of Legal Services
Texas Commission on Environmental Quality
Austin, TX 78753

**Re: Proposed Nonattainment Fee Rule
TCEQ Docket No. 2009-1400-RUL**

Dear Mr. Ryan:

Magellan Terminals Holdings, L.P. ("Magellan") owns and operates a marine petroleum products terminal located in Galena Park, which is a major source that will be subject to the Failure to Attain Rules currently before the Commission.

As a preliminary matter, Magellan adopts the comments submitted by Texas Oil and Gas Association (TXOGA). In addition, Magellan hereby adopts and incorporates into its comments the comments prepared by Baker & Botts and submitted on behalf of the "Section 185 Working Group." Magellan particularly agrees with and supports the arguments made in that submission that no fee program is required because as EPA has clearly stated that "for an area that [EPA] determines is attaining either the 1-hour or 1997 8-hour ozone NAAQS, based on permanent and enforceable emissions reductions, the area would no longer be required to submit a fee program SIP revision to satisfy the anti-backsliding requirements associated with

the transition from the 1-hour standard to the 1997 8-hour standard. In such cases, an area's existing SIP should be considered an adequate alternative program.”¹

Notwithstanding, should TCEQ determine that it must adopt a fee program, Magellan reiterates and adopts and incorporates into these comments the comments it submitted by letter dated July 7, 2009 in this docket. As discussed in its July 7, 2009 comments, Magellan notes that with respect to the “baseline amount,” as currently drafted, it is not clear that it includes roof landing emissions from Magellan’s Galena Park terminal.

According to TCEQ, as of December 2006, “with few exceptions, floating roof landings and the associated air emissions were not considered in permit review, represented in permit applications, nor considered in the development of permits by rule (PBR) to authorize storage tanks.”² This was due, in part because there had not been a generally accepted method available to estimate the air emissions during the period when a floating roof was landed and neither industry nor TCEQ had formed a consensus on how to deal with such emissions.³

It wasn’t until December 2006 when TCEQ issued a memo that provided guidance related to tank floating roof landings and the resulting air emissions to all stakeholders that TCEQ provided direction to industry as to the manner in which to deal with these emission sources. It wasn’t until that time that it became clear that these emissions should be permitted.

As early as August 2003, Magellan self-disclosed roof landing events and requested guidance from TCEQ on how to manage such previously unaccounted emissions. The guidance for Magellan ultimately came at the same time that it was provided for all other stakeholders in Texas – in December 2006. At that time, Magellan and TCEQ entered into a Compliance Agreement that required Magellan to submit an application to amend its permit pursuant to 30 TAC § 116.110(b). Magellan submitted its application on March 9, 2007. A letter from TCEQ declared the application administratively complete on March 30, 2007. Consistent with 30 TAC §116.114 (relating to Application Review Schedule), the amendment should have been issued before the end of 2007.⁴ Instead, the permit was not issued by TCEQ until full two-years later – on June 12, 2009.

¹ Memorandum from Stephen Page, Director of Air Quality Planning and Standards, regarding Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS (Jan. 5, 2010) at 3.

² TCEQ Interoffice Memorandum from Dan Eden, David Schanbacher, and John Steib, regarding Air Emissions During Tank Floating Roof Landings, December 5, 2006, at 1.

http://www.tceq.state.tx.us/assets/public/permitting/air/memos/tank_landing_final.pdf (Hereafter “TCEQ Roof Landings Memorandum”).

³ *Id.*

⁴ See 30 TAC §101.222(j).

The Roof Landing Emissions Should be Included in the Baseline

Absent a rule that includes roof landings in the baseline, Magellan will be punished despite the fact that it acted promptly and consistent with TCEQ's guidance to have these roof landings included in its permit.

The failure to include these roof landings in the baseline amount will not only punish Magellan, but defeats the purpose for establishing a baseline amount. EPA recognized that the baseline calculation should be "representative of the source's normal operating conditions."⁵ To exclude this significant source of emissions would not represent the source's normal operating conditions in the attainment year. The roof landings represented 85.37% of the total emissions from the facility in 2007. Magellan included the roof landings in its EI since 2003, and, as such, roof landing emissions were available to be used to develop the SIP. They contributed to the pollutants emitted in 2007, they were recognized and acknowledged by TCEQ, they will be used to calculate fees, and they should be included in the baseline amount.

The Emissions Were "Allowed"

There are several ways in which TCEQ can make the determination that the roof landing events constitute "allowable" emissions.⁶

First, recognizing that planned maintenance, startup, and shutdown ("MSS") activities had not been included in permits across the state, TCEQ issued rules that set-forth a schedule at 30 TAC § 101.222(h) that specified when owners or operators were to file an application to authorize the emissions. This section was effective January 5, 2006 (30 Tex. Reg. 8884), and based on Magellan's SIC code of 5171 and 4226, it need not have submitted a permit application for its roof landings until January 5, 2013. In a guidance document entitled "*Responses to Maintenance, Startup, and Shutdown (MSS) Questions from Advanced Air permitting Seminar (September 26, 2006- September 28, 2006)*,"⁷ TCEQ explains that despite the fact that such emissions were recognized as occurring, TCEQ did not want all sources to be permitted immediately:

[TCEQ's Air Permit's Division, or APD] discourages the permitting of planned MSS emissions ahead of the established schedule. Currently, there are more than 14,000 active new source review (NSR) permits in Texas. The commission has one of the nation's largest minor source permitting programs, as well as a large number of major sources. The opportunity to seek authorization for MSS emissions is not limited to major sources. The commission's air permitting staff has limited experience permitting emissions from MSS activities, and therefore this case by case review will involve

⁵ EPA memorandum from William Harnett to Regional Air Division Directors, Regions I-X, March 21, 2008.

⁶ The specific language in Section 185 of the Clean Air Act does not speak in terms of "authorized" emissions, but emissions that are "allowed."

⁷ http://tceq.com/assets/public/permitting/air/mss_response_seminar.pdf.

developing an understanding of the methods and techniques available to minimize the emissions from these activities.

Texas is one of the most industrialized states in the country with large numbers of diverse industries. The state has several international ports, and one of the nation's largest complexes of refining and petrochemical companies. Furthermore, there are a wide variety of industries in the state, including a large number of oil and gas production facilities. The schedule in §101.222(h) provides time for the commission to gain a better understanding and development of Best Available Control Technology (BACT), and conduct impacts analyses. Requiring companies in various industries to submit applications at the same time as those from similar facilities will allow the commission to compare how companies plan to control MSS emissions. This will facilitate an understanding of the best ways to control and minimize these emissions.

In addition, the schedule allows for review of the most important emissions, starting with those facilities that are complex, and have large amounts of unauthorized emissions or have emissions with a greater possibility for off site impacts. This schedule will decrease the likelihood that these emissions of concern are not adequately reviewed for best available technology and protection of public health and physical property.

The schedule for the phasing out of the ability to claim an affirmative defense is based on the level of excess emissions reported by industry type in the 2002 emissions inventory. The standard industrial classification (SIC) codes specifically listed in the revised phase out schedule in §101.222(h)(1) are those that reported more than 98% of the total excess emissions reported to the commission's emissions inventory for calendar year 2002.

While the adoption of this rule and the schedule did not "authorize" the emissions, it did "allow" such emissions in the sense that TCEQ recognized that the emissions were occurring, and would allow them to continue to occur so long as the schedule was followed and the applicable permit was ultimately amended. If an owner/operator submitted a permit application for amendment in the attainment year for MSS, TCEQ should consider such emissions to be "allowed" under the permit for that year by 30 TAC § 101.222(h).

Second, even if the emissions were not considered "allowed" pursuant to 30 TAC § 101.222, in Magellan's case, the emissions should be considered "allowed" under the permit pursuant to the Compliance Agreement it executed with TCEQ in December 2006. That Compliance Agreement ordered Magellan to submit a permit application, which it did, in the attainment year. Although the Compliance Agreement did not "authorize" the emissions, it acknowledged their existence in the attainment year and "allowed" Magellan to continue operating under specified terms and conditions – all of which Magellan complied with. By

entering into a Compliance Agreement, and satisfying the terms of the Compliance Agreement within the attainment year, the emissions were "allowed."

Suggested Revisions to the Proposed Rule

Magellan respectfully requests that the preamble or the rule language of Section 101.103(b)(2) be amended such that those emissions are included. There are several ways for this to occur – any of which would be acceptable to Magellan. Two suggestions are as follows:

- 1) Interpret the existing language of 101.103(a)(2) that states "including emissions from maintenance, shutdown and startup activities, applicable to the source in the attainment year" would include routine emissions which were counted in the Emissions Inventory for the facility in the attainment year as MSS activities or would include activities for which a permit was sought for MSS in the attainment year. This would require no change to the proposed language, but may require clarification by the TCEQ.
- 2) Amend proposed section 101.103(a)(2) to read as follows:

"101.103(a)(2): total emissions allowed under authorizations applicable to the source in the attainment year, including emissions from maintenance, shutdown and startup activities and emissions from activities for which emissions were occurring in the attainment year and an administratively complete permit amendment was submitted for such emissions in the attainment year; or"

Conclusion

Magellan appreciates the opportunity to provide comments on these rules. It requests that TCEQ acknowledge that the "baseline amount" should include roof landing emissions from Magellan's Galena Park terminal.

Should you have any questions, please do not hesitate to contact me at (918) 574-7031.

Sincerely,



Paul E. Pratt
Associate General Counsel