

January 25, 2010

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

**SUBJECT:** Comments on Rule Project Number 2009-009-101-EN (Section 185 Failure-to-Attain Fee Rule)

**SUBMITTED VIA:** Electronic Upload at <http://www5.tceq.state.tx.us/rules/ecomments/>

Dear Mr. Ryan,

Texas Petrochemicals appreciates the opportunity to provide comments on the proposed Section 185 Failure-to-Attain Fee Rule, Rule Project Number 2009-009-101-EN. Texas Petrochemicals is a Houston-based company, with operating facilities in Houston's East End (Milby Park area), Port Neches (Jefferson County), and Baytown. We have approximately \$2 billion in annual sales revenue, and employ nearly 800 full time employees and contractors.

The issue of the Failure-to-Attain fees is a very important one to Texas Petrochemicals. For example, our Baytown plant is a very small production operation with only about 25 full-time employees supporting a 24/7 operation, and only recently become a major source due to elevation of the Houston area to Severe ozone nonattainment, and yet its fees could be as large as \$200,000 per year, based on VOC only. Since the site is still minor for NOx emissions, it would not be subject to the fee for NOx emissions. Such a large economic impact on such a small plant operation could have a very negative impact on profitability of the operation; the size of the fee amounts to a significant percent of annual site profitability. Therefore, some of our comments are aimed at managing the impact of this fee on this small yet very important operation for our company.

We strongly recommend eliminating the rule entirely by acknowledging the recent three years of monitoring data showing no monitor in exceedance of the standard. Should TCEQ decide to proceed with the program, Texas Petrochemicals seeks as much flexibility as possible in the rule, to provide the opportunity to manage the impact in the best manner possible, and shifting of some portion of the fees to the mobile source sector in accordance with EPA guidance.

#### SUMMARY

Texas Petrochemicals urges TCEQ to make a termination determination for the Failure-to-Attain Fee rule and to halt the process of rule adoption. Two very significant recent developments make the termination determination possible:

1. The Environmental Protection Agency's (EPA's) January 5, 2010, guidance and Federal Register comments
2. Houston-Galveston-Brazoria (HGB) ozone air quality monitoring indicating attainment for 2009, based on monitoring data obtained in the years 2007 through 2009

Instead, we encourage TCEQ to focus their efforts on making an attainment demonstration for the HGB since such demonstration would negate the need for the Failure-to-Attain Fee rule.

Should TCEQ determine that it must go forward with the Failure-to-Attain Fee rule, we urge TCEQ to fully utilize the opportunities presented in EPA's January 5 guidance memo, and expand the flexibility of the rule by eliminating restrictions on use of the flexibility provisions.

In particular, Texas Petrochemicals recommends that TCEQ eliminate the requirement for each of the multiple sites involved in aggregation of volatile organic compound (VOC) emissions to be subject to the HRVOC Emissions Cap and Trade (HECT) program of §101 Subchapter H, Division 6. The relationship between VOCs and HRVOCs is not a linear one, and the threshold for HRVOC applicability is so small, 10 tons, well below the 25-ton VOC "major" definition that pulls a site into the fee program, that it unfairly penalizes small sites that are subject to the fee due to being major in size, but not subject to the HECT program due to small size and/or due to not being impacted by the HECT program. We know of no legal reason why HECT program applicability should be connected to aggregation of VOC emissions across sites under this fee program. Maintaining this restriction in the final rule unfairly penalizes small sites like our Baytown operation where the site exceeds the "major" threshold but is not subject to the HECT program due to its small size.

Texas Petrochemicals does not support the application of retroactive fees wherein fees will be charged for one or more years prior to the adoption of a final rule. Additionally, we recommend that some portion of the fee burden be shifted to the mobile source sector since the combination of on-road and off-road mobile source NOx emissions account for well over half of the NOx inventory.

Although Texas Petrochemicals has several comments regarding not adopting the rule at all or, should the rule be necessary, to modify its provisions, we have also pointed out several favorable aspects of the rule.

In addition to our own comments in this letter which are designed to highlight key issues regarding the rule, we also fully support and incorporate by reference comments submitted separately by the Texas Chemical Council (TCC) and the Section 185 Working Group.

### **TCEQ SHOULD MAKE A TERMINATION DETERMINATION**

In EPA's January 5, 2010, Federal Register publication regarding their "Finding of Failure to Submit Certain State Implementation Plans Required for the 1-Hour Ozone NAAQS", EPA stated in the footnote on page 232:

*Although EPA has not in all cases completed determinations through notice-and-comment rulemaking, current air quality data indicate that a number of nonattainment areas classified as Severe or Extreme for the 1-hour NAAQS and also designated in June 2004 nonattainment for the 1997 8-hour NAAQS appear to have attained the 1-hour NAAQS and/or the 1997 8-hour NAAQS. In this notice EPA is not making findings that states failed to submit SIP revisions for these areas. These areas are: . . . Houston, TX. . .*

In addition, EPA's January 5, 2010, guidance document also states:

*EPA believes that for an area that we determine is attaining either the 1-hour or the 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.*

Clearly, EPA does not intend for Texas to submit a Section 185 Failure-to-Attain Fee rule and associated SIP revision. Furthermore, EPA representatives have recently indicated they will support a termination determination for the Texas Failure-to-Attain Fee rule provided that Texas can demonstrate that recent ozone attainment data resulted from emissions reductions that are both permanent and enforceable.

HGB air monitoring data shows that attainment has been reached for the year 2009, based on averaging the fourth highest monitoring value for each Federal Reference Method (FRM) monitor throughout HGB, over the 3-year period from 2007 through 2009. These monitoring values resulted from reductions in ozone resulting from permanent and enforceable reductions in precursor emissions.

- The year 2007 draws on a full year of effectiveness for TCEQ's rule for monitoring and reducing Highly Reactive Volatile Organic Compounds (HRVOCs), those compounds that more readily form ozone.
- The effect of the HRVOC rule continues, as evidenced by the continued reductions of HRVOC concentrations in ambient air measured within the Houston Ship Channel area, an area where much of the emissions reduction occurred. Comparing 2009 Ship Channel ambient concentrations of HRVOC to 2003 ambient concentrations, HRVOC concentrations are down 60 percent.
- Area industry reduced NO<sub>x</sub> emissions during the last decade in accordance with TCEQ regulations and the Mass Emissions Cap and Trade (MECT) rule. Ambient concentrations of NO<sub>x</sub> in 2009 were reduced by 50 percent compared to 1985, and the 2009 concentration was 30 percent less than that 2004 concentration, just five years earlier. These ambient air concentration reductions are largely a direct result of point source emissions reductions.
- The mobile fleet continues to turn over, resulting in fewer mobile source emissions of nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs). On-road mobile source emissions are down 24 percent for 2005 compared to 1999.
- The Texas Emissions Reduction Program (TERP) has been wildly successful at reducing off-road mobile source emissions. Off-road mobile source emissions are down 33 percent, again comparing the years 2005 to 1999.
- Industry has spent several billion dollars since 1990 in permanent and enforceable reductions of NO<sub>x</sub>, VOC, and HRVOC emissions.
- These reductions in HRVOC, VOC, and NO<sub>x</sub> are significant and relevant despite concurrent increases in area population.

Some would argue that the economic turndown has resulted in the reduced ambient levels of ozone. We remain convinced that ambient ozone concentrations have reduced due to permanent and enforceable reductions and less so due to the economic slowdown, for the following reasons:

- Fugitive emissions of VOC and HRVOC remain the same at any operating rate, and even remain the same with no operation, as long as plant equipment has not been depressured and emptied.
- During an economic slowdown, facilities may have incurred additional shutdowns of plant operations to idle capacity for various periods of time. Such shutdowns and subsequent startups actually result in more emissions than routine stable operation.

The above information demonstrates that adopting a Failure-to-Attain Fee rule at this time is not needed based on Houston's attainment status for the 8-hour 0.08 ppm ozone standard.

Furthermore, several recent studies show that Houston's ozone may be impacted by several parts per billion from the impact of international pollutant transport from Canada, Mexico, and across the Pacific Ocean. The Clean Air Act would absolve TCEQ of the burden of imposing a Failure-to-Attain Fee rule if it can be shown that the HGB area would have attained the standard but for cases of internationally transported emissions. TCEQ has used similar analysis in its recent demonstration of attainment for PM<sub>2.5</sub> for the Houston area. We recommend that TCEQ pursue the international transport analysis for

HGB's ozone attainment demonstration.

TCEQ's own back-up documentation for the rule proposal, dated October 30, 2009, acknowledges that no deadline currently exists for adopting this rule or making it effective. Should a Failure-to-Attain Fee rule become necessary in the future or should EPA fail to agree with a termination determination, it is our belief that at that time, EPA would publish their finding in the Federal Register as they did recently with a California SIP, and start an 18-month clock at that time under which TCEQ would be required to adopt the rule. Unless and until that happens, there is no need to proceed with rule adoption. Should EPA publish a Federal Register notice and start the clock for adoption, TCEQ would at that time have plenty of time to re-propose the rule and proceed with adoption.

### **POSITIVE ASPECTS OF THE RULE**

Should TCEQ fail to make a termination determination resulting in halting the process of finalizing the Failure-to-Attain fee rule, Texas Petrochemicals supports the following aspects of the rule as proposed:

- Inclusion of the new source exemption (§101.102)
- High two-in-ten years lookback for setting baseline emissions (high two-in-five for electrical utility steam generating units) (§101.103(b)), although we recommend clarifying applicability of this provision in a programmatic manner and revising the wording regarding the baseline amount calculation (§101.103(a)) to ensure availability of this option wherever appropriate, both as detailed below
- Provision to allow aggregation of pollutants (§101.104(a) and (b)), although we recommend eliminating restrictions on the use of pollutant aggregation as detailed below
- Provision to allow aggregation of NO<sub>x</sub> and VOC pollutants across multiple sites (§101.105(a) and (b)), although we recommend eliminating restrictions on the use of site aggregation as detailed below
- Program cessation stipulations (§101.118)
- Exemption from Failure to Attain Fee obligation (§101.119)
- Allowance for Equivalent Alternative Obligation (§101.120), although we recommend elimination of restrictions on the use of the Equivalent Alternative Obligation as detailed below

### **TEXAS' RULE SHOULD ALLOW INCREASED FLEXIBILITY**

Should TCEQ fail to make a termination determination resulting in halting the process of finalizing the Failure-to-Attain fee rule, then Texas Petrochemicals recommends that TCEQ further enhance the flexibility provisions of the rule.

Most importantly, we urge TCEQ to eliminate the requirement such that each of the multiple sites involved in aggregation of volatile organic compound (VOC) emissions be subject to the HRVOC Emissions Cap and Trade (HECT) program of §101 Subchapter H, Division 6 (§101.105(b)). The relationship between VOCs and HRVOCs is not a linear one, and the threshold for HRVOC applicability is so small, 10 tons unless a facility opted in several years ago, well below the 25-ton "major" definition, that it unfairly penalizes small sites that are "major" but do not fall under the HECT program. We know of no legal requirement that would require pulling the HECT program applicability into this provision.

We recommend that additional flexibility be incorporated as follows:

- Eliminate the restriction on aggregating emissions from multiple sites for those sites choosing to aggregate pollutants (§101.104(c)).
- Eliminate the restriction on using the Equivalent Alternative Obligation provision for those sites choosing to aggregate pollutants (§101.104(d)).
- Eliminate the restriction on aggregating pollutants for those sites choosing to aggregate emissions from multiple sites (§101.105(d)).
- Eliminate the restrictions for Equivalent Alternative Obligation disallowing its use to partially meet

a fee obligation for a single pollutant or for an obligation based on aggregated pollutants or sites (§101.120(b)).

- Similarly, eliminate the restriction on using the Equivalent Alternative Obligation for sites with an aggregated pollutant baseline (§101.120(e)).

We are not aware of any legal basis for restrictions on use of the Equivalent Alternative Obligation, or on combining the use of site and pollutant aggregation. Furthermore, any restrictions on the use of the Equivalent Alternative Obligation will inappropriately restrict funds from being channeled to emissions reductions projects and will, in effect, result in continued higher emissions to the environment because emissions reduction projects will not be implemented.

### ADDITIONAL COMMENTS

Texas Petrochemicals does not support the application of retroactive fees wherein fees will be charged for one or more years of operation prior to the adoption of a final rule (§101.112(b), §101.114(b), §101.115(c), and §101.116(b)). Retroactive fees would be analogous to determining how or what income will be taxed years after the income occurred, and do not afford the company with the opportunity to manage emissions to minimize fees owed. Further, we do not believe that retroactively applied fees are necessary under the requirements for this rule, and such retroactivity may not pass legal muster.

Should a fee program be needed, Texas Petrochemicals recommends that TCEQ incorporate a provision allowed by EPA's January 5, 2010, guidance to incorporate mobile sources into the program. Since on-road and non-road mobile source emissions count for 63 percent of the NOx emissions according to TCEQ's 2005 inventory, it is appropriate to shift a portion of the fee burden to these sources. This could be done through an incremental fee tacked onto vehicle registration fees, and could potentially be prorated based on miles driven for on-road vehicles.

Regarding the provision allowing a high two-in-ten years lookback for setting baseline emissions (high two-in-five for electrical utility steam generating units) (§101.103(b)), we recommend clarifying the applicability of this provision by providing either rule or preamble language ascertaining this option is provided to all within the chemical industry due to the inherent cyclicity and irregularity of the business rather than leaving this option potentially subject to case-by-case facility determinations.

In addition, the language of the Baseline Amount Calculation (Section 101.103(a)) needs to be changed for consistency with the preamble language and to meet the intent of the high two-in-ten years lookback feature of the rule. As presently worded, a facility must use the lower of:

- *Actual emissions in the attainment year,*
- *Authorized emissions in the attainment year, or*
- *Average baseline emissions as calculated using the multi-year baseline provision*

This wording negates the multi-year baseline provision in many cases. Texas Petrochemicals believes the wording in the preamble more accurately meets the intent of the provision, and recommends that TCEQ revise the rule language accordingly as:

- *The lower of:*
  - *Actual emissions in the attainment year;*
  - *Authorized emissions in the attainment year; or*
- *The multi-year average baseline emissions as calculated under section (b) of this section*

This language meets the intent of the multi-year baseline provision.

Texas Petrochemicals urges the agency to extend the payment due date well beyond 30 days from the date of the invoice (§101.117(c)). We recommend a 90 day payment due date following the invoice.

Failure-to-Attain fees will be very sizable, and a 30-day payment due date may not allow sufficient time for some sites to access sufficient funds. The short payment due date may be more likely to be problematic for smaller companies, smaller facilities, or companies suffering financial distress. Additionally, it is difficult in any company to process a payment request of that size, which typically requires many levels of approvals, and make the payment on time under a 30 day window.

Finally, we recommend removing the word “only” from the Supplemental Environmental Project (SEP) use provisions for the Equivalent Alternative Obligation restriction on benefitting the subject nonattainment area (§101.118(b)(2)). Some SEP projects could, conceivably, benefit the subject nonattainment area but, due to pollutant transport, benefit another nonattainment area in addition to the subject area. The word “only” in this provision would seemingly prohibit such a project.

Once again, we appreciate the opportunity to comment on this important rule, and we thank you in advance for considering each of our comments. In addition to our individual company comments outlined in this letter, designed to highlight some of the points that we consider to be the most important and to reflect some of the potential impact on our company specifically, we also endorse and incorporate by reference the comments submitted separately by the Texas Chemical Council and by the Section 185 Working Group.

If you have any questions on these comments submitted by Texas Petrochemicals Inc., please contact me at [marise.textor@txpetrochem.com](mailto:marise.textor@txpetrochem.com) or 713-703-8245.

Sincerely,



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