Texas Pipeline Association

Patrick J. Nugent
Executive Director

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Via email: 185rule@tceq.state.tx.us

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

Re: Comments on Draft Failure to Attain (Section 185) Rule Language

Dear Ms. Pendleton:

The Texas Pipeline Association ("TPA") submits the following comments related to the Texas Commission on Environmental Quality's June 8, 2009 draft Failure to Attain (Section 185) rule language. TPA is a trade association whose members gather, transport, and process natural gas and liquids through intrastate pipelines in Texas. Its members own and operate major sources in the Houston-Galveston-Brazoria County nonattainment area. Those sites would be subject to the Section 185 Fee contemplated by this draft proposal.

Generally, TPA considers the draft rules as a good first attempt at rule language for this program. However, we note some gaps in information or unclear regulatory provisions that we point out in these comments. With these clarifications, compliance with this regulatory program and payment of the related fee will be facilitated.

1. The language of the Applicability provision should be tightened as follows: Proposed new language is underlined, old language is struck through.

§ 101.110. Applicability.

The provisions of this ~~rule~~ subchapter apply to all regulated entities that are major sources of volatile organic compounds (VOC) or nitrogen oxides (NOx) that are located in a severe or extreme nonattainment area that has failed to attain the national primary ambient air quality standard for ozone by the applicable

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attainment date. For purposes of this section, an affected regulated entity is one which meets ~~shall have met~~ any one of the following conditions:

(a) For a sources located in a severe nonattainment area, where the area ~~that~~ has failed to demonstrate attainment by the applicable attainment date:

(1) The source ~~regulated entity has~~ had the potential to emit, at maximum operation or design capacity, 25 tons per year (tpy) or more of VOC~~;~~ as of the applicable attainment date; or

(2) The source ~~regulated entity has~~ had the potential to emit, at maximum operation or design capacity, 25 tons per year (tpy) or more of NOx as of the applicable attainment date.

(b) For a sources located in an extreme ozone nonattainment area, where the area ~~that~~ has failed to demonstrate attainment by the applicable attainment date:

(1) The source ~~regulated entity has~~ had the potential to emit, at maximum operation or design capacity, 10 tons per year (tpy) or more of VOC~~;~~ as of the applicable attainment date; or

(2) The source ~~regulated entity has~~ had the potential to emit, at maximum operation or design capacity, 10 tons per year (tpy) or more of NOx as of the applicable attainment date.

These revisions, if made, would clarify that the source would be subject to the rule if it has the potential to emit either VOCs or NOx emissions above a threshold level.

2 Proposed § 101.120(a) and (b) should be amended to avoid confusion on how to calculate baseline emissions and to eliminate vagueness concerning the term "non-utility."

Currently, the proposed language in § 101.120(a) could be interpreted such that calculations must be based on the lower of either (1) or (2), when the calculation in option (3) should also be available. Suggested new language is presented below; the new language is based on the definition of Baseline Amount in § 101.100(4) and is designed to be consistent with the intent of the March 21, 2008 EPA Memorandum, "Guidance on Establishes Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment."

In addition, proposed § 101.120(b) provides, in certain circumstances, for the calculation of baseline amounts to be established on any single 24-month consecutive period within a preceding historical period. TPA supports this approach but believes that clarification is needed. As proposed, § 101.120(b) would allow "electric utility steam

generating units" to establish a baseline emission level over a 5-year period of time; "non-utilities" would establish a baseline emission level over a 10-year period of time. Use of the term "non-utilities" in this context is unduly vague and could lead to confusion. For example, a natural gas pipeline can be considered a "utility" under the rules of the Railroad Commission, in this case a major source that is a part of a natural gas pipeline designated a utility would fall into neither category designated by the draft rule language – it is neither an electric utility steam generating unit nor a non-utility. To clarify this ambiguity, TPA proposes that the draft rule be revised as indicated below.

§101.120. Baseline Amount Calculation.

(a) For purposes of this section, the baseline amount shall be computed as the lower ~~of either~~ of the following:

(1) total amount of actual emissions ~~in the attainment year;~~

~~(2) total~~ or emissions allowed under the permit applicable to the source in the attainment year; or

(~~3~~2) total emissions as calculated under subsection (b) of this section.

(b) If the regulated entity's emissions are irregular, cyclical, or otherwise vary significantly from year to year, then the baseline amount may be computed using any single 24-month consecutive period with a historical period preceding the calendar year containing the attainment year to compute an average actual annual emission rate (tons per year) for the site. If used, the historical period must be 10 years, except that, for electrical utility steam generating units, the historical period must be 5 years. ~~If used, the historical period must be:~~

~~(3) ten years for non-utilities~~

~~(4) five years for electrical utility steam generation units~~.

3. The Executive Director's determination of the baseline amount should be subject to review by the Commissioners. At several points in the proposed rules, the subject of approval of "baseline amount calculations" is addressed. At each point, final authority is given to the Executive Director. See proposed §§ 101.125(d), 101.127(e), 101.130(c). The draft rules provide that after the Executive Director makes this decision, the baseline amount remains fixed and will not change for the life of the program, unless the Executive Director approves the change. Accordingly, the baseline amount will be used to establish the penalty fee for as long as the area is subject to the Section 185 fee. The significance of the baseline amount is further underscored by the amount of the fee, which is now in the range of $8000 tpy for every ton of VOC or NOx emitted above 80% of the baseline. Therefore, TPA believes that the baseline amount should be subject to review of some sort. TPA proposes that the baseline amount be subject to a Motion for Reconsideration under § 55.201 in order to provide a check and

balance against the Executive Director and to give the Commissioners of the TCEQ final decision-making authority over this issue. Accordingly, TPA proposes that the following additional sentence be added to the end of the three sections referenced above:

> "Decisions made by the executive director pursuant to this section shall be subject to review by the Commission by the filing of a Motion for Reconsideration under § 55.201 no later than 30 days after the date on which the Executive Director has mailed his determination of the baseline amount to the owner or operator of the major source. The decision of the Commission is final and nonappealable."

4. A final clause is omitted from § 101.120(e). The final clause – "until the failure to attain fee no longer applies for the area" – is omitted from the text of § 101.120(e).

5. For facilities with less than 24 months of operations, a more realistic timeframe should be permitted during which to establish the baseline. The language currently proposed in § 101.130(b) would require a facility with less than 24 months of operation at the attainment date, within 60 days of completing 24 months of operation, to submit a report establishing its adjusted baseline emissions calculation. Limiting a facility to establish its baseline on the initial 24-month period of operations might lead to the establishment of a baseline that is not truly representative of the facility's operation. Often a facility's first 24-months of operations may be abnormally high or low depending on the kind of site, the state of the economy, and many other factors. TPA proposes that such a facility be allowed to select a 24-month period from its first five years of operation as the baseline period. Two interim baselines could be established before the final and fixed baseline as follows:

1) Establish the first interim baseline as the permitted allowable emission rate;

2) Establish the second interim actual emissions baseline within 60 days of completing 24 months of operation; and

3) Establish the final and fixed actual emissions baseline after 5 full years of operation reflecting any 24 month cycle as other sources are permitted to do.

This would allow a facility to establish a baseline that reflects more operating experience than simply the initial 24-month period, and as such would increase the likelihood that the baseline reflected actual operating conditions at the facility.

6. The "new source exemption" provisions should be clarified. Proposed § 101.115 provides that "[a]ny major source … that was not in operation on or before the attainment date is exempt from the requirements of this subchapter." The use of such language could lead to the incorrect inference that the exemption does not apply to any facility that was in operation on or before the attainment date. The proposed language

does not clearly provide for a situation where the site was a minor source and in operation on or before the attainment date and later in time became a major source. Based upon our reading of the Federal Clean Air Act and other guidance materials for the Section 185 penalty fee, the fee should and does apply to an operating facility that is a major source on the attainment date. On the other hand, a facility that was not in operation on or before the attainment date, or a facility that was a minor source at that time and only later became a major source, should be exempt. Therefore, TPA proposes that § 101.115 be amended to make clear that the exemption applies to a facility that was in operation on or before the attainment date, if the facility was a minor source on or before the attainment date. TPA suggests the following underlined revision:

§ 101.115 New Source Exemption.

Any major source meeting the applicability requirements of § 101.110 that was not in operation on or before the attainment date<u>, or that was a minor source on or before the attainment date,</u> is exempt from the requirements of this subchapter.

7. The "equivalent alternative obligation" provisions do not contain sufficient detail. TPA favors alternative means through which to satisfy the penalty fee obligation. The draft rules offer a means of retirement of various forms of emissions credits in lieu of monetary payment. However, there are many unaddressed issues in the draft rule including the following:

- Where the credit represents a stream of allowances, how do you account for retirement of credits for a single year? In other words, may you retire only a portion of the allowance or do you have to retire the entire amount?
- Must your allowance credits be pollutant specific? For example, may you retire a NOx allowance to meet a VOC threshold?
- Does the answer to the immediately preceding question change if you are aggregating pollutants to establish a baseline?
- What does it mean to "retire" an allowance?
- Can an equivalent amount of mobile emission reduction credits (MERCs) or mobile discrete emission reduction credits (MDERCs) in accordance with Chapter 101, Subchapter H, Division 1 or 4 relating to Emission Credit Banking and Trading; and Discrete Emission Credit Banking and Trading be used to meet the Equivalent Alternative Obligation?

Overall, this provision needs to be developed and more detail provided.

8. An alternative means of fulfilling failure to attain fee obligations should be inserted into proposed § 101.210. The rules should be made more flexible so that facilities have additional alternatives through which to fulfill failure to attain obligations. Currently, the rules provide for satisfaction of such obligations by retiring emission reduction credits, HECT program allowances, or MECT program allowances. TPA proposes that the following additional language be inserted as a new subsection (d) to proposed § 101.210:

> (d) In the alternative, a major stationary source subject to this Subchapter may submit a request to fulfill its failure to attain fee obligation by implementing air quality improvement projects according to the following prioritization:
>
> (1) projects at the subject source;
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> (2) projects in the community adjacent to the subject source;
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> (3) projects at another source under common control with the subject source; and
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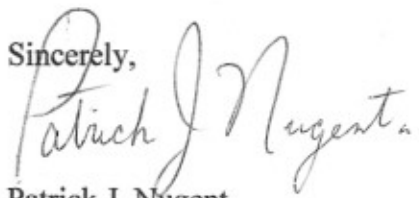
> (4) other air quality improvement projects.

After adoption of the Rule, the Commission should develop formal guidelines for implementing the categories of projects listed above through a public process that takes into account input from all interested parties.

We appreciate the opportunity to provide these comments to you at this early date in the rule development process. We hope to engage in a continuing dialogue on these rules.

Sincerely,



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