



SIERRA  
CLUB

FOUNDED 1892

December 23, 2009

Houston Regional Group

P. O. Box 3021

Houston, Texas 77253-3021

713-895-9309

<http://texas.sierraclub.org/houston/>

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

Dear Devon Ryan,

Enclosed are the comments of the Houston Regional Group and Lone Star Chapter of the Sierra Club (Sierra Club) regarding the Texas Commission on Environmental Quality's (TCEQ) proposed Subchapter B: Failure to Attain Fee, 101.100-101.105, 101.107-101.109, 101.112, and 101.114-101.122, Section 185 penalty fees for volatile organic compounds and or nitrogen oxides emissions (VOC and or NOx) for the 1-Hour Ozone National Ambient Air Quality Standards State Implementation Plan (SIP) revision as required by the Federal Clean Air Act Amendments (FCAAA).

1) Under **101.100 Definitions**, the TCEQ has failed to define what "emissions are irregular, cyclical, or otherwise vary significant from year to year" are. Without such a definition industry will attempt to include emissions that in fact are not "irregular, cyclical, or otherwise vary significant from year to year." The Sierra Club requests that TCEQ define this phrase.

2) Under **101.103(b) Baseline Amount Calculation**, the Sierra Club believes as we stated in 1) above, that "emissions are irregular, cyclical, or otherwise vary significant from year to year" must be defined so that EPA, TCEQ, industry, and public know what the ground rules are.

The Sierra Club urges TCEQ not to allow refineries, petrochemical plants, and other major sources to state that their emissions are irregular, cyclical, or otherwise vary significantly. The processes at these companies are well known and accurate emission inventories should be available. If accurate emissions inventories are not available it means that the company has not spent the time, money, and effort to do the job right. After all of these years a major source should not be able to claim that it is unable to calculate a baseline amount. If a company does claim this then it is de facto saying that it has been filing an erroneous emission inventory and does not know what it is doing.

The baseline emissions calculation must be 80% of the lower of the actual or allowed emissions for the attainment year. Using some other baseline year or

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*

averaging protocol over a different time period is not acceptable by law unless TCEQ finds that the company's source emissions are irregular, cyclical, or otherwise vary significantly or EPA guidance (Section 185(b)(2)) allows another way to calculate the baseline.

3) Under **101.103(d) Baseline Amount Calculation**, the Sierra Club supports calculation the baseline amount separately for VOC and NOx and the publishing of this information publicly so the public knows how much of each pollutant is being emitted (transparency) and so a deterrent effect is created and not nullified.

4) Under **101.104 Aggregated Pollutant Baseline Amount and 101.105 Multiple Site Baseline Amount, and 101.115 Failure to Attain Fee obligation for Multiple Site Aggregation**, the Sierra Club opposes the aggregating of the pollutant baseline amount or multiple site aggregation of the baseline amount. By doing this TCEQ reduces transparency for the public and nullifies the deterrent effect of having to report how much a company pollutes, of what pollutant, how much a company has to pay for a certain pollutant, and do this for a certain site.

The Sierra Club does not favor aggregating sources in the penalty fee calculations because it believes besides paying the penalty fees one of the biggest incentives for companies to reduce their emissions is the embarrassment and public pressure that will result from publicly advertising who paid what penalty fee, for what pollutants, at what plant. Citizens, elected officials, local agencies, civic clubs, non-governmental organizations, and others can use this information to get the companies to be good neighbors and reduce emissions further.

By publishing penalty fee information in public venues citizens will know which companies are emitting more air pollutants than they should, what air pollutants are being emitted, and the amount of air pollutants that are being emitted. Like the Toxics Release Inventory the Sierra Club sees penalty fees, made public, resulting in reduced emissions. These reduced emissions will result in reduced penalty fees. This action will show the public that companies can make progress to reduce air pollutants that have harmful effects on people's health.

TCEQ should not forget that companies have done such a poor job with their emission inventories that they in some cases emit 10 to 100 times what TCEQ thought they did. TCEQ must no longer give companies the benefit of the doubt. If the company that operates a plant does not know what it emits then this shows irresponsibility by the company with regard to the public's health and safety.

The Sierra Club does not favor aggregating pollutants (VOC and or NOx) in the penalty fee calculation. It should be clear to the public what pollutants have not been reduced sufficiently to meet the ozone standard. The emission of VOC and

or NOx insufficiently to attain the ozone standard is responsible for the Section 185 penalty fees.

5) Under **101.118 (2) and (3) Cessation of Program**, only (a), "Re-designation of the nonattainment area by EPA," is stated in Section 185(a). TCEQ should remove (2) and (3) because they are not allowed under the specific language of Section 185(a) of the FCAAA. TCEQ cannot legally substitute its own judgment for that of the U.S. Congress in the FCAAA.

6) Under **101.120 Eligibility for Equivalent Alternative Obligation, 101.121 Equivalent Alternative Obligation, and 101.122 using Supplemental Environmental project to Fulfill an Equivalent Alternative Obligation**, TCEQ sets-up a program of alternative obligation to pay via emissions reduction credits, discrete emission reduction credits, Highly Reactive VOC Emissions Cap and Trade program allowances, Mass Emissions Cap and Trade program allowances, and supplemental environmental projects.

The substitution of these proposals for a penalty fee is not allowed by the FCAAA. Section 185(a) requires payment of a penalty fee for all major stationary sources of VOCs and NOx in severe and extreme ozone non-attainment areas, period. No alternative way to pay was allowed by the U.S. Congress. TCEQ cannot substitute its judgment for that of the U.S. Congress in an approved and signed federal air pollution law.

The Sierra Club reminds TCEQ that these are penalty fees. They are not supposed to be eased and made more palatable for companies. They are supposed to hurt and hit hard the economic bottom line of a company. The Sierra Club supports the maximum penalty fee possible in cash be assessed so that there is the maximum economic incentive for reduction of emissions to the 80% baseline amount.

The Sierra Club does not favor maximum flexibility in choosing alternatives to a penalty fee program. The Sierra Club does not favor alternatives to penalty fees because the FCAAA requires a penalty fee be paid. Penalty fees are the law of the land and their non-payment is not negotiable by TCEQ or the EPA. The Sierra Club believes that penalty fees in conjunction with a SIP are the best incentive to get companies to reduce their emissions and the best disincentive to get companies not to delay needed emission reductions further.

The Sierra Club does not support an emissions equivalent alternative program. The FCAAA requires penalty fees and we support this method of enforcement as the most appropriate incentive to reduce emissions at this time.

7) Under **101.121**, on **page 6** of the explanation of these rule changes TCEQ relies on a draft EPA memo, which was disputed by members of the EPA Section 185 Work Group, to allow the use of alternatives to a penalty fee. **Page 6** states

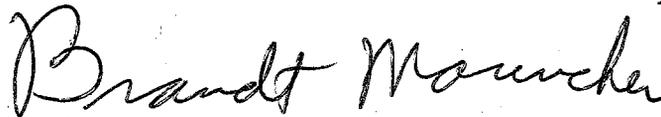
“allow state to propose alternative programs for reduction in ozone pollution, rather than imposing fees, **if the alternative program achieves the same environmental benefit as imposing a fee program.**” Yet on **page 3** of the explanation of these rule changes TCEQ quotes EPA again when it states “penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. **However, the penalty fee does not ensure that any actual emissions reduction will ever occur since every source can pay a penalty rather than achieve actual emissions reductions.** The provision’s plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have a stated purpose the goal of emissions reductions.”

Which of these two conflicting views does TCEQ hold? TCEQ cannot state that alternative forms of addressing the penalty fee achieve the same environmental benefit as imposing a fee program if there is no benefit. If there is no benefit then TCEQ should be honest and state that to the public instead of suggesting that alternatives to paying the penalty fee have the same environmental benefit. Such wordplay games are not appropriate for the state agency that is supposed to protect the public’s health and welfare.

8) Under **101.100(1), Actual Emissions and 101.103, Baseline Amount Calculation**, the Sierra Club is opposed to TCEQ not requiring emission event (upsets) emissions being included in the definition of actual emissions. Since emissions from upsets are “actual,” “real”, and not “phantom” they certainly should be included in the penalty fee calculation. In fact upset emissions are representative of normal operations because if they were not then they would not occur repeatedly. It is normal to have upsets or they would not occur with such frequency. TCEQ allows large companies, who have upset emissions, to escape from having to pay for all of their emissions and therefore is ensuring that there is no incentive to reduce upset emissions. This is not protective of public health and welfare. Shame on TCEQ!

The Sierra Club appreciates this opportunity to comment. Thank you.

Sincerely,



Brandt Mannchen  
Air Quality Issue Chair  
Lone Star Chapter of the Sierra Club  
Chair, Air Quality Committee  
Houston Regional Group of the Sierra Club  
5431 Carew  
Houston, Texas 77096  
713-664-5962  
[brandtshnfbt@juno.com](mailto:brandtshnfbt@juno.com)