



# SIERRA CLUB

FOUNDED 1892

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Houston Regional Group

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Ms. Charlotte Horn  
MC 205  
Office of Legal Services  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Dear Ms. Horn,

Enclosed are the comments of the Houston Regional Group of the Sierra Club (Sierra Club) regarding the Texas Commission on Environmental Quality's (TCEQ) proposal for Section 185 penalty fees for volatile organic compounds (VOCs)/nitrogen oxides (NOx) for the 1-Hour Ozone National Ambient Air Quality Standard State Implementation Plan (SIP) revision as required by the Federal Clean Air Act Amendments (FCAA).

1) The Sierra Club opposes the TCEQ decision to emasculate Section 185 penalty fees and place the burden on paying fees on the public and not the large companies where it is required to go. Unlike what TCEQ states under **Public Benefits and Cost**, there will be no compliance with federal law because this proposal does not meet federal law. There will be no incentive for reductions of ozone (O3) because those responsible for air pollution will be subsidized by the public and will not have to use their own resources to pay for their own air pollution. This proposed action by TCEQ calls the question: Which side is TCEQ on? Is TCEQ on the side of the public or the polluters?

2) The Sierra Club does not agree that Texas Emissions Reduction Plan (TERP) funding can take the place of Section 185 penalty fees. TERP funding is not reliable as TCEQ knows because the Texas Legislature holds the purse strings and has consistently restricted TERP funding so that the money can be used by the Legislature to pretend to balance the state budget. TCEQ has not control or predictability with TERP funding even if it were allowed by federal law to substitute TERP for Section 185 penalty fees. There is no guarantee TERP money can be spent each year to substitute for Section 185 penalty fees. But this is a pointless debate because this substitution is not allowed by law.

The substitute of funding by sources that are already in compliance, motor vehicle owners, for those that are not in compliance, large companies, penalizes the public and subsidizes companies on the backs of the public. This is both unfair and not allowed by federal law because Section 185 penalty fees cannot be avoided by companies that contribute to the failure to meet the O3 standard.

*"When we try to pick out anything by itself, we find it hitched to everything else in the universe." John Muir*

3) The use of fees associated with vehicle Inspection and Maintenance (I/M) programs to pay for penalty fees unfairly penalizes people so that they subsidize companies that emit large amounts of air pollution. The amount of money that the LIRAP (Low-Income Vehicle Repair, Assistance, Retrofit, and Accelerated Vehicles Repair Program) uses is miniscule in comparison to the Section 185 penalty fees that large companies must pay. The Sierra Club opposes use of I/M program monies as an alternative program to Section 185 penalty fees.

4) The Sierra Club disagrees with TCEQ that calling an alternative funding program "no less stringent" than the Section 185 penalty fees is correct. One funding program is not a penalty for failing to reduce air pollution but is a control measure approved in the SIP for attainment of the ozone standard in Houston.

5) TCEQ has provided no documentation that its proposed program of shifting the burden of Section 185 penalty fees to individuals will result in encouragement of further air pollution reductions in Houston. Approval of such a program will create a backlash by people who will feel unfairly singled out and will detest the subsidization of large companies that should pay their penalty fees. The public will resent TCEQ which will lead to a loss of public support for other clean air endeavors.

6) The Sierra Club does not agree with TCEQ that Section 185 penalty fees can be removed from well controlled sources and assigned to poorly controlled sources. The federal law does not state that this can be done but does state that companies (it does not exclude well controlled companies) must pay the penalty fee. By making well controlled companies pay the Section 185 penalty fees the TCEQ encourages peer pressure on poorly controlled companies to clean-up. If companies are poorly controlled why is TCEQ not doing something about to force their clean-up? TCEQ consistently whines it has done all it can do to reduce air pollution and that no air pollution can be cleaned up without costing too much or being technically too difficult.

7) The Sierra Club does not support the use of emission reduction credits, discrete emission reduction credits, current or banked Highly-Reactive VOC Emissions Cap and Trade program allowances, or current or banked Mass Emissions Cap and Trade program allowances to substitute for Section 185 penalty fees. The FCAA does not allow for substitutions.

8) Federal law and court rulings do not allow, as **101.122 – Using Supplemental Environmental Project to Fulfill and Equivalent Alternative Obligation** would, alternative ways to fulfill paying penalty fees. Paying penalty fees is required by federal law and court rulings. Supplemental environmental projects are not allowed to substitute for paying penalty fees under federal law.

9) The Sierra Club does not support any emissions-based alternatives to the Section 185 penalty fees including credit for air pollution reductions beyond

current requirements, the use of air pollution credits, the use of SEPs, the use of the TERP program, and vehicle I/M program monies.

10) The Sierra Club finds it sad that TCEQ admits that its intent is "to minimize the possibility of FCAA, 185 fees being imposed and collected by the federal government." Apparently, TCEQ wants to prevent the EPA from collecting Section 185 penalty fees and then ensure that it does not collect them. This obstructionist position hurts people's health and welfare because there will be no incentive for companies to reduce air pollution if TCEQ's lets them off the hook.

11) TCEQ uses a 2010 rate for the Section 185 penalty fee calculation. Due to inflation a 2011 figure should be used so that the full value of the penalty fee will be assessed and paid.

12) TCEQ states that companies may "curtail or cease operations" to account for the Section 185 penalty fees. Since TCEQ is attempting to not collect Section 185 penalty fees this statement has little validity. The TCEQ should provide documentation for how many companies it expects to curtail or cease operations. This is a typical industry scare tactic that TCEQ now uses to confuse and create fear in the public. Shame on TCEQ!

13) Apparently, the Sierra Club is not a stakeholder by TCEQ's definition. The Sierra Club in March and June of 2009 did not request more flexibility for the Section 185 penalty fees. This documents the bias of TCEQ by including the Sierra Club as a stakeholder in its public process.

14) TCEQ states that it wants Section 101.222 maintenance, startup, and shutdown (MSS) air pollution not to be counted when calculating some sources' Section 185 penalty fees. This is unfair to the public. Why are companies that pollute always given a fair shake but not people?

The Sierra Club supports the following in Section 185 penalty fee regulation/rules:

1. The Sierra Club does not favor aggregating sources in the penalty fee calculations. The Sierra Club believes besides paying penalty fees one of the biggest incentives for companies to reduce their air pollution is the embarrassment and public pressure that will result from advertising who must pay how much in penalty fees, for what pollutants, at what location. Citizens, elected officials, local agencies, civic clubs, non-governmental organizations, and others can use this information to pressure companies to be good neighbors and reduce air pollution.

By publishing penalty fee information in public venues citizens will know which companies emit more air pollutants than they should, what air pollutants are being emitted, and the amount of air pollutants that are being emitted. Like the

Toxics Release Inventory the Sierra Club views penalty fees that are made public as a way to reduce air pollution. This reduced air pollution will result in reduced penalty fees. This action will show the public that companies can make progress in the reduction of air pollutants that have harmful effects on people's health and welfare.

TCEQ should not forget that companies have done a poor job with their air pollution inventories and that in some cases these companies emit 10 to 100 times what TCEQ thought they did. TCEQ must no longer shield and give companies the benefit of the doubt. If a company operates a plant and does not know what air pollution it releases then this shows that the company is irresponsible.

2. Penalty fees should not be eased and made more palatable for companies. Penalty fees are supposed to hurt and hit hard at the economic bottom line of companies so they feel it and will have an incentive to reduce their air pollution. Penalty fees are a way that economic efficiency is improved since companies that reduce their air pollution become more efficient with their use of natural resources and are rewarded by paying less in penalty fees.

3. The Sierra Club favors no alternatives to penalty fees because the FCAAA intent is that penalty fees will be paid. Penalty fees are the law of the land and their non-payment is not negotiable by TCEQ or the U.S. Environmental Protection Agency (EPA). The Sierra Club believes that penalty fees in conjunction with a strong SIP are the best incentives for companies to reduce their air pollution.

4. The Sierra Club favors using collected penalty fees to fund TCEQ enforcement, compliance, and air monitoring activities.

5. The Sierra Club supports penalty fees not funding alternative air pollution reduction projects. Penalty fees are paid because companies have not reduced air pollution enough to reach attainment of the health-based O3 standard. Why should companies be rewarded with money for air pollution reduction projects when they are responsible to not pollute? Such a program penalizes companies that have already reduced their air pollution. Such actions reward those who delay and have not acted responsibly to reduce their air pollution.

6. The Sierra Club supports not allowing companies to recalculate their baseline air pollution. The baseline air pollution calculation must be straight forward, consistent, understandable, consist of all VOC/NOx air pollution emitted, use actual/allowable air pollution, and use the attainment year for the baseline.

The TCEQ must not allow companies to modify their baseline air pollution calculation so that it is most beneficial for them and so they reduce the penalty

fees they have to pay. Why should polluters be in charge of how much they pay in penalty fees?

Companies should have reduced their air pollution sufficiently years ago so that people are not exposed to breathing unhealthy air. Companies have already reaped tremendous economic benefits via profits in the past while polluting. Now it is time for these companies to pay for their irresponsible and insufficient actions.

7. Refineries, petrochemical plants, and other major sources must not be allowed to state that their air pollution is irregular, cyclical, or otherwise varies significantly if it does not. The processes at these companies are well known and accurate air pollution inventories should be available. If accurate air pollution inventories are not available it means that the company has not spent the time, money, and effort to do the job right. After 42 years companies should not be allowed to claim that they are unable to calculate their air pollution baseline. If a company does claim this then it is de facto saying that it has been filing erroneous air pollution inventories and does not know what it is doing. Air pollution that is "irregular, cyclical, or otherwise varies significantly" must be defined clearly and strictly so companies do not claim they emit air pollutants in this manner when they do not

8. The Sierra Club supports the maximum penalty fee possible be assessed so that there is the maximum economic incentive for reduction of air pollution.

9. The Sierra Club does not support an air pollution equivalent alternative program. The FCAAA requires penalty fees and the Sierra Club supports this method of enforcement as the most appropriate incentive to reduce air pollution at this time.

10. Companies will try to use mathematical sleight-of-hand to convince TCEQ that they do not emit the amount of air pollution that they do and thus are required to pay less in penalty fees. TCEQ must have an incredibly good quality assurance/quality control program to ensure that companies do not fraudulently submit air pollution data, as they have in the past, for air pollution inventories that underestimate their air pollution.

11. The Sierra Club does not support a demonstration of equivalent-or-better air quality impact alternative to paying penalty fees. The FCAAA requires penalty fees and we support this method of enforcement as the most appropriate incentive to reduce air pollution at this time.

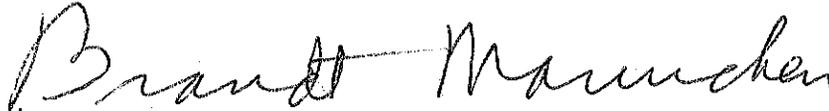
12. The Sierra Club does not support companies retiring NOx ozone season allowances equivalent in cost of Section 185 penalty fees. The FCAAA requires penalty fees and we support this method of enforcement as the most appropriate incentive to reduce air pollution at this time.

13. The FCAA states in Section 185 that the baseline air pollution calculation must be 80% of the lower of the actual/allowed air pollution for the attainment year. Using some other baseline year or averaging protocol over a different time period is not acceptable by law unless TCEQ finds that the company's air pollution is irregular, cyclical, or otherwise varies significantly.

14. Companies that have implemented best available control technology (BACT) or lowest achievable emissions rate (LAER) technologies prior to setting the baseline must not be allowed to use these technology reductions as a way of meeting Section 185 penalty fee obligations. The BACT/LAER reductions are required separately by the SIP and FCAA. Such an action does not meet the "not less stringent" additionality test.

The Sierra Club appreciates this opportunity to comment. Thank you.

Sincerely,



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