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Electronically via TCEQ's Online Public Comments System

Texas Register Team - MC 205
General Law Division
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TCEQ
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RE: Comments to TCEQ on Section 185 Fee Program in Texas for the 2008 Ozone NAAQS

In response to a recent proposed rulemaking (30 TAC §§101.700-101.718; Rule Project No. 2023-131-101-AI), the Texas Chemistry Council,[1] the Texas Oil and Gas Association,[2] and the Texas Pipeline Association[3] respectfully submit the following comments to the Texas Commission on Environmental Quality ("TCEQ") regarding the proposed Section 185 fee program for the Houston-Galveston-Brazoria ("HGB") and Dallas-Fort Worth ("DFW") "severe" nonattainment areas under the 2008 75 ppb 8-hour ozone national ambient air quality standard ("NAAQS"). TCEQ's proposal is published at 50 Tex. Reg. 2925 (May 16, 2025).

Section 185 of the federal Clean Air Act ("CAA") applies a fee to areas that have failed to attain a NAAQS by the area's "severe" attainment date.[4] Section 185 requires that states collect a fee of $5,000 (adjusted for inflation) for each ton of volatile organic compounds

[1] The Texas Chemistry Council ("TCC") represents 65 member companies who own and operate more than 200 chemical manufacturing and research facilities across the state of Texas. Our members have over $250 billion in physical assets in the state, directly employ more than 80,000 Texans, and are responsible for 500,000 indirect industry jobs in the form of contractors, suppliers, and service providers that support the business of chemistry in Texas. Texas chemical manufacturing is the number one non-energy export in the state with over $50 billion exported annually.

[2] The Texas Oil & Gas Association (TXOGA) is a statewide trade association representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces approximately 90 percent of Texas' crude oil and natural gas and operates the vast majority of the state's refineries and pipelines. In fiscal year 2024, the Texas oil and natural gas industry supported over 490,000 direct jobs and paid $27.3 billion in state and local taxes and state royalties, funding our state's schools, roads and first responders.

[3] The Texas Pipeline Association ("TPA") is the largest state trade association in the country representing solely the interests of the Texas intrastate pipeline industry. TPA consists of 33 members who, collectively, engage in the gathering, processing and transport of natural gas and liquid petroleum products through more than 475,000 miles of pipelines across Texas. In 2022 alone this network generated over $60.5 billion in economic output.

[4] CAA § 185(a).

("VOCs") emitted by a major stationary source in a calendar year in excess of 80 percent of its baseline emissions.[5]

CAA Section 172(e) provides that, if the U.S. Environmental Protection Agency ("EPA") "relaxes" a NAAQS, EPA should promulgate requirements that "are not less stringent than the controls applicable" before the relaxation.[6] This provision is known as the "anti-backsliding" provision. EPA has interpreted Section 172(e) to apply also when a NAAQS is "strengthened," an interpretation that has been upheld on review.[7]

Here, the 2008 75 ppb ozone NAAQS was strengthened when the 2015 70 ppb ozone NAAQS became effective. EPA has acknowledged that the 2015 NAAQS strengthened the ozone standards.[8] No authority limits Section 172(e)'s application to a NAAQS being revoked.

The anti-backsliding provision provided a basis to include "equivalent alternatives" in the HGB Section 185 fee program for the 1979 1-hour ozone NAAQS, including using fees generated from the Texas Emissions Reduction Plan ("TERP") to offset fees assessed under the 1-hour Section 185 fee program.[9]

Now as then, the statute and case law support that Section 172(e) provides a basis for equivalent alternatives to a Section 185 fee program for the 2008 75 ppb ozone NAAQS. We support TCEQ's proposal to credit the use of funds generated and expended through the TERP program and other equivalent sources to satisfy the areas' obligations. Integrating TERP captures the role of motor vehicles in the airshed, as motor vehicles represent a significant portion of the emissions inventory. Crediting TERP funds expended in the airshed supports and reinforces TERP's role in facilitating mobile source emissions reductions. Texas regulators are extremely limited in their authority to regulate emissions from the largest combined source of oxides of nitrogen ("NOx") in Texas—on-road motor vehicles, such as cars and trucks, and non-road vehicles, such as railroad engines, marine vessels, aircraft, airport equipment, and construction equipment.[10] Therefore, the ability afforded TCEQ through the TERP program to generate emission reductions is a crucial measure to reduce emissions from the mobile source sector.

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[5] CAA § 185(b)(1).
[6] CAA § 172(e).
[7] *South Coast Air Quality Management District ("SCAQMD") v. EPA*, 472 F.3d 882 (D.C. Cir. 2006); *NRDC v. EPA*, 779 F.3d 1119 (9th Cir. 2015).
[8] Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements, 83 Fed. Reg. 62,998, 63,029 n.87 (Dec. 6, 2018) (stating that "[b]ecause the air quality in [nonattainment] areas does not currently meet the revised [NAAQS], populations in these areas would be expected to benefit from implementation of the ***strengthened*** standards." (emphasis added).
[9] 38 Tex. Reg. 3610, 3613 (June 7, 2013).
[10] *See* Commission Approval for Adoption of the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) Moderate Areas Reasonable Further Progress (RFP) State Implementation Plan (SIP) Revision for the 2015 Eight-Hour Ozone National Ambient Air Quality Standard (NAAQS) (Non-Rule Project No. 2022-023-SIP-NR) (February 7, 2025), Chapter 2: Emissions Inventories.

In addition, we support TCEQ's proposal to allow a major stationary source to establish its baseline emissions using an averaging calculation across operative years. The CAA provides that EPA may issue guidance establishing that baseline emissions can be calculated as an average "determined over a period of more than one calendar year" for sources with emissions that are "irregular, cyclical or otherwise vary significantly from year to year."[11] Using this authority, EPA issued final guidance establishing that baseline emissions can be calculated using the methods found in EPA's regulations for Prevention of Significant Deterioration of Air Quality ("PSD").[12] TCEQ applied it in its fee program for the 1-hour ozone NAAQS.[13] We support TCEQ's proposal to similarly adopt this element here.

We support TCEQ's proposal to allow owners or operators of major stationary sources to choose to aggregate VOCs and NOx for baseline calculations and fee assessment purposes. The CAA provisions applicable to ozone establish that "the plan provisions required under this subpart for major stationary sources of volatile organic compounds shall also apply to major stationary sources ... of oxides of nitrogen."[14] EPA has interpreted this provision as establishing that "while Section 185 expressly mentions only VOC, section 182(f) extends the application of this provision to NOx."[15] This statutory provision supports the principle that a Section 185 fee program can allow aggregation of VOCs and NOx for baseline calculations and fee assessment purposes. EPA and TCEQ integrated this element in the fee program for the 1-hour ozone NAAQS.[16] Thus, we support TCEQ's proposal to adopt precursor aggregation.

Additionally, we support TCEQ's proposal to allow the owners or operators of multiple major stationary sources under common control to choose to aggregate baseline amounts of VOC and/or NOx emissions, or both, consistent with longstanding EPA principles allowing major stationary source aggregation and with Texas's state implementation plans ("SIPs"), including Texas's SIP-approved cap and trade program.[17]

Finally, TCEQ's proposal, in Section 101.709, would allow an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under Chapter 116, Subchapter B, Division 5.[18] Because

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[11] CAA § 185(b)(2).
[12] EPA, "Guidance on Establishing 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," March 21, 2008.
[13] 38 Tex. Reg. 3610, 3612 (June 7, 2013).
[14] CAA § 182(f).
[15] EPA, "Guidance on Developing Fee Programs Required by the Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010 (remanded on other bases).
[16] 38 Tex. Reg. 3610, 3615 (June 7, 2013); 85 Fed. Reg. 8411, 8421 (Feb. 14, 2020) (EPA stated that "We do not believe anything in the Act precludes provisions that allow aggregation of VOC and NOx emissions in calculating a source's baseline emissions.").
[17] EPA, "Guidance on Developing Fee Programs Required by the Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010 (remanded on other bases); 38 Tex. Reg. 3610, 3618, 3635 (June 7, 2013); 85 Fed. Reg. 8411, 8421 (Feb. 14, 2020).
[18] 50 Tex. Reg. at 2936, 2947 (May 16, 2025).

sources can be authorized by permits other than nonattainment permits issued under Chapter 116, we would support TCEQ's final rule expanding the available authorization mechanisms beyond the permits issued under Chapter 116.

Sincerely,

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