



OFFICE OF THE
HARRIS COUNTY ATTORNEY
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Submitted via TCEQ Online Public Comment System

**HARRIS COUNTY ATTORNEY OFFICE'S COMMENTS ON THE PROPOSED
SECTION 185 FEE PROGRAM UNDER THE FEDERAL CLEAN AIR ACT**

RE: TCEQ Rule Project No. 2023-131-101-AI

To whom it may concern,

The Harris County Attorney's Office ("HCAO") appreciates the opportunity to submit comment regarding the Texas Commission on Environmental Quality's ("TCEQ") proposed Section 185 Fee Program under the Federal Clean Air Act ("FCAA"), which has the potential to significantly impact air quality in our region.

BACKGROUND

Section 185 requires states to implement penalty fee programs for major stationary sources of nitrogen oxides (NOx) and volatile organic compounds (VOCs) in severe or extreme ozone nonattainment areas that fail to attain the National Ambient Air Quality Standards ("NAAQS") by their applicable attainment dates. These fees are designed to provide economic incentives for emission reductions while generating revenue for air quality improvement programs.

The Houston-Galveston-Brazoria ("HGB") area, which includes Harris County, has been designated as a severe nonattainment area for the 2008 ozone NAAQS and faces potential reclassification that would trigger Section 185 fee requirements. TCEQ is required to develop and submit Section 185 fee rules to the Environmental Protection Agency ("EPA") by November 2025, with potential fee implementation in 2028.

HCAO'S CONCERNS

There are several legal and policy concerns with TCEQ's proposed approach to the Section 185 fee program. These concerns raise questions about whether the current proposal complies with FCAA, the Texas Constitution, and the program's intended environmental effectiveness.

FCAA Progressive Enhancement Structure

HCAO is concerned that TCEQ's proposal seems to rely on the Texas Emissions Reduction Plan ("TERP") – an existing state incentive program – to fulfill its Section 185 obligations. This approach would be inconsistent with FCAA's graduated regulatory design. FCAA envisions increasingly stringent measures the longer an area remains in nonattainment status. This principle recognizes that existing programs have failed to achieve timely attainment and stronger measures are necessary.

Established in 2001, TERP was designed to reduce nitrogen oxide emissions and has been in effect during the entire period in which the HGB area failed to achieve compliance with the 2008 ozone standard. Thus, TERP's existing framework has proven insufficient to bring the region into attainment. TCEQ's implementation of Section 185 fees should impose new and direct economic pressure on major stationary sources, rather than continuing to rely on previously implemented programs that have already proven insufficient to bring nonattainment areas into compliance

The statutory language and regulatory framework of Section 185 contemplate new, supplemental programs that build upon rather than substitute for existing air quality improvement efforts. TCEQ's approach of using TERP as the primary mechanism for Section 185 compliance potentially violates this fundamental principle of FCAA.

Use of Public Funds

TCEQ's proposed 185 Fee structure raises potential constitutional concerns under state law by utilizing public funds to effectively pay private entities' regulatory penalties. The Texas Constitution contains prohibitions against the use of public money for private purposes.¹ Section 185 fees are assessments imposed on major stationary sources for their VOC and NOx emissions. These regulatory sanctions impose costs on private entities whose emissions contribute to ongoing ozone nonattainment. When TCEQ proposes to use publicly funded TERP resources to offset or reduce these private obligations, it effectively converts public environmental funds into subsidies for private regulatory penalties. This may amount to an unconstitutional use of public funds.

¹ Tex. State Const. Art. III, §§ 50, 51.

Section 185 and TERP are not equivalent programs

TCEQ's attempt to treat Section 185 fees and TERP funding as equivalent mechanisms conflates two distinct programs with fundamentally different purposes and legal structures. Section 185 fees are direct regulatory penalties imposed specifically on major stationary sources that emit NO_x and VOCs in nonattainment areas. They create immediate, source-specific economic consequences for ongoing emissions, which ultimately incentivize direct emission reductions by the fee-paying entities. TERP, by contrast, is an indirect incentive program that provides funding for voluntary emission reduction projects across various sectors. TERP funding does not create direct penalties for non-compliance, nor does it establish the same economic incentives for specific source behavior modification that Section 185 contemplates. These structural differences mean that TERP should not serve as a legal substitute for Section 185 compliance.

Eliminates Emission Reduction Incentives

Section 185 imposes direct financial consequences on major stationary sources to encourage emissions reductions. TCEQ's proposed approach risks circumventing this core mechanism by potentially resulting in no--or significantly reduced--fees being assessed or collected from these sources in the HGB area.

Under TCEQ's structure, major stationary sources— entities whose emissions contribute to nonattainment—face no direct economic consequences for their ongoing emissions. This removes the primary incentive mechanism that Congress intended to drive emission reductions from the largest industrial sources in nonattainment areas.

The absence of direct fees to major sources creates several concerns:

1. **Elimination of Deterrent Effect:** Without this direct financial consequences, major sources have less economic incentive to reduce emissions.
2. **Inequitable Cost Distribution:** The costs of addressing ongoing nonattainment are shifted from the private entities causing the problem to the public through TERP funding mechanisms.
3. **Reduced Emission Reduction Pressure:** The lack of financial pressure reduces the motivation for major sources to invest in advanced control technologies or make operational changes necessary to achieve meaningful reductions.

HCAO is concerned this approach dilutes the statutory purpose of Section 185 and threatens to prolong the region's nonattainment status by removing a pressure intended to drive improvement.

The Section 185 fee program represents a critical opportunity to address ongoing ozone nonattainment in the HGB area through economic incentives for emission reductions. HCAO is concerned TCEQ's current proposal fails to fulfill the program's fundamental purposes and raises legal concerns. HCAO respectfully requests TCEQ to reconsider its approach and create a Section 185 program that will drive meaningful emission reductions from major stationary sources.

Sincerely,

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