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August 2, 2024

*Via Electronic Delivery Only*

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*Submitted online via <https://tceq.commentinput.com/>  
and by email to: [amy.browning@TCEQ.texas.gov](mailto:amy.browning@TCEQ.texas.gov).*

**Re: Rule Project Number 2024-003-039-LS, amendment of 30 TAC Chapter 39, Public Notice; and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment**

The Environmental Integrity Project (“EIP”) respectfully submits the following comments to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) Sunset Implementation of Sunset Bill, SB 1397 (88R) (hereinafter, “Sunset legislation”), based on our review of the Sunset Implementation chart issued by TCEQ (July 1, 2024), applicable portions of the [Sunset Report](#) and [Sunset Bill](#), and our extensive participation in the Commission’s various processes. We are joined in our comments by the following organizations: Public Citizen (Texas Office); Air Alliance Houston; the Watershed Association; Environmental Stewardship; Texas Conservation Alliance; Ingleside on the Bay Coastal Watch Association; Greater Edwards Aquifer Alliance; Coastal Alliance to Protect our Environment (CAPE); San Antonio Bay Estuarine Waterkeeper; Friends of Hondo Canyon; Texas Coastal Bend Chapter, Surfrider Foundation; Save Barton Creek Association; Chispa Texas; and Environment Texas.

EIP is a national nonprofit organization headquartered at 888 17th Street NW, Suite 810, Washington, D.C. 20006 that is deeply involved in numerous administrative, legal, and regulatory matters in Texas. We are dedicated to advocating for more effective environmental laws and better enforcement. EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce or implement environmental laws increases pollution and harms public health; (2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) to help local communities obtain the protection of environmental laws.

Improving TCEQ’s programs as part of the Sunset legislation process should begin by accepting as true the very first assertion in the Sunset staff report: “TCEQ’s Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.” The Commission has considerable work to do to alleviate this distrust and confusion. It does not appear that the documents have been

made publicly available regarding this upcoming proposed rulemaking and the solicitation for stakeholder input. This hinders the ability of the public to provide relevant comments and may limit the effectiveness of the process. While we understand that a formal rulemaking would include another round of public input, the process might be more useful if the public had more information earlier in the process.

As described in more detail below, EIP strongly opposes any effort to eliminate or curtail TCEQ’s existing—even if imperfect—public notice regulations. The goal of public notice should be to reach as many people as possible who may be impacted by a proposed action. This goal is best served by providing as many routes of public notice as possible. To that end, we support *additional* electronic notices, including notice by email and notice to relevant elected officials. We do not support any changes that would limit current notice requirements including newspaper publication, sign posting at the proposed location of a facility, and centralized notice through TCEQ offices and other public posting locations. Although many people may be able to receive internet notice, there are still individuals who only become aware of notices through these other methods. Crucially, some of these types of notice, such as sign posting, will reach people who are not otherwise looking for notice of an action. Previously, notices were available at the nearest public library to a proposed facility. City Halls were often used to house public notices if there was no nearby library; we encourage the agency to resume this practice.

**1. Public Meetings, Contested Case Hearings, and Requests for Reconsideration.**

**a. Hybrid Meetings**

EIP requests that TCEQ’s amendments expand meeting options for public meetings and contested case hearings. While in-person meetings present an opportunity for personal, face-to-face interaction, virtual meetings increase accessibility for those unable to attend in person. TCEQ should ensure—and optimize—both options in every public meeting and contested case hearing as the default.

For public meetings in particular, TCEQ should offer video participation for all attendees and an open chat with a “Question and Answer” feature. Further, TCEQ should amend 30 TEX. ADMIN. CODE § 55.154(f), which currently provides that an audio recording or written transcript of public meetings be “made available” to the public, to specifically require that TCEQ produce slides, meeting audio recordings, written transcripts, and presentation materials on its website and/or by email immediately following each meeting’s conclusion.

**b. Standing Requirements**

TCEQ should conform “affected person” status requirements for contested case hearings with standing requirements applicable in federal court to ensure litigants’ full procedural rights to challenge permitting decisions. Currently, TCEQ has taken the position that a contested case hearing, or a denial of one, may be a prerequisite to appeal. *See* 30 TEX. ADMIN. CODE §§ 80.272(b), 55.211. Protestants to permitting decisions thus must exhaust these administrative remedies prior to filing in state court or, for natural gas facilities, federal court. *See* 15 U.S.C. §§

717b, 717r(d)(1) (providing original jurisdiction over challenges to state administrative agency permitting actions to the Court of Appeals).

By imposing additional procedural hurdles for a litigant to be considered an “affected person” who can pursue a matter in court, TCEQ has restricted Protestants’ access to litigate these issues. *Compare* 0 Tex. Admin. Code §§ 55.201, 55.203, *and* Tex. Water Code § 5.115 (permitting TCEQ to consider certain factors in determining whether a person has a justiciable interest), *with Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992) (outlining the three elements of constitutional standing). Further, for the sake of efficiency, clarity, and legal certainty, litigants should have a uniform standard for justiciability in administrative hearings and courts alike. Accordingly, TCEQ should eliminate rules imposing more arduous standing requirements than those applicable to court proceedings.

**c. Public Funding for Public Participation**

The contested case hearing is a legal proceeding that often necessitates costly legal advice and expert consultation. However, members of communities co-located with facilities seeking permitting are often lower-income or have large populations of people of color with limited access to legal resources. *See Fossil Fuel Racism in the United States: How Phasing Out Coal, Oil, and Gas Can Protect Communities*, 100 ENERGY RSCH. & SOCIAL SCI. 103104 (2023). Accordingly, TCEQ’s amendments should establish a fund by which community members may pay for necessary contested case costs.

**d. Requests for Reconsideration**

While the Texas Water Code allows any person to request that the Commission “reconsider the executive director’s decision” on an environmental permit, TCEQ’s rules do not articulate a clear standard by which the hearing officer is expected to determine when reconsideration is appropriate. *See* TEX. WATER CODE § 5.556(a); 30 TEX. ADMIN. CODE § 55.211. TCEQ should amend § 55.211 to provide guidelines for when a person who is not deemed an “affected person” is entitled to reconsideration and what the requestor must provide to meet such a standard.<sup>1</sup>

**2. Public Availability of TPDES<sup>2</sup> Permit Information**

EIP appreciates that the state legislature’s directives to TCEQ include requirements to expand public availability and notice for NPDES permit applications and draft NPDES permits. At the same time, we submit that TCEQ should further expand the availability of such information available to the public and do so for all phases of TPDES permit issuance—including draft fact sheets. We highly recommend that the requested revisions to the public participation processes described below be *in addition to*, and not *in lieu of*, existing requirements. Public participation is not a bonus or side feature in the Clean Water Act; it is its heart. “Congress identified public participation rights as a critical means of advancing the goals

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<sup>1</sup> Also see section 4.a. below, which discusses the Guidance on “Affected Persons” at more length.

<sup>2</sup> “TPDES” is the Texas Pollutant Discharge Elimination System program, or the state’s version of the National Pollutant Discharge Elimination System (“NPDES”). “TPDES” and “NPDES” are used interchangeably herein.

of the Clean Water Act in its primary statement of the Act’s approach and philosophy.” *Env’t Def. Ctr., Inc. v. U.S. Env’t Prot. Agency*, 344 F.3d 832, 856–57 (9th Cir. 2003).

Public participation is especially important in the NPDES permitting process because those permits contain key, legally enforceable effluent limits that control pollution. “Public participation in the development, revision, and enforcement of any . . . effluent limitation . . . established by the [EPA] Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” Section 101(e) of the Clean Water Act (“CWA”), 33 U.S.C. § 1251(e). “NPDES permitting decisions should be determined in ‘the most open, accessible forum possible, and at a stage where the permitting authority has the greatest flexibility to make appropriate modifications to the permit.’” *Env’t Def. Ctr., Inc.*, 344 F.3d at 856–57 (quoting 44 Fed. Reg. 32,854, 32,885 (June 7, 1979), internal brackets removed); *see also Costle v. Pac. Legal Found.*, 445 U.S. 198, 216 (1980) (noting the “general policy of encouraging public participation is applicable to the administration of the NPDES permit program”).

A critical method that the public participates in CWA permitting is through comments on draft permits. After a permit application is received, permitting agencies like TCEQ must publicly post a draft permit or draft denial and accept public comments on the draft for at least 30 days. 40 C.F.R. § 124.6(e) (EPA regulations applicable to delegated states under 40 C.F.R. § 123.25). The public also has the opportunity to request a public hearing on the draft permit during these 30 days. 40 C.F.R. § 124.12. Robust public participation in the NPDES permitting process is a fundamental premise of the [Memorandum of Agreement Between TCEQ and EPA Region 6 Concerning the National Pollutant Elimination System](#) (June 12, 2020) (EPA-TCEQ MOA) at p. 12 (“The TCEQ shall prepare public notice and cause the notice to be published as required in 30 TAC Chapter 39. The notice shall be mailed concurrently to EPA, [multiple other federal and local entities], other persons who request notice, or who are otherwise on the TCEQ mailing list or who in the judgment of the TCEQ may be affected.”).

Effective public participation in state-funded permitting processes, like Texas’s TPDES program, is also mandated by Title VI of the Civil Rights Act of 1964, which prohibits agencies receiving federal funds from discriminating on the basis of race, color, and national origin. 42 U.S.C. §§ 2000d *et seq.*; 40 C.F.R. §§ 7.30, 7.35 (EPA Title VI regulations). To ensure compliance with Title VI, it is essential that agencies “focus on early, inclusive and meaningful public involvement throughout the entire permitting process.” EPA, “[Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs](#),” 71 Fed. Reg. 14,207, 14,210 (Mar. 21, 2006).

To improve public participation, EIP strongly recommends that TCEQ take the following specific steps to enhance its overall NPDES permit-issuance process:

- a. Publish an electronic list, updated on a daily basis, of the following items:<sup>3</sup>
  - i. All TPDES permits for which Notices of Receipt of Application and Intent to Obtain a Permit (NORI) have been submitted to TCEQ, including permit renewals and modifications/amendments. The full applications should be available electronically (together with the NORIs);
  - ii. Draft TPDES permits and fact sheets on which TCEQ is currently seeking public comment.
  - iii. Final TPDES permits and fact sheets issued to permittees.
- b. Publish the list of applications and draft and final documents in a prominent, easily found place on the Commission’s website, and ensure that it is identifiable through a Google search.
- c. For each permit in the public notice list, include the following information to enable the public to identify facilities without knowing permit numbers: permittee(s) name(s); facility name (including alternate names, if applicable); street address and coordinates; basic operations description; and any requested changes/amendments/modifications.<sup>4</sup> Such information would bolster the ongoing implementation of Sunset Report and Sunset Bill efforts styled “Information Provided by Public Notices.”
- d. Include in the list of applications and draft and final documents a phone number and email address the public can use to request more information.
- e. Provide date-certain deadlines for public input on draft TPDES permits and fact sheets, *e.g.*, “September 15, 2024” as opposed to “30 days from publication in a newspaper.” Specifying actual deadlines is necessary to help laypersons know how much time they have to comment, and also to comport with both the EPA-TCEQ MOA at p. 12 (“The public notice for draft permits shall *set a deadline* . . .”) (emphasis added); and state regulations, 30 Tex. Admin. Code § 39.409 (“Notice given under this chapter will *specify any applicable deadline* to file public comment . . .”) (emphasis added).
- f. In addition to expanding electronic availability of public comment opportunities for draft NDPEs permits, continue to provide public notice in newspapers to support Texans without internet access. In other words, the above improvements must be *additive*, and not in place of the existing public participation requirements. TCEQ should also explore additional opportunities to expand public notification, including the use of social media, better public outreach about specific permits, and translation resources; these efforts are needed to supplement public access to these critical documents and to fully comply with the Clean Water Act’s public participation goals, as well as Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq.*
- g. Verify that newspaper notifications are occurring for each public-noticed draft TPDES permit. This is important because efforts by EIP and various partner groups to obtain draft documents from local libraries have been routinely unsuccessful.

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<sup>3</sup> EIP acknowledges that TCEQ has begun posting some limited information online, *e.g.*, certain permit applications, *see* <https://www.tceq.texas.gov/permitting/wastewater/pending-permits/tpdes-applications>, but this effort must be expanded to include *all* documents with public notice. EIP efforts to locate a variety draft documents during July 2024 showed that many items that should have been available at that website were not.

<sup>4</sup> The SB 1397 Sunset Recommendations require some of this information—the name of the permit applicant, the type of permit applied for, and the location of each proposed or existing site subject to the proposed permit – but additional information is needed to help the public both locate and comment on draft permits.

- h. Evaluate other state NPDES public notice processes to identify programs with existing robust programs, including Indiana,<sup>5</sup> Louisiana<sup>6</sup>, and Utah,<sup>7</sup> on which TCEQ improvements can be modeled.

### **3. Public Availability of Air Permit Information**

Operating Permits issued under Title V of the Clean Air Act, including “applicable requirements” listed in Title V permits, should be electronically available to anyone wishing to learn more about them. Any person with internet access should be able to click on a source’s Title V Permit posted to TCEQ’s website, and then—more importantly—they should be able to click on the applicable requirements, including the source’s applicable permits and certain applicable regulations. Other states have established this level of transparency for their Air permits, and there is no reason that Texas cannot readily make a source’s applicable requirements available by clicking on them.

### **4. Other Concerns**

#### **a. Guidance on Affected Person Determinations**

According to the Sunset Report and Sunset Bill, the legislature has directed TCEQ to revise its guidance on affected person determinations by “develop[ing] a guidance document that explains what information the commission needs to evaluate whether a person is potentially affected by a permit application and [which] states that each request is reviewed on a case-by-case basis, considering all the factors in its rule, including—but not limited to—distance.” EIP applauds this directive, but at the same time suggests that the Commission think even broader about populations that might be affected by actions it regulates to ensure robust notification of individuals who could potentially be impacted by the issuance of permits. In fact, expanding affected person determinations would be consistent with and even support current state regulations. *See, e.g.*, 30 Tex. Admin. Code § 55.203 (prescribing that, in determining whether a person is an affected person, “*all* factors shall be considered,” including, among others, whether the interest claimed is one protected by the law under which the application will be considered; relationship between the interest claimed and the activity regulated; likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; and likely impact of the regulated activity on use of the impacted natural resource by the person) (emphasis added). There are many examples of persons who might be affected by issuance of a TPDES permit but who do not meet the traditional distance criteria for notification: for instance, a TPDES permit that results in increased pollution in a local receiving stream could eventually reach other waterbodies downstream and affect people who fish and recreate in those further waters as well.

EIP also notes that expanding notice to reach all persons potentially affected by a permit issuance or modification is not a difficult process in the Internet Age. The Commission could, for

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<sup>5</sup> <https://www.in.gov/idem/public-notice/>.

<sup>6</sup> <https://www.deq.louisiana.gov/page/edms>.

<sup>7</sup> <https://deq.utah.gov/public-notice-archive/water-quality-public-notice/>; <https://deq.utah.gov/public-notice-archive/water-quality-public-notice-z>.

example, rely on existing information about affected persons, such as that maintained by Air Alliance Houston (AAH), a non-profit advocacy organization working to reduce the public health impacts from air pollution and advance environmental justice. [AAH's free "AirMail" tool](#) provides easy-to-use mapping locations of facilities throughout Texas. TCEQ could apply that tool as a starting point and, at a minimum, send postcards to addresses within a certain distance of facilities seeking a permit. At the same time, TCEQ should also ensure that it is complying with the EPA-TCEQ MOA provision requiring mailed notice to "affected landowners named in the permit application" of permits that have been declared administratively complete and an additional mailed notice after the draft permit has been filed with the Commission's Chief Clerk. EPA-TCEQ MOA at p. 12.

### **b. Compliance History Rating Formula Considerations**

The Sunset legislation directs TCEQ to review and update the Commission's compliance history rating formula "to ensure it accurately reflects a regulated entity's record of violations, including considerations of site complexity and cumulative violations or multiple violations of the same type." In general, EIP agrees with the broader approach to compliance history as directed by the Texas legislature. In addition, we note that TCEQ needs to ensure that its revisions are consistent with the EPA-TCEQ MOA, which provides that:

TCEQ shall use risk-based inspection targeting strategies as outlined in the Enforcement Program Description<sup>8</sup> to select TPDES entities for scheduled compliance inspections. Factors that will be taken into account will include: watershed impairment, severe and/or chronic effluent noncompliance, prior compliance history, and time since the last scheduled compliance inspection. TCEQ will also consider EPA inspection guidance, the watershed strategy and the annual Office of Enforcement and Compliance Assurance MOA guidance when targeting TPDES permittees for scheduled compliance inspections.

EPA-TCEQ MOA at p. 15.

Also with regard to compliance history, EIP submits that TCEQ should be required to reflect the *entire* compliance history for larger individual, but interconnected, facilities (*e.g.*, complexes) as well as for responsible entities at sites where owners and/or operators have changed or are in flux—despite those facilities having individual permit numbers in some cases. For example, the ExxonMobil facility in Baytown, Texas consists of multiple internal plants: Baytown Refinery; Baytown Olefins Plant; Baytown Chemical Plant. All these internal plants are confined to a single swath of contiguous land owned and operated by the same permittee and are considered as one facility—the "Baytown Complex"—for purposes of EPA's ECHO database. ECHO compiles the multitude of permits and plants included in the Baytown Complex into one central webpage when assessing the environmental compliance of each of its individual facilities.<sup>9</sup> Where a complex is owned and operated by the same company, it makes sense for TCEQ to consider its compliance history in a comprehensive, holistic manner when it determines whether permits should be renewed, modified/amended, or otherwise changed (*e.g.*, when increased limits are requested for a pollutant whose limit has been regularly exceeded at a

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<sup>8</sup> EIP attempted to locate the mentioned Enforcement Program Description online but was unsuccessful in doing so.

<sup>9</sup> <https://echo.epa.gov/detailed-facility-report?fid=110000463178>.



different part of the Complex). We urge TCEQ to follow a similar practice when assessing facilities' and owner/operators' compliance history rather than limiting evaluations to immediate sites or current owner/operators.

### **c. Repeat Violators Classification**

For repeat violators, the Sunset legislation requires TCEQ to add minor and moderate violations to its existing classifications. EIP requests that TCEQ notify us once these categories are developed so that we may comment on them at that time. In the meantime, we suggest that the Commission specifically include a reference in any Commission regulations, guidance or policy dealing with repeat violators that both an entire complex and historical owner/operator information be reflected when assessing penalties for repeat violators.<sup>10</sup>

### **d. Reclassify Recordkeeping Violations**

The Sunset Advisory Commission Staff Report raises a concern that TCEQ's policy on how to classify certain monitoring and recordkeeping violations could allow industry to conceal more serious violations. "Despite relying heavily on self-reported information from regulated entities, TCEQ does not sufficiently distinguish between serious failures to maintain monitoring equipment and records and minor paperwork violations when classifying violations as major, moderate, or minor." Sunset Report at p. 36. EIP agrees that there can be a range of severity of types of recordkeeping violations. Conversely, though, we believe that *all* recordkeeping violations are relevant and should be addressed by TCEQ—even if through informal compliance.

At the federal level, recordkeeping violations are treated the same as, *e.g.*, effluent violations, for penalty purposes. The same penalty caps are imposed for violations of sections 301, 302, 306, 307, 308, 318 and 405 of the Clean Water Act (CWA), and for violations of any permit issued under section 402 of the CWA. Section 308 includes provisions requiring certain recordkeeping by owners or operators of point sources, and TPDES permits (and their recordkeeping requirements) are issued under section 402 of the CWA (through a delegation to TCEQ).<sup>11</sup> EPA has issued extensive guidance documents that address how EPA and states are expected to evaluate a facility's recordkeeping and reporting compliance,<sup>12</sup> because of the importance of the accuracy of those activities, and notes that "compliance monitoring is a cornerstone of [the Agency's] program to achieve clean water."<sup>13</sup> The importance of accurate recordkeeping should not be minimized: without it, federal and state environmental agencies are unable to sufficiently assess facilities' compliance.

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<sup>10</sup> The importance of taking into account full facilities and prior owners/operators is discussed more fully in the preceding section.

<sup>11</sup> See 33 U.S.C. §§ 1318 and 1342, respectively.

<sup>12</sup> See generally, EPA, "NPDES Compliance Inspection Manual" (together with Appendices, Procedures, etc.) (Jan. 2017) available at: <https://www.epa.gov/compliance/compliance-inspection-manual-national-pollutant-discharge-elimination-system>.

<sup>13</sup> EPA, [NPDES Compliance Inspection Manual, Chapter 1](#) at p. 3



Thank you for your consideration of these comments. Please feel free to reach out with questions.

Sincerely,



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