Scope of State Discretion in Implementing Clean Air Act Section 185

May 12, 2009 Draft

Policy Options	Supporters/Opponents of Policy Options/Comments	Policy/Legal Objection	Questions/Comments	Alternative Language
BASELINE SELECTION				
1. Multiple-Year Baseline: Establish baseline based on source's selection of highest two consecutive years over past ten years.	**Supporter: Baker Botts.** A multiple-year baseline concept is consistent with the plain language of Section 185, which allows EPA to issue guidance authorizing a baseline determined over a period of more than one calendar year, and would flexibly and efficiently meet the statutory requirements. EPA issued a guidance memorandum in 2008 stating that this is an acceptable method. Such an approach would place the obligation appropriately on sources that have not contributed to attainment goals, while avoiding perversely rewarding delays in the implementation of emissions controls until after the attainment year. The approach, as applied in the NSR context, was upheld by the D.C. Circuit in *New York v. EPA*.			

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	Supporter: Clean Energy Group Sec. 185 Subgroup. Consistent with EPA's 2008 guidance memorandum, multiple-year baselines should be allowed. A multiple-year baseline would recognize sources that already have made substantial reductions in the past to ensure that Section 185 does not reward companies for delaying the installation of emissions control equipment at the expense of improved air quality. Utility sources should be allowed to use a ten-year period as opposed to a five-year period.		See illustrative example included in comment letter.	
	Supporter: Regulatory Flexibility Group. A facility should be allowed to select an appropriate baseline year period and to average its emissions over multiple time periods, as explicitly recognized by Congress in Section 185(b)(2) and in the legislative history.		The NSR provisions are based on a project and, for this rule, the project is demonstrating attainment by the scheduled year.	
	Supporter: TCEQ. Facilities should be allowed to use a 24 month average to determine a baseline as allowed in			

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	NSR/PSD. This period is 10 years for non-utilities and 5-yrs for utilities prior to the scheduled attainment year. **Opponent: New York State.** Utility sources should not use a ten-year baseline but should be limited to be consistent with NSR.			
	Opponent: Environmental Defense Fund. In exceptional cases – where the source's emissions are demonstrated to be irregular, cyclical or to vary significantly from year to year – EPA may authorize a baseline that considers the lower of actuals or allowables over more than one calendar year. EPA's 2008 guidance provides that for facilities that operate on an intermittent, irregular, or non-continuous cycle (clear guidelines should be set for this determination), the baseline is presumed to be calculated from the last consecutive 24 months' worth of data that represents their normal operating conditions. The most recent emissions data should be used to	The statutory text expressly commands that the "baseline amount shall be computed" in accordance with a baseline that is the lower of actuals or allowables (permitted or SIP limits) "during the attainment year." Id. The statute also authorizes EPA to include in its guidance provision for determination of a "baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year." CAA §185(b)(2). The average calculation "for a specific source may be used if that source's		

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	calculate the baseline in these circumstances. In all instances, the baseline emissions should be comprehensive, encompassing direct and fugitive emissions from the source.	emissions are irregular, cyclical, or otherwise vary significantly from year to year." Id.		
	Opponent: NRDC and Earthjustice. The suggestion would violate the statute.	(1) Extended baseline periods are allowed only if it is first established that a source's emissions are "irregular, cyclical, or otherwise vary significantly from year to year." §185(b)(2). This does not apply to any facility that has varying emissions. Such variation must be significant. (2) There is no basis for "cherry picking" the highest emissions over an extended baseline period. The Act provides for averaging emissions over a period of more than one year to account for variability. The use of the highest subset of emissions over the extended baseline is inconsistent with the plain language in section 185(b)(2) allowing the use of "average" emissions		

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		determined over an extended baseline period. (3) The suggestions that this should be analogized to the baseline determination in new source review has no statutory basis. Section 185 does not refer to the new source review program, and there is no similar language specifying that emissions may be averaged over an extended baseline in the new source review provisions. (4) The policy arguments for this flexible baseline are misguided. The only policy directive intended by this flexibility is to allow some flexibility to ensure an accurate representation of emissions from a given source at the time of the missed attainment deadline.		
2. Allowable Emissions Baseline: Use allowable emissions baseline for facilities or equipment that have undergone new source review.	**Supporter: Regulatory Flexibility Group.** Facilities with equipment installed or modified after 1976 should be permitted to use an allowable emissions baseline because their allowable emissions level			

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	(or potential to emit) would necessarily reflect actual emissions reductions as required under new source review regulation. **Supporter: Baker Botts.** This approach is consistent with the treatment of new sources under established airshed cap-and-trade programs. New sources are baselined at allowable, subject to later adjustment to actuals based on five years' operation. **Supporter: TCEQ.** The FCAA allows a facility to use the lower of the permitted or actual emissions for calculation of a baseline.			
	Supporter: Los Angeles County Sanitation District (LACSD)	Presuming that offsetting thresholds are appropriately accounted for in state attainment plans and/or that facility emissions are contemporaneously offset or fully offset with ERCs that meet EPA validity tests, allowable emissions levels could represent a substantial investment by		

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		a company; not operating at the allowable level might be only be the result of uncontrollable market conditions.		
	Opponent: Environmental Defense Fund. In all instances, the baseline emissions should be comprehensive, encompassing direct and fugitive emissions from the source.			
	Opponent: NRDC and Earthjustice. The Act permits the use of allowables in the attainment year as long as actuals in the attainment year are not lower.	(1) The Act is clear on when allowables can be used. To the extent this suggestion would change that directive, it would be illegal. (2) The factual claim that the "allowable emissions level (or potential to emit) would necessarily reflect actual emission reductions" is specious. (3) To the extent actuals might be lower than allowables as a result of market conditions, there is some ability to look at average emissions if it can be established that such market forces		

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		are cyclical. Otherwise, Congress has spoken to any "fairness" concerns by explicitly setting the penalty based on the lower level of emissions.		
AGGREGATION APPROACHES				
3. Source Aggregation (commonly-owned or –operated facilities): Establish baseline for a multiple-facility operator based on emissions from all facilities and impose the fee based on whether emissions in the aggregate exceed the baseline.	**Supporter: Sempra Energy.** An aggregation concept would allow an operator with multiple, integrated facilities to concentrate investment in control technologies that achieve the most energy-efficient and cost-effective emission reductions. This is the fundamental principle for cap-and-trade programs such as the RECLAIM program.			**Need to clarify that this is within the same nonattainment area.**
	Supporter: LACSD	This is a common-sense cost effective approach as opposed to precisely controlling each major source an entity operates. Such an approach also makes enforcement easier since fewer total facilities need to be specially monitored to assure the extra emissions reduction.		

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	Supporter: Clean Energy Group Sec. 185 Subgroup. The flexibility of source aggregation will ensure that owners of major stationary sources in the same nonattainment area deploy capital across their systems in the most cost-effective manner.		Aggregation should be pollutant-based or site based where supported by approved programs (such as trading) in SIPS.	
	Supporter: Baker Botts. This approach aligns the program with existing cap-and-trade structures, whereby the regulated community has efficiently implemented precursor reductions across an asset fleet. **Supporter: TCEQ.** States should be allowed to customize program to best meet needs of nonattainment area. Site aggregation prevents site from being penalized if over-control were achieved at one site to offset another site to meet SIP goals.		Administrative law gives agencies some latitude in implementing statutory programs, for example if the agency can also achieve other statutory objectives of the full Act. Therefore a flexibility option that achieves either the punitive provisions or the emission reduction goal of Section 185, and also advances other objectives of the Clean Air Act, should be allowable.	
	Supporter: Regulatory Flexibility Group. The aggregation approach better reflects the interconnected		Allowing an operator to aggregate the emissions from all subject facilities it owns qualifies as such an	

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	nature of many businesses and thus better reflects overall emissions reduction progress.		option. An operator who owns several facilities subject to Section 185, by strict interpretation of the section, would have to reduce annual emissions by 20 percent at each facility in order to achieve Section 185's emission reduction goal. However, as is often the case, it may be more cost effective to over-control equipment at one facility and achieve equal or greater emission reductions than are required for all the commonly owned facilities. But if the agency would allow an operator to combine the baselines of all facilities under his ownership every year, then the operator would have an incentive to over-control at one or more, achieving equal or greater emission reductions. Allowing this type of flexibility option would achieve Section 185's emission reduction goal and also a goal of the Clean Air Act, to achieve	

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			equal or greater emission reductions in a more cost effective manner. This flexibility is not new to environmental agencies. In fact this is the fundamental principle for cap and trade programs, e.g. the SCAQMD's RECLAIM program.	
	Opponent: New York State. Aggregation of multiple co-owned sites would violate the plain language of Section 185.			
	Opponent: Environmental Defense Fund. Ozone is formed locally. Any reduction of ozone precursors should be across all facilities to ensure fair distribution of the benefits of pollution reduction to the communities affected.	In section 185(a), Congress commanded that the protections are keyed to "the area to which such plan revisions applies," directed that the penalty apply to major source "located in the area" and apply until "the area is redesignated as an attainment area for ozone."		
	Opponent: NRDC and Earthjustice. This suggestion would violate the statute.	(1) The Act is clear that the fee is to be paid and computed for "each" source. Section 185(a) says "each major stationary source shall . . . pay a fee to the State as a penalty for [failing		

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		to attain].” Section 185(b)(1) provides that the fee is to be computed based on the VOC emitted “by the source.” Each stationary source must reduce emissions to 80 percent of baseline or pay a fee. (2) To the extent EPA wants to encourage additional cost-effective reductions or be consistent with a cap and trade approach, the solution that meets section 185 and provides such incentives is to encourage states/districts to impose a fee for all emissions, not just those above 80 percent of baseline.		
4. Source Aggregation (inventory-wide): Calculate the baseline and post-attainment year emissions based on basin-wide actual emissions for all major stationary sources.	**Supporter: Regulatory Flexibility Group.** Basin-wide major source aggregation would better reflect the region’s emissions reduction progress and be less subject to individual facility economic activity.			

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	Opponent: New York State. Aggregation of facilities would violate the plain language of Section 185.			
	Opponent: TCEQ. Aggregation of all facilities is not supported under Section 185 or under approved SIP plans**.**			
	Opponent: Environmental Defense Fund. Ozone is formed locally. Any reduction of ozone precursors should be across all facilities to ensure fair distribution of the benefits of pollution reduction to the communities affected.	In section 185(a), Congress commanded that the protections are keyed to "the area to which such plan revisions applies," directed that the penalty apply to major source "located in the area" and apply until "the area is redesignated as an attainment area for ozone."		
	Opponent: NRDC and Earthjustice. The suggestion would violate the statute.	See Response to #3 above.		

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5. Pollutant Aggregation: Establish baseline based on emissions of NOx and VOC emissions.	**Supporter: Clean Energy Group Sec. 185 Subgroup.** Aggregation of NOx and VOC emissions could be helpful in situations where a source can more cost-effectively reduce the emission of one pollutant more than the other. This approach is supported by Section 182(f)(1), which states that "plan provisions required under this subpart [including Section 185] shall also apply to major stationary sources . . . of [NOx]." **Supporter: Baker Botts.** Aggregation of NOx and VOC in a single formula is consistent with the plain language of Section 185, read in light of Section 182(f). A single formula was SIP-approved for Sacramento and the D.C. area programs. **Supporter: TCEQ** States should be allowed to customize program to best meet needs of nonattainment area. If attainment demonstration demonstrated that reducing ozone in a nonattainment area was to more heavily control one pollutant, sources should not be penalized for supporting		**LACSD**: More importantly, peak ozone (O3) isopleths as a volume function of NOx and VOC tell us that regulating one pollutant unequally over another in say, a polluted urban area as opposed to a rural countryside, is the most effective attainment strategy. This is good science and good policy. See attachments for clarification.	**PRIORITY ISSUE**

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	state SIP goals.			
	Supporter: LACSD	An understanding of basic ozone equilibrium chemistry and how it can be more beneficial to over control one pollutant over another to reach attainment faster should be easily demonstrated by modeling..		
	Opponent: New York State. Sources should not aggregate NOx and VOC emissions in making their baseline determinations because Section 182f requires NOx requirements to be the same as those for VOC, not for the combination of these requirements.			
	Opponent: Environmental Defense Fund. Penalty fees	The Senate Report that accompanied the final		

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	should be collected for each covered major stationary source of VOCs and NOx – without aggregation – and to impose the penalties promptly until timely attainment of the 1-hour ozone NAAQS is achieved. As NOX and VOCs do not contribute equally to ozone formation, there is no justification for them to be treated as such.	version of the bill that included section 185 described the purpose of the fee as "an incentive for sources to reduce VOCs further." Senate Report No. 101-228, 1990 USCCAN 2285, 3433 (Dec. 20, 1989).		
	Opponent: NRDC and Earthjustice. The suggestion would violate the statute.	(1) The Act is clear that fee is based on tons of VOC emissions. Section 182(f) does not mean, and has never meant, that the VOC controls required by the Act can be replaced with NOx-equivalent controls. To the contrary section 182(f) is clear that the provisions for major sources of VOC shall "also" apply to major sources of NOx. These NOx requirements are in addition to, not in lieu of the plain requirements for VOC controls. (2) Appeals to the science surrounding ozone formation may be appealing, but they are not relevant to interpreting the plain language of the		

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		Act and ignore the structure of the Act, which focuses on VOC controls regardless of the relative contribution between NOx and VOC. Credit for Past Controls		
RECOGNITION OF CONTROL EFFORTS				
6. LAER/BARCT/BACT Exemption: Exempt emissions from equipment already meeting LAER/BARCT/BACT standards).	**Supporter: Clean Energy Group Sec. 185 Subgroup.** Section 185 is structured in such a way that indicates Congressional intent to avoid imposing major fees on sources that have installed modern pollution control systems since areas were first found to be out of attainment. Rather, it is intended to target sources that have made little or no progress in terms of improving environmental performance and to create an incentive for improvements in air quality. Section 185 should not create a perverse incentive to increase the utilization of higher-emitting facilities outside of a nonattainment area. If a source has installed LAER/BARCT/BACT equipment, this investment			**PRIORITY ISSUE** **Implementation Issues**

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	should be considered as meeting the requirements of Section 185. If a source plans to install control equipment to reduce emissions below baseline, it should be exempted from fee payment while the retrofits are in the planning stages.			
	Supporter: LACSD.	We believe that the Section 185 20% emission reduction requirement possibly derived from the reasonable anticipation that this degree of control ~ 20 years ago would move most RACT facilities up to PSD BACT, maybe even California BARCT, maybe even up to federal LAER. Hence it is unconscionable for us to believe that once there, Congress meant to "reward" this good behavior by further penalizing those cleaner facilities.		
	Supporter: Regulatory Flexibility Group. The Section 185 approach should reflect appropriate pre-attainment year emissions reduction actions, such as by excluding from the facility			

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	emissions calculation pre- and post-control emissions of equipment or processes that have been controlled to LAER/BARCT/BACT standards. This approach protects against the arbitrary and unintended consequence of penalizing a facility for controlling its emissions prior to the attainment year and would recognize that, at such sources, any further reductions could be achieved only by curtailing operations and risking employment and other economic damage to the region. This approach has the advantage also of being suitable to, and avoiding an arbitrary penalty to, any new or modified source installed or modified on or after the attainment year.			
	Opponent: New York State. Facilities that installed LAER/BARCT/BACT equipment (and other well-controlled equipment or clean units) prior to the baseline should not be exempt because this would not meet the 'not less stringent' "additionally test," as the implementation of these controls would be a SIP and		**LACSD.** There is at least one other policy consideration that should be taken into account if facilities at LAER must reduce their throughput. In our case, the Sanitation Districts generate about 127MW of electrical energy from renewable resources as sewage digester gas, landfill gas,	

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	Clean Air Act requirement. This also would violate the plain language of Section 185, which does not allow for such an exemption. **Opponent: TCEQ.** Exclusion of BACT/LAER units is not allowed in FCAA, § 185, and is not consistent with requiring alternative programs to be "surplus" to the SIP.		refuse and bio-solids. To reduce throughput only means that fossil fuels must make up the MW difference thereby increasing greenhouse gases and that the alternative fuels be flared or otherwise wasted. This is a dichotomy that no framer of Section 185 could have reasonably foreseen.	
	Opponent: Environmental Defense Fund. Exemption of facilities that installed LAER/BARCT/BACT equipment (and other well-controlled equipment or clean units) prior to the baseline is not legal as this would not meet the 'not less stringent' "additionally test," as the implementation of these controls would be a SIP and Clean Air Act requirement.	This would violate the plain language of Section 185, which does not allow for such an exemption.		
	Opponent: NRDC and Earthjustice. This suggestion would violate the statute.	(1) The Act provides for no such exemptions. In fact the Act expressly addresses how the fee shall apply to sources subject to more stringent permit limits in section 185(b)(2). (2) The repeated appeals		

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		to "fairness" and assertions that Congress intended "to target sources that have made little or no progress in terms of improving environmental performance" have no basis in the statute. Congress recognized that the areas subject to section 185 will have adopted RACT for major stationary sources, that other sources will have gone through new source review and become subject to LAER, and that SIPs may have targeted certain categories for more stringent controls than others. All of this is assumed and is laid out in subparts 1 and 2.		
IMPLEMENTATION ALTERNATIVES				
7. Cost-Spreading: Calculate the fee based on post-attainment year actual annual emissions from non-exempt major stationary sources but spread it across all non-exempt reporting	**Supporter: Regulatory Flexibility Group.** Such an approach would recognize that most (if not all) major stationary sources have been heavily regulated and that cost-effective control opportunities may exist to a			**Would be difficult to impose fees on other than major stationary sources.**

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stationary sources, including non-major sources.	greater extent at minor sources. Spreading the fee across all sources would reduce the penalty effect on already-regulated sources while creating a reduction incentive at all sources. (A variant of this approach would be to apply the fee to mobile sources as a trip-reduction or engine/vehicle turnover incentive). **Opponent: TCEQ.** The Section 185 fee clearly applies to only major sources. **Opponent: NRDC and Earthjustice.** This suggestion would violate the statute.	(1) Section 185 applies to major stationary sources. Allowing such sources to avoid paying the statutory fee by spreading the penalty to others would violate the plain language of the Act. (2) As noted above, these appeals to fairness have no connection to the statute and the choices that Congress has made. Congress knew that major sources would be the more regulated and yet still chose to impose the fee on major stationary sources. This was the "fair" solution chosen by		

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		Congress. (3) For many of these suggestions, the solution is not to try to avoid the fee imposed by section 185 but to expand the fee program to cover additional sources and provide the necessary incentives. Major stationary sources must pay a fee for all emissions over 80 percent of the applicable baseline – that is the unavoidable statutory requirement. Nothing, however, prevents the states/ districts from imposing additional fees on all sources – major, non-major, mobile – to provide incentives for less well controlled sources to reduce emissions.		
8. Fee Offset or Adjustments: Allow any major source to deduct from its nonattainment fee any non-administrative fee (e.g., RECLAIM Trading Credits ("RTCs") and Emission Reduction Credits ("ERCs")) paid to	**Potential Supporter: Baker Botts.** Not specifically addressed in comments, but commenter indicates support for allowing facilities to satisfy the fee obligation by retiring ERCs. Tone of comment indicates that commenter could support Fee Offset.		There seems to be consensus emerging here. The CAAAC task group should focus on the range of approvable options for dedication of the 185 obligation to the creation of local emissions reductions rather than payments to state or	**HIGH PRIORITY**

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the state/air district.	**Supporter: Clean Energy Group Sec. 185 Subgroup.** Where ERCs have been used to offset the emissions from a source, these investments should be considered equivalent to paying fees under Section 185 because ERCs provide a permanent offset to a facility's emissions and companies can incur significant costs in acquiring ERCs. Commenter also indicates support for allowing facilities to satisfy the fee obligation by retiring ERCs. **Supporter: Regulatory Flexibility Group.** Appropriate credit should be provided for sources that have purchased RTCs or ERCs (or that participate in other fee programs). Such payments already provide an economic incentive at the same or higher cost level for reducing VOC and NOx emissions. **Supporter: TCEQ.** Credits should be allowed to be retired to satisfy fee obligations.		federal fee funds. The term "offset" should not be used – offsetting refers to the explicit requirements during the nonattainment new source review permitting process.	

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	Opponent: Environmental Defense Fund. Retiring credits from existing programs does not meet the 'not less stringent' "additionally test," as the implementation of these programs are a SIP and Clean Air Act requirement..			
	Opponent: NRDC and Earthjustice. This suggestion would violate the statute.	(1) There is no statutory basis for avoiding the required fees based on fees paid to meet other requirements. The statutory language on how fees are to be calculated is plain. (2) The rationale for this suggestion suffers from the same defects as the arguments for crediting emission reductions made to meet other requirements such as new source review (see, e.g., #6 above). The fact that a source has paid a fee in lieu of reducing emissions does not change the nature of the issue.		
USE OF REVENUES				
9. Revenue Return: Allow any source to	**Supporter: Baker Botts.** The state/air district should			**HIGH PRIORITY**

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recapture any fees paid within a certain time period for qualified on- or off-site projects (alternative: allow a source to receive the emissions reduction benefits of the state's/air district's use of its fees).	dedicate fee revenue to that area's attainment effort by crediting the source's Section 185 obligation for new pollution control investment or returning escrowed Section 185 fees to stationary sources upon the completion of area-wide ozone goals. The state/air district could direct Section 185-equivalent revenue toward existing emission reduction programs in the area (e.g., Clean School Bus Program).			**General agreement that fees be used for attaining the air quality standard.**
	Supporter: Clean Energy Group Sec. 185 Subgroup. Fees should be directed toward projects that will improve air quality and contribute toward attainment. States/air districts have discretion in how to use the fees. Sources should be allowed to apply Section 185 fees to projects at the source, or at other sources in the nonattainment area or adjacent areas (upwind), that improve the air quality in the nonattainment area, in recognition of the fact that ozone pollution can be		**LACSD.** We strongly believe that sources should be allowed to re-invest the Section 185 fees within their own fence line facilities since a) it makes an unpalatable rule somewhat most palatable; b) since most of these facilities are Title V facilities, there is greater assurance that the emissions reductions will actually occur as a result of monitoring provisions, threat of enforcement actions and public scrutiny of most proposed	

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	transported over long distances.		changes, as opposed to spending mandates by the states outside the fence line that do not carry the same MRR. Note for facilities already at California BARCT and LAER , a waiting period of several years might be appropriate to accrue the funds to install the incremental, very expensive controls.	
	Supporter: Regulatory Flexibility Group. Equity considerations warrant this approach.			
	Supporter: State of New Jersey. Supports but states that the use of the word "fee" is misleading and problematic. The State agrees that fees paid to a state cannot be "recaptured" by the source. They suggest providing a credit for investments in air pollution control during the year when the fee is applicable, or some other defined time frame that is not too lengthy, i.e., plus or minus one year of the year for which the excess emissions are being calculated. This would be a dollar for dollar credit.			

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	Preference is that this be a credit that reduces the penalty fee, rather than revenue return; they do not support collecting money and then returning it. **Opponent: New York State.** A state/air district that collects the fee can use it as it wishes (implying that fees should not be recaptured by the source paying the fee). Section 185 does not require that the source recapture the fee.			
	Opponent: **Environmental Defense Fund**. Congress forged in law nearly two decades ago that penalties are singularly devoted to clean air measures in the nonattainment area with a sharp focus on expeditiously restoring healthy air. Accordingly, we vigorously oppose that fees be utilized for ancillary purposes or for activities outside of the nonattainment area.	The law is clear that the fees must be imposed as a penalty in order to restore compliance with the ozone NAAQS in the face of a failure to achieve timely attainment.		
	Opponent: NRDC and Earthjustice.	(1) A statutory requirement founded upon the obligation to pay fees to state and local government entities would be subverted by a		

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		suggestion that these fees could be returned to be used at the discretion of those facilities that pay the fees. This should not be interpreted to preclude state or local entities from approving specific projects at facilities that have paid fees. There are too many pitfalls to relying upon the paying entities to achieve desired pollution reductions at their own discretion, and there must be oversight from state and/or local government entities. (2) Allowing sources to receive emission reductions credits for projects funded with the fees would defeat the purpose of the program by allowing those emission reductions to be undone with future expansion of sources.		
EQUIVALENT PROGRAMS				
10. Air Quality Benefit Alternative: Exempt any source that participates in an approved air quality	**Supporter: Baker Botts.** Fee requirements should be satisfied by actual emissions reduction commitments,			**HIGH PRIORITY**

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improvement program (e.g., engine turnover, employee car repair and maintenance).	including any additional NOx or VOC reductions from point sources that advance the attainment goals. **Supporter: Regulatory Flexibility Group.** Alternative strategies that target under-regulated sectors are likely to have a more beneficial air quality impact and reduce the adverse economic impact of a mere tax on facilities. **TCEQ** Rather than exempting sources that participate in an alternative program, sources should use these programs to generate credits that can be used to reduce the amount of emissions upon which fees are paid. **Supporter: State of New Jersey.** They would like to support the intent of this alternative consistent with the recommendation of the TCEQ that it not be an exemption but be an emission credit. This would be analogous to option 9, but instead of a dollar for dollar credit, it would be a ton for ton credit.			

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	Opponent: New York State. Capital investments should not be used in lieu of payment of the fee.		MJB&A supports the ability of major stationary sources to apply Section 185 fees to projects at the major stationary source subject to Section 185 or at other sources in the nonattainment area or adjacent upwind areas with the goal of improving air quality in relevant nonattainment area. EPA has the authority to provide this flexibility under section 172(e)	
	Opponent: Environmental Defense Fund. The program is intended to penalize the large covered sources in an area out of compliance. It would turn this penalty provision on its head were the sources singled out for penalties to use the fees to pay for reduced emissions. Such an inverted outcome would mean that such sources not only benefit from postponing critical clean air investments but that delayed action pays. Such sources should not be allowed to do an end-run around long-standing control requirements by using the fees to do at a later date what they should have done	The law expressly provides that the fee shall be paid "as a penalty." CAA §185(a).		

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	already.			
	Opponent: NRDC and Earthjustice. This suggestion would violate the statute.	(1) There is no authority for rewriting the Act to replace statutory requirements with "equivalent" programs in nonattainment areas where the NAAQS have been strengthened. Nothing in section 172(e) speaks to alternative options, waiver or equivalency to statutory requirements. The focus of this language is on preserving the controls that would otherwise be required. The court explained in *SCAQMD v. EPA*, that the penalty provision of section 185(a) is a "control[] that that section 172(e) requires to be retained." 472 F.3d 882, 903 (D.C. Cir. 2006). The court rejected EPA's attempt to avoid imposing this provision in 1-hour ozone areas noting, "By EPA's reading, the standards could be		

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		changed every fourteenth year – just prior to the attainment date – and a state could go unpenalized without ever attaining even the original NAAQS referenced in the 1990 Amendments." *Id.* at 902-03. The suggestion that EPA can use section 172(e) to create a new loophole to avoid imposing Congress' clear direction in passing section 185 controls cannot be reconciled with the court's decision. (2) Section 185 does not provide any such exemption from the fee requirement.		
11. Equivalent Emission Reductions: Establish an alternative program that achieves equivalent emission reductions from non-major stationary sources or from mobile or area	**Supporter: TCEQ.** Projects that are verifiable with actual reductions to emissions in the nonattainment area should be approvable on a ton per ton basis for reducing the fee obligation.			**HIGH PRIORITY**

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sources.	**Supporter: Regulatory Flexibility Group.** Same reasons as the air quality benefit alternative.		The CAA does not specify how states may spend or allocate the fees collected under a section 185 fee program. In the previous recommendation letter, MJB&A offers specific recommendations on the types of projects that EPA might include in its guidance document and that MJB&A believes should qualify under an alternative equivalent program.	
	Supporter: LACSD.	The mobile source component of this proposal is extremely important in California and warrants further explanation. In the South Coast Air Basin (SOCAB), mobile sources account for something like 80% of the air pollution so it seems logical to focus on the biggest contributor to the problem. In an earlier e-mail, we described the possibility of moving heavy duty, off-road Diesel powered equipment from a closing landfill to a new landfill		

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		outside the SOCAB. This equipment would be "captured" equipment in another air basin; we would stipulate that it would never return to the SOCAB (specify engine block numbers in an agreement of some sort). The amount of HD off-road equipment moving to another air basin would be directly proportional to the tonnage of refuse also being railed there. The balance of the tonnage and HD earth-moving equipment we assume would be absorbed by other operating landfills in SOCAB. This would be a true emissions offset and would displace our entire stationary source obligation under Section 185. It makes good policy sense to seek mobile source emissions reductions in those areas dominated by mobile sources such as the one described here.		

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	Opponent: Environmental Defense Fund. Any alternative or equivalent program will only require additional time and personnel commitments for the review of such programs propagated by several states and in any case cannot be less stringent than the section 185 requirements.	The Clean Air Act is clear in its intention that the 185 Section result in the levying of fees on major sources for non-attainment of the NAAQS standard. There is no mention in the act of alternative or equivalent programs.		
	Opponent: NRDC and Earthjustice	To the extent this suggestion is targeted at how revenues should be spent, the suggestion is fine. To the extent it is intended to substitute for the 185 fee program, it would violate the statute as explained above in #10 above.		
12. 185 Program Sunset: When areas achieve the level of the relevant standard (*e.g.,* the revoked one-hour standard), fees should	**Supporter: Baker Botts.** Section 185 fee payments should be suspended upon the first year in which an area achieves the level of the relevant standard. Where a state or district and its			

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sunset.	regulated community work successfully to achieve the air quality objective, it is unfair and contrary to the Act to saddle the area with further penalties.			
	Environmental Defense Fund. The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm is < 1.			
	Opponent: NRDC and Earthjustice. This suggestion would violate the statute.	Section 185 applies "until the area is redesignated." § 185(a). Redesignation requires more than merely monitoring achievement of the standard. The dilemma EPA has created is a product of its own inappropriate decision to revoke the 1-hour ozone standard. At a minimum, EPA must ensure the same protections provided by sections 107(d)(3)(E) and 175A are provided before turning off the fee program. EPA must show that attainment is the result of permanent and enforceable emission reductions and that there		

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		is a plan in place, with backstop measures, to ensure continued attainment.		
13. Other	**Supporter: LACSD.**	The proposed fees, especially in extreme non-attainment areas will, negatively impact local governments, essential public services and small businesses, and not just big business entities. The 10 TPY threshold for designating major sources is simply not that large, roughly the potential to emit from a 100 BHP uncontrolled (11 gr/BHP-HR) reciprocating engine. The 10 TPY limit captures central heating plants of government complexes, school campuses, hospitals and medical centers. Small printers, because of VOCs in inks and washes they use, are brought in too. Essential public services as sewage treatment plants and landfill gas control operations are similarly brought into this situation. Our point is that the		

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		deliberations of the Section 185 task force and the CAAAC should be mindful of how far down the consequences of Section 185 reach. Section 185 does not simply impact the largest businesses as refineries and utility companies. Mobile source reductions should be the primary area of flexibility given to the states. This flexibility should not be limited to the creation of ERCs which is extremely difficult to do in the South Coast (because of BACT discounting at time of generation). Creative mobile source reduction proposals that meet the EPA tests for permanence, enforceability, surplus etc. should be approvable by the states. Paying for these reductions via a SEP should be only one avenue of many that is available to the states in crafting these programs that directly seek to reduce emissions from the highest polluting sector.		

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		LACSD by itself and with affiliated operations currently generates about 119 MW of electrical energy soon to increase to 126MW by the end of the year. Many of these facilities are at California BACT or very close to it, at BARCT. Without some clean unit exemption for many of the underlying facilities, a throughput reduction may need to occur, renewable fuels must be flared or sent to a landfill and the difference in the electrical output probably made up by burning more fossil fuels at the utility level. Given the tremendous interest in the United States recently in reducing GHGs, it is completely counter productive to allow this situation to develop. LACSD also believes that the individual states by themselves or regionally are in the best position to decide which alternative strategies will lead to quicker attainment such as favoring NOx-heavy		

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		reduction strategies as opposed to across-the-board, equal NOx and VOC reductions. The states should be given considerable flexibility to maximize alternative reductions of emissions consistent with their SIPs.		