



Texas Pipeline Association

Thure Cannon  
Executive Director

January 14, 2013

*Via TCEQ eComments system*  
<http://www5.tceq.texas.gov/rules/ecomments/>  
*and facsimile transmission (512) 239-4808*  
Charlotte Horn  
MC 205, Office of Legal Services  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711

Re: Docket No. 2009-1400-RUL, Rule Project No. 2009-009-101-AI; Chapter 101,  
General Air Quality Rules, Severe Ozone Nonattainment Area Failure to Attain Fee

Dear Ms. Horn:

The Texas Pipeline Association (TPA) submits the following comments on TCEQ's proposed rules regarding Severe Nonattainment Area Failure to Attain Fees for major sources of VOC or NO<sub>x</sub> emissions in the Houston-Galveston-Brazoria (HGB) nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). TPA is an organization comprised of over 40 members who gather, process, treat, and transport natural gas and hazardous liquids materials through intrastate pipelines in Texas. TPA's members own and operate major sources in the HGB nonattainment area, which would be subject to the rules that are being proposed.

In this proposal, TCEQ is responding to Federal Clean Air Act (FCAA) provisions, including Section 185, requiring states to impose a penalty fee upon major stationary sources of VOC and NO<sub>x</sub> emissions if the source is located in an area classified as severe or extreme nonattainment for the ozone NAAQS and the area has not achieved the NAAQS by its attainment date. HGB is a severe nonattainment area for the one-hour ozone NAAQS and it did not achieve attainment by its deadline of November 15, 2007.<sup>1</sup> The FCAA sets the amount of

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<sup>1</sup> See 77 Fed. Reg. 36400 (June 19, 2012). The one-hour ozone standard has been revoked and replaced by the more-stringent 1997 eight-hour standard. See 77 Fed. Reg. 4938 (Feb. 1, 2012). However, EPA has concluded that it must continue to provide a mechanism to give effect to the one-hour anti-backsliding requirements, which include the Section 185 failure to attain fee. See 77 Fed. Reg. 36402-03 (June 19, 2012). TPA's submission of these comments should not be taken as our agreement with EPA's conclusion in this regard. To the contrary, we believe that it is illogical, inefficient, and legally unnecessary to expend time and energy developing rules aimed at implementing a standard that has been revoked – particularly where, as here, EPA has stated that will no longer even assess whether an area has achieved compliance with such standard. See 37 Tex. Reg. 9477 (Nov. 30, 2012).

the penalty fee at \$5,000 per ton (as adjusted for inflation) of VOC, NO<sub>x</sub>, or both emitted in excess of 80 percent of the affected source's baseline emissions.

**1. TPA supports the proposed alternatives to direct imposition of Section 185 fees.**

The proposal under consideration includes various alternatives to direct imposition of Section 185 fees on major sources. Most importantly, TCEQ proposes to offset the overall fee obligation for major sources in the HGB area with revenue collected through the Texas Emissions Reduction Plan (TERP) program and the vehicle Inspection and Maintenance (I/M) program. This would reduce or eliminate major sources' obligation to make payments under the failure to attain rules, depending on the area's overall fee obligation and the amount of TERP and I/M funds generated in a given year.

This is a sensible proposal because it recognizes that a substantial portion of NO<sub>x</sub> emissions in the HGB area is attributable to mobile sources rather than stationary sources, and because it recognizes that major stationary sources in this severe nonattainment area are already subject to stringent emission controls. This being so, there is little more that major stationary sources in the HGB area can do to improve air quality in the area short of cutting production, which would have a corresponding negative economic impact. If a source is already heavily controlled and cannot achieve further reductions, it is not fair to nonetheless impose fee obligations on that source. Beyond being unfair, it is also ineffective: the incentive to install additional controls should be borne by mobile sources which are the remaining largest contributor of ozone precursors in the area.

We agree with TCEQ that the FCAA authorizes the Section 185 alternatives that TCEQ is proposing here. In this regard we note that EPA has recently approved two separate programs in the State of California whereby Section 185 requirements are satisfied through "equivalent alternative" arrangements similar in nature to the arrangement currently proposed by TCEQ. In the San Joaquin Valley area, "clean" sources (those that apply BACT) are exempt from the Section 185 fee obligation and the resulting revenue gap is made up by imposing mobile source fees on motor vehicles. In the South Coast area, the yearly fee obligation for the area is determined and a demonstration is then made showing that an equivalent amount of money was spent in the area on emissions-reduction projects that year. In each case, the fee obligation has been shifted in whole or in part away from major stationary sources, based on the State's recognition that imposing the fee on such heavily controlled sources would be unfair and unlikely to result in further emissions reductions. EPA has issued final rules approving the San Joaquin Valley and South Coast equivalent alternative arrangements.<sup>2</sup>

Such equivalent arrangements, including the one proposed by TCEQ, satisfy the FCAA because they are not less stringent than the Section 185 fee program and as such are authorized by anti-backsliding obligations established in FCAA § 172(e). As EPA has explained:

Section 172(e) is an anti-backsliding provision ... that requires EPA to develop regulations to ensure that controls in a nonattainment area are "not less stringent"

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<sup>2</sup> See 77 Fed. Reg. 50021 (Aug. 20, 2012) (Final Rule, Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District); 77 Fed. Reg. 74372 (Dec. 14, 2012) (Final Rule, Revisions to the California State Implementation Plan, South Coast Air Quality Management District).

than those that applied to the area before EPA revised a ... NAAQS to make it less stringent. In the Phase 1 ozone implementation rule for the 1997 ozone NAAQS ... EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply the same anti-backsliding principle that would apply to the relaxation of a standard for the transition from the 1-hour NAAQS to the more stringent 1997 8-hour NAAQS. As part of applying the principles in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states to retain programs that applied for purposes of the 1-hour standard, or alternatively can allow states to adopt alternative programs, but only if such alternatives are determined through notice-and-comment rulemaking to be “not less stringent” than the mandated program.<sup>3</sup>

According to EPA, a state can demonstrate that an alternative program is “not less stringent” by “comparing expected fees and/or emission reductions directly attributable to application of section 185 to the expected fees, pollution control project funding, and/or emissions reductions from the proposed alternative program.”<sup>4</sup> Here, TCEQ would make a yearly accounting of the Section 185 fee obligations for the HGB area and would compare that figure to the amount of funds generated by the TERP and I/M programs to determine whether funds from those programs matched or exceeded the Section 185 fee obligation amount. If revenue attributable to the TERP and I/M programs was insufficient to offset the HGB area’s fee obligation for that year, then fees would be assessed against HGB-area major sources sufficient to make up the shortfall. Thus the equivalent alternative program would contain a “backstop” mechanism to ensure that the HGB area met its fee obligation each year.<sup>5</sup> TCEQ’s approach satisfies the requirement that fees from the alternative program match those that would have been collected by application of the Section 185 fee assessment program.

In addition, the TERP and I/M programs are specifically aimed at emissions reduction, meaning that TCEQ’s proposed alternative approach will satisfy the requirement that emission reductions from the alternative program meet or exceed the reductions that would be directly attributable to application of Section 185’s fee collection provisions. Indeed, given that direct fee collection under Section 185 would fall on major sources where there is little if any room for further improvement, the likely outcome of a Section 185 direct-fee-collection approach would simply be payment of fees by these sources rather than achievement of emissions reductions, resulting in little benefit to the environment. TCEQ’s alternative approach is an appropriate means of satisfying the FCAA while not unfairly punishing sources that have already spent a significant amount of time, money, and effort installing emissions controls required by existing State and Federal regulations.

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<sup>3</sup> EPA Region IX Air Division, “Technical Support Document for EPA’s Rulemaking for the California State Implementation Plan as submitted by the California Air Resources Board Regarding San Joaquin Valley Unified Air Pollution Control District Rule 3170, Federally Mandated Ozone Nonattainment Fee” (July 19, 2011) at 5.

<sup>4</sup> 77 Fed. Reg. 50023 (Aug. 20, 2012).

<sup>5</sup> See 30 TAC 101.104(c)(3) (proposed).

We also support the equivalent alternative proposals set forth in proposed §§ 101.121 and 101.122 regarding use of credits or supplemental environmental projects to fulfill Section 185 requirements. Allowing the use of such alternative means of compliance is good public policy because the availability of alternatives will minimize unnecessary burden on industry without jeopardizing the goals sought to be achieved through the rules.

**2. TPA supports TCEQ's actions to avoid retroactivity.** TCEQ proposes that fee assessment under the Section 185 program begin in 2013, based on 2012 emissions inventories. TCEQ notes that the first year after the attainment date was 2008 but states that it would be inappropriate to impose fees on sources based on emissions during 2008 to 2011 because that could be considered to constitute retroactive rulemaking.<sup>6</sup> TCEQ also explains that it would be unfair to impose fees based on such prior year emissions because “[s]ources would not have had an opportunity to reduce emissions (and thus, fees) by adjusting processes or operations.”<sup>7</sup> In other words, it would be inappropriate to impose a fee on emissions that occurred before the rule was finalized because sources would not have known about the rule and could not have adjusted operations to manage emissions in an effort to minimize fees owed under the then-non-existent rule. TPA agrees with TCEQ on these points and we support TCEQ's actions to avoid retroactivity in these rules.

**3. TPA supports cessation of the program if future circumstances warrant.** Under a literal reading of the FCAA, payment of Section 185 fees must continue until the nonattainment area has been redesignated. TCEQ proposes to continue the calculation of Section 185 fees but to place the collection of such fees in abeyance if three consecutive years of data show that the HGB area is meeting the standard.<sup>8</sup> TPA supports this proposal. TCEQ is correct to anticipate the possibility that the HGB area will meet the one-hour ozone NAAQS but that sources nonetheless would continue to be burdened by the Section 185 fee obligation, based solely on EPA's failure to make redesignations under a revoked standard. It is appropriate that the Executive Director be given the ability to suspend fee collection under such circumstances.

**4. TPA supports the proposal to provide additional flexibility in calculation of baseline amounts.** TCEQ is proposing to allow sites under common control to aggregate VOC and/or NOx emissions at a single site or across multiple sites. TPA supports this proposal because it would provide owners / operators with increased flexibility in arriving at a baseline amount that most accurately reflects emission levels at their facilities. We believe, however, that certain aspects of the current proposal are ambiguous and should be revised.

For example, TCEQ staff states that proposed § 101.107 is intended to allow owners or operators to aggregate emissions across multiple major stationary sources under common control.<sup>9</sup> Presumably this means that emissions from sources that are not subject to aggregation under traditional single-source analysis could nonetheless be aggregated for purposes of the

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<sup>6</sup> 37 Tex. Reg. 9477 (Nov. 30, 2012).

<sup>7</sup> *Id.*

<sup>8</sup> See 30 TAC 101.118 (proposed).

<sup>9</sup> See 37 Tex. Reg. 9470 (Nov. 30, 2012).

instant rule, so long as (1) the sources are under common control and (2) the sources are located within the HGB nonattainment area. While this is a logical supposition, it is not one that is stated clearly in the draft rule language. TCEQ should draft the rule language in a more precise manner, so that no question remains as to the circumstances under which aggregation of emissions may occur. This can be accomplished by revising proposed § 101.107(a) as follows:

(a) Aggregation. Notwithstanding the requirements of § 101.106 of this title (relating to Baseline Amount Calculation), a major stationary source of emissions that meets the applicability requirements of § 101.101 of this title (relating to Applicability) after calculating each pollutant's emission baseline amount in accordance with this subchapter may choose to combine:

(1) volatile organic compounds (VOC) emissions into a single aggregated pollutant baseline amount for multiple separate major stationary sources that are located in the HGB one-hour ozone standard nonattainment area and that are under common control;

(2) nitrogen oxides (NOx) emissions into a single aggregated pollutant baseline amount for multiple separate major stationary sources that are located in the HGB one-hour ozone standard nonattainment area and that are under common control;

(3) emissions for both VOC and NOx into a single aggregated pollutant baseline amount for a single major stationary source; and/or

(4) emissions for both VOC and NOx into a single aggregated pollutant baseline amount for multiple separate major stationary sources that are located in the HGB one-hour ozone standard nonattainment area and that are under common control.

In addition, it appears to be TCEQ's intention that the multiple sources eligible for aggregation would include all sources in the HGB area, company-wide, that are under common control. While this appears to be TCEQ's intent, we do not believe that the proposed rule language clearly carries out this intent. We urge TCEQ to clarify proposed § 101.107 as to the parameters of an owner / operator's ability to aggregate across multiple sources, so that it is clear that all sources in the HGB area, company-wide, are eligible for aggregation to the extent that those sources are under common control.

**5. TPA supports TCEQ's proposals regarding inclusion of MSS emissions in baseline determinations.** TCEQ is proposing to allow owners / operators to take into account emissions from maintenance, startup, and shutdown (MSS) events in their baseline determinations, as long as those emissions were allowed under TCEQ authorization.<sup>10</sup> TCEQ

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<sup>10</sup> See 30 TAC 101.108(a) (proposed).

explains that this proposal stems from FCAA provisions requiring that authorizations in existence as of the attainment date be included in baseline calculations.<sup>11</sup>

TCEQ has recognized a potential inequity in this context. As TCEQ explains, in 2005 major sources in Texas were allowed to authorize planned MSS emissions pursuant to a TCEQ schedule that extended past the November 15, 2007 attainment date for some sources. Thus, the possibility exists that a source would be unable to include MSS emissions in its baseline calculation, if that authorization happened to occur after November 15, 2007 – even though the source had fully complied with TCEQ’s authorization schedule and had followed TCEQ rules and guidance in existence prior to the inception of the FCAA Section 185 fee program. To address this situation, proposed § 101.108(a) would allow MSS emissions permitted after November 15, 2007 to be included in a source’s baseline calculation if the source’s failure to obtain pre-attainment date authorization was due to the source’s adherence to the TCEQ authorization schedule.

We commend TCEQ for fashioning a remedy for this potential inequity. As TCEQ points out, it would be unfair to penalize a source (by not allowing the source to include planned MSS emissions in its baseline amount, thus resulting in a lower baseline) where the source’s authorization “delay” was due solely to its adherence to an authorization schedule developed and imposed by TCEQ. TPA supports proposed § 101.108(a) because it would provide a fair solution to this issue.

**6. Sources that were not major sources as of the attainment date should be exempt from the requirements of these rules.** When TCEQ last proposed Section 185 failure to attain fee rules, in 2009, TCEQ included an exemption from the fee obligation for “[a]ny major stationary source ... that was not in operation on or before the attainment date ....”<sup>12</sup> TCEQ explained that such an exemption was justified because “any major stationary source that was not in operation on or before the attainment date ... did not contribute emissions to a baseline amount for the nonattainment area for the attainment date ....”<sup>13</sup> TCEQ added that such sources “did not contribute to the area’s emissions and nonattainment status.”<sup>14</sup> For these reasons, TCEQ stated that exempting such sources from the Section 185 fee requirements was justified.

In the new proposal, however, no such exemption is provided. TPA believes that the exemption continues to be appropriate for the reasons previously stated by TCEQ and we urge TCEQ to revise the current proposal to include such an exemption.

The exemption should also apply to any facility that was a minor source as of the attainment date and that only later became a major source. Extending the exemption in this manner would not compromise environmental quality because a facility going from minor to major will have already been subjected to the allowance requirements set forth in the Mass

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<sup>11</sup> See TCEQ Interoffice Memorandum (Oct. 26, 2012) at 7.

<sup>12</sup> 34 Tex. Reg. 8655 (Dec. 4, 2009).

<sup>13</sup> *Id.* at 8646-47.

<sup>14</sup> *Id.*

Emissions Cap and Trade Program (*see* 30 TAC §§ 101.350-363) and the source would also be required to achieve the Lowest Achievable Emission Rate as a major new or modified source in a non-attainment area.

Therefore, we urge TCEQ to include in the rules the following exemption, as a new section:

Section [\_\_\_\_\_]. Exemption.

Any stationary source that was not in operation on or before the attainment date, or that was a minor source on or before the attainment date, is exempt from the requirements of this subchapter.

Because a facility that was a minor source on the attainment date should be exempt from the Section 185 fee requirements, proposed § 101.110, which establishes baseline calculation methods for such facilities, should be deleted. In the alternative, if such facilities are made subject to Section 185 requirements, TPA would support the general approach taken in the proposed rules, which is to allow a minor source that became major after the attainment date to establish its baseline by using emissions levels reflecting the facility's operation as a major source, rather than the lower level emitted by the facility while it operated as a minor source.

**7. The language regarding baseline calculations for irregular, cyclical, or otherwise variable emissions should be revised.** Proposed § 101.106 provides that baseline emissions must be calculated based on the attainment year unless the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year. TPA supports the provision of an alternative to address varying emissions because this will help to ensure that the baseline amount fairly and accurately reflects the source's operations. However, we believe that the language used by TCEQ to implement this alternative should be revised.

Proposed § 101.106(b)(2) provides that baseline emissions must be from the attainment year or "if the regulated entity's emissions are irregular, cyclical, or otherwise vary significantly from year to year, any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute an average baseline emissions amount (tons per year) for the major stationary source." This provision is made confusing by the language beginning with "to compute ...." We suggest that proposed § 101.106(b)(2) be amended as follows:

(b) For the purposes of this subchapter, the baseline emissions must be from:

...

(2) if the regulated entity's emissions are irregular, cyclical, or otherwise vary significantly from year to year, any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year ~~to compute an average baseline emissions amount (tons per year) for the major stationary source.~~ If used, the historical period must be:

- (A) ten years for non-electric utility steam generating units; or
- (B) five years for electrical utility steam generating units.

**8. Additional flexibility should be given to new sources regarding the calculation of baseline amounts.** Proposed § 101.110 contains provisions relating to calculation of baseline amounts for new sources. As noted elsewhere in these comments, TPA opposes the proposal to apply these rules to sources that were not major sources as of the attainment date. However, if TCEQ does impose these rules to such sources, then we submit the following comments regarding proposed § 101.110.

Section 101.110 would provide that a new source's baseline amount would initially be based on its first full year of operation.<sup>15</sup> Subsequently, the source would have the opportunity to adjust its baseline based on its first 24 months of operation.<sup>16</sup> TPA believes that TCEQ should provide one additional opportunity to adjust the baseline amount. This is needed because a facility's initial 24-month period of operations often does not provide a true picture of the facility's operations; a facility's first 24 months of operations will often be abnormally high or low, depending on start-up issues, the kind of site it is, the state of the economy, and other factors. A source should be given the additional option to select a 24-month period from its first five years of operation as the baseline period. This would allow the source to establish a final, fixed actual emissions baseline after five full years of operation, reflecting any 24-month period within those five years.

**9. The Executive Director's determinations regarding the baseline amount should be subject to review by the Commissioners.** The proposed rules provide that baseline amount calculations are subject to review by the Executive Director.<sup>17</sup> TPA believes that the Executive Director's determinations should be subject to review. Accordingly, TPA proposes that the baseline amount determinations be subject to a Motion for Reconsideration under 30 TAC 55.201 in order to provide a check and balance against the Executive Director and to give the Commissioners final decision-making authority in this area. TPA suggests addition of the following language at the end of proposed § 101.106(f):

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.

**10. Dates in the proposed compliance schedule should be extended.** Proposed § 101.117(a) provides that baseline amount determination forms would be due 120 days after the new rules' adoption date. We submit that 180 days would be a more appropriate time period, so that these potentially complex calculations can be done in a careful and accurate manner.

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<sup>15</sup> See 30 TAC 101.110(a) (proposed).

<sup>16</sup> See 30 TAC 101.110(d) (proposed).

<sup>17</sup> See 30 TAC 101.106(f) (proposed).

In addition, proposed § 101.117(d) provides that Section 185 fees would be due within 30 days of the invoice date. We suggest that this period be changed to 90 days. Application of the Section 185 program may require large fee payments, including payments by relatively small companies. Requiring payment within 30 days could pose an unnecessary hardship on such companies. Allowing 90 days to submit payment would help to alleviate this potential hardship.

We appreciate the opportunity to submit these comments.

Yours truly,

A handwritten signature in black ink, appearing to read 'Thure Cannon', with a long horizontal line extending to the right.

Thure Cannon  
Executive Director