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ATTN: Ms. Devon Ryan
Office of Legal Services, MC 205
Texas Commission on Environmental Quality

RE: Comments on Proposed Failure to Attain Fee Rule
Section 185 Fees
Rule Project Number 2009-009-101-EN

FROM: Debbie Hastings, Texas Oil & Gas Association
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7 pages, including cover sheet.

TEXAS OIL & GAS ASSOCIATION COMMENTS**COMMENTS ON PROPOSED FAILURE TO ATTAIN FEE RULE (SECTION 185 FEES)
RULE PROJECT NUMBER 2009-009-101-EN**Roof Landing Emissions

The "baseline amount" as currently drafted, may not include Roof Landing emissions from Terminals operation because some TCEQ permits for them were not issued until after the attainment date (2007). For reasons explained below, not including roof landings will skew the baseline data and unfairly prejudice some companies that have worked to account for roof landings in air permits, made changes in operating procedures, and invested in control technology to reduce roof landing emissions. Therefore TxOGA respectfully requests that the preamble or rule language be amended to clearly include these emissions in the baseline.

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."¹ 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.²

It was not 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 was not until that time that it became clear that these emissions should be permitted. Subsequently, Houston area terminals submitted air permit applications to amend their permits to include roof landing emissions.

Application and permit issuance dates vary for individual companies and their facilities. In one or more cases, a timely and complete permit application was submitted but the amended permit was not issued before the end of 2007, which is the attainment date. In at least one case, the TCEQ issued the permit in 2009 after two years in process. Consistent with 30 TAC §116.114 (relating to Application Review Schedule), permit amendments received by early 2007 should have been issued before the attainment date.³

Absent a rule that includes roof landings in the baseline, terminals in this situation will be punished despite the fact they acted promptly and consistent with TCEQ's guidance to have these roof landings included in permits. The failure to include these roof landings in the baseline amount will not only punish such terminals, but defeats the purpose for establishing a baseline amount. EPA recognized that the baseline calculation should be "representative of the source's

¹ 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").

² *Id.*

³ See 30 TAC §101.222(j).

normal operating conditions.”⁴ To exclude this significant source of emissions would not represent the source’s normal operating conditions in the attainment year. Roof landings are included in the Emission Inventory (EI) and, as such, should have been 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.

Proposed Solutions for Roof Landings

There are several ways in which TCEQ can make the determination that the roof landing events constitute “allowable” emissions.⁵ The rule does not define “authorized emissions” so TxOGA proposes either a definition or interpretation that allows inclusion of roof landing emissions.

If roof landing emissions are not considered “allowed” pursuant to 30 TAC § 101.222, they should be considered “allowed” pursuant to Compliance Agreements and other mechanisms TCEQ used to require permit amendments for roof landing emissions, including their Find-And-Fix-It program. That program and compliance agreements, orders, and schedules acknowledged roof landings existence in the attainment year and “allowed” terminals to continue operating under specified terms and conditions.

Also for reference, TCEQ has other state regulations that provide a broader basis for authorized or allowable emissions. 30 TAC 116.12 Nonattainment and PSD Review Definitions include Baseline Actual Emissions with one reference to “the date a complete permit application is received for a permit” and another part states “Until March 1, 2016, emissions previously demonstrated as emission events or historically exempted under Chapter 101 of this title (related to General Air Quality Rules) may be included to the extent that they have been authorized, or are being authorized.”

30 TAC Chapter 101 definition for Unauthorized Emissions specifies “that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by the Texas Clean Air Act, 382.0518(g).”

TxOGA respectfully requests that the preamble or rule language be amended such that “authorized emissions” for the purposes of this subchapter, include emissions that were either being authorized based on receipt of a complete permit application by the attainment date, or “allowed” by a TCEQ Compliance Agreement, Order, or similar mechanism. One suggestion is to amend proposed section 101.103(a)(2) 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

⁴ EPA memorandum from William Harnett to Regional Air Division Directors, Regions I-X, March 21, 2008.

⁵ The specific language in Section 185 of the Clean Air Act does not speak in terms of “authorized” emissions, but emissions that are “allowed.”

amendment was submitted for such emissions in the attainment year; or”

Lastly, roof landing events are a type of startup/shutdown for floating roof tanks and could be addressed as maintenance, startup and shutdown (“MSS”) as discussed below. In that case TCEQ may interpret 101.103(a)(2) to include roof landings which were counted in the EI 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.

MSS Emissions

The proposed rule addresses MSS activities but the baseline calculation does not adequately cover those which are not yet permitted, were not reported in the attainment year, or are cyclical and occurred outside the selected 24-month period. These are all potential issues for terminals and refineries, as explained below.

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 terminal SIC codes, they are not required to submit a permit application for MSS until January 5, 2012 (for SIC Codes 4612 and 4613) or January 5, 2013 (for SIC Codes 4226 and 5171). [Refineries (SIC 2911) were due 1/5/07 and Chemicals & Allied Products (SIC 28, except 2895) were due 1/5/08.] In a guidance document entitled “*Responses to Maintenance, Startup, and Shutdown (MSS) Questions from Advanced Air permitting Seminar (September 26, 2006-September 28, 2006)*,”⁶ 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 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

⁶ http://tceq.com/assets/public/permitting/air/mss_response_seminar.pdf.

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). Additionally the rule must address MSS that were not permitted by 2007 as directed by TCEQ.

The draft rule seems to include unauthorized MSS, if they were reported in the baseline emissions in the attainment year. However some MSS emissions (roof landings, tank cleanings, vacuum trucks, etc.) historically have not been quantified. Thus, they have not been represented in either actual or authorized emissions although they are clearly part of normal facility operations and should be allowed in the calculation of the baseline once they are quantified. The current draft language does not appear to have the flexibility to allow inclusion of MSS emissions once they are quantified and permitted per the MSS permitting schedule implemented by TCEQ.

Therefore, future permitting of MSS emissions per the TCEQ schedule should not result in CAA fees being imposed on those emissions once they are quantified and authorized. Had terminal or refinery plant operators known that MSS emissions may be subjected to future CAA 185 fees, they would have acted to authorize those emissions so they could be included in baseline calculations.

Lastly, the rule should allow a different baseline period for MSS than normal operations. MSS emissions at long intervals such as > 10 years for tank cleaning at terminals and > 4 years for

turnarounds at refineries. Otherwise operators will be penalized for infrequent types of maintenance.

Proposed Solutions for Unauthorized MSS Emissions

One suggestion is to amend §101.108(c), which gives the executive director the authority to approve a change in the baseline amount. We propose adding the following to the end of §101.103(e):

“Any requested baseline adjustment resulting from the future quantification and authorization of MSS emissions, per the schedule set-forth in 30 TAC § 101.222(h), will be approved.”

Alternatively, a new subsection (d) could be added to §101.103 that addresses the automatic adjustment of a facility baseline upon the quantification and authorization of MSS emissions, so long as the application and authorization were consistent with 30 TAC § 101.222(h). Another approach would be to simply account for MSS emissions in the baseline at their permit allowables.

101.100 Definitions

The proposed definition of Major Stationary Source in 101.100(9) is not consistent with the Title V program in TAC Chapter 122, which excludes from the PTE consideration, fugitive emissions unless the source is one of the 28 listed categories. Additionally, PTE does not recognize the use of permit limits instead of maximum design capacity. TxOGA proposes the definitions be revised for consistency with Chapter 122.

101.102 New Source Exemption

The applicability requirements for the new source exemption are not clear and appear to only apply to new facilities that are major stationary sources and not to individual pieces of equipment (i.e. a new tank or loading rack). However, in previous discussions with TCEQ staff by one terminal company, it was their understanding that the New Source Exemption was also intended for new pieces of equipment or processes at a major stationary source so long as the new equipment or process were BACT compliant. The New Source Exemption should include new equipment and processes; otherwise, the Failure to Attain Fee will become a barrier to facility growth which translates into a barrier to economic growth. The New Source Exemption language should be modified to clearly state that it applies to new equipment and processes that were not in operation on or before the attainment date.

Likewise, terminal companies have observed new EPA emission factors and methods developed in recent years, which increase reported emissions despite no change to facility operations. Therefore TxOGA requests the New Source Exemption be expanded to include emission increases based solely on changes of emission factors or methods. Otherwise there should be some way to adjust the baseline, to account for these types of changes.

101.103(a) Baseline Determination

The proposed rule sets the baseline as the "lower" of 3 options, the last one addressing emissions that are irregular, cyclical or otherwise vary from year to year. MSS activities, like tank cleaning

and turnarounds, are irregular and variable. Because the word "lower" is applied to all 3 options, the irregular/cyclical emissions are always limited by the first 2 options. Therefore the rule should be revised to clarify the baseline amount is (1) the "lower" of the (a) total amount of baseline emissions in the attainment year, or (b) the total allowable emissions including MSS in the attainment year, or (2) total average baseline emissions as calculated under 101.103(b).

101.116 Failure to Attain Fee Payment

This rule will impose retroactive fees going back to the first calendar year following the attainment year, which is 2008. This section does not clearly identify the payment schedule for past years, which gives concern that all past fees could be due at the time of the first payment. It is assumed the fee payment will be on an annual basis two year in arrears (i.e. 2008 fee will be paid in 2010). TxOGA encourages TCEQ to clarify in the rule that collection of fees will be on a year-by-year basis. Furthermore we strongly urge TCEQ to initiate collection of fees in 2011 so that companies can appropriately account for the fees in their budgetary planning process for 2011.

TCEQ has solicited comments about the first year of penalty fees being 2008. Industry was not aware of potential penalties prior to 2008 and therefore did not reduce emissions to avoid penalty fees. It is more appropriate to begin the fee program once the rule is final to avoid collecting fees retroactively which is legally questionable.

101.120 Eligibility for Equivalent Alternative Obligation

The proposed rule offers some good alternatives for satisfying the fee obligation such as the use of Supplemental Environmental Projects. However, the proposed rule then constrains the use of the alternatives by prohibiting the use of an equivalent alternative obligation to partially meet a fee obligation, and prohibiting the use of equivalent alternative obligations in combination with precursor aggregation. The constraints essentially discourage investing the money into actual emissions reductions. We encourage TCEQ to remove these restrictions.

101.122 Using SEP to Fulfill an Equivalent Alternative Obligation

The language in 101.122 could be interpreted to allow a major stationary source to contribute to its own on-site Supplemental Environmental Project. If that is the intent, TXOGA is supportive of the concept and believes such an allowance would be a strong incentive for industry to initiate onsite Supplemental Environmental Projects that will reduce emissions in the subject nonattainment area. This concept has been approved by the EPA in Attachment C of their January 5, 2010 guidance memo where it is stated "In general, we [EPA] believe that a state may choose to use collected fees to support air quality improvement projects at sources." We suggest the following modification to clarify that on-site Supplemental Environmental Projects are an acceptable means of fulfilling an Equivalent Alternative Obligation.

- (a) The owner and/or operator of a major stationary source subject to this subchapter may submit a request to fulfill its Failure to Attain Fee obligation by contributing to a Supplemental Environmental Project, *including projects to be implemented at the owner and/or operator's major stationary source*, on a pollutant specific basis by either: