



OFFICE OF THE
HARRIS COUNTY ATTORNEY
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Via tceq.commentinput.com

RE: Stakeholder Input on Upcoming Rulemaking Related to 30 TAC Chapter 39 and Chapter 55

The Texas Commission on Environmental Quality (TCEQ or the Commission) conducted stakeholder meetings on July 15, 16, and 18, 2024, to solicit feedback and informal comments on the regulatory changes required by Senate Bill 1397. The Sunset Commission made recommendations regarding TCEQ regulations on a number of topics, including but not limited to the Commission's public participation policies and procedures, how TCEQ classifies facilities that often violate pollution laws and regulations, and how the Commission evaluates affirmative defense requests. These stakeholder meetings are focused on the relevant changes to Chapters 39 and 55 of Title 30 of the Texas Administrative Code.

Texas law vests Harris County with Authority to enforce environmental laws concurrently with TCEQ. Tex. Water Code § 7.351; Tex. Health & Safety Code §§ 382.111, .113. This means that TCEQ and Harris County enforce the same environmental statutes and rules within the jurisdictional boundaries of Harris County. Harris County's Pollution Control Services Department (PCS) administers environmental enforcement for the County, and reviews and comments on TCEQ rules and permits. PCS was first established in 1953—making it the first county pollution control agency in the United States. Since then, Harris County has used available legal tools, such as filing documents with TCEQ and bringing enforcement actions, to redress environmental issues in Harris County.

Harris County appreciates the opportunity to provide comment on these potential changes to TCEQ rules. The County comments for the purpose of promoting public health and safety, public participation, environmental stewardship, and a strong regional economy. Harris County is especially concerned with public participation and offers recommendations to improve TCEQ's public participation policies and procedures.

Public Participation

Harris County is the largest county in Texas and along the Gulf of Mexico. In addition to containing Houston, the fourth largest city in the U.S., Harris County is also home to a large and diverse concentration of industry—including the Houston Ship Channel and the Port of Houston.

TCEQ actions frequently effect Harris County's resources and residents due to this heightened presence of industry and the emissions events, chemical disasters, smog, and related environmental factors that come along with it. Therefore, Harris County frequently participates in TCEQ actions through rulemaking and contested case hearings and has an interest in ensuring these procedures are efficient and accessible.

Houston is also the largest U.S city without zoning laws, which further compounds potential environmental hazards for the communities that are quite literally at the fence-line of industry. The County is minority majority and many environmental justice (EJ) communities live within Harris County. Thus, communities in the County are frequently affected by TCEQ actions and the County has an interest in ensuring residents are able to engage in the TCEQ's public participation process without undue hardship.

Permit Availability

The availability and accessibility of TCEQ permits and application materials has been a consistent issue for stakeholders. Harris County has repeatedly encountered issues accessing permit materials during the relevant comment periods, as outlined below. The County makes the following suggestions to improve accessibility to permitting materials and the public participation process overall.

Texas Water Code § 5.136 directs the Commission 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 addition to publishing related written materials, which should be made available both online and in print form at TCEQ regional and main offices, Harris County encourages TCEQ to hold in-person seminars on the rules and processes involved in public participation.

Harris County also requests that these education and outreach efforts include information about the timing of public participation deadlines, such as the end of a comment period or the cut-off date to request a contested case hearing, and how to properly calculate them. These deadlines are often difficult to ascertain, in part because different permitting actions have varying deadlines. Even TCEQ staff has at times been confused regarding deadlines for contested case hearing requests. Therefore, it is crucial to meaningful public participation that these deadlines are clearly outlined in a central document that stakeholders can easily access.

Texas Water Code § 5.1734 concerns the electronic posting of permit applications and related materials and directs TCEQ to post such materials on its website once an application becomes administratively complete. Firstly, TCEQ should make their website more user friendly, as it is difficult to navigate. Harris County staff have spent significant amounts of time searching through the various search engines and links for permits and related documents. TCEQ staff has also been unable to assist when asked to point County staff to a specific page for permitting materials and have even instructed County to simply type in the word "permits" to the search bar on the TCEQ website. Posting a permit somewhere on a large website without specified instructions on how to find it runs contrary to the intent of Texas law and TCEQ rules and must be corrected.

Harris County suggests that the various search engines and databases on TCEQ's website be consolidated into a single database containing permit materials, including applications and notices. The URL for this database should be prominently featured in a conspicuous place on the homepage of TCEQ's website and included in all permit notices and educational materials.

Additionally, HCAO asks that TCEQ implement a deadline for posting permit application materials once the application becomes administratively complete. HCAO suggests permit materials be posted no later than one week after an application becomes administratively complete, or another finite amount of time.

Texas Water Code § 5.1734(b) permits TCEQ to exempt associated permitting materials from its website if: 1) doing so would be unduly burdensome or 2) the materials are too large to be posted on the website. Factors to weigh when determining whether posting would be "unduly burdensome" should be laid out in a rule. What sort of file is "too large" should also be defined. For example, "too large" might be defined as larger than a specified unit of digital information that lends the rule reasonable applicability.

TCEQ should also continue to keep physical copies of permitting materials, including notices, at TCEQ regional offices to accommodate members of the public who have limited internet and computer access and / or literacy. Allowing the public to continue to access these materials at regional offices eliminates hardship that might be caused by confusion from navigating the TCEQ website. Additionally, TCEQ should begin to keep draft permit materials, such as applications and draft permits, at regional offices, as opposed to just keeping them at a single public place near the facility.

TCEQ should lay out specific procedures for the public to access permit materials at regional offices in the upcoming rulemaking. Currently, TCEQ is required to allow the public to access documents in their possession (subject to some limited exceptions), but there appears to be no protocol to access such materials. This lack of protocol has created an unnecessary bar to public participation, as Harris County has consistently had trouble accessing these documents during visits to the Houston Regional Office. The County has raised this issue in multiple comments filed with TCEQ.

County employees have had difficulty accessing documents at the Houston Regional Office, and when told they need to call ahead and schedule appointments or schedule appointments online, have not been able to do so. County employees have been told contradictory information about where permits are kept and whether they are kept at all. County employees faced problems calling the Regional Office and air phone line when trying to access materials or ask simple questions. These issues represent a small subset of problems faced by those trying to work with TCEQ and participate in the public participation process and, while certainly not exhaustive, paint a representative picture of the Commission's deficient public access scheme.

In summary, based on these visits, it is clear that: 1) there is no protocol for viewing documents at the Houston Regional Office; 2) there is a misunderstanding amongst TCEQ employees regarding how, when, and even *if* permits are available for public viewing at that office; and 3) this

misunderstanding is leading to incorrect information being shared with interested stakeholders, which bars and discourages public participation.

Should TCEQ not continue to have all permitting materials available for public viewing, HCAO asks that protocols be put in place for public viewing of documents exempted from being posted online per Texas Water Code § 5.1734(b).

Notice

Harris County would like to emphasize the importance of notices being published both online and in newspapers. Additionally, the County asks TCEQ implement rules that require TCEQ to verify that all applicable requirements are met. The County has encountered notices with glaring and obvious issues, such as the incorrect city being listed for the relevant facility, that might be avoided if there was a thorough review process at TCEQ to verify that the information in a notice meets requirements.

Harris County asks that TCEQ clarify in their rulemaking what constitutes a “newspaper of general circulation” in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility per 30 Tex. Admin. Code § 39.603.

Harris County has recently encountered instances in which applicants have posted notice to small, newsletter-type publications that are inserted into major publications. For example, the Houston Chronicle has various biweekly newsletters that cover items of interest to specific Houston-area suburbs. A facility can put out legal notices for a permit application in these smaller publications without technically publishing in the major publication. The County is concerned that, in certain instances, doing so might not provide adequate notice to residents regarding an application, and asks TCEQ to clarify if and when doing so is appropriate. Additionally, the County is uncertain that these smaller newsletter publications satisfy the requirement that notice for an application be posted in a newspaper of “general circulation,” especially if the newsletter only reaches a small geographic area that may or may not actually cover the area the facility is located in.

Harris County requests that the public be provided more consistent clarity on when a comment period ends and when the deadline to file for a contested case hearing is. Currently, the burden is often put on the public and stakeholders to research when a deadline might be. TCEQ rules regarding opportunities for contested case hearings and comment periods vary greatly between the various types of TCEQ actions and permitting processes. The applicable statutes and rules are cumbersome, difficult for community members to decipher, and contribute to public distrust of the TCEQ. For instance, in order to seek a contested case hearing for certain air permits a person must file a written request for a contested case hearing within 30 days of the publication of the Notice of Receipt of Application and Intent to Obtain a Permit (NORI). In contrast, the deadline to file a contested case hearing in other permit actions, such as a Texas Pollutant Discharge Elimination System (TPDES) permit application, are tied to the TCEQ decision letter. Additionally, comment submittal deadlines on permitting actions are often articulated in notices as being a specified number of days after the publication date. However, the notices include issuance dates, not publication dates, and a notice can be published weeks after the issuance dates. Therefore, if an

interested member of the public did not access the notice via newspaper publication, and did so through a mailing list, the library, or online, as is often the case, they would not know the deadline for comment without engaging in some (often cumbersome) research. This extra hurdle to comment might deter some from participating. Harris County recommends TCEQ require applicants to include language in the notice informing the public about the specific deadline for contested case hearings and comment periods.

Online meetings

TCEQ should strive to provide an in-person option for public meetings and make all efforts to hold such meetings in effected regions and / or counties. Unfortunately, online TCEQ meetings are frequently plagued with technical difficulties, and thus Harris County asks that in-person meetings remain the standard unless atypical circumstances exist that require the meeting be held online.

To help reduce the likelihood of technical difficulties, the County asks that TCEQ staff be required to conduct these meetings in-office, where technical support staff and office-quality technology is available, as opposed to at home or elsewhere.

Additionally, members of the public should be able to request public meetings be held in-person. TCEQ should promulgate a rule that requires an in-person meeting be held if such a request is made.

36-hour extension

Harris County approves of the addition of a 36-hour window to file comments after a public meeting for a permit application. The County recommends that TCEQ also apply this window to public hearing requests. This way, community members may request a public hearing up to 36 hours after a public meeting in case there are any issues with notice, public participation, or the permit itself that only reveal themselves at the public meeting.

Additionally, the County recommends that TCEQ adopt the 36-hour extension for every type of permit proceeding, even those not explicitly covered by Chapters 39 and 55 of the Texas Administrative Code. Specifically, the County recommends that TCEQ include an amendment to its rules, in Chapter 39, that the 36-hour rule applies to Title V permits and proceedings. TCEQ need not open up Chapter 122, which covers Title V proceedings, and can instead include a rule in Chapter 39 that references Chapter 122.

Website

As stated above, TCEQ's website is difficult to navigate. Harris County would like to emphasize its request that TCEQ combine its many databases and search engines into one, easily navigable source of information for the public. Additionally, there should only be one comment submittal portal.

Affected Person Status Determination

The Sunset Report recommends that TCEQ develop 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 every “request is reviewed on a case-by-case basis, considering all the factors in its rule, including—but not limited to—distance.” The definition of an “affected person” is statutorily defined and TCEQ is supposed to use a variety of factors to determine affected person status, such as distance restrictions or other limitations imposed by law on the affected interest, likely impact of regulated activity and the health and safety of the person or use of impacted natural resource by the person, and whether a reasonable relationship exists between the legally protected interest claimed and the activity being regulated. As the Sunset Report points out, though, TCEQ has instead developed an informal distance rule where it denies affected person status to persons who live further than a mile from a contested activity.

As a party often affected by TCEQ regulated activities, Harris County has an interest in utilizing sound, clear, and equitable formal guidelines that it can expect TCEQ to use in determining affected person status. Harris County recommends that TCEQ take an expansive approach when creating the guidelines for determining affected person status and include all of the factors described in TCEQ rules, not just the distance requirement (and not even a 1-mile requirement, as this may not be accurate for every activity). What might be helpful in determining the guidelines is identifying different classes of regulated activities and having suggested distance limitations based on sound science, such as calculations of the effect on air quality around different types of regulated activities that affect air quality. If TCEQ were to adopt an industry-by-industry guideline for any factor, it still must holistically analyze affected person status based on *all* of the factors.

Repeat Violations

S.B. 1397 amended Texas Water Code § 5.574 subsection (c)(2)(A) and added subsection (c-1). These sections state that TCEQ must set the number of major, moderate, and minor violations needed to be classified as a repeat violator and that TCEQ may “review, suspend, or reclassify a person’s compliance history in accordance with commission rules if the executive director determines that exigent circumstances exist.” Tex. Water Code § 5.574. Based on these statutory changes, the Sunset Commission recommended multiple changes to TCEQ regulations, including reviewing and updating the Commission’s compliance history rating formula, regularly updating a facility’s compliance history rating throughout the year, requiring TCEQ to consider all violations when classifying an entity as a repeat violator, reclassify recordkeeping violations based on the potential risk and severity of the violation, and authorizing TCEQ to review and potentially suspend a facility’s compliance history rating in the event of exigent circumstances, such as an emergency event causing death or injury.

The Sunset recommendation requests that a facility’s rating be updated “throughout the year as the agency receives additional information that could alter the rating.” Harris County recommends that TCEQ update compliance ratings as often as violations are reported, so a facility’s compliance rating is “live” and accurately reflects the current state of affairs at a facility. This continuously updated compliance rating scheme would provide accurate snapshots of a facility’s compliance at all times. This would allow the Commission to properly weigh all considerations in the permitting process and in any administrative enforcement or legal action against a facility.

Harris County also requests that TCEQ explicitly define what it means by the “exigent circumstances” in the forthcoming rule. The Sunset report recommended that TCEQ be authorized to “review and potentially suspend a facility’s compliance history rating in the event of exigent circumstances, such as an emergency event causing death or injury.” The rule should clarify what this means. Does the exigent circumstance refer to an event that causes death or injury to an employee at the facility, or to a community member outside of the facility? The rule should similarly elaborate as to why this would suspend a facility’s compliance history rating. It would seem that if a deadly or seriously harmful event occurs at a facility, that the facility’s compliance history rating should accurately reflect this circumstance. Thus, Harris County additionally recommends that this ability to “review, suspend, or reclassify” a facility’s compliance rating only be allowed to “ratchet up.” In other words, exigent circumstances should only increase the seriousness of a facility’s compliance history rating. It should not afford the facility’s rating any leniency.

Harris County also requests that if TCEQ determines that the current formula does not meaningfully assess compliance performance among complex facilities and develops a separate compliance history rating for sufficiently complex facilities, that this complex facility rating does not afford facilities any undue leniency. It might be possible that some facilities, due to their size and “complexity,” are over-represented in the current compliance formula. But, this does not necessarily warrant a new category and formula for complex facilities. All facilities, even complex ones, are approved by TCEQ under certain feasible conditions and limits and are expected to adhere to those conditions and limits. If TCEQ does create an alternative formula, which Harris County requests it doesn’t do, this formula should not be much different from the original compliance history rating formula, so that the commission does not afford “complex” facilities any leniency they are not owed.

Lastly, Harris County agrees with the Sunset Report’s recommendation that a facility’s compliance rating should not improve if the facility seeks an affirmative defense for a violation that affected its compliance history rating. To do so would run counter to the purpose of compliance ratings.

Affirmative Defense Guidance

The Sunset Report recommends TCEQ: (1) develop and implement clear guidance to evaluate affirmative defense requests for air emissions and (2) establish a centralized committee of agency staff authorized to review and approve all applications for an affirmative defense related to unauthorized air pollution emissions. An affirmative defense waives enforcement for air pollution emission events that are unplanned, unavoidable, and properly reported. TCEQ, and the Fifth Circuit, justify use of this affirmative defense scheme as a “narrowly defined and tailored tool” that incentivizes voluntary, proactive compliance. What the Sunset Commission found to actually be happening and what Harris County has seen first-hand, is that there is a lack of consistency and predictability as to how regulated entities are to meet the affirmative defense criteria.

Harris County agrees with the Sunset Commission regarding this issue and recommends that TCEQ revisit the affirmative defense criteria to ensure that the defense is sufficiently rigorous and narrowly tailored, only applying to those emission events that are truly unavoidable and do not cause sufficient harm. When TCEQ conducts investigations into emission events, the affirmative

defense answers offered by regulated entities are often single sentences (or less) and do not provide TCEQ with the detail it should need to make a deliberation, yet the defense is often granted anyways. Judicious application of the affirmative defense would provide the regulated community and regulatory community with clear guidelines as to when an affirmative defense is even on the table.

Lastly, Harris County agrees with the Sunset Commission and requests that TCEQ create a centralized committee of Commission staff authorized to review and approve all applications for an affirmative defense related to unauthorized air pollution emissions. This could be a smaller subset of all TCEQ air investigators that already have expertise with certain issues or facilities and when guided by updated TCEQ guidance on the availability of affirmative defenses, can further grow this expertise. Such a panel would ideally ensure that the affirmative defense is only being used as intended: rigorously, narrowly, and sparingly.

Sincerely,

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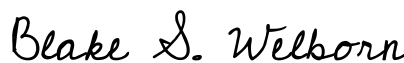
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