Caroline Crow

Good afternoon,

Attached are public comments on Rule Project Number 2023-131-101-AI submitted by Lone Star Legal Aid on behalf of Better Brazoria – Clean Air & Clean Water.

Thank you.

PAUL E. FURRH, JR.
Attorney at Law
Chief Executive Officer

ERNEST W. BROWN, JR.
Attorney at Law
Deputy Director

SAPNA AIYER
Directing Attorney

HEATHER KEEGAN
Director of Litigation

AMY DINN
KIMBERLY BROWN MYLES
Litigation Directors

Lone Star Legal Aid
EQUITABLE DEVELOPMENT INITIATIVE

CAROLINE CROW
NOOR MOZAFFAR
CHASE PORTER
Staff Attorneys

Houston Address:
1415 Fannin, 2nd Floor
Houston, TX 77002

(713) 652-0077 x 8108 Telephone
(800) 733-8394 Toll-free

June 17, 2025

VIA ELECTRONIC SUBMISSION
https://tceq.commentinput.com/

VIA U.S. MAIL
Texas Register Team - MC 205
General Law Division
Office of Legal Services
TCEQ
P.O. Box 13087
Austin, TX 78711-3087

Gwen Ricco,
TCEQ, MC 205, Office of Legal Services,
P.O. Box 13087
Austin, Texas 78711-3087

RE: Public Comments on Rule Project Number 2023-131-101-AI

To whom it may concern:

On behalf of our represented client and stakeholder, Better Brazoria – Clean Air & Clean Water (Better Brazoria), Lone Star Legal Aid (LSLA) provides the following comments to the Texas Commission on Environmental Quality (TCEQ) on Rule Project Number 2023-131-101-AI.

I. INTRODUCTION

LSLA's mission is to protect and advance the civil legal rights of the millions of Texans living in poverty by providing free advocacy, legal representation, and community education to ensure equal access to justice. LSLA's service area encompasses one-third of the State of Texas, including 72 counties in the eastern and Gulf Coast regions of the state. LSLA's Environmental Justice team focuses on the right to the fair distribution of environmental benefits and burdens and the right to

equal protection from environmental hazards. LSLA advocates for these rights on behalf of impacted individuals and communities in LSLA's service area. These comments are submitted on behalf of Better Brazoria – Clean Air & Clean Water, which serves and represents the low-income environmental justice community of Freeport, Brazoria County, and its residents.

Stakeholder Better Brazoria was formed to educate Freeport residents about environmental issues and to advocate for solutions to protect and improve air and water quality. To accomplish this mission, Better Brazoria holds community meetings to raise awareness about potentially harmful air and water pollution events in Freeport, Texas and Brazoria County. The group communicates with TCEQ and other state and local governmental entities to remain up to date on the latest developments in the area. Better Brazoria engages with the public participation component of the environmental permitting process by submitting comments, and engaging in hearings on air, water, and waste permits, and submitting comments, like these, on State and Federal Clean Air Act issues in the region. The group's goal is to encourage protection of public health through compliance with permitting schemes and environmental laws.

Better Brazoria is a stakeholder in submitting comments on the proposed Federal Clean Air Act (FCAA) Section 185 Fee Program because the group: (1) primarily serves Brazoria County, an area designated as in severe nonattainment effective as of November 7, 2022; (2) serves an area which is home to many major sources of both Volatile Organic Compounds (VOCs) and Nitrogen Oxides (NOx); (3) regularly receives and reviews public notices related to a diverse selection of air permitting actions from TCEQ; and (4) Better Brazoria submitted informal comments to the TCEQ on the FCAA Section 185 Fee Program on September 9, 2024 (Informal Comments). Informal Comments are attached and incorporated herein by reference.

Better Brazoria encourages the TCEQ to abandon the Alternative Fee Program and implement a direct fee structure compliant with the FCAA Section 185.

II. BRAZORIA COUNTY IS A VULNERABLE AREA THAT IS AFFECTED BY MAJOR SOURCES OF NO_X AND VOC POLLUTION.

Brazoria County is heavily affected by major sources of NOx and VOC pollution. Better Brazoria presented detailed information on its demographics and the adverse effects of pollution on the area's residents in its previously submitted Informal Comments which are incorporated herein by reference.

III. TCEQ FAILED TO COMPLY WITH THE FCAA PUBLIC PARTICIPATION REQUIREMENTS

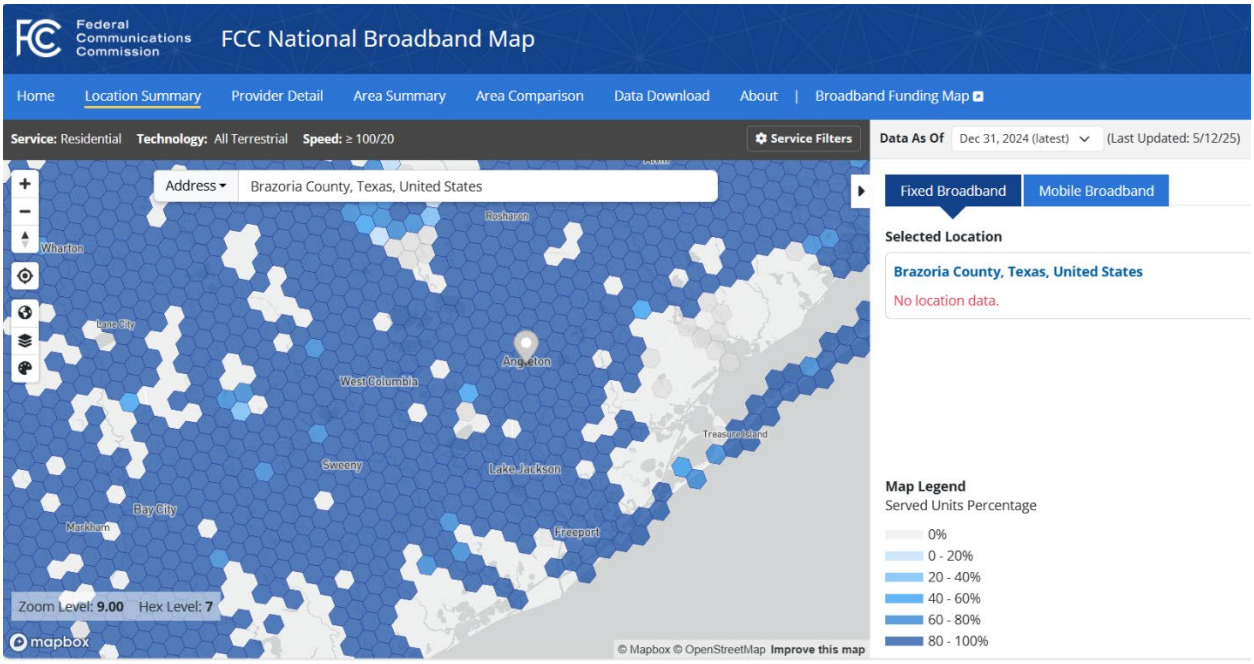
A. FCAA requires public participation in State Implementation Plan development.

Importantly, the Clean Air Act emphasizes public participation. These requirements for public participation are codified by statute.[1] Accordingly, a Section 185 Fee Program must include opportunities for public comment, particularly from the communities most affected by air pollution. Specifically, 42 U.S.C. § 7410(a)(2) requires public participation in State

[1] *Cf.* 40 C.F.R. §§§ 51.160, 51.161, 51.166(q) (public participation requirements from FCAA Prevention of Significant Deterioration Program).

Implementation Plan (SIP) development. TCEQ heavily relied on virtual platforms for this rulemaking. In doing so, the affected areas of Brazoria County may have been unable to access information or participate in the rulemaking due to low rates of internet access.

Figure 1: Federal Communications Commission Map of Wired and Ground-Fixed Internet Availability in Brazoria County, Texas[2]



IV. THE ALTERNATIVE FEE PROGRAM VIOLATES THE FCAA

In the Commission's Executive Summary materials for the proposed rules, it noted that an alternative fee program is a potential controversial concern and point of legislative interest.[3] Thus, the Commission is aware that commenters are unsupportive of an alternative fee program and that an alternative fee program may be subject to disapproval by the EPA.

A. Alternative Fee Programs unfairly burdens vulnerable communities in Brazoria County.

Concentrated portions of the population in Brazoria County live near highly industrialized and energy development zones and already suffer from poor air quality, as was explained in Better Brazoria's Informal Comments. The NAAQS were designed to "protect public health with an adequate margin of safety."[4] And, the Section 185 Fee Program is a FCAA mechanism to enforce

[2] Federal Communications Commissions, National Broadband Map focused on Brazoria County, https://broadbandmap.fcc.gov/location-summary/fixed?version=dec2024&lon=-95.431946&lat=29.167557&addr_full=Brazoria+County%2C+Texas%2C+United+States&zoom=9.00&vlon=-95.563289&vlat=29.108752&br=r&speed=100_20&tech=1_2_3_6_7

[3] TCEQ Interoffice Memorandum RE Commission Approval for Proposed Rulemaking "Executive Summary", Docket No. 2023-1061-RUL, (Apr. 11, 2025) at 4.

[4] 42 U.S. Code § 7409.

compliance with NAAQS in areas that have repeatedly failed to meet these federally designated air quality standards. This mechanism is intended to force compliance with NAAQS and penalize major offenders that do not work to reduce harmful emissions. Together, this ensures the purpose of the FCAA and NAAQS are met. Accordingly, an alternative fee program which offsets penalty fees with other funds, like TERP and mobile source fees, undermines the FCAA's goals because it does not directly reduce emissions from major sources. In *Whitman v. American Trucking Associations*, the court upheld the purpose of the FCAA, finding that Section 109(b) does not permit the Administrator to consider implementation costs in setting NAAQS, but, instead, NAAQS are intended to protect the public health and the FCAA requirements are to do the same. 531 U.S. 457, 457 (2001).

The NAAQS are set to protect public health, and Section 185 Fees are designed to promote compliance with NAAQS in areas that have repeatedly failed to comply. Consequently, a program which allows offsets, credits, or other paper games and fails to assess appropriate penalties against the largest contributors to NAAQS violations fails to comply with the FCAA—and leaves Brazoria County, an already vulnerable area, subject to dangerous ongoing pollution.

B. TCEQ cannot use Mobile Source Fees to fulfill the Statutory Obligations of Major Stationary Sources.

Previous non-attainment fee programs have considered placing fees on mobile sources in mistaken attempts to pursue Section 185's objectives. TCEQ cannot include such a program to satisfy Section 185 fee program requirements.

TCEQ justifies penalty offsets through TERP Program objectives to reduce NOx emissions. This justification fails because the offset does not satisfy Section 185 requirements. First, it does not also address VOCs. FCAA § 182(f) expressly discusses VOCs. The requirement is extended to NOx under the Section 185 Fee Program but must penalize both emissions the same. So, while mobile sources undoubtedly produce NOx emissions, those cannot serve as a surrogate for major sources of VOCs in Brazoria County—or vice versa. Additionally, stationary sources like refineries, chemical plants and power plants dominate emissions in the region. In the HGB area, mobile sources cannot be used as a scapegoat to reduce major stationary source's obligations under the program. Further, as explained below, alternative programs are impermissible because the 8-hour ozone NAAQS are currently enforceable and have not been revoked.[5]

Specifically, TCEQ's 2022 data for VOC emissions in HGB reveals that mobile sources account for only 16% of all VOC emissions.[6] Stationary sources account for the remaining 84% of emissions.[7] EPA predicts that this trend will continue as stationary sources account for a greater proportion of VOC emissions while mobile sources emissions gradually dissipate.[8] By 2032 EPA predicts that mobile sources will contribute only 6% of total VOC emissions in the HGB area.

---

[5] EPA, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, at 2-3 (Jan. 5, 2010). (Note: This guidance was vacated by the D.C. Circuit Court of Appeals in *NRDC v. EPA*, 643 F.3d 322 (D.C. Cir. 2011) on procedural grounds, but the Court did not prohibit alternative programs.)

[6] Texas Commission on Environmental Quality, Texas Emission Sources - A Graphical Representation https://www.tceq.texas.gov/airquality/areasource/emissions-sources-charts

[7] *Id*.

[8] 84 FR 22,093 at 22,098, Table 4 (May 16, 2019).

Absent a compelling reason (not borne out in the data), TCEQ and EPA should not focus this program on mobile sources. There is no basis.

Accordingly, targeting mobile sources for fee payment deviates from the text of Section 185. Congress expressly intended major stationary sources to bear the cost and responsibility for their harmful emissions.[9] Reorienting this program to target mobile sources would mix the penalties conceived under Section 185 and improperly burden the broader population.

C. Use of TERP Funds provides an improper subsidy to private industry.

Texas' Section 185 Fee Program must achieve emissions reductions and comply with SIP requirements. Public Citizen already criticized this structure because it shifts the financial burden from major polluters to taxpayers.[10] This cost-shifting is problematic as it imposes fees on one group, drivers, in order to finance exemptions for another group—polluters. Additionally, the mobile source fee design is not specifically explained in the TCEQ's rule-making materials. To be an approvable program, the details of the program must be explained in a public-facing rulemaking process.

D. Alternative Fee Program is subject to disapproval by EPA.

Because an alternative fee program violates the FCAA's directive, it puts the State at risk. One, the State could lose delegation of the penalty program for its failure to create a program that complies with the FCAA. Two, any money that the TCEQ projects it would collect, that should be reinvested into the communities impacted by poor air quality, may be lost. Specifically, the FCAA Sections 185(d) and 502(b)(3)(C), explain that if a state fails to create a required fee program, EPA must collect the unpaid fees and could also collect interest on any outstanding unpaid fees. Accordingly, under Section 185, all revenue collected by EPA must be deposited in a special fund in the U.S. Treasury for "licensing and other services and may be used to fund the Agency's activities for collecting such fees"—which takes money from the State.[11]

EPA has emphasized that the program must result in "enforceable" emissions reductions to comply with the FCAA.[12] Moreover, EPA guidance contemplates that mobile sources should only be assessed fees where major sources have "well controlled" emissions.[13] An area classified in severe nonattainment—indicating perpetual NAAQS compliance problems—is not an area that has "well controlled" emissions. Moreover, as was discussed above, stationary sources account for the 84% of VOC emissions in the HGB area.[14] This statistic does not support the premise that stationary

---

[9] 42 U.S.C. 7511(a).
[10] Kathryn Guerra, Public Citizen's Opposition to the TCEQ's Section 185 Fee Program – Making Texas Drivers Pay for Private Industry Pollution Fees.
[11] EPA, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, at 2 (Jan. 5, 2010). (Note: This guidance was vacated by the D.C. Circuit Court of Appeals in *NRDC v. EPA*, 643 F.3d 322 (D.C. Cir. 2011) on procedural grounds, but the Court did not prohibit alternative programs.); and *see*, FCAA §§ 185(d); 502(b)(3)(C).
[12] EPA, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, at 2-3 (Jan. 5, 2010). (Note: This guidance was vacated by the D.C. Circuit Court of Appeals in *NRDC v. EPA*, 643 F.3d 322 (D.C. Cir. 2011) on procedural grounds, but the Court did not prohibit alternative programs.)
[13] EPA, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, at 5 (Jan. 5, 2010).
[14] *Id*.

source emissions are well-controlled warranting mobile source fees as a substitute, or offset, for major source penalty fees.

Importantly, TCEQ additionally acknowledges that the proposed program includes "flexibility aspects not directly described in FCAA, §185, including but not limited to alternative revenue and baseline aggregation."[15] Accordingly the TCEQ's proposed program risks disapproval and subsequent forfeiture of an anticipated "over $200 million per year" in penalty fees.[16] At bottom, "EPA's 2010 guidance requires an alternative program to achieve the same emissions reductions, raise the same amount of revenue and establish a process by which penalty funds would be used to pay for emission reductions that would further improve ozone air quality, or a combination of emissions reductions or revenue collection."[17] The current flexibilities that TCEQ has embedded in the penalty program may undermine or fail to achieve these stated requirements.

E. Alternative fee programs cannot be implemented for active NAAQS

The primary NAAQS are set at a level "requisite" to protect public health with an adequate margin of safety.[18] EPA may not consider costs of implementing, ability to attain, technological feasibility, or background ozone in setting NAAQS.[19] Active NAAQS reflect current scientific standards for protecting public health.[20]

Revoked NAAQS are replaced with more stringent/updated standards.[21] Meeting a revoked standard is focused on preventing regressions, whereas a program designed to meet an active standard must be urgently focused on achieving new attainment.[22] Accordingly, the FCAA's requirements for active NAAQS prioritizes direct penalties on major stationary sources to ensure timely attainment, whereas revoked NAAQS potentially may allow some flexibility for alternative approaches because there is a reduced regulatory priority for several reasons.

First, the FCAA emphasizes direct accountability to incentivize emissions reductions because they are critical to public health and fulfill the purpose of NAAQS.[23] The fee must be assessed and collected directly from the sources until attainment is met.[24] Second, whatever program TCEQ implements must achieve emissions reductions because meeting active NAAQS has an element of ongoing public health urgency. Texas cannot meet this stringent requirement with a paper game that uses TERP funds or other fees in place of penalizing major sources or offsets penalties that would otherwise be due from the major sources. Instead, the goal of meeting an active NAAQS can only be met by following the statutory mandate by directly penalizing polluters. Finally, EPA

---

[15] TCEQ Chapter 101 – General Air Quality Rules Rule Project No. 2023-131-101-AI, Proposal Preamble at 3.
[16] TCEQ Chapter 101 – General Air Quality Rules Rule Project No. 2023-131-101-AI, Proposal Preamble at 3.
[17] TCEQ Chapter 101 – General Air Quality Rules Rule Project No. 2023-131-101-AI, Proposal Preamble at 4.
[18] 42 U.S.C. § 7409.
[19] EPA Region 6 Office, *Review of National Ambient Air Quality Standards* (Dec. 14, 2022) at 4.
[20] 42 U.S.C. § 7409.
[21] 40 C.F.R. § 50.2(b).
[22] *See* 42 U.S.C. § 7502(e) (Nonattainment plan provisions in general**)** and 40 C.F.R. § 51.905 (Anti-backsliding provisions explained); *see also* 85 FR 8425 ("the purpose of CAA section 185 is to provide incentives for emission reductions to occur that would provide for attainment and maintenance of an ozone standard in a Severe or Extreme nonattainment area that missed the attainment deadline for that standard.")
[23] 42 U.S.C. § 7511d(a)-(b)
[24] 42 U.S.C. § 7511d(a)-(b)

only previously supported alternative options to a fee-based program for the ***revoked*** 1-hour ozone NAAQS, but none of the approvals cited by the TCEQ apply to an ***active*** NAAQS.[25]

Recent Section 185 programs have also recognized Section 172(e)'s inability to fundamentally alter the purpose and operation of Section 185 fee penalty programs. For example, in 2022 San Diego Air Pollution Control District (San Diego APCD) recognized it could ***not*** adopt an alternative fee program.[26] San Diego APCD stated "according to EPA's guidance, an alternative fee program for the 2008 8-hour ozone NAAQS is not a SIP-approvable element."[27] Later in the same document, San Diego APCD "confirmed with EPA that an alternative fee program" is not an approvable element of a Section 185 fee program and that including such a program would at minimum "set a new precedent."[28] And, in March 2024, South Coast Air Quality Management District (South Coast AQMD) reached the same conclusion in its Proposed Rule to adopt Nonattainment Fees for the 2008 and 2015 8-hour Ozone. South Coast AQMD's Staff Report concluded "because [the 8-hour standards] have not been revoked … EPA would not allow use of [an] alternative approach for these standards and required adherence to CAA section 185 through fee collection."[29] Accordingly, an alternative fee program must be prohibited.

Moreover, the TCAA mandates that TCEQ implements measures to attain and maintain NAAQS in ways that are consistent with the FCAA.[30] TERP, however, aims to reduce emissions from mobile and other sources through grants and other incentives.[31] Active NAAQS are implemented to protect public health and offsetting fees for industrial polluters with funds from mobile sources, like registration fees, conflicts with the TCAA's requirement (consistent with the FCAA) to attain and maintain NAAQS.[32]

F. Alternative Fee Programs do not meet the FCAA's Direct Penalty Requirements.

The EPA has already indicated that alternative program flexibilities, such as aggregation, will "potentially" not be allowed for the 2008 eight-hour ozone NAAQS. [33] Accordingly, Texas cannot

[25] TCEQ Chapter 101 – General Air Quality Rules Rule Project No. 2023-131-101-AI, Proposal Preamble at 4-5. *See also* San Joaquin 77 FR 50021 ("EPA proposed to allow states to meet the section 185 obligation arising from the **revoked 1-hour ozone NAAQS**" 77 FR at 50022.); South Coast Air Quality Management District, 77 FR 74372 ("We note, however, that we are approving SCAQMD Rule 317 in the context of the **revoked 1-hour ozone NAAQS** and that Rule 317 satisfies the requirements of CAA section 185, consistent with the principles of section 172(e)." 77 FR at 74375, 74380); New York portion of the New York Northern New Jersey-Long Island nonattainment area 84FR 12511 ("The Environmental Protection Agency is finalizing approval of the State of New York's Low Emissions Vehicle program as an alternative program to fulfill the Clean Air Act section 185 requirement for the New York portion of the New York-Northern New Jersey-Long Island, NY-NJ-CT nonattainment area for the **revoked 1979 1-hour ozone National Ambient Air Quality Standard.**" 84 FR at 12512).

[26] San Diego Air Pollution Control District, Adoption of Proposed New Rule 45 – Federally Mandated Ozone Nonattainment Fees, at 12, 18 (June 9, 2022).

[27] *Id*. at 12.

[28] *Id*. at 18-19.

[29] South Coast Air Quality Management District, Preliminary Staff Report: Proposed Rule 317.1--Clean Air Act Nonattainment Fees for the 8-hour Ozone Standards, at 15 (March 2024).

[30] Tex. Health & Safety Code § 382.011

[31] Tex. Health & Safety Code § 386.002

[32] 89 FR 103735 ("Since 2010, the EPA has taken the position that the Agency can approve SIPs that include an equivalent alternative program to the section 185 fee program specified in the CAA ***when addressing anti-backsliding*** for ***a revoked ozone standard*** under the principles of section 172(e).")(emphasis added).

[33] TCEQ Houston-Galveston-Brazoria Technical Information Meeting Section 185 Fee (July 28, 2022) at Slide 9.

create an alternative program that will employ such flexibilities, or others. Section 185(a) expressly provides that fees shall be paid as a penalty. The program is intended to penalize a major stationary source in a nonattainment area. Sources are not intended to benefit from the program as many "alternatives" allow. Further, Section 172(e) does not identify how a regulating body would provide alternative options, waivers, or equivalency to statutory requirements. Instead, Section 172(e) focuses on preservation of otherwise required controls. The penalty provision of Section 185(a) are "controls" that section 172(e) "requires to be retained." *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 903 (D.C. Cir. 2006). Section 172(e) does not create a loophole to avoid Section 185's directive that penalties must be assessed against major stationary sources of ozone precursors operating in active ozone NAAQS severe nonattainment areas.

G. Alternative Fee Program violates the FCAA and may interfere with the FCAA's Reasonable Further Progress Requirement

Broadly, the FCAA prohibits SIP revisions that "interfere with any applicable requirement concerning attainment and reasonable further progress."[34] And Section 172(c)(2) of the FCAA requires that SIPs provide for "reasonable further progress" (RFP) toward attaining NAAQS. RFP is a proactive obligation. This is defined as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part of may be reasonably be required by the Administrator for the purposes of ensuring attainment of the applicable [NAAQS] by the applicable date."[35] Accordingly, RFP ensures steady, measurable progress to protect public health. Because the Section 185 Fee Programs are part of the broader SIP framework, the program must align with and not impede RFP requirements. Section 185 Fee Programs are a prospective measure meant to mitigate attainment failures. TCEQ's Alternative Fee Program violates broad FCAA provisions to require areas that are out of attainment to reach attainment and may also indirectly interfere with the RFP mandate.

TCEQ's proposed Alternative Fee Program allows major stationary sources to offset Section 185 fees that the sources would otherwise owe with mobile source fees. Thus, each major stationary source has a reduced financial penalty that may disincentivize major sources to cut emissions—and therefore impede RFP requirements. A rejected or ineffective program may reduce overall emission reductions, which would only create more RFP requirements, and additionally endanger the public while emissions rise and the region continues to be perpetually out of attainment. As such, TCEQ should ensure that major stationary sources are directly assessed fees per Section 185.

Additionally, RFP requires that a state demonstrate, through its SIP, that certain percentages of emissions reductions are being met annually. TCEQ submitted a severe area RFP SIP revision to the EPA that TCEQ adopted April 24, 2024.[36] This revision contemplated an "18% emissions reduction for the six-year period from January 1, 2021 through December 31, 2026, for the eight-

[34] 42 U.S.C. § 7410(l) Plan Revisions.
[35] 42 U.S.C. § 7502(c)(2).
[36] TCEQ SIP Revision: Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB), 2008 Eight-Hour Ozone Severe Area Reasonable Further Progress (RFP), (Apr. 24, 2024) available at: https://www.tceq.texas.gov/downloads/air-quality/sip/archive/23108sip_dfw-hgb_2008sev_rfp_archive.pdf

county HGB 2008 ozone NAAQS nonattainment area."[37] However, if TCEQ prioritizes its alternative fee program over strengthening mobile source controls in the RFP SIP, it may end up limiting the effectiveness and scope of the RFP reductions. Diverting focus to a future fee program may delay or weaken more proactive mobile source controls, which will impede RFP compliance and violate the FCAA. Accordingly, any alternative fee program must reduce emissions in such a way that indicates compliance and progress toward meeting attainment.

Further, to the extent the alternative fee program relies on measures already credited in the RFP SIP's contingency plans, it may reduce the effectiveness of those measures. EPA prohibits "double-counting" reductions.[38] Each SIP requirement (e.g. RFP, attainment, contingency, and penalty programs) relies on distinct and enforceable reductions. Specifically, EPA has advised that emissions reductions can only be credited one time, and reductions claimed for RFP cannot be reused for contingency measures, or other FCAA obligations—like Section 185 alternative fee program.[39] Instead, each requirement should be achieving unique environmental benefits. Accordingly, TCEQ's alternative fee program may be disapproved and/or ineffective at reducing emissions and repairing the region's air quality.

H. Alternative Fee Program fails to satisfy equivalency requirements.

Section 185 does not allow an alternative fee program for active NAAQS. Even if it could be construed to allow one, TCEQ has not provided an adequate basis for the EPA to approve an alternative fee program. As proposed, the alternative fee program fails to meet equivalency requirements outlined in the statute. TCEQ acknowledges that the EPA's 2010 Guidance on alternative fee programs was "vacated by the D.C. Circuit Court of Appeals,"[40] but only on procedural grounds, so TCEQ continues to rely on this guidance to justify its proposed alternative fee program. In TCEQ's continued reliance, it recognizes the EPA guidance requires an Alternative Fee Program to: "achieve the same emissions reductions, raise the same amount of revenue and establish a process by which penalty funds would be used to pay for emission reductions that would further improve ozone air quality, or a combination of emissions reductions or revenue collection."[41]

Accordingly, for an Alternative Fee Program to be approved, the program must achieve equivalent or greater emission reductions, or fees, as compared with a Section 185 Program.[42] TCEQ's

---

[37] TCEQ SIP Revision: Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB), 2008 Eight-Hour Ozone Severe Area Reasonable Further Progress (RFP), (Apr. 24, 2024) available at: https://www.tceq.texas.gov/downloads/air-quality/sip/archive/23108sip_dfw-hgb_2008sev_rfp_archive.pdf at 2.

[38] *See* 88 FR 67957 (Oct. 2, 2023) (discussing EPA's prohibition on double-counting reductions in the context of HGB Contingency measures disapproval. EPA disapproves Texas contingency measures for the HGB area because the measures were already implemented or not triggerable upon failure which violated FCAA's requirements for prospective conditional controls. FCAA Section 172(c)(9) and 182(c)(9).)

[39] "All creditable emission reductions must be real, permanent, and enforceable. States must keep careful records of all emissions reductions to ensure that the same reductions are not "double-counted" or, more simply, used more than one time (i.e., reductions cannot be used for offsets and to meet the 15 percent rate of progress requirement)." 57 FR 13509 (Apr. 16, 1992).

[40] TCEQ Chapter 101 – General Air Quality Rules Rule Project No. 2023-131-101-AI, Proposal Preamble at 3-4.

[41] TCEQ Chapter 101 – General Air Quality Rules Rule Project No. 2023-131-101-AI, Proposal Preamble at 4.

[42] TCEQ Interoffice Memorandum RE Commission Approval for Proposed Rulemaking "Executive Summary", Docket No. 2023-1061-RUL, (Apr. 11, 2025) at 3-4.

proposed rules, however, contemplate using TERP revenue to fund mobile source reductions. The proposed rules additionally cannot be approved because there is no methodology detailed in the rules to quantify the emission reductions from the proposed alternative fee program. The Alternative Fee Program relies on existing TERP revenue and includes no new enforceable measures—so the alternative fee program fails to demonstrate it is equivalent to the Section 185 fees.

TCEQ repeatedly claims that Section 185 only requires a fee—not a reduction in emissions—but this is incorrect.[43] As TCEQ acknowledges, and is quoted above, any alternative program must continue to meet all the requirements of a Section 185 program, including emissions reductions. TCEQ is not at liberty to use TERP revenue to offset major source penalty obligations without ensuring equivalent emissions reductions because this fails to meet the equivalency requirement.

V. "FLEXIBILITES" IN THE PROPOSED RULES VIOLATE THE FCAA.

As the Commission noted in its Executive Summary of the proposed rules, the following flexibilities are points of potential controversial concern and legislative interest:

- Baseline Amount Flexibility - Staff propose allowing baseline amount aggregation by pollutant and/or sites under common control for sites located in the same nonattainment area. During the informal comment period, stakeholders submitted comments in support of and in opposition to baseline amount determination flexibilities.
- Baseline Amount Adjustments - Adjustments to established baseline amounts are proposed for limited circumstances, which may not be considered approvable by EPA.[44]

Better Brazoria reasserts its concerns submitted in their Informal Comments that are incorporated herein by reference.

VI. CONCLUSION

Better Brazoria appreciates the opportunity to provide these comments and is hopeful that the TCEQ will abandon its Alternative Fee Program and implement a direct fee structure that is compliant with Section 185 of the Federal Clean Air Act.

LONE STAR LEGAL AID
EQUITABLE DEVELOPMENT INITIATIVE
ENVIRONMENTAL JUSTICE PROJECT

Caroline Crow, Staff Attorney
ccrow@lonestarlegal.org
713-652-0077 x1011

[43] TCEQ Interoffice Memorandum RE Commission Approval for Proposed Rulemaking "Executive Summary", Docket No. 2023-1061-RUL, (Apr. 11, 2025) at 3-5.
[44] TCEQ Interoffice Memorandum RE Commission Approval for Proposed Rulemaking "Executive Summary", Docket No. 2023-1061-RUL, (Apr. 11, 2025) at 4.

LONE STAR LEGAL AID'S INFORMAL COMMENTS SUBMITTED ON BEHALF OF BETTER BRAZORIA—CLEAN AIR & CLEAN WATER

Proposed Rulemaking to Address the Federal Clean Air Act, Section 185 Fee
Rule Project No. 2023-131-101-AI

September 9, 2024

PAUL E. FURRH, JR.
Attorney at Law
Chief Executive Officer

ERNEST W. BROWN, JR.
Attorney at Law
Deputy Director

SAPNA AIYER
Directing Attorney

HEATHER KEEGAN
Director of Litigation

AMY DINN
KIMBERLY BROWN MYLES
Litigation Directors

Lone Star Legal Aid
EQUITABLE DEVELOPMENT INITIATIVE

CAROLINE CROW
NOOR MOZAFFAR
CHASE PORTER
JOE WELSH
Staff Attorneys

Houston Address:
P. O. Box 398
Houston, Texas 77001-0398

1415 Fannin, 2nd Floor
Houston, TX 77002

(713) 652-0077 x 8108 Telephone
(800) 733-8394 Toll-free

September 9, 2024

VIA EMAIL
185Rule@tceq.texas.gov.

Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. E
Austin, Texas 78753

RE: Federal Clean Air Act Section 185 Fee Program

To whom it may concern:

On behalf of our represented client, Stakeholder Better Brazoria – Clean Air & Clean Water (Better Brazoria), Lone Star Legal Aid (LSLA) provides the following informal comments to the Texas Commission on Environmental Quality (TCEQ) on the Federal Clean Air Act (FCAA) Section 185 Fee Program (42 U.S.C. § 7511d).

I. INTRODUCTION

LSLA's mission is to protect and advance the civil legal rights of the millions of Texans living in poverty by providing free advocacy, legal representation, and community education to ensure equal access to justice. LSLA's service area encompasses one-third of the State of Texas, including 72 counties in the eastern and Gulf Coast regions of the state. LSLA's Environmental Justice team focuses on the right to the fair distribution of environmental benefits and burdens and the right to equal protection from environmental hazards. LSLA advocates for these rights on behalf of impacted individuals and communities in LSLA's service area. These comments are submitted on behalf of Better Brazoria – Clean Air & Clean Water, which serves and represents the low-income environmental justice community of Freeport, Brazoria County, and its residents.

Stakeholder Better Brazoria was formed to educate Freeport residents about environmental issues and to advocate for solutions to protect and improve air and water quality. To accomplish this mission, Better Brazoria holds community meetings to raise awareness about potentially harmful air and water pollution events in Freeport, Texas and Brazoria County. The group communicates

with TCEQ and other state and local governmental entities to remain up to date on the latest developments in the area. Better Brazoria engages with the public participation component of the environmental permitting process by submitting comments, and engaging in hearings on air, water, and waste permits, and submitting comments, like these, on State and Federal Clean Air Act issues in the region. The group's goal is to encourage protection of public health through compliance with permitting schemes and environmental laws.

Better Brazoria is a stakeholder in submitting comments on the proposed FCAA Section 185 Fee Program because the group: (1) primarily serves Brazoria County, an area designated as in severe nonattainment effective as of November 7, 2022; (2) serves an area which is home to many major sources of both Volatile Organic Compounds (VOCs) and Nitrogen Oxides (NOx); and (3) regularly receives and reviews public notices related to a diverse selection of air permitting actions from TCEQ.

At a minimum, any Section 185 Fee Program that TCEQ adopts must guard against major stationary sources employing creative or flexible emissions counting methods, where artificial emissions that are unrepresentative of the pollutants contributing to ozone are evaluated or offset by paper reductions to avoid penalties. Emissions assessments must reflect comprehensive emissions and penalties must be levied to force the region to meet attainment timely.

II. BRAZORIA COUNTY IS AN ENVIRONMENTAL JUSTICE AREA THAT IS AFFECTED BY MAJOR SOURCES OF NO_x AND VOC POLLUTION.

Freeport, Texas is a small industrial city on the Gulf Coast located in Brazoria County, Texas. A large percentage of Freeport's approximately 12,169 residents are minorities: over 64% are of Hispanic descent, while another 14% identify as Black or African American. Freeport has a higher minority population than 82% of American communities. Freeport is also in the 82nd percentile nationally for the proportion of low-income residents, with a per capita income of $19,277 and 55% of the population classified as low-income. Thirty-five percent of residents have less than a high school education, which is worse than 93% of American communities. And 10% are linguistically isolated, well above the national average of 4%. Freeport residents are closer to facilities handling hazardous waste than 92% of American communities.

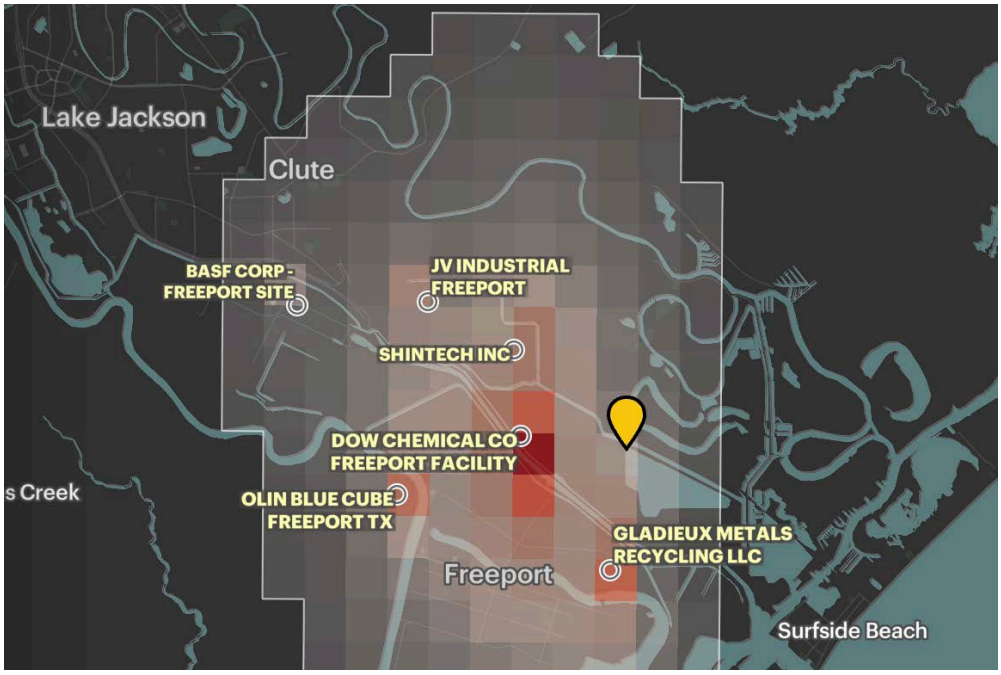
Freeport residents also rank highly in proximity to Superfund sites. Nearly the entire Freeport population lives within five miles of the GulfCo Marine Maintenance Superfund site. GulfCo Marine Maintenance was the site of barge cleaning operations for three decades and became a Superfund site when evidence revealed that hazardous substances were migrating from the site and posing a threat to nearby drinking water supplies and downstream sensitive environments. Additionally, Freeport residents are closer to facilities that discharge water pollution than 98% of American communities. Water pollution is a serious problem, but air quality remains one of the community's greatest concerns.

This high concentration of minority and low-income residents in conjunction with a high concentration of large industrial polluters is indicative of an environmental justice community. In Freeport, as along much of the Texas Gulf Coast, minority and low-income populations continue to bear an extremely disproportionate burden of the toxic pollution from the state's petrochemical

industry, while being denied a share in the economic prosperity that the industry has brought to other parts of the state.

ProPublica's recent study on cancer causing industrial air pollution in the United States, identified Freeport as a hot spot.[1] This analysis reviewed five years of modeled EPA data and identified more than 1,000 toxic hot spots across the country.[2] The map below in **Figure 1** illustrates the facilities in Freeport, Texas, and the dark red spots denote the most problematic areas.

Figure 1: Pro Publica Map of Facilities in Freeport, TX that Emit Toxic Chemical Emissions[3]



The major facilities contributing to toxic air emissions in Freeport include:

- Gladieux Metals Recycling: (responsible for emitting Cobalt compounds, Arsenic compounds and Nickel compounds); contributes to **47.3%** of the estimated ***excess*** cancer risk in Freeport;
- Nalco Champion: (responsible for emitting Ethylene oxide, Formaldehyde, Propylene oxide and 3 more carcinogens); contributes to 40.9% of the estimated ***excess*** cancer risk in Freeport; and
- Dow Chemical (responsible for emitting Ethylene oxide, Butadiene, 1,3-, Dichloroethane, 1,2- and 40 more carcinogens); contributes to 11% of the estimated ***excess*** cancer risk in Freeport.[4]

[1] Al Shaw and Lylla Younes, The Most Detailed Map of Cancer-Causing Industrial Air Pollution in the U.S., Pro Publica, (Nov. 2, 2021 updated Aug. 28, 2023), https://projects.propublica.org/toxmap/.
[2] *Id.*
[3] *Id.*
[4] Al Shaw and Lylla Younes, The Most Detailed Map of Cancer-Causing Industrial Air Pollution in the U.S., Pro Publica, (Nov. 2, 2021 updated Mar. 15, 2022); https://projects.propublica.org/toxmap/

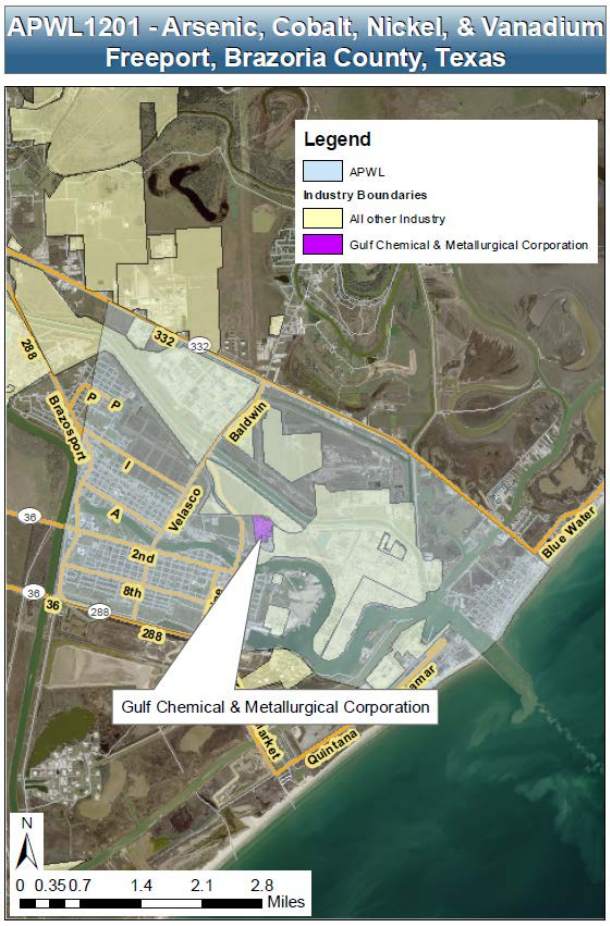
According to the Texas Attorney General's (OAG) 2021 lawsuit against Dow[5], the company's Freeport plant is particularly problematic. The OAG alleges that the Dow Plant has experienced "continuing problems associated with errors and equipment malfunctions resulting in emissions events that emit unauthorized contaminants into the environment."[6] And, during 2016-2021, TCEQ entered six administrative orders against Dow for air emission violations.[7]

While Dow remains an ongoing air quality concern, the Gladieux Facility (f/k/a Gulf Chemical and Metallurgical) also has a sordid criminal environmental history that continues to cause the local Freeport community concerns about airborne metal emissions. Especially because in 2005 the area around the Gladieux Facility was added to the Air Pollutant Watchlist as a result of elevated short-term Arsenic, Cobalt, Nickel, and Vanadium levels, which exceeded their respective air monitoring comparison values (AMCVs).[8] AMCV is a collective term used to describe chemical-specific air concentrations used to evaluate air monitoring data that are set to protect human health and welfare. Short-term AMCVs are based on data concerning acute health effects, odor potential, and acute vegetation effects.

TCEQ defined a large area where short-term exposure from this air pollution may cause respiratory symptoms and worsen existing medical conditions. As shown on the following map as Figure 2, this area covers nearly the entire city of Freeport.

[5] Cause No. D-1-GN-21-002123, State of Texas v. Dow Chemical Company, Travis County District Court, 250th Judicial District; Original Petition and Application for Injunctive relief (May 10, 2021) at 8.
[6] *Id*.
[7] *See*, Orders entered into the following dockets: Docket No. 2014-1053-AIR-E on May 23, 2015; Docket No. 2014-1881-AIR-E on Oct. 1, 2015; Docket No. 2015-1242-AIR-E on Jul. 13, 2016; Docket No. 2015-1671-AIR-E on Nov. 8, 2016; Docket No. 2017-0378-AIR-E on Feb. 27, 2018; and Docket No. 2016-1940-AIR-E on May 30, 2018.
[8] Texas Commission on Environmental Quality's Air Pollutant Watch List Area Map of 1201, Freeport, Texas.

Figure 2: TCEQ Air Pollutant Watchlist Map showing all of Freeport affected[9]



Gladieux purchased the Gulf Chemical facility out of bankruptcy in 2017, and the facility is still becoming fully operational while it is also expanding. As the TCEQ issues Gladieux more permits to begin and expand its operations in Freeport, the community's concern about harmful emissions has grown. The community is especially concerned because Gladieux has applied for permits with de minimis air emission limits, and the facility *only now* has a pending application for the initial issuance of its Title V permit—identifying NOx as the primary pollutant.

Additionally, Freeport is already home to the Freeport LNG terminal. This LNG terminal emits tons of pollutants which can damage lungs.[10] Moreover, an explosion and fire occurred at the Freeport LNG facility on June 8, 2022 (Incident No. 381194) releasing 476,698 lbs. of CO and 55,592 lbs. of NOx (Incident No. 381191). The direct cause of the June 2022 explosion is the

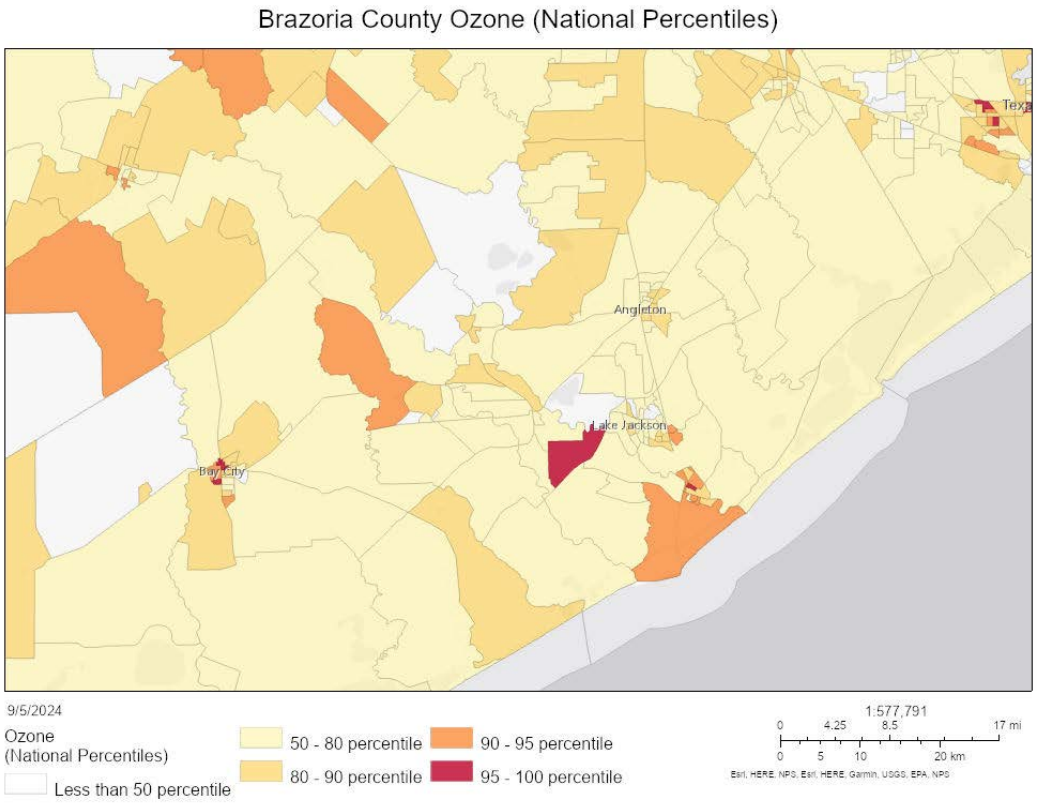
[9] Texas Commission on Environmental Quality, Air Pollutant Watch List Area Map of 1201, Freeport, Texas.
[10] Environmental Integrity Project, Troubled Waters for LNG: The COVID-19 Recession and Overproduction derail Dramatic Expansion of Liquefied Natural Gas Terminals (Oct. 5, 2020); https://environmentalintegrity.org/wp-content/uploads/2020/10/LNG-REPORT-10.5.20.pdf

subject of full investigative report by IFO Group for the Pipeline and Hazardous Materials Safety Administration (PHMSA),[11] and this incident resulted in a $163,054 fine by EPA.

Freeport remains concerned about ozone and has growing concerns about whether there is adequate monitoring in the region to capture accurate ozone measurements. There are an unusually high number of pipelines in the area, and the town is bordered on one side by Dow Chemical and BASF plants. These plants are both major suppliers of polyurethane raw materials and systems—which contribute major emissions that increase ozone pollution. According to local residents, the air in Freeport, and all of Brazoria County, often irritates residents' eyes on a windy day—other times there are noxious chemical clouds. All of these industries contribute to ozone pollution.

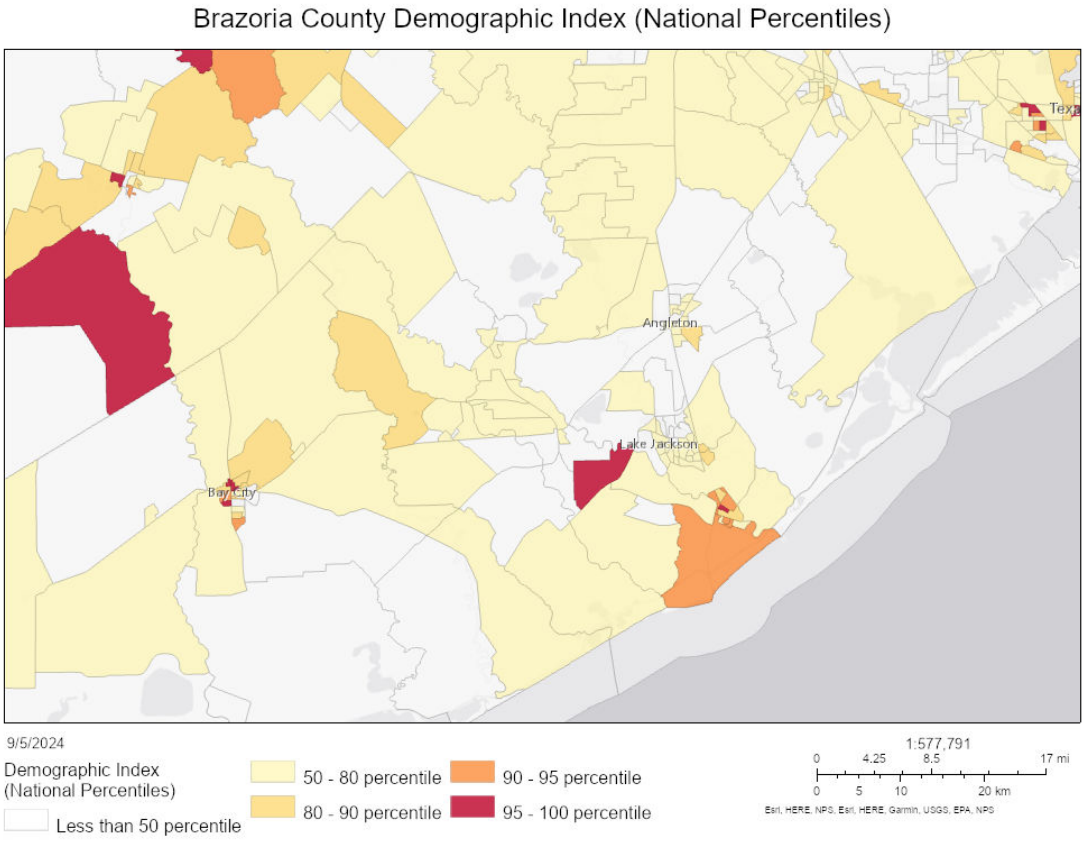
Figures 3 and 4 below illustrate the ozone burdens on the environmental justice communities in Brazoria County.

Figure 3: EPA EJ Screen Brazoria County Ozone as Compared with National Percentiles



[11] IFO Group, Freeport LNG, Quintana Island, Texas, June 8, 2022 - Loss of Primary Containment, Incident Investigation Report (October 30, 2022). A heavily redacted version of the published report is available here: https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2022-11/IFO-Group-RCFA-Report-final-redacted.pdf.

Figure 4: EPA EJ Screen Brazoria County Demographic Index



Major stationary sources are defined in 30 Texas Administrative Code Section 116.12 and are based upon actual or potential emissions. The major stationary source threshold in severe ozone nonattainment areas is 25 tons per year (tpy) of either actual or potential emissions of ozone precursors, NOx and VOCs.[12] According to the TCEQ's 2022 Emissions Inventory the following facilities are major sources of NOx in Brazoria County, per their reported actual emissions:

Table 1: Major Sources of NOx in Brazoria County according to TCEQ's Actual Emission Inventory

RN NUMBER	COMPANY	SITE	COUNTY	NOx (TPY)
RN100213198	SHINTECH INCORPORATED	SHINTECH FREEPORT PLANT	BRAZORIA	28.6632
RN106481500	FREEPORT LNG DEVELOPMENT LP	FREEPORT LNG PRETREATMENT FACILITY	BRAZORIA	31.2892
RN106603970	PHILLIPS 66 COMPANY	OLD OCEAN NGL FRACTIONATION PLANT	BRAZORIA	32.8244

[12] 30 TEX. ADMIN. CODE § 116.12, Table 1.

RN NUMBER	COMPANY	SITE	COUNTY	NOx (TPY)
RN106492325	INDORAMA VENTURES OXIDES LLC	LAB CHOCOLATE BAYOU PLANT	BRAZORIA	44.2969
RN110471240	LINDE INC	SWEENY HYDROGEN PRODUCTION PLANT	BRAZORIA	45.86
RN102607884	ENERGY TRANSFER FUEL LP	SWEENY COMPRESSOR STATION	BRAZORIA	56.0257
RN100218999	SI GROUP INC	SI GROUP TX OPERATIONS	BRAZORIA	83.7411
RN100238682	ASCEND PERFORMANCE MATERIALS OPERATIONS LLC	ASCEND PERFORMANCE MATERIALS CHOCOLATE BAYOU PLANT	BRAZORIA	276.0023
RN100223122	FREEPORT POWER LIMITED	OYSTER CREEK COGENERATION POWER UNIT 8	BRAZORIA	376.0823
RN100218049	BASF CORPORATION	FREEPORT SITE	BRAZORIA	468.0822
RN100217033	SWEENY COGENERATION LP	SWEENY COGENERATION FACILITY	BRAZORIA	502.9137
RN101619179	PHILLIPS 66 COMPANY	SWEENY REFINERY PETROCHEM	BRAZORIA	506.0627
RN108772245	BLUE CUBE OPERATIONS LLC	BLUE CUBE OPERATIONS FREEPORT	BRAZORIA	561.7876
RN100238708	INEOS USA LLC	CHOCOLATE BAYOU PLANT	BRAZORIA	898.4758
RN100825249	CHEVRON PHILLIPS CHEMICAL COMPANY LP	SWEENY OLD OCEAN FACILITIES	BRAZORIA	1113.2323
RN100225945	THE DOW CHEMICAL COMPANY	DOW TEXAS OPERATIONS FREEPORT	BRAZORIA	1454.4506

According to the TCEQ's 2022 Emissions Inventory the following facilities are major sources of Volatile Organic Compounds (VOCs) in Brazoria County, per their actual reported emissions:

Table 2: Major Sources of VOCs in Brazoria County according to TCEQ's Actual Emission Inventory

RN NUMBER	COMPANY	SITE	COUNTY	VOC (TPY)
RN100215425	DENBURY ONSHORE LLC	MANVEL FIELD CENTRAL COMPRESSOR STATION	BRAZORIA	24.5534
RN100221134	PHILLIPS 66 COMPANY	FREEPORT TERMINAL	BRAZORIA	26.716
RN100217033	SWEENY COGENERATION LP	SWEENY COGENERATION FACILITY	BRAZORIA	28.8907
RN102037959	TEXAS BARGE & BOAT INC	TEXAS BARGE & BOAT	BRAZORIA	32.5224
RN100218999	SI GROUP INC	SI GROUP TX OPERATIONS	BRAZORIA	34.8584
RN106603970	PHILLIPS 66 COMPANY	OLD OCEAN NGL FRACTIONATION PLANT	BRAZORIA	42.9465
RN102200482	CHEVRON PHILLIPS CHEMICAL COMPANY LP	CLEMENS TERMINAL	BRAZORIA	51.9994
RN106302508	BRASKEM AMERICA INC	BRASKEM AMERICA	BRAZORIA	54.8827
RN100213198	SHINTECH INCORPORATED	SHINTECH FREEPORT PLANT	BRAZORIA	59.257
RN100238682	ASCEND PERFORMANCE MATERIALS OPERATIONS LLC	ASCEND PERFORMANCE MATERIALS CHOCOLATE BAYOU PLANT	BRAZORIA	69.6687
RN108772245	BLUE CUBE OPERATIONS LLC	BLUE CUBE OPERATIONS FREEPORT	BRAZORIA	81.9446
RN100237668	EQUISTAR CHEMICALS LP	CHOCOLATE BAYOU POLYMERS	BRAZORIA	120.493
RN100218049	BASF CORPORATION	FREEPORT SITE	BRAZORIA	174.938
RN100238708	INEOS USA LLC	CHOCOLATE BAYOU PLANT	BRAZORIA	359.3506
RN101619179	PHILLIPS 66 COMPANY	SWEENY REFINERY PETROCHEM	BRAZORIA	397.3113
RN100825249	CHEVRON PHILLIPS CHEMICAL COMPANY LP	SWEENY OLD OCEAN FACILITIES	BRAZORIA	459.47
RN100225945	THE DOW CHEMICAL COMPANY	DOW TEXAS OPERATIONS FREEPORT	BRAZORIA	575.4314

III. ENVIRONMENTAL JUSTICE

The creation of a Section 185 Fee Program (Section 185 Program or Program) offers potential benefits to environmental justice communities. However, achieving such benefits in practice will require thoughtful regulations and careful design to ensure the Program effectively reduces emissions, protects vulnerable communities, and leads to long-term air quality improvements. Importantly, the fees collected should be reinvested into environmental justice areas. To ensure that occurs, there must be a regulatory framework to provide transparency in funding allocation and continued robust public participation in the Program's development.

When considering the effectiveness of fees, the regulations should set the fees high enough to compel business to invest in cleaner technologies rather than simply absorb costs as a business expense. The Program should additionally include provisions to funnel collected fees into programs that directly benefit communities, such as funding air monitoring, public health initiatives, or pollution mitigation projects.

Importantly, the Clean Air Act emphasizes public participation. These requirements for public participation are codified by statute.[13] Accordingly, a Section 185 Fee Program must include opportunities for public comment, particularly from the communities most affected by air pollution.

To ensure long term compliance and emissions reduction, the Section 185 Fee Program should also include compliance and accountability measures like ongoing evaluations of the Program's effectiveness including periodic assessments of emission reductions and health improvements and increasing fees for repeated non-compliance.

IV. DETERMINING BASELINE EMISSIONS

During the stakeholder meeting on August 8, 2024, TCEQ specifically requested input on several concepts related to determining baseline emission amounts for purposes of penalty fees for the Houston-Galveston-Brazoria (HGB) area. Better Brazoria responds to each topic that the TCEQ highlighted below.

A. New major sources after the attainment date.

New major sources after the attainment date could include at least two types of sources: (1) sources that were permitted but are not operational; and (2) sources that were recently permitted.

For the first type of source, EPA previously found rules exempting sources which began operation after the attainment year did not fully comply with the requirements of Section 185.[14] Accordingly,

[13] 40 C.F.R. §§ 51.161, 51.166(q).
[14] Lily Wong, U.S. Environmental Protection Agency Technical Source Document for EPA's Rulemaking for the California State Implementation Plan as submitted by the California Air Resources Board Regarding San Joaquin Valley Unified Air Pollution Control District Rule 3170, "Federally Mandated Ozone Nonattainment Fee." (July 19, 2011) at 4.

TCEQ may not promulgate rules which allow major sources who delay operations until after the attainment year to avoid penalties via an exemption.

For the second type of source, one approach to assessing penalties for new major sources which were permitted after the attainment date is to evaluate when the source became major. For example, 3 categories could be created to identify when the source became major: (1) at the beginning of the attainment year, (2) during the attainment year, or (3) after the attainment year. For each category, a penalty would be assessed but could be assessed differently. All three categories would be subject to penalties for allowable emissions. Allowable emissions should include emissions allowed for a source through permits, plans, applicable rules, and/or implementation plans. Additionally, depending on when a source became major, the rules could require an extrapolation of the source's actual emission over the entire initial year of operation as a Major Source. Creating this structure up front will incentivize emission reduction because it will assure that a major source contributing to nonattainment will be penalized for emissions overages. This way, the Program will disincentive timing games to avoid penalties and delay necessary permitting.

Additionally, pursuant to §§ 182(d), 182(e), 182(f) and 185, a major stationary source must have a Title V permit. For purposes of any fee program, pending Title V Permit renewals, or an untimely Title V Permit renewal, should still be subject to penalties. These penalties should be based on previous years' actual emissions or extrapolated for recent operational periods, if necessary.

B. Minor sources that existed on the attainment date but later became major sources.

Pursuant to Section 185, if a source is major, then a penalty must be assessed. To manage the nuance of a source's transition, the approaches below could be considered.

For a source that transitions to a major source after the attainment year, baseline emission could be calculated as the lower of either: (1) emissions allowable by permits, or rules, for the source, extrapolated over a year from the first operational period as a major source; or (2) actual emissions for the source extrapolated over a year from the first operation period as a major source.

C. Equipment sold or transferred between companies.

Section 185 is a federal mandate requiring the State to create a fee program. The EPA approves the Program including how the State will assess penalties for each major source in areas where NAAQS ozone nonattainment is graded as severe or extreme. And while TCEQ has discretion to implement a program, that program must comply with the FCAA to be approved.

The Texas Clean Air Act defines "Facility" as something discrete that contains a stationary source, including "equipment."[15] Equipment remains undefined but is included in the definition and could be construed as synonymous with Facility. Importantly, Facility is a unique term specific to air permitting in Texas.[16] According to TCEQ Guidance, TCEQ equates the federal term "Emission

[15] TEX. HEALTH & SAFETY CODE §382.003(6).
[16] Texas Commission on Environmental Quality, Air Permits Division, Air Permit Reviewer Reference Guide APDG 6110 Air Pollution Control, How to Conduct a Pollution Control Evaluation, https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf at 31.

Unit" with the State's term "Facility," but the two definitions are not identical. In guidance, the TCEQ has indicated that the State's term is at least as stringent as the federal term.[17]

> Emission Unit: any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the [FCAA]. 40 C.F.R. § 70.2.
>
> Facility: means a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility. TEX. HEALTH & SAFETY CODE § 382.003(6).

For purposes of a Section 185 Fee Program, a Facility "can constitute but cannot contain a 'major stationary source'" as defined by federal law.[18] And, a major stationary source "can include more than one [Facility]" as defined by Texas law, or a Facility can be "a major stationary source in and of itself."[19] Because Facility and Equipment may be interchangeable, or a major stationary source may find some benefit in interchanging these terms to obscure emissions data, any Section 185 Free Program must guard against this. Specifically, the Texas Clean Air Act contains unique terms which may encompass a major source subject to a penalty fee under Section 185—Better Brazoria requests that the TCEQ provide explicit definitions related to any adopted penalty program.

The selling or transfer of "equipment" between companies should impact penalties where there is credible evidence showing an owner is transferring equipment to avoid the fee. Credible evidence could include transfers near or around the attainment date, multiple sources previously under singular ownership and then spread out over multiple but other related entities, or perpetual owner name changes. Any Section 185 Fee Program must contemplate that a source's owner could try to disaggregate ownership of equipment at a Facility to avoid a penalty. The TCEQ has implemented rules in other program areas to prevent regulated parties from circumventing rules to avoid consequences.[20] Rules related to assessing penalties when equipment is sold or transferred near or around the attainment date should also include objective factors to be applied to make this determination.

---

[17] Texas Commission on Environmental Quality, Air Permits Division, Air Permit Reviewer Reference Guide APDG 6110 Air Pollution Control, How to Conduct a Pollution Control Evaluation, https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf at 30.

[18] Texas Commission on Environmental Quality, Air Permits Division, Air Permit Reviewer Reference Guide APDG 6110 Air Pollution Control, How to Conduct a Pollution Control Evaluation, https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf at 31.

[19] Texas Commission on Environmental Quality, Air Permits Division, Air Permit Reviewer Reference Guide APDG 6110 Air Pollution Control, How to Conduct a Pollution Control Evaluation, https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf at 31; *see also* 40 C.F.R. § 51.165(a)(1)(iv)(A).

[20] *See* TEX. ADMIN. CODE § 50.143(b) requiring the Executive Director to review an application submitted and withdrawn between certain years when the TCEQ rules changed related to a contested case hearing with any resubmitted application to ensure that the two applications were not substantially similar and were not filed in attempts to circumvent the hearing request portion of the TCEQ's public participation requirements. The TCEQ said this requirement was a necessary and long-standing agency policy to prevent circumvention of the hearing request portion of the public participation requirements. The TCEQ rules include factors to be reviewed when determining if applications are substantially similar.

Additionally, if a Facility or "equipment" does change hands resulting in some suspension of operations, then fees should still be assessed based on either the prior year's emissions or extrapolated emissions utilizing Actual Emission, as defined by the program.

At bottom, terms related to or defining a major source at the State and Federal level cannot conflict and cannot serve as a basis to avoid penalty fees mandated by Section 185.

D. Aggregation of NOx and VOC emissions for a baseline determination.

Better Brazoria advocates against commingling and aggregating two different emission types to determine baseline emissions. Section 185(a) requires *each* major stationary source of VOCs to reduce emissions or pay a fee. Section 182(f) creates an independent fee obligation to *each* major stationary source of NOx. Therefore, each source is subject to its own discrete fee obligation and each fee obligation requires separate calculation and support. These two emission types cannot be interchanged or substituted for one another. Moreover, NOx and VOCs may not contribute equally to ozone formation, and the major stationary sources in an area may also contribute differently to ozone. Accordingly, each major source of NOx and each major source of VOCs in an area, must have independent penalties assessed consistent with each's emissions.

Moreover, aggregation should be prohibited as it could incentivize avoiding a major source application. Section 185 is clear that the fee program is intended to be based on tons of VOC emissions. While Section 182(f) complements Section 185 and extends the fee program to NOx, it has never meant that VOC controls required by the FCAA can be replaced by NOx-equivalent controls. Instead, Section 182(f) is clear, major stationary sources of VOC emissions shall "also" apply to major stationary sources of NOx.[21] In other words, the NOx requirement is additional to, not in lieu of, required VOC controls.

E. Aggregation of sites under common control for a baseline determination.

Section 185 imposes an emission fee on *each* major source of VOC emissions and on *each* major source of NOx emissions in areas of a state that missed the attainment deadline.[22] This penalty is a kind of automatic sanction on major sources contributing to nonattainment—the purpose of which is to achieve the primary NAAQS "as expeditiously as practicable."[23] Thus a penalty program should be designed to promote emission reductions at *each* applicable major source as expeditiously as practicable.

Aggregation of emissions across sources in different locations, but under common control, conflicts with the direct application of Section 185's language which specifically requires penalties to be assessed for *each* major stationary source in an area. If sources under common control are allowed to offset total emissions by including another source with decreased emissions, it does not

[21] FCAA Section 182(f)(1).
[22] 42 U.S.C. § 7511(d).
[23] EPA can allow a state ten years from the date of designation if it deems it appropriate, given the severity, availability, and feasibility of control measures. 42 U.S.C.A. § 7502(a)(2)(A). The deadline for achieving the secondary standards remains "as expeditiously as practicable." 42 U.S.C.A. § 7502(a)(2)(B).

further the purpose of the Clean Air Act, or a Section 185 Fee Program. Such artificial offsets would disincentivize the major source from decreasing its emissions because it could reduce emissions elsewhere and then not suffer a penalty for the overages at the major source. This could result in potentially dire consequences for overburdened communities. For example, a major source may reduce its emissions, but those emission reductions could be at a source located anywhere—instead of at the major source in an overburdened community. In fact, the source in the overburdened community, via these artificial offsets, may be able to increase its emissions in that vulnerable community while reducing emissions elsewhere and entirely avoid penalties. In this circumstance if both major sources were under common control, then potentially, the reduction would eliminate the penalty that would otherwise be due by the polluter in the overburdened area. Thus, extinguishing any punitive consequence that would otherwise be levied against the major source. This would undermine the purpose of the penalty and the Act. The goal of Section 185 Fees is to incentivize emissions reductions by assessing a penalty on each major source that fails to achieve emissions reductions.

Previously, Texas relied on "consistency with the [Houston-Galveston-Brazoria] attainment plan" for the 1-hour ozone standards to justify aggregating emissions among major sources in different locations under common control." However, this aggregation was only allowed under an equivalent alternative program.[24] Importantly, the EPA indicated that alternative program flexibilities, such as aggregation, will "potentially" not be allowed for the 2008 eight-hour ozone NAAQS.[25] HGB was required to reach attainment by the end of 2020 to meet its July 20, 2021 serious attainment date. Based on monitoring data, Texas qualified for a one-year attainment date extension. By 2022, Texas still failed to reach attainment, so EPA proposed to deny the extension request and reclassify the area to a graduated designation of severe nonattainment for the 2008 eight-hour ozone NAAQS.

Texas has a duty to implement a fee program consistent with the language of Section 185.[26] The above-outlined failures to attain do not provide a reasonable basis for Texas to create a flexible program that provides for aggregation of sources or other artificial emissions reductions.

Section 185 expressly, repeatedly, mandates assessment of emissions from *each* source and payment of the applicable fee from *each* source. The plain language of the FCAA does not support source aggregation. Absent such express statutory support combined with Texas' consistent failure to attain, Texas cannot engage in source or emission aggregation which allow industry to circumvent fee payment.

The text of Section 185(a) requires that programs and protections be designed for the "area to which such plan revision applies" directing the penalties to be applied to the major sources in the area. Accordingly, major sources under common control cannot be aggregated together just because they are under common control. Prohibiting aggregation of sources under common control

[24] 85 FR 8,411 at 8,421 (2020).
[25] TCEQ Houston-Galveston-Brazoria (HGB) Technical Information Meeting Section 185 Fee (July 28, 2022) at Slide 9.
[26] 85 FR 8,411 at 8,421 (2020).

will effectively ensure that there is a fair distribution of the benefits of pollution reduction to the communities most affected by pollution.

***

Additionally, aggregation is similar to averaging because both provide artificial emission sums. While an average may be calculated by summing up all the values in a dataset and dividing by the number values, aggregation is similarly not representative of actual emissions. If a source can cherry pick values from major sources—either increased or decreased—and total these up without providing a cumulative measure and without considering distribution or centrality—a similarly artificial sum of the source's emissions is created. In the past, the EPA has disapproved portions of Section 185 Fee Programs that average baseline emissions over 2-5 years.[27] Therefore, any rule must assess penalties based on the "actual emissions" of a major source for limited prescribed periods of time. Actual Emissions must be defined by the regulations and should meet specific criteria more fully explained below at Section VI.A.

V. DETERMINING YEARS FOR PENALTY FEE ASSESSMENTS

A. Attainment Date Definition

The Section 185 Fee Program must clearly define Attainment Date. The Attainment Date should reflect the EPA-approved date by which the area must meet the federal air quality standard for ozone. According to the TCEQ, January 1-December 31, 2026 is the attainment year for the 2008 eight-hour ozone NAAQS.[28] In the event that a nonattainment area classified as Severe or Extreme fails to attain the ozone standard by the required date, Section 185 requires each major stationary source that is a source of either NOx or VOCs located in that nonattainment area must pay a fee to the state for each calendar year in excess of 80% of the "baseline amount." According to the EPA's most recent Memorandum on effective fee rates, Section 185 fees are to be based on a calendar year—January through December.[29] As a result, the EPA's Memorandum scales the fee rates and adjusts it to reflect this calendar year requirement. TCEQ regulations should clearly define the Attainment Date consistently with EPA Guidance so that proper fees are assessed for the appropriate periods of time. Below is a chart with the applicable attainment deadlines, fees should be levied against any source not meeting the deadlines below.

---

[27] Lily Wong, U.S. Environmental Protection Agency Technical Source Document for EPA's Rulemaking for the California State Implementation Plan as submitted by the California Air Resources Board Regarding San Joaquin Valley Unified Air Pollution Control District Rule 3170, "Federally Mandated Ozone Nonattainment Fee." (July 19, 2011) at 4.

[28] *See* TCEQ Section 185 Fee Overview of the Houston-Galveston-Brazoria (HGB) Area Eight-Hour Ozone Nonattainment Area, (Apr. 26, 2023) at slide 14, https://www.tceq.texas.gov/downloads/air-quality/point-source/hgb_185fee_final_042623.pdf

[29] Scott Mathias, EPA Memorandum, "Clean Air Act Section 185 Fee Rates Effective for Calendar Year 2023 (Oct. 12. 2023) at 2, https://www.epa.gov/system/files/documents/2024-01/memorandum_sec-185-penalty-fees-for-year-2023_10-12-2023.pdf

Table 3: Houston-Galveston-Brazoria Area: Attainment Status by Pollutant[30]

POLLUTANT	PRIMARY NAAQS	AVERAGING PERIOD	DESIGNATION	COUNTIES	ATTAINMENT DEADLINE
Ozone (O_3)*	0.070 ppm (2015 standard)	8-hour	Serious Nonattainment	Brazoria, Chambers, Fort Bend, Galveston, Harris, Montgomery	August 3, 2027
	0.075 ppm (2008 standard)	8-hour	Severe Nonattainment	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, Waller	July 20, 2027

B. Baseline Years for Purposes of Penalties

The plain text of the rule requires that baseline emissions be determined during the attainment year. FCAA § 185(b)(2). A deviation from this requirement can only be provided for if the major source demonstrates that its emissions were irregular, highly variable, or cyclical—such that the attainment year is no longer indicative of the major source's emissions.[31] This deviation is only applied when it is necessary to determine actual emissions by comparing a source's actual emissions to its permitted emissions. A stationary source should only resort to an alternative baseline when year-to-year variation is significant. FCAA § 185(b)(2). Sources should be required to submit emissions information that demonstrates and justifies use of any alternative baseline.

A major source cannot be allowed to cherry pick a year that will provide the baseline which is most beneficial to them. Moreover, this optionality or unfettered discretion should not be afforded to TCEQ because it is unsupported by the Act. There is no basis for such baseline cherry-picking. If Texas selected an extended baseline period such that it allowed a source to select the most favorable period, at least two harmful consequences could occur: (1) penalties accrued from exceedance of the 80% threshold would not be realized; and (2) it would ease a source's ability to artificially decrease their emissions 20% only to avoid the fee while not contributing to the area's attainment. While some states award a source's artificial emissions reduction by excluding the source from a penalty fee, such exclusions from the penalty program are unproductive toward achieving attainment—and so run counter to the Act's intentions. When emissions are judged against a cherry-picked, extended baseline it becomes too simple for sources to engage in artificial reductions and continue operation as usual, avoiding mandatory penalties. Most importantly, the

[30] Texas Commission on Environmental Quality, Houston-Galveston-Brazoria: Current Attainment Status, https://www.tceq.texas.gov/airquality/sip/hgb/hgb-status
[31] FCAA § 185(b)(2).

use of the highest subset of emissions over an extended baseline is inconsistent with Section 185(b)(2).

The true purpose of allowing a "flexible baseline" is to ensure accurate representation of emissions from a given source. If a flexible baseline option is extended to all sources, this flexibility can be used to game the Program and avoid penalization. Accordingly, a major source should be required to demonstrate their process variability before the state regulator approves the use of such an option.

C. Extension Year Definition and Exemption

In October 2022, EPA proposed to deny the State of Texas' request for a one-year extension from July 20, 2021, to July 20, 2022, for the HGB area. The proposed denial of TCEQ's request came after EPA considered "air quality trends in the Houston area that indicated the area would not timely attain by the extended attainment date, nor even quality for a second 1-year extension of the attainment date"[32] and the burden on "communities within the area."[33]

Figure 5: Table from Federal Register Noting Design Values for HGB (2018-2020 and 2020)

TABLE 1—2008 OZONE NAAQS SERIOUS NONATTAINMENT AREA PROPOSED ACTION SUMMARY

2008 NAAQS nonattainment area	2018–2020 design value (DV) (ppm)	2008 NAAQS attained by the serious attainment date	2020 4th highest daily maximum 8-hr average (ppm)	Area failed to attain 2008 NAAQS but state requested 1-year attainment date extension based on 2020 4th highest daily maximum 8-hr average ≤0.075 ppm
Dallas-Fort Worth, TX*	0.076	Failed to Attain	0.077	No.
Denver-Boulder-Greeley-Ft. Collins-Loveland, CO.	0.081	Failed to Attain	0.087	No.
Greater Connecticut, CT	0.073	Attained	0.071	N/A.
Houston-Galveston-Brazoria, TX	0.079	Failed to Attain	0.075	Yes.
Morongo Band of Mission Indians	0.099	Failed to Attain	0.103	No.

Importantly, the HGB area has never met any of the ozone standards at the time of implementation. As a result of these multiple failures to attain during previously requested extension years, Texas should not be afforded any additional extension years. Providing an extension or an exemption of penalties in an improperly approved extension year will disproportionately impact overburdened environmental justice communities, and as such would be both violating the FCAA and an abuse of agency discretion.

Better Brazoria does believe that the HGB area would qualify for any additional extensions in meeting attainment. As a basic premise, if there is more than one exceedance in the year preceding any extension year, then that area should not be eligible for an extension year. However, if the TCEQ were inclined to try to create regulations contemplating an extension these regulations should mirror requirements from the FCAA in determining whether an area is eligible for an extension year to meet attainment. Section 181(a)(5) of the CAA provides the EPA the limited discretion to extend an area's applicable attainment date by 1 additional year upon application by

[32] 87 FR 60,926 at 60,927 (Oct. 7, 2022); *see also* 87 FR 2185 at 21835 (April 13, 2022).
[33] *Id.*

any state if the state meets the two criteria under CAA section 181(a)(5) as interpreted by the EPA in 40 C.F.R. §51.1307. Any extension year should be approved by the EPA and requested under Section 181(a)(5) of the FCAA.

VI. OTHER ISSUES

A. Determining emissions

Clarification must be provided to accurately assess the major stationary source emissions subject to the Section 185 fee program. Section 185 determines at least two categories of emissions, actual and allowable, both are pivotal to determining a baseline exceedance. However, the provision does little to explain what emissions should be included under those two categories. Texas' Section 185 fee program must fill this statutory gap by requiring the broadest definition of actual or allowable emissions to be calculated toward both the emissions baseline and the annual emissions subject to the fee. Only a broad definition of actual and allowable emissions would fulfill the statutory objective of restoring ozone attainment in the HGB area. In all instances, the baseline emissions should be comprehensive.

Actual Emissions should provide a comprehensive report of the source's emissions. Actual Emissions should include: (1) Permitted Emissions; (2) Regulated Emissions; (3) Fugitive Emissions; and (4) Unregulated Emissions.[34] Permitted Emissions include stationary point source emissions covered under a TCEQ-issued permit. Regulated Emissions include emissions controlled by Permits by Rule or Standard Permits and other emissions that are regulated but not subject to Prevention of Significant Deterioration or New Source Review requirements. Fugitive emissions are defined by regulations and include any "gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening designed to direct or control its flow.[35] Unregulated emissions should include unauthorized emissions as defined by 30 TEX. ADMIN. CODE § 101.1, or those emissions generated from newly emerging technologies.

Allowable Emissions are broader than Actual Emissions, and this should be reflected by Texas' definition of the term. At minimum, such definition must contemplate a source's maximum potential to emit (PTE), also incorporating likely fugitive emissions and maintenance, startup, and shutdown (MSS) emissions. For each source, Allowable Emissions could include a required calculation of average annual fugitive and MSS emissions as those would be emissions attributable toward "allowable" emissions under the program.

If a source is subject to partial years or other timing issues relevant to Actual or Allowable Emissions calculations, emissions should be extrapolated using the most recent available data using the emissions which most closely resemble the source's defined emissions for the relevant period.

[34] South Coast Air Quality Management District, Preliminary Draft Staff Report – Proposed Rule 317.1: Clean Air Act Nonattainment Fees for the 8-hour Ozone Standards, at 2-3 (March 2024).
[35] 30 TEX. ADMIN. CODE § 101.1.

B. Equivalent Alternative Programs

The EPA has already indicated that alternative program flexibilities, such as aggregation, will "potentially" not be allowed for the 2008 eight-hour ozone NAAQS. [36] Accordingly, Texas cannot create a program that will employ such flexibilities. Section 185(a) expressly provides that fees shall be paid as a penalty. The program is intended to penalize a major stationary source in a nonattainment area. Sources are not intended to benefit from the program as many "equivalent alternatives" allow. Further, Section 172(e) does not identify how a regulating body would provide alternative options, waiver, or equivalency to statutory requirements. Instead, Section 172(e) focuses on preservation of otherwise required controls. The penalty provision of Section 185(a) is a "control that section 172(e) requires to be retained." *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 903 (D.C. Cir. 2006). Section 172(e) does not create a loophole to avoid Section 185's directive that penalties must be assessed against major stationary sources of ozone precursors operating in ozone NAAQS nonattainment areas.

Recent Section 185 programs have also recognized Section 172(e)'s inability to fundamentally alter the purpose and operation of Section 185 fee penalty programs. For example, in 2022 San Diego Air Pollution Control District (San Diego APCD) recognized it could not adopt an equivalent fee program.[37] San Diego APCD stated "according to EPA's guidance, an alternative fee program for the 2008 8-hour ozone NAAQS is not a SIP-approvable element."[38] Later in the same document, San Diego APCD "confirmed with EPA that an alternative fee program" is not an approvable element of a Section 185 fee program and that including such a program would at minimum "set a new precedent."[39] And, in March 2024, South Coast Air Quality Management District (South Coast AQMD) reached the same conclusion in its Proposed Rule to adopt Nonattainment Fees for the 2008 and 2015 8-hour Ozone. South Coast AQMD's Staff Report concluded "because [the 8-hour standards] have not been revoked … EPA would not allow use of [an] alternative approach for these standards and required adherence to CAA section 185 through fee collection."[40] Accordingly, an alternative equivalent fee program is prohibited.

C. TCEQ cannot use Mobile Source Fees for VOC emissions to mitigate the Statutory Obligations of Major Stationary Sources.

Previous non-attainment fee programs have considered placing fees on mobile sources in mistaken attempts to pursue Section 185's objectives. TCEQ cannot include such a program to satisfy Section 185 fee program requirements. While mobile sources undoubtedly produce VOC emissions, in the HGB area they are not the primary source and should not be used as a scapegoat to reduce major stationary source's obligations under the program. Further, as explained above,

[36] TCEQ Houston-Galveston-Brazoria (HGB) Technical Information Meeting Section 185 Fee (July 28, 2022) at Slide 9.
[37] San Diego Air Pollution Control District, Adoption of Proposed New Rule 45 – Federally Mandated Ozone Nonattainment Fees, at 12, 18 (June 9, 2022).
[38] *Id*. at 12.
[39] *Id*. at 18-19.
[40] South Coast Air Quality Management District, Preliminary Staff Report: Proposed Rule 317.1--Clean Air Act Nonattainment Fees for the 8-hour Ozone Standards, at 15 (March 2024).

equivalent alternative programs are impermissible because the 8-hour ozone NAAQS are currently enforceable and have not been revoked.[41]

TCEQ's 2022 data for VOC emission in HGB reveals that mobile sources account for only 16% of all VOC emissions.[42] Stationary sources account for the remaining 84% of emissions.[43] EPA predicts that this trend will continue as stationary sources account for a greater proportion of VOC emissions while mobile sources emissions gradually dissipate.[44] By 2032 EPA predicts that mobile sources will contribute only 6% of total VOC emissions in the HGB area. Absent a compelling reason (not borne out in the data), TCEQ and EPA should not focus this program on mobile sources.

In *Natural Resource Defense Council v. United States Environmental Protection Agency*, the 9th Circuit found that the South Coast Air Quality Management District's Rule 317 fee program targeted mobile sources because they accounted for 80% of ozone pollution in the district, revoked NAAQS were controlled by the program, and "major sources [were] already strictly regulated and contribute[d] a relatively small amount to ozone pollution." 779 F.3d 1119, 1124, 1128 (9th Cir. 2015). Not so here. First, the 8-hour ozone NAAQS are currently enforceable, therefore, equivalent alternative programs are impermissible controls. And second, targeting mobile source VOC emissions reductions programs reaches only a small amount of ozone precursor emissions and does not achieve the emissions reductions envisioned by Section 185.

Accordingly, targeting mobile sources for fee payment deviates from the text of Section 185. Congress expressly intended major stationary sources to bear the cost and responsibility for their harmful emissions.[45] Reorienting this program to target mobile sources would mix the penalties conceived under Section 185 and burden the broader population, which contributes a disproportionately small level of emissions in comparison to the approximately seventeen major stationary sources subject to this penalty in Brazoria County.

D. Certain Program Exemptions are Not Approvable.

Major emission sources should not be exempt from fees because they are meeting independent requirements under the Clean Air Act to implement Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER). Section 185 applies when an area fails to attain, and it does not contemplate evaluating these other controls required under the FCAA. Rather, the Act prescribes two considerations for the penalty fee. One—whether the area is designated among the highest graduated levels of nonattainment: severe or extreme. Two—whether the source in the nonattainment area is a major stationary one.[46] The Act itself acknowledges that the level of control may vary by source. *See* FCAA § 185(b)(2) (explaining that a baseline emission level is determined by either the lower of actual emissions or emissions allowed by the permit applicable to the source, or, if there is not a permit, then the emissions allowed by a State Implementation Plan). And,

[41] EPA, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS*, at 2-3 (Jan. 5, 2010).
[42] Texas Commission on Environmental Quality, Texas Emission Sources - A Graphical Representation https://www.tceq.texas.gov/airquality/areasource/emissions-sources-charts
[43] *Id*.
[44] 84 FR 22,093 at 22,098 tbl.4 (May 16, 2019).
[45] 42 U.S.C. 7511(a).
[46] FCAA § 185(a).

importantly, the EPA expressly took issue where a fee program attempted to exempt sources from payment because the source employed BACT or beyond-BACT.[47] EPA identified this exemption as a rule deficiency preventing the rule's approval.

E. Options for Program Termination are Expressly Limited.

The Federal Clean Air Act prescribes only one condition under which a Section 185 fee program can be terminated—redesignation.[48] Texas previously promulgated rules prescribing when a program could be terminated, but EPA only explicitly approved the portion of these rules that is consistent with the FCAA.[49] EPA took no action on the other provisions included in the SIP submittal that did not correspond to the prescriptive requirements of the FCAA for program cessation.[50] Accordingly, Texas should abide by the statutory prescription that is provided and only allow for termination of the penalty fee program upon redesignation of HGB to attainment of the relevant ozone NAAQS. Limiting termination of the program to redesignation is consistent with the punitive nature of Section 185 which seeks to incentivize major stationary sources of ozone precursors to do everything in their power to return the area to consistent attainment.

VII. CONCLUSION

Better Brazoria appreciates the opportunity to provide these informal comments and is hopeful that the Section 185 Fee Program that the TCEQ implements will closely follow directives from the Federal Clean Air Act.

LONE STAR LEGAL AID
EQUITABLE DEVELOPMENT INITIATIVE
ENVIRONMENTAL JUSTICE PROJECT

Caroline Crow, Staff Attorney
ccrow@lonestarlegal.org
713-652-0077 x1011

Joe Welsh, Staff Attorney
jwelsh@lonestarlegal.org
713-652-0077 x1018

[47] Lily Wong, U.S. Environmental Protection Agency Technical Source Document for EPA's Rulemaking for the California State Implementation Plan as submitted by the California Air Resources Board Regarding San Joaquin Valley Unified Air Pollution Control District Rule 3170, "Federally Mandated Ozone Nonattainment Fee." (July 19, 2011) at 4.
[48] 42 U.S.C. § 7511d(a).
[49] 30 Tex. Admin Code 101.118; *see also* Technical Support Document, EPA Action on the Texas Severe Ozone Attainment Area Failure to Attain Fee Program (HGB Alternative Section 185 Fee Equivalent Program) for the Houston-Galveston-Brazoria 1-Hour Ozone Standard Attainment Area, Docket Number: EPA-R06-OAR-2018-0715 (May 2019) at 8-9.
[50] *Id.*