

June 18, 2025

Texas Commission on Environmental Quality
Air Quality Division
P.O. Box 13087
Austin, TX 78711-3087

RE: Public Comments on Section 185 Fee for the 2008 Ozone NAAQS; Rule Project Number 2023-131-101-AI

We appreciate the opportunity to submit comments for the Texas Commission on Environmental Quality's (TCEQ) proposed rulemaking to implement the Section 185 Fee program under the federal Clean Air Act for the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS). Under FCAA Section 185, states are required to impose annual penalty fees from major stationary sources of volatile organic compounds (VOC) and nitrogen oxides (NO_x) in areas classified as "severe" or "extreme" ozone nonattainment that fail to meet the NAAQS by their attainment date. This federal requirement is designed to reduce ozone precursors by penalizing the failure to timely constrain emissions and incentivizing emissions reductions.

As of November 7, 2022, the EPA reclassified the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) areas from "serious" to "severe" nonattainment for the 2008 ozone standard. Areas that don't meet the EPA's 2008 ozone standard by the end of 2026 will be subject to the Section 185 Fee each year until they meet the standards.

This group has some real concerns about the proposed rule, particularly its implications for public health. Both ozone and its precursors, NO_x and VOC, result in serious environmental and health impacts, including asthma and respiratory diseases. These pollutants pose an especially serious threat to vulnerable populations like children, the elderly, and those with pre-existing conditions. Without substantial revisions, this proposal falls short of delivering the emission reductions urgently needed to safeguard the health and well-being of communities living in severe ozone areas. Moreover, key provisions of the program, as proposed, create the risk of federal disapproval, a process that would prolong meaningful action in these severe nonattainment areas and deprive the state of significant funding if the EPA institutes its own fee program and collects the revenue.

Ozone Pollution's Impacts on Human Health

The Houston and Dallas metro areas ranked in the top ten worst cities for ozone pollution, and exposure to this pollution can have very harmful effects.¹ It "can damage the tissues of the respiratory tract, causing inflammation and irritation, and result in symptoms such as coughing,

¹ Sanchez, C. (2025, April 30). *Houston, Dallas rank among worst in U.S. for ozone pollution, report reveals*. Spectrum News 1; Charter Communications
<https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2025/04/30/american-lung-association-us-air-quality-report-texas>.

chest tightness, and worsening of asthma symptoms.”² In counties in the DFW area, there are 7,986,690 of these at-risk Texans.³ In the HGB area counties, 7,449,640 at-risk people, bringing the total to over 15.4 million people.⁴ This is almost half the entire population of the state.⁵ To protect our citizens, TCEQ should do everything in its power to limit ozone pollution, including collecting fines from point-source polluters.

Alternative Fee Program and the Texas Emissions Reduction Plan (TERP)

Under the proposed rule, equivalency credits, revenue collected in a calendar year from the TERP, would be used to offset or reduce the Section 185 Fee obligations. TCEQ administers TERP, a successful and popular program that largely targets mobile sources of NO_x emissions. The proposed approach would effectively allow major sources to take paper credit for TERP funding and reduce their 185 Fee obligations without actually contributing any additional funds for critical emissions reductions in the areas.

We acknowledge that TCEQ obtained EPA approval for its similarly structured alternative fee program for the revoked 1979 1-hour ozone NAAQS in HGB. The instant proposed fee program is distinguishable from 30 Tex. Admin. Code ch. 101, Subchapter B, because the 2008 8-hour NAAQS has not been revoked. While the EPA has indicated that Section 172(e)’s anti-backsliding principles may be reasonable in other circumstances, it has also indicated that components in TCEQ’s proposed program, including the TERP diversion, may not be approvable for the 2008 8-hour ozone NAAQS. We urge TCEQ to avoid this uncertain path by revising the proposed rules to conform to Section 185’s plain language.

Although this is intended to incentivize emission reduction, it does the opposite by allowing industry to take credit for TERP funding and projects, and granting unnecessary flexibility for industry. Using TERP funds instead of imposing fees would shield major stationary sources from penalties and remove the incentive to reduce emissions.

Indeed, TERP funding comes directly from registration, inspection fees, vehicle title transfer fees, and surcharges on both on-road and off-road vehicles, and is not derived from any fees on point-source polluters. These revenues are deposited into the General Revenue-Dedicated TERP Account No. 5071, which functions as a trust fund held by the Texas Comptroller and administered by the Texas Commission on Environmental Quality (TCEQ). It is fundamentally unfair that, under the TCEQ proposal, the fees and surcharges already collected from these mobile sources would be used to “forgive” fees on industrial pollution. It is, in essence, a shift in responsibility from one sector to another and undermines the very rationale of Section 185.

² California Air Resources Board. (n.d.). *Ozone & Health* | California Air Resources Board. [Ww2.Arb.ca.gov](https://ww2.arb.ca.gov/resources/ozone-and-health). <https://ww2.arb.ca.gov/resources/ozone-and-health>.

³ See *Texas Air Quality Report Card*. (n.d.). American Lung Association. <https://www.lung.org/research/sota/city-rankings/states/texas>

⁴ See *id.*

⁵ United States Census Bureau. (2024). *QuickFacts: Texas*. Census Bureau QuickFacts. <https://www.census.gov/quickfacts/fact/table/TX/PST045224>

By law, we have to have clean air. Since Texas is not in attainment, more money is necessary, and those funds could be obtained through collecting penalty fees from point source polluters in the area. The proposal explains that “in the DFW severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 65%. In the HGB severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 55%.” However, point source pollution accounted for 15% of NO_x emissions in DFW and 33% of NO_x emissions in the HGB area - an increase from 2020.⁶ This is by no means an insignificant portion of emissions. Collecting fees from point sources may not mean that they will stop emitting the pollutant contributing to NAAQS non-compliance, but using the penalty fees to fund programs under TERP could have a substantial impact on lowering ozone pollution in the areas by further limiting emissions from mobile sources. Section 185 penalty fees are only assessed against point sources exceeding major source thresholds. If those emitters wish not to pay the fee, they could invest in projects to reduce their emissions by 20% from their baseline amount. However, if they choose to pay the fees instead, it could generate more than \$200 million annually, funding that could be directed to TERP grants and used to improve air quality for Texans.

Aggregating emissions of VOC and NO_x emissions for the purpose of calculating the baseline fee

The EPA typically treats VOC and NO_x as separate precursors and requires independent baselines and fees. Aggregating emissions could weaken enforcement, undermine ozone reduction goals, and potentially allow facilities that exceed the threshold for one pollutant to avoid fees by balancing it against the other. We urge TCEQ to maintain separate baselines and fees for VOCs and NO_x in accordance with EPA precedent.

Use of Supplemental Environmental Projects

TCEQ’s proposal would allow major stationary sources to partially or completely fulfill the total fee owed by contributing to Supplemental Environmental Projects (SEPs) that reduce ozone precursor emissions instead of paying the fee obligation directly to the state, or reduce emissions to avoid fee liability. While we agree that industry should fund emissions reductions, we do not agree that SEPs are an appropriate mechanism to offset Section 185 Fee liability.

Under Texas Water Code § 7.067, the commission has the discretion to allow a respondent to contribute to a SEP as part of an agreed resolution of an alleged violation. SEPs are designed to reduce and remediate pollution, with statutory preference given to projects that benefit communities in which violations occur. The legislature provided that only local governments are entitled to use SEPs to remedy noncompliances.⁷ In the Section 185 Fee context, which presumably would not involve alleged violations and enforcement actions initiated by TCEQ, we do not believe the agency has the authority to allow major sources to fulfill Section 185 liability through using SEPs.

⁶ *Texas Emission Sources - A Graphical Representation*. (2022, June 14). Texas Commission on Environmental Quality. <https://www.tceq.texas.gov/airquality/areasource/emissions-sources-charts>

⁷ Tex. Water Code § 7.067(a-1).

We also question why the agency is proposing to use SEPs in this manner while proposing to create the complicated fee equivalency program under TERP. SEPs are an important tool in the agency's enforcement program that deliver real environmental benefits to impacted communities. Instead of utilizing this limited enforcement remedy in the Section 185 Fee program, TCEQ should consider appropriate alternatives, such as creating a structure within TERP or other agency programs⁸ where major stationary sources can contribute actual funds to satisfy Section 185 Fee liability.

Conclusion

Section 185 Fee is designed to penalize owners/operators of major stationary sources for failing to timely attain the ozone standard. It is a mandatory fee that will hold polluters accountable and work to improve the health and safety of our communities by incentivizing emissions reductions. As described above, TCEQ's proposed rule falls short of these goals, and we urge the agency to strengthen key provisions to ensure that the Section 185 Fee program works to deliver the actual ozone precursor emissions reductions that communities in the Houston and Dallas/Fort Worth areas deserve.

Sincerely,

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⁸ For example, TCEQ could evaluate whether regulated entities could contribute to other environmental remediation projects, such as the TxMCW program administered by the Air Grants Division.