Lauren Godshall

Please see attached comments.

EARTHJUSTICE

June 18, 2025

Via Online Submission at https://tceq.commentinput.com/comment/search
Gwen Ricco
MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-308

Re: Rule Project No. 2023-131-101-AI (Section 185 Ozone Penalty Fee Program)

To Ms. Ricco:

On behalf of Downwinders at Risk, Air Alliance Houston, and the Sierra Club Lone Star Chapter, we submit the following comments in response to the Texas Commission on Environmental Quality's (TCEQ) request for comments regarding the Section 185 Penalty Fee program specific to the 2008 eight-hour ozone NAAQS as required by the federal Clean Air Act (CAA) section 185 (42 U.S.C. § 7511d).

TCEQ's proposed Section 185 fee program does not conform to the federal Section 185 rule and does not offer an equivalent alternative program. Section 185 does not contemplate alternative methods to calculate, impose or collect fees and EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard. Despite this, TCEQ is proposing a complicated system that deviates significantly from Section 185, relying on inapplicable guidance from other revoked standards and straying significantly from the authorizing act. TCEQ is unnecessarily devising a system that will not lead to the collection of any fees while exposing the agency to risks.

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

Ozone levels in the Dallas area have gotten worse, not better, over recent years; "Ozone levels in the metroplex averaged at 83 parts per billion from 2022 to 2024, according to data collected as of Oct. 21. That's up from the 81 parts per billion of ozone calculated for 2021 to 2023 . . . .

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

Levels ranging from 71 to 85 parts per billion of ozone are considered unhealthy for sensitive groups. So far in 2024, the Dallas-Fort Worth region saw 52 days where the ozone was 71 parts per billion or above."[3] Likewise, the Houston area has not improved over time, as the recent American Lung Association's 2025 "State of the Air" report, "reveals that Houston metro area was named 7th most polluted in the nation for ozone pollution" while trending worse than the year before for excessive ozone days.[4]

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

Because ozone pollution in the Houston and Dallas areas has been at unhealthy levels for so long, both areas have long been designated nonattainment.[5] When required bylaw to address their respective air quality issues, both areas still failed to meet attainment deadlines. Both areas are now classified as "severe" under the 2008 8-hour standard. Commenters, who represent residents of both areas, are extremely concerned about the health impacts from this inability to reach attainment and are invested in Section 185's ability to both incentivize emissions reductions and potentially fund clean air programs in Texas.

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

Ozone, the main component of urban smog, is a corrosive air pollutant that inflames the lungs and constricts breathing.[6] Exposure to ozone can damage lungs, leads to respiratory infection and aggravate asthma; long term exposure to ozone is associated with deaths from respiratory disease.[7]

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[3] Nicole Lopez, "North Texas ozone levels are getting worse. Air planners don't expect improvement," Fort Worth Report, Oct. 31, 2024, available at https://fortworthreport.org/2024/10/31/north-texas-ozone-levels-are-getting-worse-air-planners-dont-expect-improvement/#:~:text=Ozone%20levels%20in%20the%20metroplex%20averaged%20at,per%20billion%20average%20from%20January%20to%20July.

[4] American Lung Association, "New 'State of the Air' Report Finds Houston Metro Area Residents Are Breathing Some of the Most Polluted Air in the Country," April 23, 2025, available at https://www.lung.org/media/press-releases/tx-sota-2025-houston-release#:~:text=The%20Houston%20metro%20area%20ranked%207th%20worst,an%20F%20grade%2C%20in%20Harris%20County%2C%20Texas ("The Houston metro area ranked 7th worst in the nation for ozone pollution. The ranking was based on the area's worst county's average number of unhealthy days—34.8 days per year, an F grade, in Harris County, Texas. This was worse than the area's ranking in last year's report of 10th worst, with 23.2 days per year, an F grade.").

[5] 80 Fed. Reg 12,311 (March 6, 2015).

[6] *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002).

[7] EPA, "Health Effects of Ozone Pollution," available at

Ozone is not emitted directly into the atmosphere, but results from the reaction of precursor chemicals—primarily volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx")—with sunlight in the atmosphere.[8] VOCs and NOx are themselves harmful air pollutants, apart from their creation of ozone; for example, VOCs include listed hazardous air pollutants like benzene, toluene, and formaldehyde,[9] and NOx exposure leads to respiratory issues much like ozone exposure.[10]

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

The goal of all of this is improved air quality; the measure by which that goal is reached is whether "attainment" of a standard is reached and maintained. To ensure attainment, Congress created a detailed program for nonattainment areas to ensure that air quality will attain ozone standards by specified deadlines ("attainment deadlines"). *Id*. §§ 7410(a), (c), 7502; *see also id.* §§ 7511-7511f (provisions specific to ozone nonattainment areas).

Pursuant to this program, for the 2008 eight-hour ozone standard of 0.75 parts per million, on October 7, 2022, EPA published a final notice that reclassified the Dallas-Fort Worth (DFW) and Houston-Galveston- Brazoria (HGB) 2008 eight-hour ozone nonattainment areas from serious to severe, effective November 7, 2022.[11] The DFW and HGB severe nonattainment areas are required to attain the 2008 eight-hour ozone standard by July 20, 2027. If a severe or extreme ozone nonattainment area does not reach attainment by the attainment date, the area will be subject to the penalty fee requirements. For fee assessment purposes, the 2027 calendar year

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https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution (last updated March 13, 2025).

[8] *See Am. Trucking Ass'ns*, 283 F.3d at 359.

[9] American Lung Association, "Volatile Organic Compounds," *available at* https://www.lung.org/clean-air/indoor-air/indoor-air-pollutants/volatile-organic-compounds#:~:text=Sources%20of%20VOCs,include%20benzene%2C%20formaldehyde%20and%20toluene.

[10] EPA, "Basic Information about NO2," available at https://www.epa.gov/no2-pollution/basic-information-about-no2 (last updated July 16, 2024).

[11] TCEQ, "Commission Approval for Proposed Rulemaking Chapter 101, General Air Quality Rules, Section 185 Fee for the 2008 Eight-Hour Ozone Standard. Rule Project No. 2023-131-101-AI," April 23, 2025, p. 1.

from January 1, 2027, through December 31, 2027, will be the baseline year for these severe nonattainment areas. The penalty fee is required to be paid until EPA either redesignates the area as attainment for the 2008 eight-hour ozone standard or takes action that results in termination of the fee.[12]

Section 185 requires each severe ozone nonattainment area – like Houston and Dallas – to assess annual fees against major stationary sources of VOCs and NOx if the area fails to timely attain the required air quality. That "fee program" must require "each major stationary source" to reduce its emissions of ozone-forming pollutants by at least 20% from its attainment year emissions or pay a penalty in the form of fees on the excess emissions. *Id*. §§ 7511a(d)(3), 7511d. TCEQ must now submit a compliant plan to the EPA explaining how the Section 185 penalty will be assessed and collected in these two regions.

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

B. Specific Comments

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

There is no language in the Clean Air Act that permits the implementation of alternative programs. Section 185 is a precisely limned penalty fee program that applies to major stationary sources of ozone-forming pollution. *Id*. § 7511d.[13] The fee program is a plainly written rule that does not include any "saving provisions" or open-ended clauses in the text.[14] This is an

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[12] Id. at p. 2.

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

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

(a) General rule

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

(b) Computation of fee

(1)Fee amount

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

(2)Baseline amount

For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the Administrator may provide, as the lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation

important signal for TCEQ: EPA does not have the authority to approve any alternative fee program, regardless of whether such are proposed by TCEQ. TCEQ should aim to avoid federal preemption of the program (and the resulting loss of any collected funds into state coffers). As TCEQ relayed in its public meetings, EPA Region 6 has confirmed to TCEQ that it does not have the authority to approve nonconforming plans.[15]

There is no legal authority under the Clean Air Act nor (advisory) EPA guidance for such a program. TCEQ claims authority for this proposal under an admittedly inapplicable EPA guidance document from 2010, as well as approvals of "similar" programs in California and New York.[16] None of this purported authority actually authorizes or even supports this alternative fee

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plan ("allowables")) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year. Such guidance may provide that such average calculation for a specific source may be used if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

(3)Annual adjustment

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

(c) Exception

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

(d) Fee collection by Administrator

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

(e) Exemptions for certain small areas

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

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

[16] TCEQ, "Commission Approval for Proposed Rulemaking Chapter 101, General Air Quality Rules, Section 185 Fee for the 2008 Eight-Hour Ozone Standard. Rule Project No. 2023-131-101-AI, - Commissioners Pre-Filing Copy" April 23, 2025; p. 171 (available at https://www.tceq.texas.gov/downloads/agency/decisions/agendas/backup/2023/2023-1061-rul.pdf).

program. The cited EPA guidance pertains to a revoked 1-hour ozone standard and, in fact, that EPA guidance takes pains to note that this alternative fee program is only appropriate for revoked NAAQS standards, not the 8-hour ozone standard:

> EPA believes that an alternative program may be· acceptable if it is consistent with the principles of section 172(e) of the CAA which allows EPA through rulemaking to accept alternative programs that are 'not less stringent' where EPA has revised the NAAQS to make it less stringent. **This discretion does not currently apply to a section 185 fee program obligation arising from failure to attain the 1997 8-hour ozone NAAQS** by the attainment date associated with a Severe or Extreme classification for that NAAQS **because that NAAQS has not been revoked**.[17]

Likewise, the cited California and New York equivalent fee programs were propounded in line with that guidance and limited to the revoked 1-hour ozone standard – not the active 8-hour ozone standard at issue here. The California guidance on the alternative fee program notes that the alternative fee program is limited to that revoked 1-hour ozone standard as that is the only appropriate use for an alternative fee program.[18] The New York-New Jersey approved equivalent alternative fee program is likewise applied to that same revoked 1-hour ozone standard.[19] Finally, when TCEQ last developed an "equivalent alternative program" for Houston under that same prior and revoked (1979 1-hour) ozone standard, EPA's initial approval of that "equivalent" program was remanded and EPA recognized that certain "flexibilities" allowed in the program (such as aggregation of NOx and VOC emissions and of sites in different locations that are under common control) may not be lawful.[20]

TCEQ must comply with the federal Clean Air Act and propose a program that hews to the plain text of 42 U.S.C. § 7511d rather than creating "alternative" or "equivalent" programs that do not simply calculate, assess and collect per-ton penalty fees on each permitted major source, on a precursor-by-precursor basis. There is simply no cited legal authority to do otherwise, and the law itself is unambiguous and plain.

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[17] Stephen D. Page, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," EPA Memo, Jan. 5, 2010, p. 3, available at https://19january2021snapshot.epa.gov/sites/static/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf

[18] South Coast AQMD, "Proposed Rule 317.1 Clean Air Act Nonattainment Fees for the 8-Hour Ozone Standard, Working Group #1," Nov. 2023, p. 28, available at https://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/317.1/pr317-1_wgm1_110723.pdf?sfvrsn=20

[19] New Jersey Dep't Env. Protec., "Equivalent, Alternative Program Demonstration for Clean Air Act Section 185 Requirements for New York-N. New Jersey-Long Island (NY-NJ-CT) Nonattainment Area Revoked 1979 1-Hour Ozone Standard," Dec. 2024, p.1-2, available at https://dep.nj.gov/wp-content/uploads/airplanning/1-hour-185-fee-alternative-program-demonstration.pdf

[20] *See* Declaration of David Garcia, Doc. No. 1924422, para. 11, filed in *Sierra Club v. EPA*, D.C. Cir. Case No. 20-1121 (attached as Exhibit A).

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

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

Section 185 plainly calls for fees to be assessed and collected (*id*. § 7511d(a)). It also specifies that the EPA Administrator must take over if TCEQ fails to assess and collect fees. Any workaround that replaces individual source penalty fees with on-paper credits from another funding source will violate the Clean Air Act, as well as the Texas Constitution's gift clause, which prevents the State from covering any personal, private liability.[21] There is no legal substitution of publicly funded dollars for privately paid fees in Texas.[22]

Consider the impact of this "gift" to industry. Under the law, fees must be assessed after the baseline year for any emissions have exceeded 80% of the baseline amount. If industry has no involvement in the assessment or collection of such fees, industry likewise has no incentive to reduce emissions – and may even increase emissions year after year.

TCEQ proposes that it can use funds raised as a result of already-in-force fees on motor vehicles (title fees and taxes on rental and purchase agreements related to certain vehicles throughout the state), which, by statute, are considered funding for the Texas Emissions Reduction Program ("TERP"), to pay for any fees assessed as a result of Section 185 after the baseline year. Again, this is a violation of the gift clause; Texan residents pay a fee for various titling and purchasing activities. Those funds are aggregated by the TCEQ. TCEQ proposes taking those funds and using them to pay for the incurred Section 185 penalties – and then using the penalty funds to pay for TERP grants and projects. TCEQ elides over this part of the process by emphasizing the TERP programs that are aimed at reducing ozone and other air pollution, which it considers "equivalent" to a direct fee on ozone-precursor emissions. While TERP programs are certainly

[21] Texas State Const. Art. III, § 50.

[22] The Texas Supreme Court has interpreted the Gift Clause to allow transfers of public funds to private entities so long as: "(1) the expenditure is not gratuitous but instead brings a public benefit; (2) the predominant objective is to accomplish a legitimate public purpose, not to provide a benefit to a private party; and (3) the government retains control over the funds to ensure that the public purpose is in fact accomplished." *Borgelt v. Austin Firefighters Ass'n*, 692 S.W.3d 288, 301 (Tex. 2024); *see also Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Compensation Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). Here, the transfer does not bring a public benefit; the TERP program has been funded and in existence since 2001. It will continue to exist and be funded via the fees and taxes attached to certain motor vehicle and heavy equipment transactions, and will continue to fund beneficial grants, with or without the addition of this pass-through payment of Section 185 penalty fees. The only direct beneficiaries will be the privately-owned major sources who avoid paying their penalty fees. Likewise, the predominant objective is to pay for any privately-incurred penalty fees; not a legitimate public purpose.

useful means for the state to encourage the purchase and use of low- and no-emission trucks and upgraded equipment purchases, that does not change the basic nature of the proposed program: TCEQ will pay for assessed fees with funds it collects from Texas residents, essentially pouring funds from the individual Texan fee-paying bucket into a "gift to industry" bucket to fulfill any ozone-fee-related debts – and then pouring that bucket into the TERP grant program funnels. While TCEQ explains at length the good work of the TERP program as a basis for this funds transfer, the agency cannot make such a gift of fee payments regardless of the benevolence of the outcome.

In addition, this program incorporates a level of uncertainty that will negatively impact major sources. TCEQ states that if the TERP funds are insufficient to cover the penalties assessed under Section 185, then "the remaining difference would be assessed as a Failure to Attain Fee on a major stationary source or Section 185 Account for the area on a prorated basis."[23] Under a lawful Section 185 program, a major source can either (1) anticipate its fee and set aside funds to pay for it or (2) reduce its emissions by 20% after the baseline year. Under TCEQ's program, no source will know if it has to pay a fee until long after the fee is assessed; nor will it be able to anticipate how much it owes under the program, as TERP collections vary by consumer behavior from year to year, as will the penalties imposed on all other major sources in the area that will reduce available TERP funds.

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

c. The Fee Program Cannot Aggregate NOx and VOCs

Per the new TCEQ proposed rule, "To determine a major stationary source's baseline amount and the Failure to Attain Fee that would apply to each major stationary source, the commission proposes to provide major stationary sources a choice to individually determine baselines for VOC and NOx emissions, aggregate VOC and NOx emissions into one baseline if the source is major for both pollutants, or aggregate those emissions across multiple major stationary sources under common control."[24]

TCEQ must not allow sources to calculate their baseline determination by aggregating the NOx and VOC emission streams. The Clean Air Act expressly says the penalty fee applies to "each major stationary source of VOCs." 42 USC § 7511d(a) (emphasis added). Then the Act separately extends its coverage over major sources of VOC to major sources of NOx. 42 U.S.C. § 7511a(f)(1). There is no language in § 7511d that permits or even suggests the intermingling of VOCs and NOx emissions for penalty fee calculation purposes. When Congress wanted to allow requirements for VOC emission reductions to be met with NOx emission reductions it was clear about this intent– in § 7511a(c)(2)(C), for example, it expressly permitted the substitution. *See* 42 U.S.C. § 7511a(c)(2)(C) (describing "the conditions under which NO_x control may be substituted for control or may be combined with VOC control in order to maximize the reduction in ozone

[23] TCEQ, "Commission Approval for Proposed Rulemaking Chapter 101, General Air Quality Rules, Section 185 Fee for the 2008 Eight-Hour Ozone Standard. Rule Project No. 2023-131-101-AI," April 23, 2025, p. 11.
[24] *Id*., p. 12.

air pollution."). In contrast, in § 7511d, Congress made no such statement about such substitutions or combinations. This silence is unambiguous.

Combining two separate emissions streams into one baseline calculation would also allow for greater emissions of one of the two pollution streams (counteracted by greater reductions of the other stream), instead of forcing both emissions to be reduced. As an example, a source with 50 tons per year of VOCs and 100 tons of NOx would have a total of 150 tons per ton on the baseline year. In the aggregation scenario TCEQ proposes, the source would either have to reduce the total emissions by 30 tons per year or pay an assessed fee. This could be accomplished by a 15/15 split, a 30/0 split, or any other change that adds up to a total of 30 tons in reduced emissions. In the scenario set forth in the CAA, the source would have to reduce its VOCs by 10 tons and NOx by 20 tons specifically (or be assessed and pay a fee). This is what the CAA envisions; a proportionate reduction in VOCs and NOx, rather than an aggregated total reduction that could potentially leave one of the two precursor emissions unchanged year to year.

TCEQ's own reasoning is wildly inconsistent: When justifying the aggregation, TCEQ points to the potential for lowering ozone-precursor emissions: "Since VOC and NOx emissions reductions are both effective at lowering ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas, major sources should be allowed to aggregate both NOx and VOC emissions into one baseline amount."[25] However, at other points in its explanation of the new rule, TCEQ notes that reduced emissions are not a goal of this program: "The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of emissions reductions."[26]

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

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

TCEQ's proposed program also aggregates sources together: "the commission proposes to provide major stationary sources a choice to . . . aggregate those emissions across multiple major stationary sources under common control."[27] TCEQ cites the inapplicable EPA 2010 guidance memo and an also inapplicable SEC rule to support its claim and definition of common control for these purposes.[28]

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[25] *Id*. at. p.12.
[26] TCEQ, "Commission Approval for Proposed Rulemaking Chapter 101, General Air Quality Rules, Section 185 Fee for the 2008 Eight-Hour Ozone Standard. Rule Project No. 2023-131-101-AI, - Commissioners Pre-Filing Copy" April 23, 2025; p. 174 (available at https://www.tceq.texas.gov/downloads/agency/decisions/agendas/backup/2023/2023-1061-rul.pdf).
[27] TCEQ, "Commission Approval for Proposed Rulemaking Chapter 101, General Air Quality Rules, Section 185 Fee for the 2008 Eight-Hour Ozone Standard. Rule Project No. 2023-131-101-AI," April 23, 2025, p. 13.
[28] *Id*.

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

Contrary EPA guidance also exists – making TCEQ's reliance on the inapplicable 2010 guidance more precarious. In a 2018 guidance memo on aggregation of sites under common control (for NSR permitting purposes), EPA emphasized that facilities with autonomy in permitting obligations are not under common control.[29] Separately-permitted facilities' emissions streams would not be aggregated for NSR purposes to determine whether a source is major or minor; it is inconsistent for purposes of only this section of the Act to collapse facilities with individual major source permits into a single entity – and would allow for potentially greater VOC and NOx emissions at one facility while others reduce their emissions, avoiding Section 185's plain intent that it be applied to each source.

This makes sense when hypothetical numbers are applied, as above. Envision three sources under common control, each with 50 tons/year of NOx at the baseline year. Under Section 185 as written, each of those three sources would be compelled to reduce emissions by 10 tons/year (or pay the assessed fee). Under the TCEQ rule, some of those sources could continue with unchanged emissions, so long as another source reduces emissions by more than their share. This gives incentives to aggregate as many sources as possible, as sources about to close for renovations or permanent shut-downs will make up for any emissions reductions required of other sites. This could be appropriate where systemic emissions reductions are the goal of a program, but here, as TCEQ acknowledges, the goal of Section 185 is simply to impose and collect fees; emissions reductions are incidental to the program.[30]

TCEQ may not lawfully adopt a program that aggregates different facilities for purposes of establishing the baseline emissions calculation and the subsequent potential penalty fee calculation. TCEQ must adopt a program that simply reflects the language and goals of the statute and does not change the statute's applicability or meaning by creating improper exceptions and carveouts.

C. Conclusion

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

(1) Conform to the text of the statute and not include "equivalent" or "alternative" fee programs;

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

[30] *See* TCEQ, "Commission Approval for Proposed Rulemaking Chapter 101, General Air Quality Rules, Section 185 Fee for the 2008 Eight-Hour Ozone Standard. Rule Project No. 2023-131-101-AI, - Commissioners Pre-Filing Copy" April 23, 2025; p. 174 (available at https://www.tceq.texas.gov/downloads/agency/decisions/agendas/backup/2023/2023-1061-rul.pdf) ("The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of emissions reductions.").

(2) Include a plan to assess and collect statutory penalty fees from each covered source itself, in actual dollars rather than credits; and
(3) Calculate both baseline emissions and subsequent emissions for penalty purposes for each covered source using single emissions source data without aggregating the NOx and VOC streams nor aggregating multiple sources.

Commenters respectfully urge TCEQ to consider these comments as it finalizes and submits its Section 185 program to EPA.

Respectfully submitted by:
/s/ Lauren E. Godshall
Lauren E. Godshall
Earthjustice

Counsel for: Air Alliance Houston, Downwinders at Risk, and Sierra Club Lone Star Chapter

EXHIBIT 1

Respondents' Unopposed Motion for

Partial Remand Without Vacatur

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

Case No. 20-1121

EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

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

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

DECLARATION OF DAVID F. GARCIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Date: November 18, 2021

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