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Ms. Kathy Pendleton  
MC 164  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

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AIR QUALITY  
DIVISION

Dear Kathy,

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) draft Subchapter B: Failure to Attain Fee and Equivalent Alternative Obligation, Division 1: Failure to Attain Fee, 101.100, 101.110, 101.115, 101.120, 101.125, 101.127, 101.130, 101.140, 101.145, 101.147, 101.150, 101.160, and 101.170 and Division 2: Equivalent Obligation, 101.200 and 101.210 to implement Section 185 penalty fees for volatile organic compounds and or nitrogen oxides emissions (VOC and or NOx) for the 1-Hour or 8-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 the Sierra Club predicts that 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 or in concert with the U.S. Environmental Protection Agency (EPA) define this phrase.

2) Under **101.120(a)(3) 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

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

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 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 **101.120(c) Baseline Amount Calculation**, the Sierra Club supports calculation the baseline amount separately for VOC and NOx 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 **101.125 Aggregated Pollutant Baseline Amount, 101.127 Multiple Site Aggregation Baseline Amount, 101.145 Failure to Attain Fee Obligation for Aggregated Pollutant Baseline, and 101.147 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 **101.160(a)-(c) Cessation of Program**, only (a), "Re-designation of the nonattainment area by EPA," is stated in Section 185(a). TCEQ should remove (b) and (c) because they are not allowed under 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 **101.200 Eligibility for Equivalent Alternative Obligation and 101.210 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, and Mass Emissions Cap and Trade program allowances. This is not allowed by the FCAAA. Section 185(a) requires payment of penalty fee for major stationary sources of VOCs and NOx in severe and extreme ozone non-attainment areas, period. No alternative way to pay was contemplated by the U.S. Congress or allowed. 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 the 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 State Implementation Plan (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) The Sierra Club does favor using collected penalty fees to fund TCEQ enforcement, compliance, and air monitoring activities. The Sierra Club does not support using penalty fees to fund emission reduction projects. Why should penalty fees that must be paid because we have failed to reach attainment of the health-based ozone standard be given back to companies who should already have reduced their emissions sufficiently? Such an action rewards those who delay and who have not acted responsibly to reduce their emissions sufficiently.

8) The Sierra Club opposes allowing companies enough flexibility to be able to recalculate their baseline emissions. The baseline emissions calculation must be straight forward, consistent, understandable, consist of all VOC and NOx emissions emitted, use actual or allowable emissions, and use the attainment year for the baseline.

The TCEQ must not allow companies to modify the baseline emissions calculation so that it is most beneficial for them and so they can reduce the penalty fees they have to pay. This is like allowing the fox to guard the hen house. Companies should have reduced their emissions sufficiently years ago so that people are not exposed to breathing unhealthy air. These companies have already reaped tremendous economic benefits via profits in the past. Now it is time for these companies to pay for their irresponsible and insufficient actions.

9) The Sierra Club warns TCEQ that companies will try to use mathematical sleight-of-hand to convince TCEQ that they do not emit the amount of emissions that they do and thus are required to pay less in penalty fees. TCEQ must have an incredibly good quality assurance/quality control program to ensure that companies do not fraudulently submit emissions data, as they have in the past for emissions inventories that underestimate their emissions.

10) Companies that have implemented best available control technology (BACT) or lowest achievable emissions rate (LAER) technologies prior to setting the baseline cannot use these technology reductions as a way of meeting Section 185 obligations. The BACT and LAER reductions are required by the SIP and FCAAA. If such an action was allowed then the "not less stringent" additionality test would not be met.

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

Sincerely,



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