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Houston Galveston Area Council
3555 Timmons Ln., Suite 120
Houston, TX 77027

Via E-mail: Mary.Spain@h-gac.com

8 pages

Attn: Board of Directors

Re: Comments on Proposed Non-Road Air Quality Strategies

Dear H-GAC Board Member(s):

My name is Robert C. (Bob) Lanham. I am vice president of Williams Brothers Construction Company (a Houston-based firm) and the firm is member in good standing with the Associated General Contractors of Texas (AGC of Texas) and the Houston Contractors Association (HCA).

I have been personally involved with the clean air issue in Houston and how it relates to our industry for over 12 years. A few of my credentials: I am a current member of HGAC's RAQPC. I am a Past President of the Houston Construction Industry Coalition and the AGC of Texas. I have served as the Chairman of the Highway Division of the AGC of America and as the Chairman of AGC of Texas and AGC of America's Environmental Committees. Former Speaker Pete Laney appointed me to the TERP Advisory Board where I served two years as the vice chair. I have participated in the West Coast, Mid-Atlantic and Blue Skyways Collaboratives. I have spoken at several EPA National Clean Diesel Campaign conferences. Williams Brothers Construction is an active TERP grantee with over 300 TERP projects.

I am personally disturbed about the process timeline. Modeling has not been accomplished. Subsequently, the region does not know the amount of emission reductions necessary to reach attainment. Businesses do not make decisions without a target or projected outcome. The region is undertaking a decision-making process without a target. This is unwise. Unnecessary regional economic dampers may result from following this type of process.

As a key participant in the development of these positions, as a leader in our industry, and as a subject matter expert, I am writing today to express my full support for the industry positions listed on the attached document concerning off road emission control strategies. Some of the responses are unfortunately vague due to the lack of information available about the actual strategy being considered. I am confident in the veracity of the comments and positions. I strongly urge you to consider and support them.

Regards,

Robert C. (Bob) Lanham, PE
Vice President

COMMENTS ON DRAFT OFF ROAD STRATEGIES:

#	Industry Position	Category/Strategy #	Comments
5	Support	Cleaner Equipment Requirements & Incentives	<p>Industry supports TERP but offers the following commentary as methods to improve the program:</p> <p>Expectation from TERP in its current configuration are TOO HIGH based on a number of factors:</p> <ol style="list-style-type: none"> 1) Statutory limits on emission thresholds for technology 2) Shifting of excessive funds to research 3) EPA control of technology certification 4) CARB & others lack of concern regarding NOx as a pollutant of concern when testing new technologies 5) Limitations in the manufacturing industry 6) Funding <p>As a result, program changes are needed to expand success. <u>Suggested improvement to TERP:</u></p> <ol style="list-style-type: none"> 1. <u>Maximize small business participation in TERP</u> <p>The TERP grant program requires significant, complex air emissions calculations. Though viewed as necessary for stringent audit and verification procedures, these requirements serve as a deterrent to small business participation.</p> <ol style="list-style-type: none"> a. Redefine “small business” to SBA standards in lieu of TCEQ standards for the purpose of administering TERP so that more firms can be eligible for assistance directly from the TCEQ. b. Modify TERP rules so that third parties (public, private, profit, non-profit) can serve as a cooperative or collective for the purpose of grant applications. Small firms can join the co-op and receive the benefits by the co-op submitting TERP applications on behalf of a group. c. Modify TERP rules so that certain repair shops or dealer maintenance facilities can be prequalified by a grant process to install retrofits or repowers on equipment brought in for repairs. A “coupon” process could be utilized obligating the equipment owner to all of the required reporting procedures without an application. <p>Require all public entities with capital improvement programs in affected counties to provide TERP outreach as a part of the project advertisement protocols regardless of the media outlet.</p> <ol style="list-style-type: none"> 2. <u>Lower the 30% threshold requirement in TERP for retrofit projects.</u> <p>The 30% threshold has been a barrier to technology development. Recommend lowering to 10%. The threshold could be “graduated” with a lower threshold permitted if the cost effectiveness is</p>

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			<p>excellent.</p> <p>3. <u>Lower the average cost effectiveness of TERP projects</u></p> <p>Cost and price are fundamental concepts of economics. Cost is a function of efficiency in the manufacturing process. Emission technologies have high production costs due to research and development, manufacturing inefficiencies, and slow certification protocols. Price is a function of supply and demand. There is a demand for these technologies with extremely limited supply. To lower the cost effectiveness of TERP projects, a business climate should be created that promotes both lower cost and lower price for emission reduction technology.</p> <p>To remedy/mitigate the adverse economic factors for the delivery of emission technology to the market, we recommend:</p> <ol style="list-style-type: none"> Develop and implement criteria for the expansion of entities, public or private, that can verify/certify the emission standard of new technology in a manner acceptable to the USEPA. Speed up/streamline the USEPA technology verification/certification process. The USEPA must begin to accept state agency or third party verification/certification of emissions technology. These broad based program changes will lower the cost to produce and deliver new technology to the market. It will increase competition in the market thus increasing supply and lowering price. The net effect will be lower cost effectiveness thresholds for future TERP projects. <p>4. <u>Manufacturer limitations</u> - Regardless on the amount of money available through TERP or any similar program, there are physical constraints with which we must contend.</p> <ol style="list-style-type: none"> The manufacturing industry capacity - It took decades to produce the off-road fleet currently being operated. If the manufacturers completely stopped new work and produced new engines for the existing fleet, it would take decades to make this happen. Engineering feasibility – Engines cannot be arbitrarily swapped out. Support systems have to be evaluated and redesigned to accommodate the newer type engines. Sometimes the newer engines just won't fit. Subsequently, "repowering" equipment is not a "silver bullet" to cure all of our problems.
8	Support	Cleaner Equipment Requirements & Incentives	Incentive based approaches are supported by industry. Not enough details exist on this item to provide any substantive comment.
6	Support	Cleaner Equipment Requirements & Incentives	Good if focus is short term deliverables. Researchers have not been adequately controlled to date
8	Support	Construction Equipment	Government contracting incentives – The TxDOT incentive program was developed jointly with

#	Industry Position	Category/Strategy #	Comments
		& Operations	industry and would be supported. Increases in the amount of incentives to be earned should be considered.
9	Support	Construction Equipment & Operations	This activity is already underway by USEPA. I have been a participant in the process. It will yield low cost reductions BUT there will be opposition by the NIMBY faction. BMPs has some potential but most address PM and not NOx.
10	Support (Qualified)	Construction Equipment & Operations	<p>A prohibition on extended idling of diesel engines is an effective emission reduction strategy that can be supported by the industry. Depending on the application, limits can be established on how long diesel engines should be allowed to idle.</p> <ol style="list-style-type: none"> 1) That the TCEQ work with the industry to develop recommended idling limits for various types of diesel engine applications. 2) Subsequently, TCEQ to adopt a no-idling rule based upon the agreed application-based limits. <p>Idling restrictions are generally supported by industry so long as there is no cost increases such as taxes.</p> <p>SHOULD APPLY TO ON & OFF ROAD</p> <p>Engine technologies – after market devices will be supported only under a voluntary mode such as TERP; Mandates will be litigated</p>
11-14	Support (Qualified)	Engine & Fuel Technology	<ul style="list-style-type: none"> ▪ USEPA engine standards are supported on their current time line ▪ Normal attrition of the older fleet must be allowed to occur on the normal business investment cycle unless supplemented by a voluntary program such as TERP
15-16	Support (Qualified)	Engine Standards	<ul style="list-style-type: none"> ▪ Adequate advance testing is conducted to insure no adverse affects on the diesel engine or any of its components. ▪ Adequate testing to insure no loss of power occurs in the engine output. Loss of power will require the utilization of larger equipment to perform the same task thus defeating the purpose of or reducing the effectiveness of the strategy. ▪ Adequate testing to insure no loss of fuel efficiency. Loss of fuel efficiency will cause more fuel to be consumed to produce the same amount of work thus defeating the purpose of or reducing the effectiveness of the strategy. ▪ Adequate testing to insure there are no toxicity issues. As employers, the industry is concerned with employee exposure and the creation of additional environmental hazards. ▪ Research and plan the implementation to insure adequate fuel supply. ▪ Research and plan the implementation to protect contractors in fixed price contracts from increased fuel prices.
19-20	Support (Qualified)	Fuel Standards	<ul style="list-style-type: none"> ▪ Adequate advance testing is conducted to insure no adverse affects on the diesel engine or any of its components. ▪ Adequate testing to insure no loss of power occurs in the engine output. Loss of power will require the utilization of larger equipment to perform the same task thus defeating the purpose of or reducing the effectiveness of the strategy. ▪ Adequate testing to insure no loss of fuel efficiency. Loss of fuel efficiency will cause more fuel to be consumed to produce the same amount of work thus defeating the purpose of or reducing the effectiveness of the strategy. ▪ Adequate testing to insure there are no toxicity issues. As employers, the industry is concerned with employee exposure and the creation of additional environmental hazards. ▪ Research and plan the implementation to insure adequate fuel supply. ▪ Research and plan the implementation to protect contractors in fixed price contracts from increased fuel prices.

OTHER POTENTIAL SIP CREDIT

1. Federal (USEPA) Retrofit Program - In the 2005 Energy Bill¹, Senator Voinovich introduced and passed an amendment that provides \$1 billion for the retrofit of diesel engines.
 - c) Push for full funding and appropriation by the Congress.
 - d) The TCEQ and the State of Texas apply for their fair share of this funding.
 - e) Obtain a commitment from the USEPA for a minimum guaranteed funding level for Texas retrofit projects. This guaranteed funding level could be included in the SIP in the same manner as TERP.
 - f) The funding would either be included in the TERP program or managed separately.
2. Congestion Mitigation and Air Quality Fund (CMAQ Fund) - The reauthorization of the federal highway bill, SAFETEA-LU², included revisions that permit the use of the CMAQ Fund for emission reduction projects for non-road equipment. Previously, these funds had been limited on only on-road emission reduction projects.
 - a) Work with the USDOT and FHWA to expedite guidance and policy for the implementation of this new provision.
 - b) Work with TxDOT to expedite implementation of the new policy.
 - c) Obtain a commitment from TxDOT on the amount of monies to be spent annually from CMAQ on non-road emission reduction projects.
 - d) Advertise and promote the program through local Metropolitan Planning Organizations.
 - e) Include the committed funding levels from CMAQ on emission reduction projects in the SIP in the same manner as TERP.
3. Emissions Banking and Trading Program
 - a) Emissions trading program should be modified to facilitate the inclusion of non-road source reductions.
 - b) The trading program will work similar to an incentive program with the company making an investment in clean air technology and is left with credits that can accrue value depending on the market.

¹ H.R.6, Subtitle G, Sections 791 - 797

² H.R.3

The following table is a list of proposed control strategies that are opposed by the civil construction industry and have been removed from the list by RAQPC. We would strongly oppose any reconsideration of these items as possible control strategy alternatives.

30	Neutral	Cleaner Equipment Requirements & Incentives	No comment
31	Oppose	Cleaner Equipment Requirements & Incentives	Accelerated Fleet Turnover - Litigated and defeated in the 1 Hr SIP. Only acceptable to the industry under a voluntary measure funded by TERP.
33	Oppose	Cleaner Equipment Requirements & Incentives	Operating restrictions – will be opposed; Previously litigated and overturned
34 & 35	Oppose	Construction Equipment & Operations	<p>Conditions of approval for new construction</p> <p>Backdoor approaches to achieve #31 and #33; Will be opposed; Permits for new construction will create more government; Emissions limits on projects – not technically feasible due to lack of expertise</p> <p>Unacceptable for the following reasons:</p> <ol style="list-style-type: none"> 1) Death on economic growth 2) Lack of competent technical expertise to do this intelligently 3) Will be used as a vehicle by some factions to stop growth 4) Will require a new bureaucracy to establish a permitting process. Permits would be the only mechanism to make this enforceable. <p>Contract-Based control strategies will:</p> <ul style="list-style-type: none"> • Disenfranchise contractors • Reduce competition • Increase the cost of construction <p>Furthermore, there is significant legal precedent prohibiting the use of such measures:</p> <ul style="list-style-type: none"> • For states other than California and all political subdivisions, §209(c) of the federal Clean Air Act preempts any emission-related state or local standard or other requirement on new or non-new vehicles, but allows “opting in” to California’s regulations. <ul style="list-style-type: none"> ○ §209 Protects Vehicle Consumers. As the Supreme Court held in <i>EMA v. SCAQMD</i>, 541 U.S. 246 (2004), by limiting the state and local governments to choose between EPA’s national standards and California’s standards, Congress intended §209 to protect both vehicle manufacturers and consumers from vehicle standards that fail to

<p>meet the statutory criteria (e.g., technical and economic feasibility, leadtime).</p>	<ul style="list-style-type: none"> ○ §209 Preempts In-Use Controls. §209(d) expressly reserves states' authority over in-use motor-vehicles (such as carpool lanes). By contrast, as the U.S. District Court in <i>Austin</i> held in <i>EMA v. Huston</i>, 190 F.Supp.2d 922, 927 & n.3 (W.D. Tex. 2001), §209(c) preempts all emission-related controls for nonroad vehicles, with no savings clause for in-use nonroad vehicles. ● Under some statutes, courts recognize a "market-participant" exception to otherwise-applicable federal preemption. In <i>Cardinal Towing v. City of Bedford</i>, 180 F.3d 686, 693 (5th Cir. 1999), the Fifth Circuit adopted a two-part test to determine when a government action falls on the "proprietary" side of the regulatory-proprietary distinction: <ul style="list-style-type: none"> ○ Exception Reflects Typical, Efficient Behavior. Does the action essentially reflect a private party's typical behavior in efficient procurement? ○ Exception Is Narrow. Does the action's narrow scope suggest a goal to address a specific proprietary problem, rather than to encourage a general policy? ○ Mandatory contract-based measures fail both halves of the Cardinal Towing test: (1) their greater expense makes them the very opposite of a private party's interest in efficient procurement of services; and (2) they are not narrowly tailored to project-specific criteria but instead are obviously intended to address a general policy of reducing statewide emissions, particularly for regional pollutants like ozone precursors. ● To qualify under Clean Air Act §110, mandatory contract-based controls must be federally enforceable by EPA, the state, and the public. Whether voluntary or mandatory, reductions must also be quantifiable, surplus, permanent, and adequately supported. Contract provisions fail in aspect to: <ul style="list-style-type: none"> ○ Federally Enforceable. Like private market participants, government contracts cannot impose punitive liquidated-damages clauses in contracts. <i>Priebe & Sons v. U.S.</i>, 332 U.S. 407, 411 (1947). ○ Not Quantifiable. To qualify as quantifiable, an emission reduction must be capable of "reliable and replicable" measurement, and it cannot be impractical to determine compliance with the published limit. ○ Reductions Are Not Permanent. To qualify as permanent, an emission reduction must exist throughout the time that the State Implementation Plan relies on it, unless the 	
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			state replaces it (e.g., by another emission reduction or SIP revision).
37	Oppose	Construction Equipment & Operations	Contract control clauses – Mandates will be opposed; Voluntary incentives will be supported
38	Oppose	Construction Equipment & Operations	Bid preferences will: 1) Disenfranchise contractors 2) Drive up the cost of construction exponentially 3) Violate numerous procurement statutes 4) Would be litigated by numerous construction associations Half day construction schedules – NO! See Comments on #31
40	Oppose	Construction Equipment & Operations	Share equipment → Comments reserved until more info is available; Sounds impractical and stupid.
43	Oppose	Construction Equipment & Operations	Tags on equipment – no benefit and high cost; If intent is to bundle with #31 & #33 – will be opposed
44	Oppose	Construction Equipment & Operations	
58-62	Oppose	General Operations Management	<ul style="list-style-type: none"> ▪ #58 – NO; see comments on #33 ▪ #59 – NO; see comments on #35 ▪ Any restrictions on the use of equipment will be opposed; previously litigated and overturned ▪ See comments on #31-35
85	Oppose	Stationary Engines	
87	Oppose	Cleaner Equipment Requirements & Incentives	ARB portable engine standards Adoption of CA engine standards was discussed during the 1 Hr SIP development. It removes a great deal of future control away from Texas (HGBA) if the adoption occurs. Any future CA changes would have to be immediately adopted by Texas. Recommend against.

INDUSTRY GUIDING PRINCIPLES

Litigation will be supported on any strategy (on-road or off-road) that contains any of the following including any hybrid/variation of:

- a) Equipment use restrictions
- b) Early fleet turnover or existing fleet obsolescence
- c) Mandated equipment modification or replacement
- d) Any standard that undermines the federal role in diesel engine standards
- e) Bid preferences or restrictions