EARTHJUSTICE

September 9, 2024

Via email at 185Rule@tceq.texas.gov
Texas Commission on Environmental Quality
Air Quality Division
P.O. Box 13087
Austin, TX 78711-3087

To the TCEQ Air Quality Division:

The Texas Commission on Environmental Quality (TCEQ) requested informal comments on the Federal Clean Air Act Section 185 Fee. These comments are submitted by Earthjustice, Texas Environmental Justice Advocacy Services ("t.e.j.a.s.") and Downwinders at Risk, in response to the TCEQ's forthcoming SIP revision to comply with the Clean Air Act section 185.

In short, TCEQ must draft a Section 185 fee program that conforms to the straightforward and powerful rule laid out by Congress in Clean Air Act section 185 (42 U.S.C. § 7511d) and create a program that will assess and collect the ozone penalty fees for every permitted major source in both nonattainment areas that fails to reduce its VOC and NOx emissions following the baseline year. Section 185 does not contemplate alternative methods to calculate, impose or collect fees.

The Dallas and Houston regions, both classified as severe nonattainment for ozone under the 2008 8-hour standard, have remained hovering between 80 and 75 ppb for years, despite previous efforts to control and reduce ozone.[1] As TCEQ itself has noted, "From 2014-2021, design values trends for the HGB area have not significantly increased or decreased."[2]

A straightforward and mandatory approach that directly incentivizes major sources to hit regular reductions is the most direct and fair approach. This program could be powerful: a direct and clear means to improve regional air quality quickly by transferring the social burdens of ozone pollution onto the major ozone creators. The consequences of failing to enforce the rule are also clear – as a previous "alternative" and "equivalent" program failed to get the Houston region into attainment status for ozone.

Because ozone pollution in the Houston and Dallas areas has been at unhealthy levels for so long, both areas have long been designated nonattainment.[3] When required to address their

[1] TCEQ Presentation, "Technical Information Meeting Dallas-Fort Worth Eight-Hour Ozone Design Values and more," available at https://www.tceq.texas.gov/downloads/air-quality/modeling/meetings/dfw/2022/20220824-design-values-tceq-westenbarger.pdf
[2] TCEQ Presentation, "Technical Information Meeting Houston-Galveston-Brazoria Eight-Hour Ozone Design Values," available at https://www.tceq.texas.gov/downloads/air-quality/modeling/meetings/hgb/2022/20220728-hgb-designvalues-tceq-stashak.pdf
[3] 80 Fed. Reg 12,311 (March 6, 2015).

respective air quality issues per statute, the areas both failed to meet attainment deadlines. Both areas are now classified as "severe" under the 2008 8-hour standard. Commenters, who represent residents of both areas, are extremely concerned about the health impacts from this inability to reach attainment.

A. The Purpose and Intent Behind Section 185 Demonstrate its Mandatory Nature

Ozone, the main component of urban smog, is a corrosive air pollutant that inflames the lungs and constricts breathing.[4] Exposure to ozone can damage lungs, leads to respiratory infection and aggravate asthma; long term exposure to ozone is associated with deaths from respiratory disease.[5]

Ozone is not emitted directly into the atmosphere, but results from the reaction of precursor chemicals—primarily volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx")—with sunlight in the atmosphere.[6] VOCs and NOx are themselves harmful air pollutants; for example, VOCs include listed hazardous air pollutants like benzene, toluene, and formaldehyde,[7] and NOx exposure leads to respiratory issues much like ozone exposure.[8]

The Clean Air Act directs EPA to establish national ambient air quality standards for ozone and other pollutants that protect public health with an adequate margin of safety. 42 U.S.C. §§ 7408(a), 7409(a)-(b). EPA must review and, as appropriate, revise ozone standards at least every five years to ensure they remain adequate to protect public health in light of new scientific information. *Id*. § 7409(d)(1). After promulgation, the implementation process begins, which starts with initial area air quality designations. EPA must "designate" regions of states as either violating the standard ("nonattainment" areas) or meeting the standard ("attainment" areas). *Id*. § 7407(d)(1). The levels of seriousness of the violation of the standard are then categorized as either marginal, moderate, serious, severe or extreme. *Id*. § 7511(a). The state then must develop and adopt a "state implementation plan" ("SIP," in some quotations) that "provides for implementation, maintenance, and enforcement" of a newly promulgated or revised standard. *Id*. § 7410(a)(1).

The goal of all of this is improved air quality; the measure by which that goal is reached is whether "attainment" of a standard is reached and maintained. To ensure attainment, Congress created a detailed program for nonattainment areas to ensure that air quality will attain ozone

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[4] *See* Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 359 (D.C. Cir. 2002).
[5] EPA, "Health Effects of Ozone Pollution," available at https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution
[6] See Am. Trucking Ass'ns, 283 F.3d at 359.
[7] American Lung Association, "Volatile Organic Compounds," available at https://www.lung.org/clean-air/indoor-air/indoor-air-pollutants/volatile-organic-compounds#:~:text=Sources%20of%20VOCs,include%20benzene%2C%20formaldehyde%20and%20toluene.
[8] EPA, "Basic Information about NO2," available at https://www.epa.gov/no2-pollution/basic-information-about-no2.

standards by specified deadlines ("attainment deadlines"). *Id*. §§ 7410(a), (c), 7502; *see also id.* §§ 7511-7511f (provisions specific to ozone nonattainment areas).

Congress enacted section 185 in 1990 to serve as a compelling incentive for stationary sources to reduce emissions and expedite attainment. Section 185 requires each Severe ozone nonattainment area – like Houston and Dallas – to assess annual fees against major stationary sources of VOCs and NOx if the area fails to timely attain the required air quality. That "fee program" must require "each major stationary source" to reduce its emissions of ozone-forming pollutants by at least 20% from its attainment year emissions or pay a "penalty" in the form of fees on the excess emissions. *Id*. §§ 7511a(d)(3), 7511d. Once triggered, this penalty fee program terminates only upon the area's redesignation to attainment. *Id*. § 7511d(a). TCEQ must now submit a compliant plan to the EPA explaining how the Section 185 penalty will be assessed and collected in the two regions.

Commenters appreciate the opportunity to provide their feedback on the issues raised by TCEQ in its public meetings and on the planned program design.

B. Specific Comments

a. The Clean Air Act Does Not Countenance Alternative Fee Programs, Nor Alternative Sources of Fees Paid

In the past, TCEQ has developed a purported "alternative fee program," for situations where penalties would otherwise have been incurred by major sources. Regardless of whether those were lawful, in this current instance, there is no language in the Clean Air Act that permits the implementation of alternative programs. Section 185 is a precisely limned penalty fee program that applies to major stationary sources of ozone-forming pollution. *Id*. § 7511d.[9]The fee program is a plainly written rule that does not include any "saving provisions" or open-ended clauses in the text.[10] This is an important signal for TCEQ: EPA does not have the authority to

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[9] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 484-85 (2001).

[10] The entire text of 42 U.S.C. § 7511d (i.e., Section 185) follows:

(a) General rule

Each implementation plan revision required under section 7511a(d) and (e) of this title (relating to the attainment plan for Severe and Extreme ozone nonattainment areas) shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each major stationary source of VOCs located in the area shall, except as otherwise provided under subsection (c), pay a fee to the State as a penalty for such failure, computed in accordance with subsection (b), for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees.

(b) Computation of fee

(1)Fee amount

The fee shall equal $5,000, adjusted in accordance with paragraph (3), per ton of VOC emitted by the source during the calendar year in excess of 80 percent of the baseline amount, computed under paragraph (2).

(2)Baseline amount

approve any alternative fee program, regardless of whether such are proposed by TCEQ. TCEQ should aim to avoid federal preemption of the program (and the resulting loss of any collected funds into state coffers). As TCEQ relayed in its public meetings, EPA Region 6 has confirmed to TCEQ that it does not have the authority to approve nonconforming plans.[11]

In fact, when TCEQ last developed an "equivalent alternative program" for Houston under a prior (1979 1-hour) ozone standard, EPA's initial approval of that "equivalent" program was remanded and EPA recognized that certain "flexibilities" allowed in the program (such as

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For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the Administrator may provide, as the lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation plan ("allowables")) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the 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. Such guidance may provide that such average calculation for a specific source may be used if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

(3)Annual adjustment

The fee amount under paragraph (1) shall be adjusted annually, beginning in the year beginning after 1990, in accordance with section 7661a(b)(3)(B)(v) of this title (relating to inflation adjustment).

(c) Exception

Notwithstanding any provision of this section, no source shall be required to pay any fee under subsection (a) with respect to emissions during any year that is treated as an Extension Year under section 7511(a)(5) of this title.

(d) Fee collection by Administrator

If the Administrator has found that the fee provisions of the implementation plan do not meet the requirements of this section, or if the Administrator makes a finding that the State is not administering and enforcing the fee required under this section, the Administrator shall, in addition to any other action authorized under this subchapter, collect, in accordance with procedures promulgated by the Administrator, the unpaid fees required under subsection (a). If the Administrator makes such a finding under section 7509(a)(4) of this title, the Administrator may collect fees for periods before the determination, plus interest computed in accordance with section 6621(a)(2) of title 26 (relating to computation of interest on underpayment of Federal taxes), to the extent the Administrator finds such fees have not been paid to the State. The provisions of clauses (ii) through (iii) of section 7661a(b)(3)(C) of this title (relating to penalties and use of the funds, respectively) shall apply with respect to fees collected under this subsection.

(e) Exemptions for certain small areas

For areas with a total population under 200,000 which fail to attain the standard by the applicable attainment date, no sanction under this section or under any other provision of this chapter shall apply if the area can demonstrate, consistent with guidance issued by the Administrator, that attainment in the area is prevented because of ozone or ozone precursors transported from other areas. The prohibition applies only in cases in which the area has met all requirements and implemented all measures applicable to the area under this chapter.

[11]TCEQ, "FCAA Section 185 Penalty Fee: Stakeholder Meetings" available at https://www.tceq.texas.gov/downloads/air-quality/point-source/185fee-dfw-hgb-stakeholder-presentation-aug24.pdf.

aggregation of NOx and VOC emissions and of sites in different locations that are under common control) may not be lawful.[12]

TCEQ must comply with EPA's indicated directions and propose a program that hews to the plain text of 42 U.S.C. § 7511d rather than creating "alternative" or "equivalent" programs that do not simply calculate, assess and collect per-ton penalty fees on each permitted major source, on a precursor-by-precursor basis.

b. A Fee Program Cannot Lawfully Use Public Funds to Avoid Imposition of Fees on Major Sources

The Section 185 statutory program imposes a "penalty" in order to create new incentives to come into attainment by presenting major stationary sources with a choice to either reduce their emissions of ozone-forming pollution by 20% from their emissions in the attainment year or pay a significant penalty on the excess emissions. 42 U.S.C. § 7511d(a). For the program to work as Congress intended, the fee must be assessed on and collected from those major stationary sources.

At public meetings on the penalty fee program, TCEQ noted that in its prior alternative program for Houston (under a different, no longer enforced standard), it avoided assessing or collecting any penalties on sources directly because it instead utilized TERP (Texas Emissions Reduction Program) credits and other funding sources to offset any penalties incurred. The alternative fee program thus became a paper game, shifting credits and penalties on paper without any real-world impact on the sources incurring those penalties – nor, unsurprisingly, on the ozone concentration in the Houston area.

To construct another shell game in which penalties are paid by some other funds is to violate the Clean Air Act's plain directive. Section 185 plainly calls for fees to be assessed and collected (*id*. § 7511d(a)). It also specifies that the EPA Administrator must take over if TCEQ fails to assess and collect fees. Any workaround that replaces individual source penalty fees with paper credits from another funding source will violate that language, as well as the Texas Constitution's gift clause, which prevents the State from covering any personal, private liability.[13] There is no <u>legal</u> substitution of publicly funded dollars for privately paid fees in Texas.

Commenters call for the TCEQ's proposed program to plan for the orderly assessment and collection of penalty fees annually from each permitted major source in the nonattainment regions.

c. The Fee Program Cannot Aggregate NOx and VOCs

In its slides and stakeholder presentations, TCEQ suggested the possibility of its making the § 7511d(b) "baseline determination," by allowing major sources to aggregate NOx and VOC emissions. TCEQ must not allow sources to calculate their baseline determination by aggregating

[12] *See* Declaration of David Garcia, Doc. No. 1924422, para. 11, filed in *Sierra Club v. EPA*, D.C. Cir. Case No. 20-1121 (attached as Exhibit A).
[13] Texas State Const. Art. III, § 50.

these two emissions. The Clean Air Act expressly says the penalty fee applies to "each major stationary source of VOCs." 42 USC § 7511d(a) (emphasis added). The Act separately extends its coverage over major sources of VOC to major sources of NOx. 42 U.S.C. § 7511a(f)(1). There is no language in § 7511d that suggests the intermingling of VOCs and NOx for penalty fee calculation purposes. When Congress wanted to allow requirements for VOC emission reductions to be met with NOx emission reductions it was clear about this intent– in § 7511a(c)(2)(C), for example, it expressly permitted the substitution. *See* 42 U.S.C. § 7511a(c)(2)(C) (describing "the conditions under which NO_x control may be substituted for control or may be combined with VOC control in order to maximize the reduction in ozone air pollution."). In contrast, in § 7511d, Congress made no such statement about such substitutions or combinations. This silence is unambiguous.

Combining two separate emissions streams into one baseline calculation would also allow for greater emissions of one of the two pollution streams (counteracted by greater reductions of the other stream), instead of forcing both emissions to reduce.

TCEQ must adopt a program that, as outlined in its public meeting slides, separately accounts for and separately calculates baseline emission for the two emissions streams, in order to comply with the intent and the language of the Act.

d. The Fee Program Must be Calculated For Each Source – Not Aggregated Sources

TCEQ's comments and slides also suggested it could consider a baseline (and subsequent penalty fee) determination of aggregated sites all collapsed and added together.

Section 7511d is clear that the penalty fee applies to "each major stationary source." It goes on that the fees are calculated "per ton of VOC emitted by the source…" Those terms make clear that the penalty fee is calculated on a source-specific basis, not aggregated across sources.

In a 2018 guidance memo on aggregation of sites under common control (for NSR permitting purposes), EPA emphasized that facilities with autonomy in permitting obligations are not under common control.[14] Separately-permitted facilities' emissions streams would not be aggregated for NSR purposes to determine whether a source is major or minor; it is inconsistent for purposes of only this section of the Act to collapse facilities with individual major source permits into a single entity – and would allow for potentially greater VOC and NOx emissions at one facility while others reduce their emissions, avoiding Section 185's plain intent that it be applied to each source.

TCEQ may not lawfully adopt a program that aggregates different facilities for purposes of establishing the baseline emissions calculation and the subsequent potential penalty fee calculation

[14]EPA, "Meadowbrook Energy and Keystone Landfill Common Control Analysis" (p. 8, April 30, 2018 letter), available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf.

e. The Fee Program Does Not Focus on Equipment; The Statutory Focus is on Emissions

TCEQ has raised in public meetings that section 185 does not appear to address the impact of equipment sold or transferred between companies. This is a red herring rather than a real ambiguity in the language. The impact of equipment (or expansions, or reductions) at any one facility does not change this section's applicability to that facility. Nothing in the text of section 185 signals that ownership of a source or equipment is relevant in any way. TCEQ's state clean air act does have a unique state-level definition of "facility," but this definition is not reflected in the federal Clean Air Act implicated here, nor does section 185 refer to "facility" or "equipment" at any point. Section 185 is clear: a major stationary source – which federal regulations do define (*see* 40 C.F.R § 70.2) – shall pay a fee if the penalty is triggered. Imputing state-law-based terms like "facility" or "equipment" into the program is unwarranted and a plain attempt to evade federal law.

The focus is on reducing emissions from each major stationary source. How this is best accomplished is up to the discretion and judgment of each individual facility. TCEQ must adopt a program that simply reflects the language and goals of the statute and does not change the statute's applicability or meaning by creating improper exceptions and carveouts.

f. Expansions: For Sources That Expand to Quality as Major Sources, Baseline Data Still Exists and Can Be Used

TCEQ and members of the public noted in the public meetings that facilities may expand from minor source to major source emitters after the baseline emissions calculation year, 2026. This is true but does not appear to create any legal problems or issues; a facility can calculate its actual emissions from the baseline year and use that data. Alternatively, TCEQ could require that such facilities adopt the calculation set out in the section below.

g. For Sources That Are Not Built until after the Baseline Year: Permit Data Can Be Used

TCEQ also asserted that the section did not address how baseline calculations should be calculated for facilities that are built or permitted after the baseline year. Section 185's language leaves no gap, but instead covers "each major stationary source," and such sources accordingly must be covered by the penalty fee program. TCEQ could suggest baselines of similar facilities or use the first year's permit as the baseline, in proposing its program design to EPA in a manner consistent with the section 185 language – for example, section 185 penalty rule language could include:

> For a major stationary source that begins operation or a stationary source that transitions to major source status after the attainment year, the baseline emissions shall be the lower of: (A) the amount of emissions allowed under permit(s) or any applicable rule(s) for the facility during the first year of operation or the operational period as a major source, extrapolated over the entire first year as a major source, or (B) the actual emissions for

the facility during the first year of operation or the operational period as a major source, extrapolated over the entire first year as a major source.

Language like this would be consistent with 42 U.S.C. § 7511d(b)(2).

In conclusion, TCEQ's Section 185 penalty fee program must:

(1) Conform to the text of the statute and not include "equivalent" or "alternative" fee programs;
(2) Include a plan to assess and collect statutory penalty fees from each covered source itself and not transfer credits, grants, or other funds;
(3) Calculate both baseline emissions and subsequent emissions for penalty purposes for each covered sources using single emissions stream, single emissions source data without aggregating the NOx and VOC streams nor aggregating multiple sources;
(4) Conform to the text of the statute and not include language exempting equipment that is sold or transferred as any type of exception to penalty obligations
and
(5) Apply the program to new/future sources in the nonattainment area by applying similar baseline data or permitted emissions as a baseline.

Commenters respectfully request that TCEQ consider these comments as it drafts its Section 185 program and further request that TCEQ notify Commenters when it completes its draft of the program.

Respectfully submitted by:
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EXHIBIT 1

Respondents' Unopposed Motion for

Partial Remand Without Vacatur

Sierra Club, et al. v. U.S. EPA, et al.

Case No. 20-1121

EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.* Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, Respondents,	No. 20-1121

DECLARATION OF DAVID F. GARCIA

1. I, DAVID F. GARCIA, pursuant to 28 U.S.C. § 1746, declare, under penalty of perjury, that the following statements are true and correct based upon my personal knowledge and upon information supplied to me by EPA employees.

2. I am the Director for the Air and Radiation Division for the United States Environmental Protection Agency, Region 6. I have been employed by EPA since January 1991, and I have held my current position since August 2019. As Director of the Air and Radiation Division, I am responsible for the implementation of the Region 6 Air Program. I lead a management team of first- and mid-level managers in developing strategic objectives, implementation plans, and achieving environmental accomplishments that demonstrate protection of human health and the environment. I oversee all state authorized programs in my program jurisdictions and work with state environmental offices to implement programs at least as stringent as the federal requirements. I engage with local officials and communities to

help solve problems and provide timely information. I participate in regional discussions and decision-making regarding air quality programs in addition to the regional organization, administrative functions, and operations. Prior to becoming the Director of the Air and Radiation Division, I held a Deputy Division Director position in the Region 6 Water Division.

3. EPA Region 6, in partnership with the states and tribal nations, is responsible for the oversight or execution of programs implementing federal environmental laws in the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas, and for 66 tribal nations.

4. EPA Region 6's Air and Radiation Division is responsible for implementation of the federal Clean Air Act (CAA). The CAA is structured such that States primarily take the lead in designing and adopting plans which provide for the implementation, maintenance, and enforcement of standards set under the CAA. The Air and Radiation Division is responsible for reviewing state implementation plans (SIPs) from Arkansas, Louisiana, New Mexico, Oklahoma, Texas and the City of Albuquerque.

5. This declaration is filed in support of the Joint Motion to Govern Further Proceedings and Respondents' Unopposed Motion for Partial Remand Without Vacatur in *Sierra Club, et al v. EPA, et al* (D.C. Cir. No. 20-1121). As part of my duties as the Director for the Air and Radiation Division for the United States Environmental Protection Agency, Region 6, I have been responsible for overseeing the development of the final actions at issue in the above captioned litigation: (1) "Air Plan Approval; Texas; Houston-Galveston-Brazoria Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Section 185 Fee Program, Final Rule," 85 Fed. Reg. 8,411 (Feb.14, 2020) ("Houston Action"); and (2) "Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Final Rule," 85 Fed. Reg. 19,096 (Apr. 6, 2020) ("Dallas Action").

6. Prior to the aforementioned actions, EPA employed a regulatory redesignation substitute mechanism to determine that Texas demonstrated that the Houston-Galveston-Brazoria and Dallas-Fort Worth areas were attaining the 1979 and 1997 revoked ozone standards based on permanent and enforceable emission reductions and that they would maintain each of the revoked standards for 10 years. *See* 80 Fed. Reg. 63,429 (Oct. 20, 2015) (Houston 1979 standard); 81 Fed. Reg. 78,691 (Nov. 8, 2016) (Houston 1997 standard); 81 Fed. Reg. 78,688 (Nov. 8, 2016) (Dallas 1979 and 1997 standards). This Court's decision in *South Coast Air Quality Management District v. EPA*, 882 F.3d 1138 (D.C. Cir. 2018) ("*South Coast II*") prompted four petitioners to file a petition for review in the Fifth Circuit. The petitioners challenged EPA's redesignation substitutes for the Houston and Dallas areas for the 1979 and 1997 ozone standards. *Downwinders at Risk v. EPA*, Case No. 18-60290 (5th Cir.). After briefing but before oral argument, the Fifth Circuit stayed the *Downwinders* case because EPA, based on new submissions from Texas, had proposed replacement actions for the redesignation substitutes that addressed all five statutory redesignation criteria required by this Court in *South Coast II*.

7. EPA completed these replacement actions for the Houston and Dallas areas in February and April 2020, respectively. The Houston and Dallas Actions approved the specific revisions to Texas' SIP regarding the 1979 and 1997 ozone standards for the Houston and Dallas areas. The Houston and Dallas Actions also determined that the Houston and Dallas areas continue to attain the 1979 and 1997 ozone standards and that the five criteria for redesignation for those standards in Section 7407(d)(3)(E) are met for both areas. These include identification of permanent and enforceable control measures that Texas has adopted into its SIP to reduce ozone pollution levels that attain those standards and a SIP revision for maintaining those standards for 10 years after EPA's approval. As a consequence of these

approvals and determinations, EPA terminated all anti-backsliding obligations for the 1979 and 1997 ozone standards for the Houston and Dallas areas.

8. In addition, in the Houston Action and for the Houston area, EPA approved an equivalent alternative program to address the statutory fee program for the 1979 ozone standard. 85 Fed. Reg. at 8,411. The Texas alternative fee program for Houston has several components. Generally, it calculates major source fees that would be due under a statutory fee program and then offsets the calculated major source fees with fees collected in the Houston area from mobile sources that fund programs designed to reduce emissions from mobile sources. *Id*. at 8,422. These programs provided money to replace or retrofit older diesel engines and to increase the effectiveness of inspection and maintenance programs, including assistance to low income vehicle owners. *Id*. These programs all provided for emission reductions in the Houston area which are not otherwise accounted for in any of Houston's 1979 NAAQS-related nonattainment SIP planning or obligations. *Id*.

9. A petition for review was filed on the Dallas and Houston Actions in this Court on April 14, 2020, *Sierra Club, et al v. EPA, et al* (D.C. Cir. No. 20-1121). The case was partially briefed. On February 11, 2021, Petitioners and EPA moved the Court to hold the case in abeyance to provide an opportunity for new EPA leadership to review the challenged actions in conformance with the President's Executive Order on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7,037. On April 9, 2021, this Court granted the motion and held the case in abeyance pending further order of the Court.

10. The above-cited Executive Order provides that agencies must review regulations, orders, guidance documents, and other similar actions adopted over the last four years to determine whether they conflict with national objectives stated therein. In

conformance with the Executive Order, EPA is conducting a review of certain rules and actions promulgated or adopted in the last four years. EPA has now concluded its review pursuant to the Executive Order with respect to the Houston and Dallas Actions. EPA believes that remand without vacatur of EPA's approval of an equivalent alternative program contained in the Houston Action to address the statutory fee program for the 1979 ozone standard is appropriate. EPA does not intend to further review or reconsider any other portion of the Houston and Dallas Actions.

11. The need for remand of the Houston equivalent alternative program arises because the equivalency determination rests on statutory and regulatory interpretations that EPA made in the Houston action that EPA has now concluded, after Executive Order review, warrant further examination. These interpretations may affect EPA's prior determinations that led to approval of the Houston program. They may also arise in other contexts in other areas in other states. The issues EPA will consider on remand may affect EPA's prior approval of the Houston program. The issues that warrant further examination include at least the following: (1) whether it was appropriate to approve the provisions in the Houston program that aggregate VOC and NO_X emissions for purposes of calculating a source's baseline emissions for the attainment year; (2) whether it was appropriate to approve the provisions in the Houston program that allow aggregation of emissions among major sources in different locations but under common control; and (3) whether it was appropriate to approve a program that collects fees that are not used to reduce emissions at major sources generating VOC and NO_X emissions. If EPA determines any changes to its action are warranted, it will initiate notice and comment proceedings, before issuing a new decision. Accordingly, EPA is requesting remand without vacatur of its prior approval and intends to further review on remand whether a program containing such elements as aggregation and

reliance on mobile source sector emissions is in line with EPA's statutory and regulatory requirements and the Agency's interpretations thereof.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date: November 18, 2021

David F. Garcia
Director
Air & Radiation Division
EPA Region 6