Greater Edwards Aquifer Alliance

Member Organizations

Alamo, Austin, and Lone Star chapters of the Sierra Club
Bexar Audubon Society
Austin, Bexar and Travis Green Parties
Bexar Grotto
Boerne Together
Bulverde Neighborhood Alliance
Bulverde Neighbors for Clean Water
Cibolo Center for Conservation
Citizens for the Protection of Cibolo Creek
Comal County Conservation Alliance
Environment Texas
First Universalist Unitarian Church of SA
Friends of Canyon Lake
Friends of Dry Comal Creek
Friends of Government Canyon
Fuerza Unida
Green Society of UTSA
Guadalupe River Road Alliance
Guardians of Lick Creek
Headwaters at Incarnate Word
Helotes Heritage Association
Hill Country Alliance
Kendall County Well Owners Association
Kinney County Ground Zero
Leon Springs Business Association
Native Plant Society of Texas – SA
Northwest Interstate Coalition of Neighborhoods
Pedernales River Alliance – Gillespie Co.
Preserve Castroville
Preserve Lake Dunlop Association
Preserve Our Hill Country Environment
RiverAid San Antonio
San Antonio Audubon Society
San Antonio Conservation Society
San Geronimo Valley Alliance
San Marcos Greenbelt Alliance
San Marcos River Foundation
Save Barton Creek Association
Save Our Springs Alliance
Scenic Loop/Boerne Stage Alliance
Securing a Future Environment
SEED Coalition
Signal Hill Area Alliance
Sisters of the Divine Providence
Solar San Antonio
Texas Cave Management Association
Trinity Edwards Spring Protection Assoc.
Water Aid – Texas State University
Wildlife Rescue & Rehabilitation
Wimberley Valley Watershed Association

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August 2, 2024

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Submitted online via https://tceq.commentinput.com/ and by email to 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 – Comments by Greater Edwards Aquifer Alliance

The Greater Edwards Aquifer Alliance (GEAA) appreciates the opportunity to submit these comments and recommendations on behalf of the sixty member groups of GEAA that are allied to advocate for the preservation of our ground and surface water resources in twenty-one counties within Central and South Texas.

The following recommendations reflect our experience, and those of our member groups, in working with the Texas Commission on Environmental Quality (TCEQ) during the past twenty years. Our recommendations for the changes required by TCEQ's Sunset Bill and the Sunset Commission's report are intended to help TCEQ overcome its relatively negative reputation with the public and better protect the state's water sources.

I. Public notice, participation, standing, and compliance history recommendations

The Environmental Integrity Project and, separately, Public Citizen submitted excellent recommendations for public meetings, contested case hearings, and requests for reconsideration; public availability of TPDES permit information; public availability of air permit information; and affected persons determination and violation considerations for this rule project. Rather than reiterate in full these recommendations, with which we endorse and concur, we have attached their comments to this letter to be included in GEAA's recommendations. Where GEAA discusses similar recommendations in our comments, we provide additional perspective.

II. Recommendations for changes required by Senate Bill (SB) 1397

The TCEQ must implement multiple changes required by SB 1397 (88R), the TCEQ Sunset Bill. Some of these changes are as follows: (1) extending the comment period by 36 hours after a public meeting on a draft permit; (2) providing outreach and education; (3) posting permit materials online; (4) setting violation numbers for repeat offenses; and (5) developing best management practices

(BMPs) for aggregate production operations (APOs). While these are important changes, in practice they do not appear to go as far as necessary to be protective of the regulated environmental mediums or to reduce distrust and confusion among the public.

A. Extending public comment period

Section 4 of SB 1397 requires TCEQ to "hold open the public comment period and the period for which a contested case hearing may be requested for the permit application for at least 36 hours after the end of the meeting" for consolidated notice permit applications. To encourage transparency and public participation and to limit confusion by members of the public, this public comment period extension should be applied to all permits, not just to consolidated notice permit applications.

B. Providing public outreach and education

Section 10 of SB 1397 requires TCEQ to "provide outreach and education to the public on participating in the permitting process under the air, waste, and water programs within the commission's jurisdiction." In order to fulfill this requirement while increasing trust in itself by the public, TCEQ should partner with trusted organizations – often non-profits – already doing outreach and educational work on these topics in the community.

C. Posting permit materials online

Section 11 of SB 1397 requires the electronic posting of permit applications on the commission's website. First, if TCEQ is posting electronic copies of all permit applications online, it is not yet in an easily accessible manner. We were able to access TPDES wastewater permits online, but only after receiving the website information from a permit notice. It is highly unlikely that general members of the public will be able to easily find this information. We urge TCEQ to post draft and final permits as soon as possible for all permit types and to make those postings as easy as possible to locate on the TCEQ website. Documents should be posted in text-searchable file formats.

Second, Section 11 of SB 1397 holds that the commission may exempt associated permit materials from being posted online if the commission determines that "(1) posting the materials on the website would be too burdensome; or (2) the materials are too large to be posted on the website." TCEQ should not implement this section as part of its rule-making. When meeting public notice requirements for posting the materials at public libraries, city halls, or newspapers, the commission is prohibited from failing to post relevant materials, even if deemed burdensome or too large. If TCEQ is able to provide all relevant materials non-electronically, and they are, there is no reason not to provide all relevant materials electronically, regardless of how large or burdensome they are deemed. We recommend TCEQ require all associated permit materials to be posted online at the applicant's expense.

D. Setting violation numbers

In classifying a person's compliance history, Section 13 of SB 1397 amended Section 5.754 of the Texas Water Code to require TCEQ to set the number of minor, moderate, and major violations needed to be classified as a repeat offender. However, this section kept intact the portion of the TWC that limits consideration of repeat violations in a compliance history "to violations of the same nature and the same environmental media that occurred in the preceding five years." An investigation by the San Antonio Express-News demonstrated that by continuing to place these limits on what may be considered a repeat

violation for the purposes of the recorded compliance history, the commission allows for chronic offenders to remain unknown to the public, which lowers public trust in the agency.[1]

Additionally, Rule 55.201(i)(5)(E) of Title 30 Chapter 55 of the Texas Administrative Code states that there is no right to a contested case hearing for renewal or amended applications under the Texas Water Code where the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit. Limiting what may be considered a repeat violation in an applicant's compliance history potentially allows some applicants – who would otherwise, without these limitations, have compliance histories that grant the right to a contested case hearing – to proceed through the permitting process without this right.

Though limited by statute in what it can officially categorize as a repeat violation for compliance history purposes, TCEQ should still make publicly available all violation information for each entity, regardless of the nature or date of the violation. This effort at transparency will help reduce public distrust in the agency.

E. Developing BMPs for aggregate production operations

Section 19 of SB 1397, amends Chapter 28A of the Texas Water Code (TWC) to require TCEQ to "develop and make accessible on the…website recommended best management practices for aggregate production operations that operate under the jurisdiction of the commission. The best management practices must include operational issues related to: (1) dust control; (2) water use; and (3) water storage." While this new requirement is necessary, it does not go far enough.

TCEQ must consider the impacts of APOs on the quality and availability of groundwater and surface water supplies, if not generally across the state, then at minimum for APOs located in the Edwards Aquifer Recharge Zone. The same investigation by the San Antonio Express-News mentioned above of aggregate production operations showed that violations at APOs in the Hill Country have "spoiled pristine waterways and threatened the Edwards Aquifer, the region's prime source of drinking waters."[2]

We recommend TCEQ consider incorporating Edwards-specific rules for quarries and rock crushers in the Edwards Aquifer Recharge and Contributing zones. Where these facilities are located in Edwards Limestone, the underlying aquifer is particularly vulnerable to contamination, whether or not the quarry actually excavates to below the aquifer water level. Without more stringent TCEQ regulations, quarries and rock crushers might degrade the aquifer and damage the health and water supply of adjacent communities. Currently, "the statutes and rules that govern the commission's Edwards Aquifer Protection Program do not include an opportunity for a public meeting pertaining to specific or individual water pollution abatement plans."[3] TCEQ should at minimum provide upon citizen request opportunities for hearings on water quality concerns when permitting APOs located on the Edwards Aquifer Recharge Zone. This could be achieved by changing the Water Pollution Abatement Plan to a Water Pollution Abatement Permit. Since aggregate production operations are only required to go through the permit application process for air quality, the public is deprived of the opportunity to pursue concerns regarding vital groundwater resources.

[1] The cost of Hill Country quarries: Dirt, dust, muddy creeks, altered rivers (expressnews.com)
[2] The cost of Hill Country quarries: Dirt, dust, muddy creeks, altered rivers (expressnews.com)
[3] Vulcan Quarry opponents look to overturn newly-approved plan | News | herald-zeitung.com

III. Hearings and standing recommendations

The current agency standard for notifying affected parties and recommending standing is inadequate; many people that are legally affected parties are excluded from receiving notice. These persons have legally protected interests that may not necessarily be recognized by the simple formula of identifying directly adjacent landowners or landowners one mile "downstream" from a facility. While it is the generally accepted rule of thumb to base standing on whether a person is within one mile of the permitted facility, this is not an explicit requirement set forth in Title 30 Chapter 55 of the Texas Administrative Code. In identifying affected parties, TCEQ should:

- Grant standing to the owners of private wells that may be affected by the issuance of a TPDES permit;
- Consult contour maps to determine whether parties outside of the adjacent landowners or outside of the rule of thumb one-mile distance might be affected by the issuance of a TPDES permit; and
- Expand recognition of affected parties in issuance of air quality permits to include all parties who might experience negative impacts from releases of particulate matter. (This issue is of particular concern as the paucity of TCEQ air quality monitoring stations does not provide adequate information on which to establish baseline or background levels of existing pollution.)

IV. Administrative law judge recommendations

Commissioners regularly approve a permit even after an administrative law judge (ALJ) has recommended denial. At times, Commissioners assert that an ALJ decision was wrongly decided and remand it for a revised opinion. The Commissioners should respect the ALJ's role in the process and abide by his or her recommendation. Over the past twenty years, GEAA has seen more than one instance of Commissioners approving permits that were recommended for denial by the ALJ, while providing no good reason for approval.

Thank you for your consideration. Please consider GEAA as a resource that is at your disposal. We look forward to working with you during this rulemaking period and the upcoming legislative session.

Respectfully,

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Via Electronic Delivery Only

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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.[1]

2. <u>Public Availability of TPDES[2] Permit Information</u>

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

[1] Also see section 4.a. below, which discusses the Guidance on "Affected Persons" at more length.
[2] "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:[3]
   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.[4] 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.

[3] 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.

[4] 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,[5] Louisiana[6], and Utah,[7] 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

[5] https://www.in.gov/idem/public-notices/.
[6] https://www.deq.louisiana.gov/page/edms.
[7] https://deq.utah.gov/public-notices-archive/water-quality-public-notices; https://deq.utah.gov/public-notices-archive/water-quality-public-notices-archive-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[8] 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.[9] 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

[8] EIP attempted to locate the mentioned Enforcement Program Description online but was unsuccessful in doing so.
[9] 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.[10]

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).[11] EPA has issued extensive guidance documents that address how EPA and states are expected to evaluate a facility's recordkeeping and reporting compliance,[12] 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."[13] 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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[10] The importance of taking into account full facilities and prior owners/operators is discussed more fully in the preceding section.
[11] *See* 33 U.S.C. §§ 1318 and 1342, respectively.
[12] 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.
[13] 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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Submitted online via https://tceq.commentinput.com/ and by email to amy.browning@TCEQ.texas.gov.

August 2, 2024

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 – Comments by Public Citizen

Public Citizen appreciates the opportunity to provide these comments. Our comments are based on the TCEQ Sunset bill, SB 1397 (88R), and on our extensive participation in the TCEQ Sunset review process.

This effort should begin by granting 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 agency has considerable work to do to alleviate this distrust and confusion.

I. Public notice recommendations.

A. Do not limit or restrict current forms of notice.

The goal of public notice should be to reach as many people as possible who may be impacted by the 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 most people may be able to receive internet notice, there are still people who see notice through these other methods. Crucially, some of the types of notice, such as sign posting, will reach people who are not otherwise looking for notice of an action.

In the past, notices were available at the nearest public library to a proposed facility. City Halls were often used if there was no close library. We encourage the agency to resume this practice.

B. Standardize notices and clearly state specific due dates to eliminate confusion.

The notice process is confusing to all but the most experienced participants. The confusion begins with the electronic publication of the first notice, the Notice of Receipt of Application and Intent to Obtain Permit, or NORI.

Because the comment and contested case hearing request deadline is tied to the date of newspaper publication, the electronic publication of the NORI does not contain an actual due date for comments and requests. This is needlessly confusing. Perhaps the applicant could be required to publish notice within a set time of the electronic publication of the NORI, say 15 days. Then the comment deadline could be fixed at 45 days from the electronic publication date. That was a specific due date could be included in every notice published.

Furthermore, there are both 30-day and 15-day comment periods, as well as deadlines for public comment and deadlines for requesting a contested case hearing. Some standardization across these scenarios would be helpful.

Furthermore, it isn't clear whether or not a specific application will be eligible for a contested case hearing. The NORI doesn't do anything to dispel this confusion. Similar problems occur with the opportunity for a public meeting. It's also not stated that deadline extensions are commonly granted by request.

It isn't stated in the NORI how many community members must request a public meeting before the agency will grant one. It isn't stated that the agency is required to grant a public meeting if the local elected official requests one. All of this information would be useful to participants in the public process.

The second notice, the Notice of Application and Preliminary Decision, or NAPD, can further confuse things. It isn't clear to most people when a NAPD will be required and when the NORI and the NAPD will be consolidated. The NAPD, like the NORI, lacks detail about the actual deadline for comments and requests, and the practical thresholds for being granted public meetings and hearings.

C. Improve electronic access to notices.

Online notices are posted as links that lead directly to downloads. The links themselves are quite cumbersome.[1] Having a link that goes straight to a download limits one's ability to share it

[1] *For example, a recent notice link for Permit 72039:* *https://www14.tceq.texas.gov/epic/eNotice/com/cAndDFmWS.cfc?method=downloadDocument&argData=0D8FEE8E7EBE6F0F8D9BACCB8EB0F1D2C061F1D0E5112150A5A414142485358010A042C040E0003465A5355525F6C6F6C6B626A696E646A703A113E34163C0E232F0E3C2F2863262D253034233D5B5A43184F5A5151444057415*

electronically. A popup blocker will block download links. Being unable to view the notice in a web browser—being forced to download it—will necessarily limit who actually sees it. Notices should be posted on the TCEQ webpage and viewable as links to pdf documents, not direct downloads.[2]

Much more information could be included in the electronic notice. It could include the CN or RN numbers of the applicant and links to the Central Registry. It could include links to the permit or project number through the Commissioners Integrated Database, or the Central Registry. Creating electronic notices but failing to provide links to available electronic resources is a missed opportunity.

D. Improve virtual meeting options. Do not seek to replace in person meetings with virtual meetings.

Virtual-only or hybrid meetings became popular of necessity during the coronavirus pandemic. A set of best practices have emerged for effective virtual or hybrid meetings. These include allowing video and telephone participation, requiring presenters to be on video, allowing open chat, allowing questions by chat or by speaking, and providing slides and presentation materials after the fact. The TCEQ should follow these best practices in its meetings. For most of the pandemic, TCEQ conducted "online" meetings with no video option and no chat. The agency should endeavor to improve its virtual meeting conduct to meet the standard of the day.

Furthermore, during the Sunset review process, the agency advocated to eliminate in-person meetings in favor of virtual-only meetings. We, along with other advocates, fought hard to maintain the in-person option. We know from experience that in-person meetings are an opportunity for real, face-to-face interaction that cannot be equaled on virtual platforms.

In my personal experience attending public meetings on permit applications, much can be accomplished with a handshake and a conversation. Since we know that proposed facilities will be built no matter how strenuously the public objects, we should view the public process as an opportunity for the community to get to know their future neighbor, the permit applicant. A good relationship between the new permit holder and their neighbors can save headaches—and reduce the TCEQ's administrative burden—in the future.

7564D1E4A5E430D554E4604574D51475C00554C7A633D2B6F6D6B756064702267727460212 73F7B7E7D706A327D705F60747.

[2] *The notice for this meeting, for example, is a pdf viewable on TCEQ's webpage: https://www.tceq.texas.gov/downloads/agency/decisions/hearings/notices/2024/2024-07-15-16-18-zoom-update-stakeholder-meeting-notice-2024-00-039-ls-english.pdf.*

We urge the agency to embrace the in-person meeting and never again seek to eliminate it. A well-run hybrid option can expand access to public meetings without diluting the opportunity for people who can attend in person.

II. Contested Case Hearings should expand access and opportunity for the public, not restrict it.

A. Standing requirements should align with federal standing criteria.

Texas should use the same standing criteria for contested case hearings as is used to establish federal standing. This makes sense as the contested case hearing process is part of the air permitting process, which Texas operates via delegation of authority from the Clean Air Act. This request has been made repeatedly, in the Sunset process and elsewhere, so there is no need to elaborate on it further.

B. The Commission should follow the ALJ's Recommendation.

Commissioners regularly vote to deny a permit even after an administrative law judge (ALJ) has recommended denial. At times commissioners assert that an ALJ decision was wrongly decided and remand it for a revised opinion. The commissioners should respect the ALJ's role in the process and abide by his or her recommendation.

C. The State should fund public participation in the CCH process.

In order for a member of the public to meaningfully participate in a contested case hearing, they need a lawyer and subject matter experts that can easily cost tens of thousands of dollars. The Office of Public Interest Counsel should have a fund that community members can apply to for money to hire attorneys and experts to participate in the CCH process.

III. Please provide details of progress on the community outreach provision of SB 1397.

Section 10 of SB 1397 provides:

> Sec. 5.136. COMMUNITY OUTREACH. The commission shall provide outreach and education to the public on participating in the permitting process under the air, waste, and water programs within the commission's jurisdiction.

This provision was added into the bill late in the process by Senator Borris Miles. Senator Miles was deeply involved in the TCEQ Sunset process and has always prioritized public involvement in TCEQ matters. This is appropriate, as he serves environmental justice communities that disproportionately play host to polluting industry and regularly experience pollution events, disasters, and other disturbances by industry of their daily life.

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We urge the TCEQ to collaborate with Senator Miles and other lawmakers who have a demonstrated interest in public participation in TCEQ. We also encourage the agency to collaborate with advocacy groups and members of impacted communities when developing it's community outreach and education plan.

IV. Other miscellaneous comments.

A. The deadline for public comments should be extended beyond the public meeting in all cases.

In Section 4, SB 1397 holds open for 36-hours the public comment period and the contested case hearing request period for permit applications for which consolidated notice was issued. This should be expanded to all permits, not just those with consolidated notice.

This point was raised repeatedly by virtual and in person participants at the July 15 public meeting on this rulemaking. We urge TCEQ to extend the public comment period beyond the public meeting time in all possible cases. Many people know little to nothing about a proposed facility when they attend a public meeting. The information they learn at the meeting might very well prompt them to write a comment or request a contested case hearing. These interested members of the public should be afforded that opportunity.

B. Title VI compliance plans are moving in the right direction.

The various Title VI compliance plans[3], especially the language access plan and the public participation plan, are moving the agency in the right direction. Spanish language notices are becoming more common. We encourage the agency to use EPA's EJSCREEN or another tool to determine the languages spoken in communities near a proposed facility. There will be occasions when there is a significant number of impacted community members who speak Vietnamese, Chinese, Arabic, or various other languages. The TCEQ should establish clear criteria for when it will issue notices and other materials in other languages.

C. Public posting of permit applications.

It is not yet apparent whether TCEQ is posting electronic copies of permits online. We have previously requested that both draft and final permits be posted. It is very likely that impacted community members will want to view a draft permit application during the public comment process. We urge the agency to begin posting draft and final permits as soon as possible and to make those postings as easy to locate as possible. The public notice announcing a permit should include the web address where the draft permit can be viewed.

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[3] *See https://www.tceq.texas.gov/agency/decisions/participation/title-vi-compliance.*

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D. There is confusion at public meetings about the Q&A portion and the on the record portion.

TCEQ conducts public meetings with two distinct parts: a question and answer session that is off the record and a public comment session that is on the record. The difference between these parts isn't apparent to members of the public. It is a regular occurrence at a public meeting that someone gets up and speaks to the issues during the Q&A portion only to be told, "Thank you, if you want your comments to be on the record, please say them again during the comment period." This can confuse and upset people who feel like they are not being heard.

We suggest the entire public meeting be on the record.

E. Oral comments should be rendered in writing.

Oral comments delivered at public meetings should be transcribed and entered into the written record. Automated transcription software such as otter.ai is inexpensive and 99% accurate. Without oral comments ending up in the written record, they are not directly responded to by TCEQ.

Thank you for the opportunity to provide these comments, if you wish to discuss our position further, I can be reached by email at ashelley@citizen.org or by phone at 512-477-1155.

Respectfully,

Adrian Shelley, Texas Director
Public Citizen