



September 9, 2024

Submitted via email to 185Rule@tceq.texas.gov

Section 185 Rule Project Team
Texas Commission on Environmental Quality
P.O. Box 13807
Austin, Texas 78711

Re.: Public comment on Federal Clean Air Act Section 185 Fee Program

Dear 185 Rule Project Team,

Fenceline Watch appreciates this opportunity to provide informal comments prior to the TCEQ's development of a § 185 Fee Program for the Houston and Dallas ozone National Ambient Air Quality Standards (NAAQS) nonattainment areas pursuant to the federal Clean Air Act (the Act). Fenceline Watch continuously seeks opportunities for early involvement in TCEQ process to try to address problems at the root and create systemic improvements for the benefit of environmental justice communities in Texas. Fenceline Watch seeks to provide the TCEQ with on-the-ground knowledge from the voices of the people who live in environmental justice communities, as well as regulatory recommendations based on its deep understanding of environmental regulation.

Fenceline Watch urges the TCEQ to approach the § 185 Fee Program from a community perspective with an eye toward climate resiliency. **Houston area communities sorely need investments in climate resiliency.** According to EPA projections, **Houston will experience the greatest sea level rise among the ten most populous coastal cities** in the nation under two common scenarios, 50 cm and 100 cm sea level rise.¹ Already, **sea level rise along the Texas Gulf Coast is twice the global**

¹ EPA, Climate Change and Social Vulnerability in the United States: Focus on Six Impacts, at 14 (Sept. 2021) (the EPA's 2° tipping point is based on climate data from 1986 to 2005 while the IPCC 2° tipping point is based on data from 1850 to 1900, the pre-industrial period), <https://www.epa.gov/cira/social-vulnerability-report>.

average.² Climate change is exacerbating hurricanes and extreme weather events in the Houston area. **Three-quarters of Hurricane Harvey's estimated \$90 billion in damage can be attributed to climate change.**³ Hurricane Harvey also resulted in plant failures and toxic releases across the Houston area – the type of unauthorized emissions that the § 185 Fee Program is intended to discourage. The TCEQ projects that it will collect millions of dollars under the § 185 Fee Program and every dollar should be reinvested in the most vulnerable communities. The climate is rapidly changing and the Houston area is among the most vulnerable in the world to its effects. To this end, Fenceline Watch urges the TCEQ to not delay fee collection until 2028, especially because preliminary ambient air quality monitor data shows that the Houston area may already be on track to fail to meet the severe classification attainment date.

As discussed below, Fenceline Watch recommends that the TCEQ develop a program that collects fees from major sources of oxides of nitrogen (NO_x) and volatile organic compounds (VOCs) (collectively, ozone precursors) and reinvests these funds into communities where the major sources are sited. In the Houston area, this would include Houston Ship Channel communities that exist alongside hundreds of facilities. Environmental justice communities suffer from historic disinvestment in large part because of the presence of major sources in the community. Childhood asthma clinics, climate change resilient home improvements, air conditioners for senior citizens are just some of the many community projects that could be funded. Fenceline Watch provides ideas on how TCEQ could make this happen, for example, through integration with the agency's Penalty Policy and with Supplemental Environmental Programs.

The § 185 Fee Program must be robust. The Act makes clear that all major sources are subject to the program for the entire period of nonattainment. The § 185 Fee Program should not allow for inter-precursor or inter-source aggregation as this would be contrary to the Act. Further, the program should be implemented expeditiously and collect fees until the areas' redesignation is final.

Fenceline Watch hopes that the TCEQ will take a community-centered approach as it develops the § 185 Fee Program because Congress established the NAAQS to protect the public health. The program is among the strongest incentives the Act provides to bring nonattainment areas into compliance. The stakes are high as millions

² U.S. Global Change Research Program, Impacts, Risk, and Adaptation in the United States: Fourth Climate Assessment, Volume II, Southern Great Plains (2018, revised Jun. 2019), at 22, <https://nca2018.globalchange.gov/downloads/>.

³ Frame, David J., et al., The economic cost of Hurricane Harvey attributable to climate change, Climate Change (Apr. 8, 2020), <https://link.springer.com/article/10.1007/s10584-020-02692-8>.

of Texas continue to breathe air contaminated with unhealthy levels of ozone pollution. Worst of all, ozone poses the greatest risk to children and those with existing respiratory illnesses. No child in Texas should have to miss school or go to the emergency room because of preventable air pollution.

I. A profile of some of the most impacted environmental justice communities

Houston is home to a 52-mile stretch of petrochemical facilities that make up the nation's largest petrochemical complex along the Houston Ship Channel. Houston is also the largest metropolitan city that lacks zoning restrictions and buffers. Fenceline Watch actively works with four Ship Channel Communities: Magnolia Park (Census Tracts 48201311001, 48201311002, 48201310900, and 48201311100), Harrisburg & Smith Addition (Census Tract 48201311400) and Manchester (Census Tract 48201324200).

EPA's EJScreen classify all tracts as disadvantaged communities. All four communities rank between the 97th-99th percentile nationally for air toxics cancer risk and toxic releases to air. Four of the six census tracts have a socioeconomic value of 42% - 48% with less than a high school education; the remaining two tracts have a value of 38%. Their low-income value ranges between 46%-60%. When looking at their people of color value in each given tract, they range from 92%-97%. Compared with communities throughout the US, their Limited English Proficient (LEP) percentiles all track from 96%-97%.

Healthcare coverage is even more dismal, with every census tract at the 99th US percentile, meaning only 1% of communities have worse healthcare coverage. Texas is the worst state for healthcare access and affordability. The Texas Legislature's refusal to expand Medicaid support to working poor families makes it one of 10 states that does not provide a health care program for all low-income people. All of these values, and others, are significant to our communities' ability to access resources, limiting their ability to relocate, access critical information, and increase health vulnerability.

Data indicates that LEP communities are uniquely affected by air pollution. Of the approximately 30 million individuals in our state,⁴ an estimated 10 million speak a language other than English at home,⁵ with over 3 million Texans being considered LEP individuals.⁶ In Harris County, approximately 1 million individuals are considered LEP.

⁴ <https://www.texasstandard.org/stories/how-zoning-laws-make-houstons-neighborhoods-more-toxic/>.

⁵ <https://www.houstonchronicle.com/business/columnists/tomlinson/article/texas-health-care-ranking-bottom-18171519.php>.

⁶ <https://www.lep.gov/node/2971>.

The communities that we represent are overwhelmingly communities of color and all rank in the 96th percentile in the nation for linguistically isolated populations. A 2019 study on Vulnerability and Stationary Source Pollution in Houston found that limited English households have 101% greater emissions density of PM_{2.5}. Additionally, higher emissions were reflected across the board with VOCs, PM_{2.5}, and others.

But our communities are much more than numbers, they are strong working-class communities with close ties to the land and their neighbors. Residents enjoy fishing in the many bayous around their communities but unfortunately, they cannot consume the fish they catch because industrial water pollution has rendered fish toxic to human health according to the Texas Health and Human Services Commission. Residents report wanting to hold barbeques and carne asadas but feeling shame bringing guests over to celebrate important life events because the air pollution is so bad and so unpredictable, including flaring events that can go on for days. In summer months, instead of finding reprieve in the evening from the day's heat, residents who waited all day to get outdoors for a walk at one of the many community parks in the area, report feeling like they are drowning when they breathe air laden with pollution that immediately makes their eyes watery and constricts their breathing. There is a severe human cost to the Houston area's ozone pollution, and it is not felt evenly throughout the nonattainment area. Reinvestment of the § 185 Fees in the communities where major sources of NO_x and VOCs are located would be a step in the right direction.

Malfunction and accidents are some of the main sources of unpermitted emissions and the type that could lead a major source to exceed its baseline limit for the § 185 Fee Program. When communities face air, noise, and light pollution, it is only fair that whatever penalty is collected from the facility be reinvested where the injury was felt.



Shell Deer Park Chemical, Deer Park, Texas | August 26, 2024 (Day 1)

Photo Credit: Yvette Arellano, Founder | Director, Fenceline Watch

Day 1: <https://twitter.com/FencelineWatch/status/1828257021335851342>

Day 2: <https://twitter.com/FencelineWatch/status/1828660286842175528>



August 26th, 2024, TPC chemical flaring event depicting black plume of smoke over Pecan Park neighborhood. Photo credit: Shiv Srivastava, Policy Director, Fenceline Watch

II. Section 185 Fee Program Framework

A. Federal Clean Air Act

Serious ozone nonattainment areas, like the Houston area, are subject to the Act's § 185 Fee Program. 42 U.S.C. §§ 7511a(d)(3), 7511d. The program applies to major sources of ozone-forming air pollution, that is, facilities that emit NO_x, VOCs, or both. Polluters must pay a fee for every ton emitted in excess of a predetermined baseline. The purpose of the program is to bring ozone nonattainment areas expeditiously into compliance after permits, technology standards, offsets, and other mechanisms fail to meet health-protective ozone standards. It is a measure reserved for the most polluted areas of the country, like the Houston area.

The Act requires that states promulgate § 185 Failure to Attain Fee programs, submit these plans to EPA for approval, and enforce the program through the state's SIP. Pursuant to the Act, states must calculate baseline emissions for NO_x and VOCs⁷ for each major source. Baseline emissions are set at the lower of allowable or actual emissions that occurred during the attainment year. 42 U.S.C. § 7511d(b)(2). For sources not permitted by the attainment year, the Act provides that baseline emissions are those allowed by the SIP. *Id.* The fee is assessed at \$5,000, adjusted for inflation, per ton of NO_x or VOCs emitted by the source in excess of 80% of the baseline emissions amount. *Id.*, at § 7511d(b)(1).

The Act does not authorize states to set lower baseline emission levels. Only the EPA Administrator has authority to set baseline emission calculations for specific sources that have emissions that are "irregular, cyclical, or otherwise vary significantly from year to year." *Id.*, at § 7511d(b)(2). Fee collection persists "until the area is redesignated as an attainment area for ozone." *Id.*, at § 7511d(a). That is, after EPA approves a state's attainment demonstration through a formal rulemaking process.

B. Section 185 Fee Program for the 1979 ozone NAAQS

During its stakeholder meetings, the TCEQ made clear that it is considering "all options" during its development of a § 185 Failure to Attain Fee Program for the 2008 ozone NAAQS, including the framework for the alternative program it adopted pursuant for 1979 one-hour ozone NAAQS. First proposed by the TCEQ at the state-level in 2009, the TCEQ claims that it was not required to implement the one-hour § 185 fee program because air quality data indicated that the Houston area was in attainment

⁷ The Act extends SIP requirements VOCs to NO_x. 42 U.S.C. § 7511a(f).

for the 1997 ozone NAAQS. But the air quality data did not support attainment, it demonstrated persistent nonattainment.⁸

The one-hour ozone NAAQS § 185 program bears no resemblance to the Acts' requirements. The TCEQ chose to develop an alternative program that does not include actual fee collection—it is a corporate welfare program that deprives the public of millions of dollars that could be re-invested in the communities that breathe these emissions. The program created a credit system. Major sources in the Houston area could claim credits to offset fees that they would otherwise have to pay. Fees owed by major sources were offset by vehicle registration surcharges and other fees collected to fund the Texas Emissions Reduction Plan ("TERP"), a program that is also funded by state appropriations. The TERP provides grants to "industries like trucking, farming, and construction" so they may upgrade "to newer, cleaner technology, and retiring outdated pieces of machinery."⁹ The TCEQ must transfer 35% of the TERP funds to the Texas Department of Transportation "for congestion mitigation and air quality improvement projects in nonattainment areas and affected counties" — without regard as to whether mobile sources are the main source of ozone precursors in the nonattainment area.¹⁰ "The TERP fees and surcharges will expire once there is no pending judicial review of those EPA action[s], and the final notice of such action is published in the Texas Register by TCEQ."¹¹

The TCEQ formally adopted the one-hour ozone NAAQS § 185 fee program at the state-level in 2013 but did not submit it to the EPA for approval until 2018, after this omission was brought to light in federal litigation. 84 Fed. Reg. 22,093, at 22,095 (May 16, 2019). The EPA initially approved the program in 2020. 85 Fed. Reg. 8,421. However, the EPA later reconsidered its decision after a series of judicial appeals and changes in the Houston area's ozone NAAQS classification.

The EPA found that certain features of the one-hour ozone NAAQS Fee Program warranted reconsideration, in specific:

- (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;

⁸ TCEQ comments on EPA-HQ-OAR-2018-0715-0001, at 7 (Jul. 17, 2019).

⁹ TCEQ, Texas Emissions Reduction Plan, <https://www.tceq.texas.gov/airquality/terp/index.html>.

¹⁰ See Texas Health & Safety Code §§ 386.252(a-1), 386.051(b)(19).

¹¹ TCEQ, Texas Emissions Reduction Plan Annual Report, at 4 (Dec. 2023) (TCEQ SFR-128/23), <https://www.tceq.texas.gov/downloads/air-quality/terp/publications/sfr/128-23.pdf>.

- (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.¹²

III. Reinvestment in the community

The TCEQ should develop a § 185 Fee Program that collects fees and reinvests them in communities that have major sources of NO_x and VOCs. The TCEQ should not create a credit system like the one it created for the one-hour ozone NAAQS. The EPA has already alerted the TCEQ that it would not approve such a program. Instead, it should develop a program that collects fees and reinvests them in the most impacted communities through programs intended to improve environmental conditions in the community. The TCEQ could accomplish this through incorporation with its Penalty Policy that already allows for deferrals for Supplemental Environmental Programs (SEPs).

There are already SEPs in place for the east Harris County area, like major improvements for Baytown sewage lines, and the TCEQ could lend its technical expertise to help others, such as school districts and municipalities, to develop SEPs to meet community needs. Any mechanism for a § 185 Fee Program SEP deferral should recognize the vulnerability of the Houston region and prioritize projects that make homes and communities more resilient against the impacts of climate change, air pollution, flooding, and hurricanes.

Should the TCEQ choose to proceed through TERP—even though mobile sources are not greatest contributors to the Houston area’s ozone problem—then the TCEQ has authority under Texas Health and Safety Code § 386.051 to broaden TERP’s purposes. It would be a tremendous help to working-class residents if the TCEQ redevelops the Low Income Vehicle Repair, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP). Any new LIRAP should be easier to use, cover more repairs, cover maintenance costs, and have wider advertising, including multilingual advertising. At the very least, the LIRAP should provide assistance to low-income car owners to cover the cost of oil changes as this is one of the most cost-effective ways to extend the life of a vehicle and cause an immediate reduction in emissions from smoking vehicles.

¹² See Declaration of David F. Garcia at 5, Director for the Air and Radiation Division, U.S. EPA (Nov. 18, 2021), Joint Motion to Govern Further Proceedings, *Sierra Club, et al. v. U.S. EPA, et al.*, (No. 20-1121) (D.C. Circ.) (Nov. 18, 2021) (Doc. 1923135).

IV. Baseline emissions

A. New or modified major sources

The TCEQ wrongly claims that the Act does not address baseline emissions for major sources permitted after the attainment date and minor sources that existed on the attainment date and later became major sources. The Act prescribes three possible ways to calculate baseline emissions. Pursuant to the Act, baseline emissions must be set at the lower of actual emissions or allowable emissions under a permit, or allowable emissions under the SIP. Therefore, for major sources permitted after the attainment date, the TCEQ must set initial baseline emissions at permitted allowables. For minor sources that existed on the attainment date and later became major sources, the TCEQ must set baseline emissions at permitted allowables under the major source permit. For subsequent years, under both scenarios, the major source's baseline emissions should be the lower of permitted or allowable emissions, like other major sources already subject to the program. This approach is consistent with the Act, which requires that § 185 fee programs apply to all major sources during the entire nonattainment period.

The TCEQ must ensure that when equipment is sold or transferred, § 185 fee obligations created by the sale or transfer take effect. For example, if a sale or transfer changes a minor source to a major source, the TCEQ must ensure that there is a mechanism in place to trigger the application of the § 185 fee program. The TCEQ should explain in its proposal how it will ensure that § 185 fee requirements track equipment sales and transfers.

B. Aggregation of baseline emissions

TCEQ cannot set baseline emissions based on aggregation of NO_x and VOC emissions ("interprecursor aggregation") at one source, or aggregation of NO_x and VOC emissions from sources under common control ("inter-source aggregation"). Interprecursor and inter-source aggregation will disproportionately impact environmental justice communities. Exposure to either NO_x or VOCs is harmful to human health, but each pollutant creates distinct public health risks. For example, many VOCs are known carcinogens, like benzene, while NO_x can cause and exacerbate respiratory and cardiovascular conditions. With interprecursor and inter-source aggregation, major sources could evade paying fees for increased VOC emissions with NO_x emission reductions. In doing so, major sources will compound, for example, cancer risk in a community by removing an incentive to reduce VOC emissions. Further, with inter-source aggregation, there is no guarantee that emission reductions of one pollutant will occur in the same community that sees an increase in the other

pollutant. There are already cancer clusters and suspected cancer clusters near the Houston Ship Channel. Interprecursor and inter-source aggregation will serve to intensify cancer risk in communities already exposed to cancer-causing toxics from chemical plants, chemical tank farms, and other major sources. In its comment to Texas and California, the EPA has already put states on notice that it will not approve SIP revisions that include interprecursor aggregation and inter-source aggregation in baseline emission calculations. Also, in 2021, the EPA identified these issues as items for reconsideration when the agency proposed to reconsider Texas's § 185 Fee Program for the one-hour NAAQS.

The Act does not allow for interprecursor aggregation. The plain text of § 185 identifies NO_x and VOCs individually, not collectively. Had Congress intended to allow for interprecursor aggregation, it would have stated so. In 2021, the D.C. Circuit Court of Appeals considered a similar issue.¹³ In 2018, the EPA issued a rule to implement the 2015 ozone NAAQS SIP requirements. The rule included an interprecursor trading program for offset requirements in nonattainment areas. Under the program, major sources could offset their VOC emissions with NO_x emission reductions, and vice versa. The court found that the EPA lacked authority to create this program and that the plain text of the Act created precursor-specific provisions that the EPA was not free to ignore. Such is the case here. The Act identifies NO_x and VOCs as separate pollutants for § 185 purposes. Thus, baseline emissions must be established each for NO_x and VOCs.

Inter-source aggregation is also contrary to the Act. Like interprecursor aggregation, inter-source aggregation is a radical measure that cannot be read into the Act's text. Without more, the TCEQ, like the EPA, lacks authority to create a program that takes the focus away from individual facilities. Inter-source aggregation allows companies to, for example, build new plants in different parts of the nonattainment area that create new or increased exposure to NO_x and VOCs. Companies could then offset these emissions with reductions elsewhere and avoid paying any § 185 fees. Inter-source aggregation frustrates the Act's purpose and creates incentives that are detached from the public health just to avoid paying fees. Thus, baseline emissions must be established per major source and not in the inter-source aggregation drag-net manner.

¹³ *Sierra Club, et al. v. EPA, et al.*, No. 15-1465 (D.C. Circ.) (Jan. 29, 2021)

V. The TCEQ must collect § 185 fees until the nonattainment area reclassification to attainment

The Act is clear, § 185 fees must be collected “until the area is redesignated as an attainment area for ozone.” 42 U.S.C. § 7511d(a). Formal redesignation is accomplished through formal rulemaking. Pursuant to the Administrative Procedure Act, formal rulemaking requires publication of a proposal in the Federal Register, a notice and comment period, publication of a final proposal in the Federal Register, and a second notice and comment period.

The TCEQ’s one-hour ozone NAAQS § 185 fee program allowed for deferred fee collection after the TCEQ submitted a redesignation proposal to the EPA. Deferred fee collection pending EPA consideration is not allowed under the Act and the TCEQ should not include it in any § 185 fee proposal.

The TERP subjects Texas taxpayers to fee and surcharge collection until “there is no pending judicial review” of EPA’s actions to redesignate the ozone nonattainment area and “final notice of such action is published in the Texas Register by TCEQ.”¹⁴ Major sources should be subject to no less.

Fenceline Watch looks forward to working with the TCEQ in the formal rulemaking process to make the § 185 Fee Program serve communities.

Respectfully,

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Shiv Srivastava, Policy Director
Isabel Segarra Treviño, Legal Advisor

¹⁴ TCEQ, Texas Emissions Reduction Plan Annual Report, at 4.