

Aimee Wilson

The United States Environmental Protection Agency (EPA) has prepared comments for consideration regarding the 30 Texas Administrative Code (TAC) Chapter 39, Public Notice and Chapter 55, Requests for Reconsideration and Contested Case Hearings: Public Comment that are open for public review as part of the proposed rulemaking process. Please see attached comments.



REGION 6

DALLAS, TX 75270

August 2, 2024

Ms. Patricia Duron
Program Supervisor, MC 205
Texas Register/Rule Development Team – Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Rule Project Number 2024-003-039-LS

Dear Ms. Duron,

The United States Environmental Protection Agency (EPA) has prepared comments for consideration regarding the 30 Texas Administrative Code (TAC) Chapter 39, Public Notice and Chapter 55, Requests for Reconsideration and Contested Case Hearings: Public Comment that are open for public review as part of the proposed rulemaking process. The proposed rulemaking is intended to implement changes recommended by the Sunset Commission's report. As part of our oversight duties, EPA has seen and experienced some deficiencies with the TCEQ's public notice and public comment process. Please see EPA comments provided in the enclosure of this letter.

If you have any questions, please contact our Air Permits Section Supervisor, Cynthia Kaleri at (214) 665-6772, or Aimee Wilson at (214) 665-7596.

Sincerely,

Jeff Robinson
Branch Manager
Air Permits, Monitoring & Grants Branch

Enclosure

EPA Enclosure

Comments on 30 Texas Administrative Code (TAC) Chapter 39 and Chapter 55

Introduction

TCEQ should evaluate what type of public outreach is needed considering local knowledge and information from past community engagement, including in such areas with a history of disparate impacts to minority or disadvantaged communities. The goal of community engagement is to ensure that the people most affected by the permit have input into the decisions that will impact their lives. EPA Region 6 provides comments and recommendations below for consideration as TCEQ considers amendments to the 30 TAC Chapter 39 and 55 rules.

Chapter 39 Public Notice

Interested Party List Access

30 TAC § 39.407 requires that the Office of Chief Clerk maintain mailing lists of all persons requesting notice of an application. EPA recommends that TCEQ strengthen its system for maintaining lists for interested parties and consider revising how persons can get on an interested parties list. For air permit applications, TCEQ currently maintains interested parties lists by either applicant name and permit number or county. TCEQ should include an option to be placed on an interested parties list by the facility's Regulated Entity Number (RN). If a person is interested in one permit at a facility, it stands to reason that they will be interested in other permits held by that facility, including any future "new" permits that may be applied for by that facility. Currently, to be placed on an interested parties list, you must send a request to the Chief Clerk or you are automatically added when commenting on a proposed action. TCEQ should consider developing an online tool to aid in the process of being added to an interested parties list.

Interested Party Notifications

30 TAC § 39.602(a)(2) requires that the Office of the Chief Clerk "mail" notice to persons on a relevant mailing list kept under 30 TAC § 39.407. Those placed on the interested parties list are only notified of permit actions by hard copy mail. Notifications through the mail can take a week (or longer) which results in valuable time lost to obtain the application and permit for review. The EPA understands that TCEQ already maintains the email addresses and/or phone numbers of those on the interested parties list. As such, in addition to hard copy mail, TCEQ should consider utilizing a listserv email service to send out interested party notifications. To better serve interested parties, TCEQ could also send mass text messages to notify interested parties of public notices and hearings. In any such notification, whether by mail, email, or text, TCEQ should include links to the draft or proposed permit and the permit application files. In providing these additional mechanisms for notification, TCEQ may save on the costs associated with notifying interested parties by allowing individuals to opt out of the default hard copy notification and receive only electronic communications.

Permit Record Document Availability

It can be challenging for interested parties to identify what permits are at public notice, how to comment on them, and when the public comment period ends. TCEQ maintains two separate websites

EPA Enclosure

Comments on 30 Texas Administrative Code (TAC) Chapter 39 and Chapter 55

for public announcements (for minor revisions)¹ and public notices (for renewals, initial issuance, and significant revisions)² on title V permit actions. EPA appreciates that these websites make it clear when the comment period begins and ends on the Public Announcement page and provides links to the draft permit and statement of basis. TCEQ's website for title V permit public notices includes a column for the date for the end of the 30-day comment period, but it appears to be left empty until the comment period has ended. To provide clarity to interested persons, TCEQ could populate the anticipated date for the end of the comment period and revise it as needed if a public meeting is held and/or public comment period extended. These websites could be revised to make the columns sortable and searchable to allow individuals to see what permits are at notice in their county. In addition, TCEQ could add links to the permit application files for these permits as this would help satisfy Sunset Advisory Commission (SB 1397 Section 11 / Sunset Rec 1.5) recommendation of electronic posting of permit applications. Providing easy access to a "complete application", as required under 30 TAC § 39.405(g), would assist in an interested person's ability to promptly review a draft permit.

TCEQ also maintains a similar website for pending New Source Review applications.³ This website was developed in response to a recommendation from the Sunset Advisory Commission (SB 1397 Section 11 / Sunset Rec 1.5). EPA has found that this website only provides a link to the application but does not provide any information on the public notice or comment period. TCEQ should consider adding this critical information to its website. This website should also include the county to aid individuals in locating permit applications that are of interest to them. We acknowledge that TCEQ also has a search page for public notices.⁴ This page can be useful for finding the public notices that have been issued in a county or region, however, it requires the user to perform a search on a regular basis to get the information. The information includes the date that TCEQ's letter (approving public notice) is given to the applicant. However, the actual publication date and official start of the comment period can be up to 30 days after this date. TCEQ has most of the information needed to ensure meaningful public participation in the permitting process, however, this information is spread out over many websites and none are linked to each other for ease of use. In addition, TCEQ has not made it easy to locate these webpages and should consider if there is a more efficient manner to display and make this information readily available, such as adding links on TCEQ's main air permitting page.

Public Notice of Applications Containing Information Claimed as Confidential

30 TAC § 39.405(g)(2) of the Texas SIP states that "[a] copy of the complete application (*including any subsequent revisions to the application*) and executive director's preliminary decision must be available for review and copying beginning on the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings" (emphasis added). If revisions to the application have occurred, this information must be made available for public review and comment consistent with the Texas SIP. EPA has seen instances where a public notice is published and months

¹ See https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/table.htm

² See https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/pnwebprt.htm

³ See <https://www.tceq.texas.gov/assets/public/permitting/air/reports/applications/nsr-pending-permits.html>

⁴ See <https://www14.tceq.texas.gov/epic/eNotice/>

EPA Enclosure

Comments on 30 Texas Administrative Code (TAC) Chapter 39 and Chapter 55

later a notice of deficiency (NOD) is sent to the applicant. NODs often require that additional information be submitted to the TCEQ to support the record and they can also result in material changes to the draft permit. TCEQ should ensure that any public notice for comment does not occur until after the entire application record is complete, this includes all responses to NODs and any application updates submitted by the applicant. All application files should be made available to the public.

EPA recommends that TCEQ ensure that all application materials are available for public review. We encourage TCEQ to clarify whether it interprets the § 39.405(g)(2) language which states “any subsequent revisions to the application” to also include any responses to notices of deficiency and any material submitted to TCEQ in support of the application. We recommend that 30 TAC § 39.405(g) be revised to indicate that in addition to a copy of the complete application being available for review and copying in a public place, that the complete application will also be available at the TCEQ Regional Office where the facility is located. TCEQ should indicate if any special arrangements need to be made in advance to view documents at the Regional Office.

Finally, EPA encourages TCEQ to consider how it handles permit applications that have information claimed as confidential. EPA reminds TCEQ that emissions calculations cannot be claimed as confidential information. EPA has the privilege of having ready access to permit applications submitted to TCEQ as confidential and EPA’s review of these confidential files often finds that the information that has been claimed as confidential should not be granted confidentiality under the CAA. EPA has formally objected or granted on confidentiality claims in permits, requiring TCEQ to address these concerns with individual applicants. TCEQ should consider improving the transparency of its process for reviewing and granting confidentiality claims and make it easier for the public to request access to confidential files.

Enhanced Public Outreach

TCEQ should consider additional ways to reach affected communities when conducting public outreach activities. The paid circulation of daily weekday newspapers in the United States has dropped significantly over the past 30 years. While it was once common for nearly every household to receive a daily newspaper, today this is rare for a variety of reasons. For those that can afford it, many pay to receive digital online access of their local and national newspapers. The large drop in distribution of newspapers has caused the price for home delivery of newspapers to rise which has resulted in some families cancelling their subscriptions. Newspaper notices may no longer be the most effective resource if used as the sole method for communicating public notices for air permits. Online notices are more effective, but not everyone has internet access and online distribution is sporadic across different social media platforms. Therefore, EPA encourages TCEQ to utilize other potentially more effective forms of notification, e.g., notifications through the postal mail service. Every home receives mail and there is no direct cost to the homeowner to receive mail. TCEQ could suggest that facilities send out a mass mailer informing communities of proposed permits when it is expected to have increased public interest (such as for concrete batch plants, rock crushers, expansion projects at major facilities, etc). The mailer could be done through the USPS presorted standard mail option. Presort mail would allow the mailer to be delivered to every home located within the zip code in which the facility or proposed

EPA Enclosure

Comments on 30 Texas Administrative Code (TAC) Chapter 39 and Chapter 55

action is to be located. These options would ensure that every person that could potentially be affected by the proposed permit and its emissions would be notified of the proposed facility and of their opportunity to participate in the public commenting process. If a public meeting or hearing is held, a mass mailer could also be done.

Public Input

EPA encourages the adoption of recommendation 1.1 from the Sunset Advisory Commission Report that states “Require the public comment period and deadline to request a contested case hearing for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with a consolidated notice of receipt of application and intent to obtain permit (NORI) and notice of application and preliminary decision (NAPD), if a public meeting is held” and “Require the public comment period for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with a consolidated notice of receipt of application and intent to obtain permit (NORI) and notice of application and preliminary decision (NAPD), if a public meeting is held.” EPA requests that TCEQ consider if 36 hours is a sufficient amount of time and would recommend a minimum of 48 hours and consider a longer time period for more complicated permit actions.

Language Access Plan

EPA is in support of the TCEQ’s Language Access Plan and the Alternative Language Requirements rules added at 30 TAC § 39.426. EPA requests that these rules be expanded to also apply to title V permit actions.

Chapter 55 Requests for Reconsideration and Contested Case Hearings; Public Comment

Affected Person Determinations

Federally delegated state programs must include an opportunity for judicial review of air permit decisions in state court. The right to appeal extends to individuals who participated in the public notice and comment process and satisfies the requirements for standing under Article III of the United States Constitution. TCEQ must ensure that the Chapter 55 rules for the determination of an affected person at 55.203 are not narrower than those established under Article III. TCEQ often makes reference to the use of a one-mile radius from the permitted facility to determine if a person’s residence is within this one-mile boundary to approve them as an “affected person”. TCEQ should consider the volume of emissions and their dispersion and not limit the radius of an affected person to only one mile. We also suggest that TCEQ not limit the determination solely based on residence within a set radius, but also take into consideration places of work, worship, recreation, and other instances where a person may be near the permitted facility on a routine or regular basis. EPA recommends that 55.203 be revised to clarify how an affected person is determined. We would also recommend that the recommendations from the TCEQ’s Office of Public Interest Council be considered and accepted for affected person determinations.

EPA Enclosure

Comments on 30 Texas Administrative Code (TAC) Chapter 39 and Chapter 55

EPA recommends that TCEQ revise Chapter 55 Subchapter D Rule 55.103 Definitions. We recommend that the section be revised to include a complete list of definitions, including: affected person, personal justiciable interest, legal right, duty, privilege, power, or economic interest (with examples for each of these personal justiciable interest categories). We would strongly encourage the TCEQ to make any guidance on the determination of an affected person readily available for public comment.

Applicability

EPA encourages TCEQ to consider revisions to 30 TAC § 55.101(e) to clarify what permit actions this Chapter is applicable to and to consider not limiting the use of this chapter broadly. EPA also recommends that TCEQ consider revising 30 TAC § 55.101(f)(3) to eliminate permits by rule (PBRs) from the list of items for which Chapter 55 hearing requests do not apply to. EPA makes this request for many reasons that have already been raised in our comments to TCEQ during the Quadrennial Review of Chapter 106.⁵ Specifically, EPA previously raised concerns regarding the use of multiple PBRs at large facilities and in non-attainment areas. The widespread use of PBRs is of concern in areas with large amounts of industrial activity that may be primarily permitted through PBRs, which can potentially result in air emissions sources in disparately impacted communities that are never subject to a public notice and comment period. Likewise, EPA also requests that TCEQ consider the removal of § 55.101(g)(9) from the Chapter 55 rules as we further recommend that the contested case hearing process be allowed for standard permits. EPA's request is based on the fact that standard permits can be used to make changes to the operation and control of a major stationary source through the pollution control project standard permit and that many sources may operate solely under a standard permit without a chance for any meaningful public participation.

Public Comment Period

EPA recommends minor changes to 30 TAC § 55.152, Public Comment Period. We recommend that 30 TAC § 55.152(a) be revised to state that the public comment period shall end after a minimum of 30 days. EPA has reached out to TCEQ on multiple occasions to use their authority under 30 TAC § 55.103(a)(8) to extend comment periods due to significant public interest, especially in areas where there may be claims of potential disparate impacts to local communities or neighborhoods. TCEQ should make it a practice to consider the impacts on a community and that community's interest in the permitting action when determining the length of a public comment period and set the length of the public comment period accordingly for meaningful engagement to occur.

Public Meetings

In order to allow for meaningful engagement with the community, EPA also recommends revisions to 30 TAC Chapter 55 Subchapter E, Public Meetings. 30 TAC § 55.154(b) states the public meeting is to be held in the county in which the facility is located or proposed. In order to be more accommodating to disadvantaged communities where automobile ownership is low and residents rely on public transportation or active travel (walking or biking), TCEQ should require that public meetings be held

⁵ Please see https://www.epa.gov/system/files/documents/2024-07/2023.03.14_epa-comments-on-chapter-106.pdf

EPA Enclosure

Comments on 30 Texas Administrative Code (TAC) Chapter 39 and Chapter 55

closer to where the facility is located or proposed. If this is not possible, then TCEQ could require that public meetings be held near public transportation hubs or require the applicant to provide transportation for the community members. In addition, EPA would encourage that hybrid public meetings (in person and virtually) be held if requested. It may not always be possible for interested persons to attend a public meeting in person if they are disabled or have other medical conditions that make it burdensome for them to attend a meeting. The option to allow the public to request a hybrid meeting would also allow those to participate that may not live near the facility but still have a personal interest in the proposed permit. Another option is that TCEQ could arrange a separate hybrid opportunity for that individual to provide their comments virtually outside the main public meeting forum.