Amy Dinn

Attached please find comments submitted by Lone Star Legal Aid on behalf of Better Brazoria.

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VIA ONLINE SUBMISSION: https://tceq.commentinput.com/
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Re: Proposed Rulemaking, Rule Project Number 2024-003-039-LS

On behalf of our represented client, Stakeholder Better Brazoria—Clean Air & Water (Better Brazoria), Lone Star Legal Aid (LSLA) provides the following informal comments to the Texas Commission on Environmental Quality (TCEQ) on the non-statutory changes included in the proposed rulemaking to amend 30 Texas Administrative Code Chapter 39, Public Notice; and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comments.

I. INTRODUCTION

LSLA's mission is to protect and advance the civil legal rights of the millions of Texans living in poverty by providing free advocacy, legal representation, and community education to ensure equal access to justice. LSLA's service area encompasses one-third of the State of Texas, including 72 counties in the eastern and Gulf Coast regions of the state. LSLA's Environmental Justice team focuses on the right to the fair distribution of environmental benefits and burdens and the right to equal protection from environmental hazards. LSLA advocates for these rights on behalf of impacted individuals and communities in LSLA's service area. These comments are submitted on behalf of Better Brazoria, which serves and represents the low-income environmental justice community of Freeport, Brazoria County, and its residents.

Stakeholder Better Brazoria formed to educate Freeport residents about environmental issues and to advocate for solutions to protect and improve air and water quality. To accomplish this mission, Better Brazoria holds community meetings to raise awareness about potentially harmful air and water pollution events in Freeport, Texas and Brazoria County. The group communicates with TCEQ and other state and local governmental entities to remain up to date on the latest

developments in the area. Better Brazoria continues to engage with the public participation component of the environmental permitting process by submitting comments, and engaging in hearings on air, water, and waste permits, and submitting comments, like these, on air monitors in the region. The group's goal is to encourage protection of public health through compliance with permitting schemes and environmental laws.

Better Brazoria is a stakeholder in submitting comments on these proposed rule changes to 30 Texas Administrative Code Chapter 39, Public Notice; and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comments because the group: (1) regularly receives and reviews public notices related to a diverse selection of permitting actions from TCEQ, (2) has participated in various types of permits and submitted public comments on them, (3) has requested contested case hearings from the agency on different types of permits, (4) has participated in contested cases hearings, and (5) generally followed the sunset review process of the TCEQ during the last legislative session and is familiar with many of the recommendations made by both the staff and legislators during that process.

II. PROPOSED CHANGES TO 30 TEXAS ADMINISTRATIVE CODE CHAPTER 39, PUBLIC NOTICE

Stakeholder Better Brazoria submits the following input on proposed changes to Chapter 39 of Title 30 of the Texas Administrative Code (30 TAC) covering Public Notices. All rule references below are to the TCEQ's rules found in Chapter 39 of 30 TAC.

A. Expanding Rules on Mailed to Include Electronic Publication of Notice and Emailed Notices

By enacting Section 5.583 of the Texas Water Code as part of SB 1397, the Texas Legislature sought to expand TCEQ's authority to include both newspaper and electronic publication notice for pending environmental permit applications. As recommended by the Sunset Advisory Commission,[1] any rules amended to adopt this requirement for electronic publication of notices should include postings on the TCEQ's website as well as provide the option to receive notifications through email. Any requirements for newspaper or public location notification would be in addition to this additional electronic publication.

As part of these new requirements, TCEQ should establish an additional email list for each permit as part of the existing mailing list required by the rules. At times, TCEQ already takes this step as a courtesy for those on mailing lists for many permits, which is highly appreciated by counsel representing protestants like LSLA. This email notice dramatically expands the time that stakeholders and interested parties have a chance to respond to TCEQ notices, which are already subject to short deadlines. While this notice does not substitute for the required mail notice, it provides the public and potential commenters more opportunity to respond to those permits they have already expressed interest in through an established mailing list.

[1] Sunset Advisory Commission, Staff Report with Final Results for TCEQ, 2022-2023 88th Legislature (June 2023) at A2, available at https://www.sunset.texas.gov/public/uploads/2023-08/Texas%20Commission%20on%20Environmental%20Quality%20Staff%20Report%20with%20Final%20Results_6-26-23.pdf. The Staff Report by TCEQ contained in this publication is cited as "TCEQ Staff Report" throughout.

Further, the Texas Legislature wisely realized that with electronic requirements for notice there may be unique challenges for some members of the public, especially for low-income or rural populations. The Sunset Advisory Commission noted that TCEQ should consider and accommodate if there are affected persons in areas of the state lacking internet availability who might need assistance with access to the notices, particularly if there is heightened interest or in response to comment or request.[2] This mandate in SB 1397 and codified in both Sections 5.583 and 5.173 of the Texas Water Code, stating that "[t]he commission shall consider and accommodate residents of each area affected by a proposed permit, permit amendment, or permit renewal who may need assistance accessing notice published by electronic means because of a lack of access to Internet services, particularly when there is a heightened public interest or in response to public comment." TEX. WATER CODE §§ 5.583(b), 5.1734(e).

Better Brazoria wholeheartedly agrees with this concern and would encourage the agency to try different forms of outreach to these areas utilizing local media, public libraries, and active community groups in the area to engage the public. Better Brazoria addresses some existing criteria in Chapter 39 to help explain the language "heightened public interest" in Sections 5.583(b) and 5.1734(e) below in Section III-C.

Better Brazoria identifies the following existing rules in Chapter 39 that are impacted by these suggested and required changes:

- Rule §39.405, Public Notice – General Notice Provisions (Subchapter H);
- Rule §39.407, Mailing Lists (Subchapter H);
- Rule §39.411(c), Public Notice- Applicability and General Provisions (Subchapter H);
- Rule §39.413, Mailed Notice (Subchapter H);
- Rule §39.418, Notice of Receipt of Application and Intent to Obtain Permit (Subchapter H);
- Rule §39.419, Notice of Application and Preliminary Decision (Subchapter H);
- Rule 39.501, Application for Municipal Solid Waste (Subchapter I);
- Rule §39.503(c),(f), Application (Subchapter I);
- Rule §39.551, Public Notice of Water Quality Applications and Water Quality management Plans Hazardous Waste Facility Permit (Subchapter J);
- Rule §39.602, Mailed Notice for Air Quality Permit Applications (Subchapter K);
- Rule §39.651, Public Notice of Injection Well and Other Specific Applications

[2] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A4.

(Subchapter L);

- Rule §39.653, Public Notice of Injection Well and Other Specific Applications (Subchapter L);

- Rule §39.805, Mailed Notice for Post-Closure Orders (Subchapter N);

- Rule §39.1003, Notice of Application for Minor Amendments

- Rule §39.1005(c), Notice of Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit (Subchapter P);

- Rule §39.1007, Notice of Class 2 Modification of an Industrial Solid Waste or Hazardous Waste Permit (Subchapter P);

- Rule §39.1009(a), Notice of Modification of a Municipal Solid Waste Permit or Registration (Subchapter P), and

- Rule §39.1011(a), Notice of Application for Voluntary Transfer of Injection Well Permit (Subchapter P).

B. ELECTRONIC PUBLICATION OF PERMIT APPLICATIONS ON ONLINE

Newly added Sections 5.583 and 5.1734 of the Texas Water Code require the TCEQ to electronically post all permit applications on its website. Section 5.1734(a) provides that "[t]he commission shall post on its website at the time a permit application becomes administratively complete: (1) the permit application and any associated materials; and (2) for a permit application under Subchapter D, Chapter 11, any map accompanying the permit application. TEX. WATER CODE § 5.1734(a). The application must be posted on TCEQ's website regardless of size. TEX. WATER CODE §§ 5.583(a), 5.1734(a). The Commission may only exempt associated materials if "(1) posting the materials on the website would be unduly burdensome; or (2) the materials are too large to be posted on the website." TEX. WATER CODE §§ 5.583(a), 5.1734(c).

Suggested language for revising the applicable notice rules cited above in Section I-A could include: "Regardless of the notice requirements in §39.XXX of this title, the commission shall make available by electronic means on the commission's website the permit application."

Better Brazoria further reflects that applicants have at times hosted these additional materials on their websites to make applications publicly available and any supporting materials, which is very welcome. We hope this trend will continue, and TCEQ acts to ensure that those postings are complete when TCEQ is unable to host everything itself due to size limitations. It is hard to imagine a situation where it would be too burdensome to include the additional materials if a link to an applicant-hosted website was included to ensure that the materials were readily available. Further, 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 can 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. Better Brazoria recommends TCEQ require all associated permit materials to be posted online at the applicant's expense.

Better Brazoria identifies the following existing rules in Chapter 39 that are impacted by these suggested and required changes:

- Rule §39.419, Notice of Application and Preliminary Decision;
- Rule §39.804, Text of Public Notice of Post-Closure Orders (Subchapter N);
- Rule §39.1003, Notice of Application for Minor Amendments; and
- Rule §39.1005(b), Notice of Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit.

It is extremely important that all permit applications be available on TCEQ's website so that the public can review a copy of the application without having to make an open records request. Again, this access expands the amount of time that the public may review an application and enhances the public's understanding of the noticed permit.

C. CONCERNS ABOUT TCEQ'S WEBSITES CONTAINING PERMIT INFORMATION

Communities and experienced advocates often have challenges identifying what permits are at public notice, how to comment on them, and when the public comment period ends. TCEQ maintains two separate websites for public announcements (for minor revisions)[3] and public notices (for renewals, initial issuance, and significant revisions)[4] on title V permit actions. 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.[5] This website was developed in response to a recommendation from the Sunset Advisory Commission (SB 1397 Section 11 / Sunset Rec 1.5). This website only provides a link to the application but does not provide any information on the public notice or comment period. TCEQ should

[3] https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/table.htm
[4] https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/pnwebrpt.htm
[5] https://www.tceq.texas.gov/assets/public/permitting/air/reports/applications/nsr-pending-permits.html

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.[6] 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. None of these websites 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.

D. Public Notice of Applications Containing Information Claimed as Confidential

Rule §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. Sometimes a public notice is published and months 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. NODs 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, including any NOD sent to the applicant.

TCEQ should ensure that all application materials are available for public review. We encourage TCEQ to clarify whether it interprets the Rule §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. Rule §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.

TCEQ should further consider how it handles permit applications that have information claimed as confidential. Emissions calculations cannot be claimed as confidential information. 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.

[6] https://www14.tceq.texas.gov/epic/eNotice/

E. PROPOSED CHANGES TO TEXT OF PUBLIC NOTICES TO REQUIRE THE NAME OF THE APPLICANT, TYPE OF PERMIT, AND ADDRESS OF THE PROPOSED OR EXISTING SITE.

All public notices should provide notice of where the proposed or current facility is located so that the community can know where the facility is and judge how it will affect them. Too many times, the public notices have not provided a complete address of the site or failed to identify a precise location for the facility. The address for the facility needs to be part of the public notice, not just the facility's general location, particularly because the applicant's address can be completely different from the proposed facility that is being permitted. That can be confusing to the public. The Sunset Advisory Commission specifically mentioned including the address in its the recommendations.[7]

In addition, newly amended Section 5.129 of the Texas Water Code now requires the beginning of the public notice to include a succinct statement of the subject of the notice and a summary statement designed to inform the reader of the subject matter without having to read the entire text of the notice. TEX. WATER CODE §§ 5.583(a), (a-1). These changes now need to be included in all rules concerning the text of public notices.

Better Brazoria identifies the following existing rules in Chapter 39 that are impacted by these suggested and required changes:

- Rule §39.411(e), Text of Public Notice;
- Rule §39.411(h), Text of Public Notice for Contested Case Hearings;
- Rule §39.603(e)(1), Newspaper Notice;
- Rule §39.419, Notice of Application and Preliminary Decision;
- Rule §39.804 Text of Public Notice of Post-Closure Orders (Subchapter N);
- Rule §39.1003, Notice of Application for Minor Amendments; and
- Rule §39.1005(b), Notice of Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit.

F. PROPOSED CHANGES TO RULE §39.423, NOTICE OF CONTESTED CASE HEARING

Better Brazoria proposes that TCEQ be required to mail notice of a contested case hearing to the parties at least 30 days before the hearing. Currently the rule requires that "notice shall be mailed no less than 13 days before the hearing." Rule §39.423. More time should be provided for parties to prepare for the hearing, and Better Brazoria suggests a minimum of 30-day notice. This change would make Rule §39.423 the same notice period as Rule §39.709 (Subchapter M).

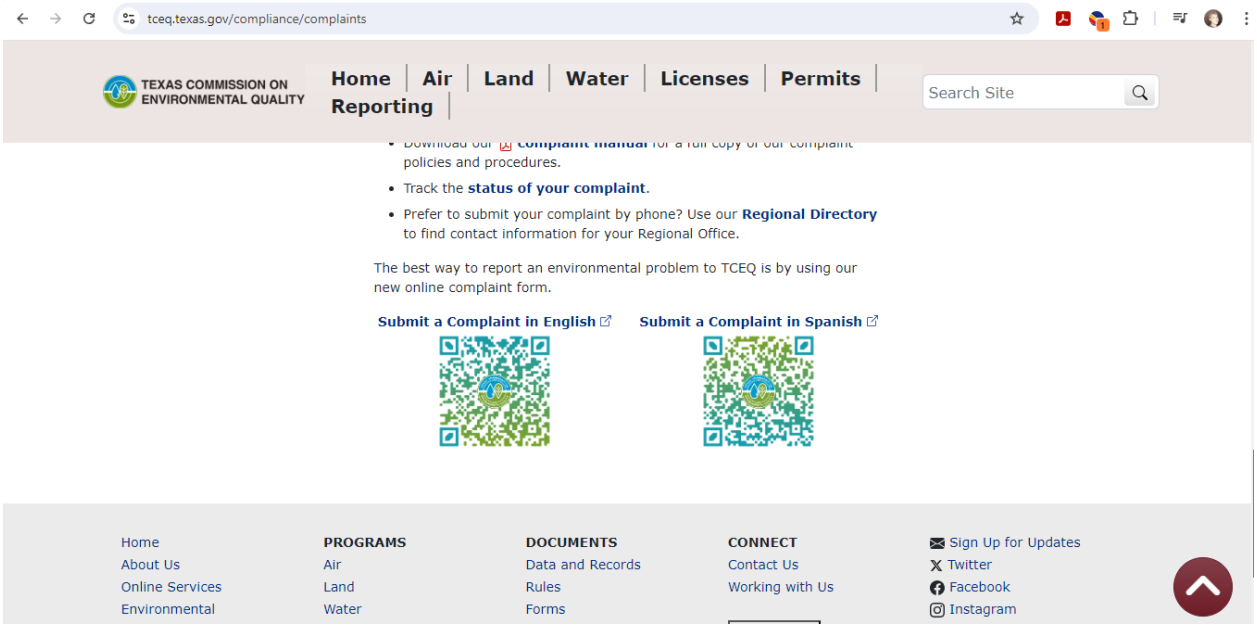
G. PROPOSED CHANGES TO RULE §39.426, ALTERNATIVE LANGUAGE REQUIREMENTS

[7] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A4.

The Sunset Review Report included several nonstatutory, management directives to TCEQ relating to the agency's Alternative Language Requirements and improving public participation by non-English speaking persons.

First, TCEQ was directed to prepare and deliver a report by September 1, 2023 to the legislature on TCEQ's efforts to enhance public participation and language access as part of its November 3, 2020, Informal Resolution Agreement with the EPA.[8] Better Brazoria appreciates that TCEQ delivered a timely report on its efforts.[9] The Report details TCEQ's efforts to perform public outreach and education and receive public input on how the Agency can improve its Public Participation, Language Access, and Disability Nondiscrimination plans. Better Brazoria appreciates that TCEQ acted on at least one of the recommendations made by the public during that process (switching meeting platforms to Zoom to allow for improved simultaneous interpretation) but hopes TCEQ will continue to engage the public via occasional informal or formal public participation periods and meetings to continue to improve the three plans. Better Brazoria is not aware that TCEQ has ever made any changes to the three plans based on public input. Better Brazoria hopes TCEQ will take the public's suggestions seriously and make appropriate changes to the three plans.

Second, TCEQ was directed to consider developing a Spanish language version of its online form through which individuals may submit a complaint.[10] TCEQ has created a link on its website to a Spanish version of the complaint form. This addition is good. However, the actual link itself is buried on the webpage and is in English[11]:



[8] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A5.
[9] https://www.tceq.texas.gov/downloads/remediation/publications/sfr-129-report-to-the-legislature-on-tceq-title-vi-efforts-and-epa-agreement-x.pdf.
[10] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A5.
[11] https://www.tceq.texas.gov/compliance/complaints.

The link to the Spanish form should be in Spanish, even on the English website. The two links should also be placed at or near the top of the webpage, rather than the very bottom. While when using a web browser on a computer, an "Espanol" option to translate the entire webpage is in the upper right hand corner, the "Espanol" option does not appear on a phone unless the user clicks a drop down arrow in the upper right hand corner of their phone screen. It is therefore not obvious on the phone how to access the Spanish version of the webpage. This circumstance is likely the same for all TCEQ webpages with a Spanish option. The Spanish option should appear on the webpage without needing to click a drop down menu to find it.

Third and similarly, the TCEQ should consider adding a form in Spanish for the public comment process (e-comment). Currently, the user can access the TCEQ's website to "Comment on a Pending Permit Application" using the "Espanol" option on the website (https://www.tceq.texas.gov/agency/decisions/cc/comments.html); however, once the user clicks on the link to comment on public comments, the user is taken to https://www14.tceq.texas.gov/epic/eComment/, which does not provide any translation to assist the user in submitting public comments in a different language. Thus, only those that speak English are guided properly in submitting public comments using TCEQ's eComment submission page.

Fourth, TCEQ should 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 to ensure accessibility in these communities.

Finally, Rule § 39.426 should be expanded to also apply to title V permit actions.

H. NOTICE TO OFFICIALS FOR PERMITS

Newly-adopted Section 5.586 of the Texas Water Code now requires TCEQ to provide notice when it receives any application for a permit, which requires public notice, to state representatives and senators that represent any portion of the proposed district's boundaries. TEX. WATER CODE § 5.586. This expanded requirement from the Legislature[12] came out of the Sunset Advisory Commission which determined that TCEQ should provide notice when it receives an application to create a new district[13] such as, the municipal utility districts (MUDs), to state representatives and senators that represent any portion of the proposed district's boundaries. This requirement should be applicable to all permits issued by TCEQ to ensure that the local representative and senator who represent the area in which the facility or activity is located to which the application relates has notice of the application.

Better Brazoria identifies the following existing rules in Chapter 39 that are impacted by these suggested and required changes:

- Rule §39.413, Mailed Notice (Subchapter H);

[12] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A5.
[13] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A4.

- Rule §39.418(2)(A), Notice of Receipt of Application and Intent to obtain Permit – Applicability and General Provisions (Subchapter H);

- Rule §39.419(a), Notice of Application and Preliminary Decision (Subchapter H);

- Rule §39.501(c)(1), Application for Municipal Solid Waste Permit (Subchapter I);

- Rule §39.503(c)(1), Application for Industrial or Hazardous Waste Facility Permit (Subchapter I);

- Rule §39.602, Public Notice of Air Quality Permit Applications (Subchapter K);

- Rule §39.651(c)(1), Public Notice of Injection Well and Other Specific Applications (Subchapter L);

- Rule §39.805, Mailed Notice for Post-Closure Orders (Subchapter N);

- Rule §39.902(c)(1), Public Notice for Marine Seawater Desalination Projects (Subchapter O);

- Rule §39.903(c)(1), Public Notice and Comment for Off-Shore Discharges (Subchapter O);

- Rule §39.1005(c), Notice of Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit (Subchapter P);

- Rule §39.1007, Notice of Class 2 Modification of an Industrial Solid Waste or Hazardous Waste Permit (Subchapter P);

- Rule §39.1009(a), Notice of Modification of a Municipal Solid Waste Permit or Registration (Subchapter P); and

- Rule §39.1011(a), Notice of Application for Voluntary Transfer of Injection Well Permit (Subchapter P).

TCEQ should revise these rules to mail notice to the representative and state senator for the area where the proposed or existing facility is located. An example of a current rule providing such notice is

> (b) Not later than 30 days after the executive director declares an application administratively complete:
> (2) the chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit to those listed in §39.413 of this title (relating to Mailed Notice), and to:
> (A) the state senator and representative who represent the general area in which the facility is located or proposed to be located….

30 TEX. ADMIN. CODE § 39.418(b)(2)(A).

I. VERIFICATION OF NEWSPAPER NOTICE

SB 1397 also required an amendment to the Texas Water Code to require that TCEQ verify that the applicant has published any required notices in the newspaper. TEX. WATER CODE § 5.584. This change is important to make sure that applicants who are required to publish notice in a newspaper to provide TCEQ with a copy of the published notice and publisher's affidavit.

Better Brazoria requests that the following TCEQ rules listed below concerning notices that must be published in a newspaper, as applicable, should include this new requirement from Section 5.584 that "if an applicant for a permit is required to publish notice in a newspaper, the applicant shall provide to the commission a copy of the published notice and an affidavit from the publisher certifying that the notice was published and the publication meets all applicable requirements, including newspaper circulation." TEX. WATER CODE § 5.584.

- Rule §39.603, Newspaper Notice;
- Rule §39.711, Proof and Certification of Notice (Subchapter M); and
- Rule §39.405, General Notice Provisions (Subchapter H);
- Rule §39.411, Text of Public Notice (Subchapter H);
- Rule §39.412, Combined Notice for Certain Greenhouse Gases Permit Applications (Subchapter H);
- Rule §39.418, Notice of Receipt of Application and Intent to Obtain Permit (Subchapter H);
- Rule §39.419, Notice of Application and Preliminary Decision (Subchapter H);
- Rule §39.426, Alternative Language Requirements (Subchapter H);
- Rule §39.501, Application for Municipal Solid Waste Permit (Subchapter I);
- Rule §39.503, Application for Industrial or Hazardous Waste Facility Permit (Subchapter I);
- Rule §39.510, Notice Requirements for Inactive Municipal Solid Waste Permit (Subchapter I);
- Rule §39.551, Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge (Subchapter J); and

- Rule §39.803, Public notice of post closure orders: General Notice Provisions (Subchapter N).

Current Rule §39.405(e) provides some guidance on how this type of requirement could be implemented into the TCEQ rules when newspaper notice is required so that the Chief Clerk can file a copy of the published notice and the publisher's affidavit.

> (e) Notice and affidavit. When Subchapters G - J and L of this chapter require an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

30 TEX. ADMIN. CODE § 39.405(e). TCEQ should revise each of the above-listed rules regarding newspaper notice as needed to include these new requirements for the applicant providing to TCEQ a copy of the published notice and publisher's affidavit.

III. PROPOSED CHANGES TO 30 TEXAS ADMINISTRATIVE CODE CHAPTER 55, REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENTS

Stakeholder Better Brazoria submits the following input on proposed changes to Chapter 55 of Title 30 of the Texas Administrative Code covering Requests for Reconsideration and Contested Case Hearings and Public Comments.

A. EXPANDING APPLICABILITY / ENTITLEMENT TO CONTESTED CASE HEARINGS TO PERMANENT ROCK & CONCRETE CRUSHERS

TCEQ should expand Rule §55.101 to apply to air quality standard permits under Chapter 116 or Title 30 of the Texas Administrative Code for permanent and rock concrete crushers, which are a source of particulate matter and other criteria pollutants. Currently, these permits are not allowed to have a contested case hearing per TCEQ's rules. An exception should be made for these facilities like there is for concrete batch plants to be allowed contested case hearing referrals. 30 TEX. ADMIN. CODE § 55.101(f). In addition, TCEQ should consider the removal of § 55.101(g)(9) from the Chapter 55 rules, the contested case hearing process be allowed for all standard permits. 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. Many sources may operate solely under a standard permit without a chance for any meaningful public participation.

B. REVIEWING AND EXPANDING DEFINITIONS IN CHAPTER 55.

TCEQ should consider reviewing and expanding Rule §55.103, Definitions, as part of this rulemaking process. This section could 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).

C. DETERMINING AFFECTED PERSON STATUS

U.S. law requires that states provide citizens with the opportunity to challenge pollution permits in federal court. The rules regarding who may bring forth challenges are laid out in Article III of the U.S. Constitution. To file an objection against a pollution permit, Texas requires the person filing to be an "affected person" who will be more impacted by the pollution than the general public. The scope of "affected person" should not be narrower or less than Article III standing requirements. As an organizational plaintiff, a group must satisfy the *Hunt* test for associational standing under Article III which requires an organization to demonstrate that: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977); *Gulf Restoration Network v. Salazar,* 683 F.3d 158, 166 (5th Cir. 2012); U.S. CONST. art 3, § 2, cl. 1. An individual or the individual members of an organization have standing to sue in their own right if (1) they have suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the respondent; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (internal citations omitted); *Shrimpers and Fisherman of RGV v. Tex. Comm'n on Envtl. Quality,* 968 F.3d 419, 424 (5th Cir. 2020).

Currently, Rule §55.103 provides that the determination of whether a person is affected shall be governed by §55.203 of this title (relating to Determination of Affected Person), or, if applicable under §55.256 of this title (relating to Determination of Affected Person). The current factors under Section 55.203 are:

- whether the interest claimed is one protected by the law under which the application will be considered;
- distance restrictions or other limitations imposed by law on the affected interest;
- whether a reasonable relationship exists 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;
- likely impact of the regulated activity on use of the impacted natural resource by the person;
- for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and

- for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Rule §55.203(c).

In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the commission may also consider the following:

- the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;
- the analysis and opinions of the executive director; and
- any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

Rule §55.203(d).

For applications subject to Rule § 55.256, the following factors are considered:

- whether the interest claimed is one protected by the law under which the application will be considered;
- distance restrictions or other limitations imposed by law on the affected interest;
- whether a reasonable relationship exists between the interest claimed and the activity regulated;
- likely impact of the regulated activity on the health, safety, and use of property of the person;
- likely impact of the regulated activity on use of the impacted natural resource by the person; and
- for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Rule §55.256(c).

Since at least 2010, the TCEQ has used an informal "1-mile rule" to determine whether someone is an affected person, reasoning that pollution won't particularly impact anyone who lives more than a mile away from the pollution source. The 1-mile rule is unofficial. It's not found in federal law, state law, or the TCEQ's governing documents, and didn't come from any official legal process.

This informal practice by TCEQ was one reason the Sunset Review process generated requests for the TCEQ to develop a guidance document[14] that explains what information the commission needs to evaluate whether a person is affected by a permit application and states that each request is reviewed on a case-by-case basis, considering all the factors in the rule, including---but not limited to—distance.[15] The Sunset Advisory Commission found the following:[16]

[14] TCEQ Staff Report at 22.
[15] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A1.
[16] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A1.

> TCEQ's current process for determining affected person status generates public confusion and frustration as the agency does not provide adequate information about what a person or entity needs to prove to be eligible to contest a permit. An affected person is someone directly and personally impacted by the operation of a permitted facility, not someone with a general concern about public health or environmental damage.
>
> TCEQ staff and permit applicants often seem to treat unwritten informal guidelines and approximations as hardline rules when recommending or arguing against a person's standing to participate in the administrative process before the commission. Such important policies should be formalized in publicly available guidance documents or, when appropriate, in rule. However, not all of TCEQ's existing rules provide clear guidance to the public on what they need to show or prove to the commission….

TCEQ should make any guidance on the determination of an affected person readily available for public comment. Better Brazoria provides several examples of its current concerns for TCEQ's consideration:

1. Distance Considerations

As noted in the Sunset Review process, while TCEQ rules require a request for a contested hearing to state a person's location and relative distance to the proposed facility or permitted activity, TCEQ provides no clarification of how the agency will take into account or measure that distance.[17] In public meetings, TCEQ commissioners discuss distance-related conditions, such as air dispersion models or tributaries between a proposed wastewater discharge point and a residence, and will deny a hearing request based on someone being "too far away," but without clarifying how they reached that determination.[18] As explained further below, in addition to distance, TCEQ should consider the volume of emissions and their dispersion and not limit the radius of an affected person to only one mile.

In practice—and as shown by the representative examples below—TCEQ ED (ED) has often read the state law definition of "affected person" to establish a presumption that those who own property or live within one mile of a proposed new or modified source are affected persons entitled to participate in a contested case hearing. Not incorporated in its rules, TCEQ has developed a "one-mile" informal guideline, generally suggesting anyone within a mile of a permitted site is an affected person while anyone farther than a mile is not.[19] However, staff and permit applicants appear to treat this unofficial criterion as if it were a formal rule even though previous TCEQ cases have demonstrated someone further than a mile from a permitted site or activity could be an affected person.[20] The following examples below show this informal pattern and practice by TCEQ despite the adoption of any formal rule to support these decisions.

[17] TCEQ, Staff Report at 17.
[18] TCEQ, Staff Report at 17.
[19] TCEQ Staff Report at 17.
[20] TCEQ Staff Report at 17.

a. Located Less Than One Mile From Facility – Affected Person Status Recommended

- TCEQ Docket No. 2021-0403-AIR: The ED recommended that five individuals and one entity were affected persons because they lived (or were located) less than one mile from the proposed facility and identified personal justiciable interests. In the same case, the ED recommend that one individual was not an affected person because he resided more than 2.5 miles from the proposed facility.

- TCEQ Docket No. 2020-1325-AIR: The ED found that three members of a group seeking associational standing, that each lived within one mile of at least one of the emissions points, would qualify as affected persons in their own right. The ED explained that "[b]ecause ***distance from the proposed facility is key*** to the issue of whether there is a likely impact of the regulated activity on a person's interests such as the health and safety of the person, and on the use of property of the person, the ED has identified an area of approximately 1 mile from the proposed facility on the provided map." The map showed that the three affected persons lived 0.71, 0.71, and 0.83 miles from emission point #1, and 1.01, 0.99, and 1.13 miles from emission point #2.

- TCEQ Docket No. 2019-1473-AIR: The ED recommended that twelve individuals that lived less than one mile from the proposed facility were affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203. In the same case, the ED recommend that sixty-two individuals were not affected persons because they resided more than 3 miles from the proposed facility.

- TCEQ Docket No. 2019-1162-AIR: The ED recommended that eighteen individuals that lived less than one mile from the proposed facility were affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203. In the same case, the ED recommend that sixteen individuals were not affected persons because they resided more than one mile from the proposed facility.

- TCEQ Docket No. 2017-0533-AIR: The ED recommended that two individuals residing more than 3 miles, three individuals residing more than 3 miles, and ten individuals residing more than 5 miles were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203. In the same case, the ED recommended that a school district with a school located approximately one mile from the plant was an affected person.

- TCEQ Docket No. 2017-0906-AIR: The ED recommended that an individual was an affected persons because she lived approximately 0.5 miles from the proposed facility and identified a personal justiciable interest.

- TCEQ Docket No. 2017-0031-AIR: The ED recommended that two individuals were affected persons because they lived approximately 0.33 miles from the proposed facility and satisfied the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2017-0085-AIR: The ED recommended that three individuals were affected persons because they "reside within close proximity of the proposed facility" (0.2, 0.7, and 0.8 miles respectively) and have also articulated a personal justiciable interest in the proposed facility. In the same case, the ED recommend that two other individuals were not affected persons because they resided 1.6 and 3.6 miles away from the proposed facility.

b. Located *More* Than One Mile From Facility – Affected Person Status Recommended

- TCEQ Docket No. 2019-0902-AIR: The ED recommended that six individuals and one entity were affected persons because they lived (or were located) either within 1 mile or "***slightly over 1 mile*** from the location of the proposed plant" and identified personal justiciable interests. In the same case, the ED recommend seven individuals were not affected persons because they resided more than 3 miles from the proposed facility. Likewise, three more individuals were not recommended to be affected persons because they resided more than 2 miles from the proposed facility. Finally, one individual living "slightly over 1 mile from the proposed location of the plant" was not recommended to be an affected person.

- TCEQ Docket No. 2021-0054-AIR: The ED recommended that seven individuals residing 2.6, 1.6, 1.6, 5.76, 6.85, 1.65, and 1.65 miles, respectively, were not affected persons because "given the distance of [their] residence[s] to the relative location of the plant, their health and safety would not be impacted in a manner different from the general public." However, in the same case, the ED recommended than one individual residing ***1.13 miles*** from the proposed facility was an affected person and had identified personal justiciable interests not common to the general public.

c. Located *More* Than One Mile From Facility – Affected Person Status *Not* Recommended

- TCEQ Docket No. 2021-0049-AIR: The ED recommended that three individuals residing 16.28, 1.74, and 16.05 miles, respectively, away from the proposed facility were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203(c).

- TCEQ Docket No. 2021-0051-AIR: The ED recommended that thirty-six individuals residing more than one mile away from the proposed facility were not affected persons. Of the thirty-six, the six closest individuals resided 1.21, 1.36, 1.51, 1.72, 1.82, and 1.89 miles from the facility, respectively. The remaining thirty individuals were located between 2.27 to 27.64 miles away from the facility.

- TCEQ Docket No. 2020-0837-AIR: The ED recommended that three individuals residing 3.68, 5.69, and 3.6 miles, respectively, away from the proposed facility were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203. The ED explained that "[f]or air authorizations, ***distance from the proposed facility is particularly relevant*** to the issue of whether there is a likely impact of the regulated activity on a person's interests

because of the dispersion and effects of individual air contaminants emitted from a facility. The natural resource that is the subject of this permit is the ambient air an individual breathes and, given the distance of [the individual's] residence to the relative location of the plant, [the individual's] health and safety would not be impacted in a manner different from the general public."

- TCEQ Docket No. 2020-0406-AIR: The ED recommended that seventeen individuals residing more than 2 miles away from the proposed facility were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203. Likewise, ED recommended that a group seeking associational standing with its member residing more than 2 miles away from the proposed facility was not an affected person.

- TCEQ Docket No. 2018-1304-AIR: The ED recommended that ten individuals residing 2.3, 2.6, 3.3, 4.6, 4.6, 5.5, 5.9, 18, 30, and 100+ miles away from the proposed facility (and those groups seeking associational standing on their behalf) were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2020-0193-AIR: The ED recommended that seven individuals residing within 4, 5, 5, 8, 8, 20, and 24 miles away from the proposed facility, respectively were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2019-0061-AIR: The ED recommended that an individual residing roughly 2 miles away from the proposed facility was not an affected person based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2018-1239-AIR: The ED recommended that an individual residing 2.45 miles away from the proposed facility was not an affected person based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2018-1304-AIR: The ED recommended that ten individuals residing 2.3, 2.6, 3.3, 4.6, 4.6, 5.5, 5.9, 18, 30, and 100+ miles away from the proposed facility (and those groups seeking associational standing on their behalf) were not affected persons based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2021-1004-AIR: The ED recommended that an individual residing within 1.67 miles away from the proposed facility was not an affected person based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2016-0923-AIR: The ED recommended that an individual residing 150 miles away from the proposed facility was not an affected person based on the criteria set out in 30 Tex. Admin. Code § 55.203.

- TCEQ Docket No. 2016-0145-AIR: The ED recommended that an individual residing 1.75 miles away from the proposed facility was not an affected person based on the criteria set out in 30 Tex. Admin. Code § 55.203.

d. Located *Less* Than One Mile From Facility – Affected Person Status *not* Recommended

- TCEQ Docket No. 2017-1727-AIR, the ED recommended that an individual residing "just under one mile from the proposed plant" was not an affected person because she failed to identify a personal justiciable interest. Likewise, the ED recommended against affected person status for another individual residing approximately 1.5 miles from the proposed facility.

- TCEQ Docket No. 2018-0710-AIR, the ED recommended that an individual residing 1010 yards from the proposed plant was not an affected person because he failed to raise any issues that may be considered personal justiciable interests. However, the ED recommended affected person status for three other individuals residing 582, 636, and 636 yards from the proposed facility, respectively.

Even though this "one-mile" presumption is not codified in any agency regulation or guidance, it is perhaps the single most important factor the Commission considers when making affected person determinations. From January 2016 to April 2021, TCEQ granted affected person status to only 12% of people who requested contested case hearings on NSR permits ("requesters"). These percentages were culled from the TCEQ ED's Response to Requests and the Commissioners Orders between January 2016 and April 2021. The denials of affected person status were mostly due to distance, failure to state a personal justiciable interest, failure to file timely comments, or failure to establish an individual member of a group as an affected person. Of the 460 requesters during this five-year period, 60% lived between one and five miles of the proposed facility, and 12% lived within one mile. Even though requesters who lived within one mile of a proposed facility made up less than a quarter of all requesters, they comprised 83% of all requesters who were granted affected person status. The remaining requesters who lived within one-mile of the proposed facility were denied affected party status for procedurals reasons or because the Commission determined they did not present a personal judiciable interest in the permit.

The majority of remaining 17% of requesters that were granted affected party status lived just slightly over a mile from the proposed facility. For example:

- "Ms. Matthews is slightly more than a mile but has convincingly demonstrated that she is an affected person. She submitted a lot of documentation as to her personal concerns. Pretty thorough. She made a very thorough demonstration of her affectedness." TCEQ Agenda Meeting (June 4, 2020);

- "The ED said Frank Dunn was too far away but I believe Dunn rehabilitated his request by pointing out in his reply that his employees and guests routinely use portions of his property that is within 1 mile of the facility." TCEQ Agenda Meeting (April 28, 2021); and

- In discussing Port Isabel's request for a contested case hearing: "It's within their ETJ. Close call. Facility is adjacent to the city limits. About a mile from the nearest city

> facility--an animal shelter. The more defensible position is identifying the city as an affected person." TCEQ Agenda Meeting (June 12, 2019)

TCEQ's use of an arbitrary one-mile rule in determining affected person status was apparent in their granting of a contested case hearing on an air permit application from Black Mountain Sand Eagle Ford, LLC. The ED recommended that Frank Dunn, who requested a contested case hearing on the air permit, be denied because of the distance of his home from the proposed facility:

> According to the hearing request, Frank Peyton Dunn's house is approximately 2.5 miles from the proposed plant. Two people live on the property full time, and he stays on the property about half of the year. He uses his property for hunting and recreation and is concerned that the permit will adversely affect his ability to safely enjoy his property and will impact the health of the full time residents. Although Mr. Dunn included a personal justiciable interest, the ED finds that he resides over two miles from the proposed plant. Because Mr. Dunn resides more than two miles from the proposed plant, the ED recommends that the commission find that Frank Peyton Dunn is not an affected person based on the criteria set out in 30 TAC § 55.203(c).

TCEQ, ED's Response to Hearing Requests for Docket No. 2021-0403-AIR at 8 (April 5, 2021). However, the Commissioners, when reviewing the contested case hearing requests at a public meeting, voted to grant Mr. Dunn a contested case hearing despite the ED's recommendation for denial. TCEQ, An Interim Order concerning TCEQ Docket No. 2021-0403-AIR at 1 (2021). One commissioner noted that Mr. Dunn "rehabilitated his request in his reply by pointing out that his employees and guests routinely use portions of his property that are much closer to the proposed plant." TCEQ Agenda Meeting (April 28, 2021). Mr. Dunn's reply to the ED's recommendations clarified that large portions of his property were within one mile of the facility. Lisa Roark, Gerald and Donna Merz, Frank Peyton Dunn, Barrier Ranch Properties, Ltd. and Patsy Tatum's Reply to the Responses to Hearing Requests, 1-2.

Similarly, when reviewing contested case hearing requests for an air permit for Holcim (US), Inc., TCEQ's ED recommended all 36 contested case hearing requests from nearby residents and environmental groups be denied. TCEQ, ED's Response to Hearing Requests for Docket No. 2021-0051-AIR at 6 (February 12, 2021). Sarah Elizabeth Ingram, one of the requesters, lived 1.21 miles from the Portland Cement Facility that was requesting a permit modification. *Id.* The ED recommended that Ms. Ingram, and the 35 other requesters, be denied because they did not "reside within one mile of the plant's emission point" and are therefore "not expected to experience any impacts different than those experienced by the general public" that would qualify them as affected persons. *Id.* Ms. Ingram, who lives with her children just slightly over one mile from the facility, stated in her contested case hearing request that she originally purchased her home because "it was next to the school and nature park and a church." Email from Sarah Elizabeth Ingram to TCEQ, Comment on Permit Number 8996 (July 25, 2019). She expressed concern for her children's health with the increase in emissions that the permit would allow and that she felt the need to relocate her family if the permit was granted. *Id.* The ED addressed Ms. Ingram's request specifically in its recommendations, stating that she did not include sufficient comments in her request to demonstrate that she has a personal justiciable interest different from

that of the general public and faulted her for requesting a "hearing" rather than a contested case hearing.

Even though the Commissioners seemed to find that Ms. Ingram had sufficiently demonstrated a personal justiciable interest, their decision to deny her affected person status turned on the proximity of her home from the facility. The Commissioners stated that "fewer than ten requesters cited a personal concern, a concern about their own well-being, and of those ten, the closest is located 1.21 miles from the proposed facility. So, the question in my mind is really whether, at that distance, if the person is affected in a manner different from the general public." TCEQ Agenda Meeting (March 21, 2021). The Commissioners decided that Ms. Ingram would not be affected differently than the general public. TCEQ, An Interim Order concerning TCEQ Docket No. 2021-0051-AIR (2021).

To the extent that TCEQ plans to adopt rules relating to distance, TCEQ should not allow distance to predominate over all other considerations already stated in Sections 55.203 and 55.256. Further there are other concerns about including distance as a metric as explained in the next section.

2. Explaining How to Measure Distance

In addition to not specifying distances as a criteria, if distance is considered by TCEQ, there is also a lack of clarity in the standard for evaluating whether a requester is an affected person. TCEQ Transcript from December 15, 2021 Agenda Meeting at 42:18-19, 44:2-5, *See also* Transcript at 43:10-11, 48:2-3 (stating repeatedly that "record could have been better"); 44:19-22 ("and I don't know that the ED's map in the record on his application really accurately indicates where that proposed location would be based off of the plot plan."); and 52:6-13 ("So to the extent that process matters, clearly the – the –the location of the facility, as indicated on the ED's map, does seem to be somewhat in –in controverted by some of the comments before us in the record. I will be supportive today of moving forward with you to –to refer this to SOAH for the effectiveness determination."). To the extent that it will consider distance, TCEQ needs consistent standards on how to measure that distance and from what locations.

For instance, TCEQ's ED recently took the position at a Commission meeting that the distance at which an individual will experience harm from the air pollution generated by a concrete batch plant should be calculated from a single arbitrarily-chosen point, rather than from the concrete batch plant itself. TCEQ Transcript from December 15, 2021 Agenda Meeting at 42:18-19, 44:2-5, *See also* Transcript at 43: 10-11, 48:2-3 (stating repeatedly that "record could have been better"); 44: 19-22 ("and I don't know that the ED's map in the record on his application really accurately indicates where that proposed location would be based off of the plot plan."); and 52:6-13 ("So to the extent that process matters, clearly the – the –the location of the facility, as indicated on the ED's map, does seem to be somewhat in –in controverted by some of the comments before us in the record. I will be supportive today of moving forward with you to –to refer this to SOAH for the effectiveness determination."). The plant is defined to include all emission sources. The TCEQ's Concrete Batch Plant Standard Permit (CBPSP) defines "Concrete Batch Plant", in pertinent part, as follows: Concrete batch plant – For the concrete batch plant standard permit, it is a plant that consists of a concrete batch plant facility and associated abatement equipment, **including, but not limited to** material storage silos, aggregate storage bins, auxiliary storage tanks, conveyors, weigh hoppers, and a mixer. Texas Health and

Safety Code §382.058(c) states that, "*[f]or purposes of this section, only those persons actually residing in a permanent residence within 440 yards of the proposed **plant** may request a hearing under Section 382.056 as a person who may be affected.* As a result of this confusion created by the ED, the Commissioners referred the issue to a preliminary hearing at SOAH rather than decide themselves who was an affected person. To rebut this argument at the preliminary hearing would require substantial briefing, mapping of the plant's layout, and live testimony to resolve the referred issue of affected person status even before requesters can participate in a contested case hearing and get judicial review of the permit's terms. SOAH Docket No. 582-22-1468 / TCEQ Docket No. 2021-1465-AIR regarding Application for CBPSP by Rhino Ready Mix, LLC in Harris County, Texas, Permit No. 319264 (Voided April 20, 2022). Requestors therefore spent months preparing for the noticed preliminary hearing and allocating resources to establish standing given the ED's contest of requestors' right to a hearing request only to have the applicant not show up, which luckily led to the TCEQ's voiding of the permit. *Id.*

In practice, TCEQ reads the state law definition of "affected person" to establish an arbitrary presumption that only those who own property or live within one mile of a proposed new or modified source are affected persons entitled to participate in a contested case hearing. While not codified anywhere, this "rule of thumb" is used regardless how large the source is, the character of the emissions, the size of a facility's stacks, or local meteorological conditions, and is so well known that counsel for applicants routinely raise it to challenge standing to participate in contested case hearings. Applicant Max Midstream Texas, LLC's Response to Hearing Requests, Application for Air Permit No. 162941, TCEQ Docket No. 2022-0157-AIR, at 6 ("Based on consistent Commission precedent, **the quintessential test regarding whether a hearing requestor has established a personal justiciable interest in a TCEQ air application is whether the purported interest (which is typically a person's residence) is located *within or only slightly further than one mile* from the facilities which would be authorized to emit air contaminants.** The sound reasoning for the Commission's quintessential test and the well-established Commission precedent has been repeated again and again in the TCEQ ED's briefing documents for well over a decade.") (hereinafter "Max Midstream Response to Hearing Requests"); *see also* Audio of Preliminary Hearing, El Paso Electric Company Application for Permit Nos. 1467, PSDTX1090M1, N284, GHGPSDTX199, SOAH Docket No. 582-21-1740, (June 3, 2021) Hour 2:16:08 (Counsel for Applicant "As I'm sure your honor has heard in other cases and maybe even more generally. Folks that are not within a mile radius of the purposed facility such as the one involved in this application are generally not given, not granted party status. It's a rule of thumb I believe that TCQ Commissioners apply when determining whether someone is affected."; Exhibit D, Excerpts From Preliminary Hearing Transcript, Application of Port Arthur LNG, LLC For New State and Prevention of Significant Deterioration Air Quality Permits No. 158420, GHGPSDTX198, and PSDTX1572, SOAH Docket No. 582-22-0201 (Nov. 16. 2021) 26:5-15; 35:12-13, 40:4-23, 43:10-44:19 (Counsel for Applicant repeatedly asking whether resident members of an association seeking a contested case hearing lived within one-mile of the proposed facility).

Revisions to the Texas Clean Air Act that have not been incorporated into the Texas SIP establish distance limitations for contested case hearing requests concerning certain kinds of concrete batch plant projects. TEX. HEALTH & SAFETY CODE § 382.058(c). Pursuant to this state-law statutory provision, only people who *live within 440 yards* of a proposed plant may participate

in a contested case hearing. *Id.* Thus, under the theory of administrative exhaustion advocated by TCEQ, a person who lives just outside the 440 yards, or a person who owns property within 440 yards but does not live there, would not be able to seek judicial review of such a permit. A bright line distance standard from a person's residence for determining access to judicial review of an air permit is not equivalent with the standards of Article III. *See e.g.*, *Allen v. Wright*, 468 U.S. 737, 751-52 (1984) (the standing inquiry is case-specific and "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."). *See also Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.").

Where a permitting scheme includes distance restrictions limiting an affected person determination, the regulations must prescribe how the distance should be measured. Better Brazoria urges the Commission to adopt regulations requiring measurements to be from the facility's property boundary to the affected structure (home, school, place of worship, etc.) using the nearest points between the two. The need for instructive regulations on how to measure distances is well illustrated in the concrete batch plant permitting context.

For example, to be an affected person entitled to a contested case hearing on a concrete batch plant ("CBP") standard permit, an individual must "reside" within 440 yards of a concrete batch plant. TEX. HEALTH & SAFETY CODE § 382.058(c). TCEQ rules, however, do not currently specify where to measure those 440 yards from. And, in practice, the ED's mapping and measurements appear arbitrary—generally, illustrating the entire concrete batch plant with a single dot somewhere within the property's boundaries. Below are maps from a variety of permitting cases, showing the varied placement and varied measurements when evaluating this distance limitation.

Figure 1:
ED's Map situating Rhino Ready Mix Concrete Batch Plant Standard Permit No. 162413

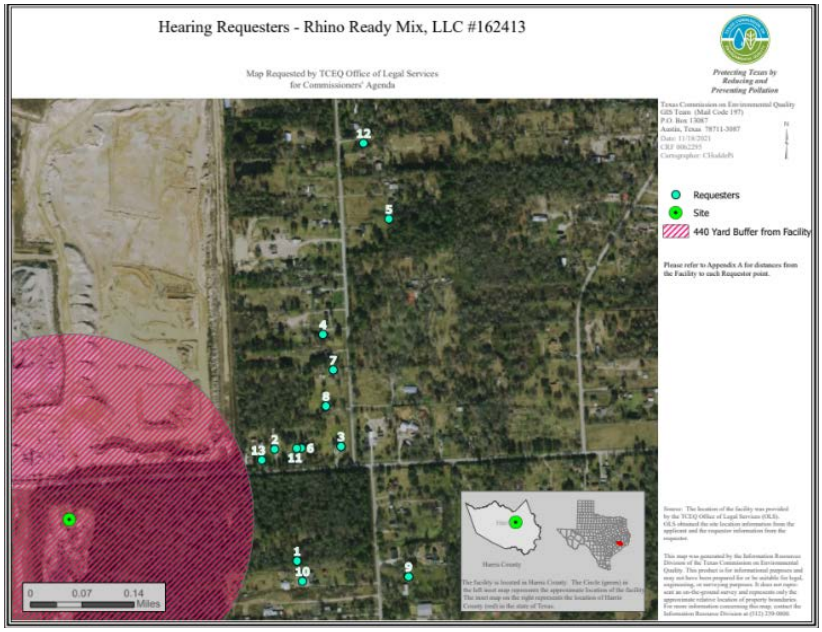


Figure 2:
ED's Map situating Soto Ready Mix Concrete Batch Plant Standard Permit No. 151715

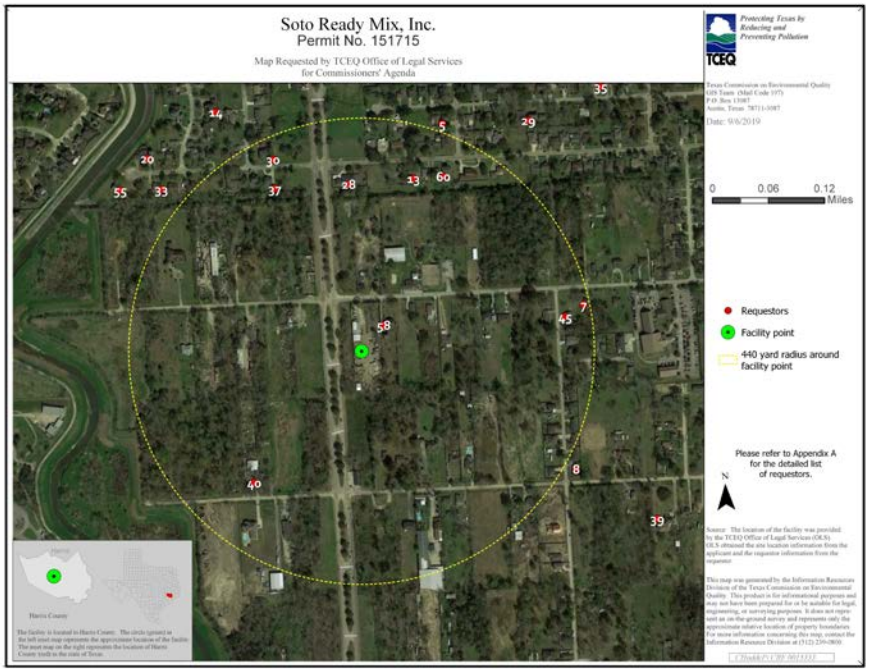
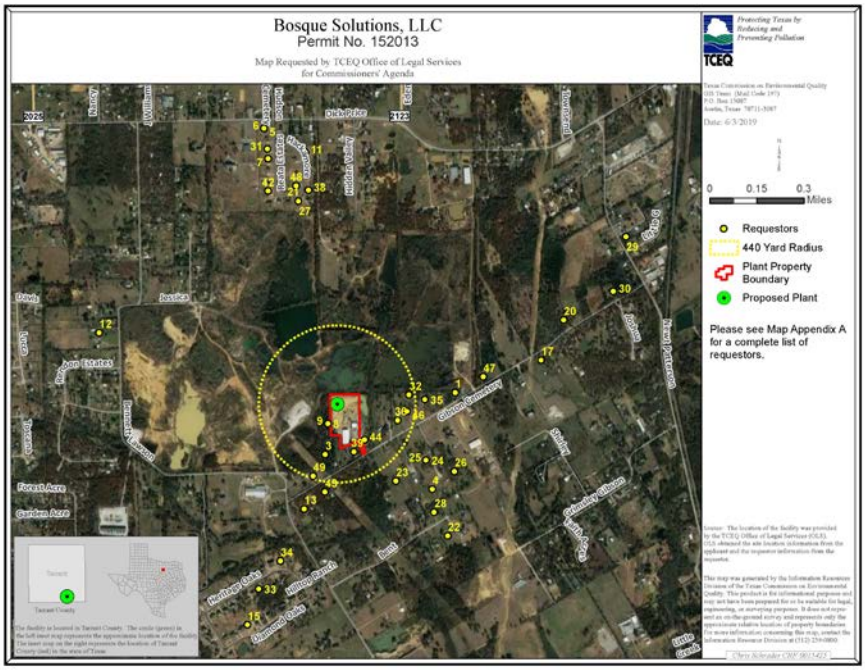


Figure 3:
ED's Map Situating Texas Concrete Enterprise Ready Mix Concrete Batch Plant Standard Permit No. 150603

Figure 4:
ED's Map Situating Bosque Solutions Concrete Batch Plant Standard Permit No. 152013



These arbitrary green dots are problematic as representative of a concrete batch plant for several reasons. First, any prescriptive distance that is ultimately defining whether a person is affected for purposes of a contested case hearing should **not** measure from a single piece of equipment. In reality, a concrete batch plant is made up of lots of equipment and many different emission points—and could never be accurately illustrated by a single dot. For example, concrete batch plants could include all the following emission points *and more*: Sand Stockpiles, Aggregate Stockpiles, Aggregate & Sand Conveyor, Sand Storage Bin/Aggregate Storage Bin, Sand & Aggregate Weighing System, Cement Silo, Fly Ash Silo, Truck Mixer, Central Dust Collector, Wind Erosion from Stockpiles, Unpaved roadways, etc. Therefore, the dot is not an adequate representation of a concrete batch plant or the corresponding emission sources that may affect a nearby community member.

Second, plant equipment layout is subject to change.[21] And, in Harris County, where CBPs are often intermixed with community, minor changes to equipment layout could bring a community member either within range to be considered an affected person or push them outside of the 440-yard range. Accordingly, these distances must be calculated from fixed points to provide certainty. Most importantly, if the equipment/emission sources are moved post-approval, the regulations do not provide for a re-evaluation of affected persons, and the comment period is also not reopened. No analysis is required to determine whether community members who previously requested a contested case hearing should be afforded one after the configuration change.[22] Once

[21] *See* 30 TEXAS ADMIN. CODE § 116.615(2); *see also* TCEQ Docket No. 2021-0056-AIR; Motion for Rehearing on Application by Ameritex Pipe & Products, LLC for Standard Permit Registration No. 159336 at 2-3 (explaining that ***after a permit is issued,*** a plant's configuration can be changed relocating emissions sources without notice to those affected).
[22] 30 TEX. ADMIN. CODE § 116.615(2)(B)-(C).

a concrete batch plant standard permit is issued to an Applicant, configuration changes within the property only require notice to the ED—not the local impacted community.[23] This procedure unfairly prejudices those potentially affected. Accordingly, the distance must be measured from a static unchanging point at the property—like the property boundary—to the nearest residence. Moreover, the application for a concrete batch plant standard permit supports this distance measurement by requiring the application to show a 3,000-foot radius from the property's boundary.

Figure 5:
Excerpted portion of an Application for a Concrete Batch Plant Standard Permit[24]

https://www.tceq.texas.gov/permitting/air/confidential.html

Requested Information	Response
C. Is a current area map attached?	
Is the area map a current map with a true north arrow, an accurate scale, the entire plant property, the location of the property relative to prominent geographical features including, but not limited to, highways, roads, streams, and significant landmarks such as buildings, residences, schools, parks, hospitals, day care centers, and churches?	
Does the map show a 3,000-foot radius from the property boundary?	

Third, concrete batch plant standard permits have a requirement to keep pollution inside the property boundaries.[25] Because this requirement exists, if pollution is allowed up to the fenceline, then the measurement to an affected person must be from the furthest point the pollution could travel (while complying with permit terms) to the residence. Otherwise, the measurement disregards how close a community member may actually be to that harmful air pollution. Measuring from the property boundary of a proposed concrete batch plant is the only way to ensure impacts from all emissions are being considered.

Better Brazoria urges the Commission to adopt uniform regulations where distances must be calculated—requiring measurements to be from the facility's property boundary to the affected structure (home, school, place of worship, etc.) utilizing the nearest points between the two.

3. TCEQ should consider all Article III interests, not just property interests.

TCEQ's process for determining affected person status currently has ignored hearing requesters' health, aesthetic, and recreational interests when deciding whether to grant affected person status. TCEQ regularly limits participation in a contested case to those with a *property interest* within an arbitrary 1-mile of the applicant's facility and denies "affected person" status to those whose health, aesthetic, or recreational interests are harmed by the proposed permit. Max Midstream Response to Hearing Requests, at 7-8 ("Max Midstream has been unable to locate a single case in which anything other than a vested real property interest (typically a person's residence) has ever historically been presented in a TCEQ air permitting matter which

[23] 30 TEX. ADMIN. CODE § 116.615(2)(B)-(C).
[24] PI-1S-CBP (version 6.0) available at https://www.tceq.texas.gov/permitting/air/newsourcereview/mechanical/cbp.html
[25] *See* Air Quality Standard Permit for Concrete Batch Plant, (Jan. 24, 2024) at General Requirement (5)(H). ("There shall be no visible fugitive emissions leaving the property.")

has been found to an interest *different than that of the general public*. Thus, only a property owner with an interest within one mile or slightly farther could possibly qualify for a contested case hearing.").

TCEQ's failure to consider non-property-based interests are inconsistent with Article III's injury-in-fact requirements and thus deny hearings to persons who would have Article III standing. *See Friends of the Earth*, 528 U.S. at 183-84 (finding an injury-in-fact where "reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests"); *Sierra Club, Lone Star Chapter v. Cedar Point Oil. Co.*, 73 F.3d 546, 557 (5th Cir. 1996) ("harm to aesthetic, environmental, or recreational interests is sufficient to confer standing") (internal quotation omitted).

In 2019, the TCEQ Commissioners denied a request for a contested case hearing on a draft air permit for a proposed liquefied natural gas ("LNG") export terminal on the Brownsville Ship Channel from Shrimpers and Fisherman of the RGV, a group of local individuals who "depend on the area of the Brownsville Ship Channel for [their] livelihood in regards to [their] income or for [their] source of rejuvenation in nature." ED's Response to Hearing Requests at 1, 13, TCEQ Docket No. 2019-0624-AIR. In their request for a contested case hearing, Shrimpers and Fisherman of the RGV named a member, Lela Burnell, in order to show that at least one member of their group was an affected person entitled to a contested case hearing. Email from Enrique Valdivia, Erin Gaines, and Kathryn J. Youker to TCEQ, Comment on Permit No. 139561 (April 24, 2019). The request explained that Ms. Burnell was a 3rd generation shrimper whose livelihood depends on fishing in and around the Brownsville Shipping Channel, along which the proposed LNG terminal would be built. She worked and docked her boats on the same ship channel as the proposed LNG terminal. Her boats would have to pass directly adjacent to the proposed facility in order to enter the Gulf, and she drove directly past the proposed facility site on a regular basis. *Id.* TCEQ's ED recommended Ms. Burnell be denied affected person status because of the distance between her *home* and the proposed terminal. ED's Response to Hearing Requests at 13, TCEQ Docket No. 2019-0624-AIR. The TCEQ Commissioners similarly only mentioned the distance of Ms. Burnell's *home* from the proposed terminal in their denial. TCEQ Agenda Meeting (June 6, 2019). TCEQ failed to consider Ms. Burnell's livelihood and work that would bring her within close proximity of the terminal on a regular basis when determining whether she qualified as an affected person.

Also in 2019, the TCEQ Commissioners adopted a recommendation from the ED to deny a contested case hearing to Hilton Kelley and his organization, Community In-Power and Development Association, Inc. in the environmental justice community of Port Arthur, Texas. Mr. Kelley had requested a contested case hearing on an air permit application from Kansas City Southern Railway Company. In his contested case hearing request, Mr. Kelley raised concerns about the effect the air pollution would have on his own health and his family's health. Email from Hilton Kelley to TCEQ, Comment on Permit No. 124775 (March 31, 2015). In the ED's response to his request, the ED pointed to the distance between Mr. Kelley's residential home and the proposed facility, 2.45 miles, and stated that "given the distance of Mr. Kelley's residence to the relative location of the proposed facility, his health and safety would not be impacted in a manner different from the general public." ED's Response to Hearing Requests at 6, TCEQ Docket No. 2018-1239-AIR. In response to the ED's recommendation that he be denied, Mr.

Kelley submitted additional comments to TCEQ prior to the Commissioner's meeting on the requests. In these comments, Mr. Kelley specified that he works weekly within 1-mile of the plant as a land surveyor. Reply to the ED re: Contested Case Hearing Requests by Mr. Kelley and CIDA, Inc. on Air Permit Application by Kansas City Southern Railway Company, TCEQ Air Permit No. 124775, 2. He regularly takes his family to a neighborhood restaurant that is within 1 mile of the plant, and there is a community park, church, and school all within 1 mile as well. *Id.* However, the Commissioners determined that Mr. Kelley lived too far away to be affected differently than the general public and denied his requests before granting the permit. TCEQ Agenda Meeting (Jan. 19, 2019).

Again in 2019, the Commissioners adopted a recommendation from the ED to deny a contested case hearing request from Ellen Copeland, who lived about two miles from the applicant's Adobe Walls Gin, LP proposed cotton gin facility. Ms. Copeland not only mentioned that she suffers from Idiopathic Pulmonary Fibrosis and is therefore worried about the air quality. Email from Ellen Copeland to TCEQ, Comment on Permit No. 151562 (Sept. 11, 2018). In addition, she was concerned about the impact of the plant on "humans, animals, and the environment, including migratory Monarch butterflies and birds" in the area in which she lived. ED's Response to Hearing Requests at 6, TCEQ Docket No. 2019-0061-AIR. The ED found this request insufficient to "identify how or why she specifically will be affected in a way not common to member of the general public." *Id.* The Commissioners agreed, finding that Ms. Copeland did not establish how she would be affected differently than the general public. TCEQ Agenda Meeting (Feb. 27, 2019).

The TCEQ's consideration of non-property ownership impacts is important to ensure that its "affected person" standard does not abrogate standing under the Article III and it should be the same standing test as required for judicial review.

4. Magnitude of Emissions Determining Impacts

The likely impact of the regulated activity "on the use of property of the person" is a factor considered in determining whether a person is an affected person. 30 TEX. ADMIN. CODE § 55.203(c)(4). There are no distance restrictions imposed by law on who may be considered an affected person for this type of air permit. 30 TEX. ADMIN. CODE § 55.203(c)(2).

The area of impact for air emissions depends on multiple factors including: the type and level of emissions, the height of the emission source, and the area topography and meteorology—and, thus, these impacts must be evaluated on a case-by-case basis. The "character and quantity of emissions… should warrant consideration of a larger radius than [TCEQ] ordinarily would look at."[26] TCEQ Agenda Meeting (August 25, 2021).

For purposes of standing, an organization, through a representative member, does not have to prove harm to a sufficient degree to entitle him to prevail on the merits, but merely sufficient standing to entitle him to a hearing. *United Copper Indus., Inc. v. Grissom,* 17 S.W.3d 797, 802-03 (Tex. App—Austin 2000, pet. dism'd). That is, a showing of potential harm or a "justiciable interest" related to the proceeding. *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. For*

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Envtl. Justice, 962 S.W.2d 288, 295 (Tex. App—Austin 1998, pet. denied); see TEX. WATER CODE § 5.115(a); *see also Tex. Rivers Prot. Ass'n v. Tex. Nat. Res. Conservation Comm'n,* 910 S.W.2d 147, 151, 152, n.2 (Tex. App.—Austin 1995, writ denied).

Specifically, the development of facts evidencing concerns about possible impacts of a proposed facility on a protestant's health and the health of a protestant's family can support granting affected status. *Grissom,* 17 S.W.3d at 803. For example, in *United Copper Indus., Inc. v. Grissom,* protestant and his whole family suffered from asthma, supporting affected status. *Grissom,* 17 S.W.3d at 803. Further, if the applicant's own data shows that its operations would result in increased contamination at the protestant's home and his son's elementary school; these additional facts in *Grissom* made it reasonable to conclude that protestant was more likely than a member of the general public to be adversely affected by the facility. *Grissom,* 17 S.W.3d at 803.

For these reasons, the emission of air contaminants at PSD levels should warrant the consideration of potential affected person status at further distances from the site than one mile. Indeed, the Commission has granted hearing requests on other permitting matters for large air emission facilities where the hearing requestor lived 4 or more miles from the site. Examples of such proceedings include:

- Application of Air Quality Permit No. 102892 for the Construction of a New Ethylene Production Unit at ExxonMobil's Baytown Olefins Plant. An individual qualified as an affected person in a challenge to ExxonMobil's Baytown Ethylene plant permit based in part on her ownership of a motorcycle repair shop which was located 4-5 miles from the ExxonMobil plant. Her home was about three blocks from the shop (SOAH Docket No. 582-13-4611; TCEQ Docket No. 2013-0657-AIR). ExxonMobil's proposed ton per year increases were as follows NOx (235.59), CO (931.16), VOC (224.14), PM, PM10, PM2.5 (90.54, 78.58, 73.45) and SO2 (22.47). *See* TCEQ Construction Permit Source Analysis Technical Review Permit No. 102982.

- In Re Application for Air Quality Permit No. 85013, PSD-TX-1138, and HAP 48 for the Las Brisas Energy, Center LLC. In the 2009 challenge to construction of the Las Brisas power plant individuals were admitted as affected persons who lived more than 10 miles from the plant site, and more than a dozen individuals were admitted as affected persons who lived more than 5 miles from the site. For example, Mr. Whakefield was an active participant in that hearing and his home was approximately 9 miles from the Las Brisas site. (SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR).

- In Re Application for Air Quality Permit Nos. 79188 PSD-TX-1072 and HAP 14 for NRG Texas Power LLC. Affected party status was granted to Douglas Ray who lived approximately 4 miles from the site. (SOAH Docket Nos-0861 and 582-08-4013; TCEQ Docket Nos. 2007-1820-AIR and 2008-1210-AIR).

From the cases noted above, if the TCEQ is going to consider distance limitations on affected person status, then it also must expand that distance limitation if there are higher levels of pollution being authorized as it is more likely that that air pollution will be impacting a greater area than for more minor sources of pollution.

5. Flooding impacts to personal property.

In the context of wastewater discharge permits, requestors for a contested case sometimes allege that the permit, if issued, would flood or otherwise impact their land along the discharge route. However, TCEQ often dismisses their concerns and requests to contest the permit because "general flooding concerns" alone are outside TCEQ's jurisdiction and cannot be a basis for a personal justiciable interest.[27] However, both statute and rule identify the "likely impact of regulated activity on the…use of the property" of the person requesting the hearing as a consideration for affected person status. During the Sunset Review process, the Office of Public Interest Counsel (OPIC) identified this as an area where TCEQ should clarify its rules. Specifically, OPIC has recommended that concerns about site suitability and functionality of a discharge route — which may lead to the flooding of an individual's property — not be considered a general concern about flooding, but rather a prevention of nuisance conditions, which are within TCEQ's jurisdiction.[28] Better Brazoria agrees with OPIC that the public would benefit from more direct guidance on what types of conditions caused by a permitted activity TCEQ considers as impacting the use of property versus conditions that do not fall under its jurisdiction.

For example, on behalf of represented clients, in late 2023, Lone Star Legal Aid provided comments on the placement of a proposed permanent rock and concrete crusher in a floodway near LBJ Hospital by applicant Texas Coastal Materials, LLC Application for an Air Quality Standard Permit; Registration No. 173296 for Permanent Rock and Concrete Crushers located at 5875 Kelley St., Houston, Texas 77026. According to publicly available records, the entire 15-acre property for the proposed facility was located in a 100-year flood plain. Moreover, 124,580 square feet (est. 2.98 acres) of the property was located in a regulated floodway. Thus, the development of the property for the proposed facility was highly restricted. LSLA also highlighted the concerns raised by the proposed facility with respect to flooding not only on neighboring properties but also an existing Harris County Flood Control project, Project Hunting. The Hunting Bayou Federal Flood Risk Management Project is a $100 million flood damage reduction project under construction along Hunting Bayou from U.S. 59 to downstream of North Wayside Drive. In its response to comments, TCEQ dismissed these siting concerns about the flooding impacts on adjacent properties and existing multi-million dollar flood control projects *in Houston* for the following reasons:

> **RESPONSE 6:** While TCEQ is responsible for the environmental protection of all media, including water, the TCAA specifically addresses air-related issues. This permit, if issued, would regulate the control and abatement of air emissions only, and therefore, issues regarding water use, water quality, or water availability are not within the scope of this permit review. This permit does not authorize the discharge of pollution into a body of water and does not authorize effluent. The TCAA does not give TCEQ authority to regulate air emissions beyond the direct impacts (inhalation) that the air emissions have on human health or welfare. However, as described in Response 1, the secondary NAAQS are those the Administrator determined are necessary to protect public welfare and the

[27] Staff Report at 18.
[28] Staff Report at 18.

environment, including animals, crops, vegetation, visibility, and buildings from any known or anticipated adverse effects associated with the presence of a contaminant in the ambient air. Because the Standard Permit was developed to comply with the NAAQS, air emissions from the proposed plant are not expected to adversely impact land, livestock, wildlife, crops, or visibility nor should emissions interfere with the use and enjoyment of surrounding land or water. As described in Response 8, TCEQ does not have jurisdiction to consider plant location choices made by an applicant when determining whether to approve or deny a permit application.

Accordingly, the TCEQ cannot deny an application because a plant is proposed to be located in a floodplain. In addition, issues concerning the creation of the floodplain maps are outside the scope of the review of this application.

Depending on the nature of the plant's operations, the Applicant may be required to apply for separate authorizations, including any applicable development permits from the city or county. It is the Applicant's responsibility to secure all necessary authorizations to operate the proposed plant. Individuals are encouraged to report environmental concerns, including water quality issues, or suspected noncompliance with the terms of any permit or other environmental regulation by contacting the TCEQ Houston Regional Office at 713-767-3500 or by calling the 24-hour toll-free Environmental Complaints Hotline at 1-888-777-3186. TCEQ reviews all complaints received. If the proposed plant is found to be out of compliance with the terms and conditions of the permit, the Applicant may be subject to investigation and enforcement action.

This response, while trying to address TCEQ's limitations to only consider air impacts of the application, failed to acknowledge the agency's obligations to prevent nuisance impacts in its permitting process. The construction of this facility will be an issue for surrounding property owners if water from Huntington Bayou during storm activity lifts and diverts crushed rocks and concrete because of the proposed facility being sited in a floodplain. Again, these types of concerns need to be included in the TCEQ's consideration of affected person status as potential property impacts to nearby property owners. This consideration is necessary even if the issue may be outside of TCEQ's perceived jurisdiction. The agency has jurisdiction to prevent nuisance impacts to neighboring property owners which should necessarily expand the agency's view of impacts.

D. DEFINING THRESHOLD REQUIREMENTS FOR PUBLIC MEETINGS AND PUBLIC ENGAGEMENT DUE TO THE PUBLIC'S PERCEIVED INTEREST IN A PERMIT

As mentioned above in Section II-A, TCEQ has a number of rules that discuss the "public interest" in permits as a threshold for triggering public meetings or further public engagement efforts. *See e.g.*, Rule §39.501, Application for Municipal Solid Waste Permit ("substantial public interest"); Rule §39.503, Application for Industrial or Hazardous Waste Facility Permit ("substantial public interest"); Rule § 55.253(c)("significant degree of public interest" to hold a public meeting). In addition, SB 1397 promulgated new requirements for engagement efforts

based on the public interest to consider. *See* TEX. WATER CODE §§ 5.583(b), 5.1734(e) ("heightened public interest"). Better Brazoria offers the following thoughts that each of these standards could be similarly defined or common language used to either unite these standards or distinguish them if they are different.

For example, Rules 39.501 and 39.503 both contain criteria for determining "substantial public interest in a permit."

> (3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:
>
> (A) a local governmental entity with jurisdiction over the location at which the facility is proposed to be located by formal resolution of the entity's governing body;
>
> (B) a council of governments with jurisdiction over the location at which the facility is proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;
>
> (C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is proposed to be located; or
>
> (D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is proposed to be located.

Better Brazoria would recommend that similar criteria be attributed to the rules to be developed in response to the public engagement required if there is "heightened public interest" in a permit under Sections 5.583(b) and 5.1734(e) of the Texas Water Code. The criteria listed above generally seems to be sufficient to define a public interest with the exceptions to subsections (C) and (D) noted below. Further, the same or similar criteria should be added to Rule §55.253(c) since that section does not include such criteria for determining whether there is significant interest in a public meeting.

Better Brazoria would note that for subsection (C) above, many organizations beyond HOAs or POA represent communities, such as tenant's groups, civic clubs, environmental groups, and other community-based organizations. In Houston, groups called Super Neighborhoods represent areas designed by the City of Houston that are even larger areas than the average civic club and include not only residents, but business interests as well. Broadening category (C) to include organizations beyond property-based ownership organizations would be important to ensure all public interests are included and represented.

As to category (D), ten generally seems like a respectable number to constitute a group; however, the State of Texas only requires three individuals to form an organization and they can be related. How does the TCEQ determine how many members a group has? Is this information that the group needs to share with the agency regarding its membership or does the TCEQ independently verify a group's membership? Groups are not required to share membership lists under Texas law. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 381–82 (Tex. 1998) (protecting information concerning contributors or members of the organization from disclosure). First Amendment associational rights are the basis for a qualified privilege against disclosure of membership lists. *Ex parte Lowe,* 887 S.W.2d 1, 2 (Tex. 1994) (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)); *see also Tilton v. Moye*, 869 S.W.2d 955 (Tex. 1994).

At the October 3, 2024 public meeting in Houston on this rulemaking, TCEQ staff explained that they assess public interest on a case-by-case basis understanding that significant public interest in a rural area may not be the same for a metro area of the state. However, this explanation is not sufficient since the agency needs to be consistent amongst permit applications in metro areas and permit applications in rural areas then. If there are two sets of criteria for these different areas, then those requirements should still be explicit in the rule or TCEQ needs to develop guidance to assist its permit reviewers or other staff in assessing when this threshold is met. Further, communities need to know what constitutes "critical mass" or how the agency weighs expression of public interest in permit to make these determination of "heightened public interest", "substantial public interest", "significant degree of public interest."

What is most important is for the TCEQ to be consistent when deploying these criteria to gauge the "public interest" across the state and across different permits. The criteria should not exclude non-property owners who reside (e.g., renters or tenants), work or recreate in the impacted area who may also have an interest in the application. So, expanding these criteria to make sure all sorts of groups representing the public should be something the agency considers not only for existing rules but also the new ones under SB 1397 concerning the "public interest."

E. PROPOSED CHANGES REGARDING CONDUCTING PUBLIC MEETINGS

1. Public Outreach

SB 1397 requires TCEQ to provide outreach and education to the public on participating in the permitting process through the enactment of Section 5.136 of the Texas Water Code:

> 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.

TCEQ should consider doing community outreach as part of the public meeting process during the technical review state so that comments on a proposed permit may be generated from an awareness of permitting procedures. In addition to the stated categories covered by Section 5.136, TCEQ should also look for opportunities to do public outreach on areas that interest the public such as air monitoring and enforcement. The TCEQ should also consider partnering with trusted organizations – often non-profits – already doing outreach and educational work on these topics in the community.

2. Public Meeting on Permits should be held both before and after issuance of the final draft permit.

While TCEQ has discretion in the current Rule § 55.154(a), (b) to hold public meetings before the permit application is published during the technical review process, the TCEQ does not utilize this rule enough to help educate the public regarding the permit application while it is still in the draft form. Unfortunately, only *after* the agency has already decided that the permit is

administratively complete or approved a draft permit does the TCEQ ask for public comment. In 2023, the TCEQ Staff report described this dilemma in a report to the Sunset Commission:[29]

> In fiscal year 2021, TCEQ held 24 public meetings on permits, each held after the agency had already completed its administrative and technical review and issued the draft permit. By the time TCEQ holds a public meeting for a draft permit, agency staff have often spent several months, sometimes more than a year, conducting extensive engineering, scientific, and legal research and analysis while engaging with the applicant on these matters, all to ensure the draft permit is written to federal and state requirements. As a result, by the time TCEQ proposes a draft permit, staff have essentially determined the draft permit terms comply with regulatory requirements, and only public comments on the adequacy of TCEQ's technical or administrative review are likely to affect the permit.

Given that the TCEQ already has the discretion to hold public meetings under Rule §§ 55.154(a), (b) before the permit's technical review is complete, Better Brazoria would encourage the TCEQ to consider the staff recommendation to the Sunset Commission to "clarify statutes relating to notices of intent, hearings, and public meetings by requiring TCEQ to hold a public meeting on a permit during the technical review of the permit application and another meeting after the issuance of the draft permit if the current statutory requirements to hold a meeting are met — significant public interest or a legislator's request."[30] Further, as an accompanying management action, TCEQ "should clearly state, in the notices and at the meetings themselves, the purposes of the meetings and current status of the permit, such as if the permit is still undergoing review or is the final draft permit."

Ideally, the initial public meeting would provide a more informal opportunity for the public to make suggestions about what should go into the permit during TCEQ staff's review of the application and before finalizing the draft permit. A second meeting would allow the public a formal opportunity to submit comments to the agency on the final version of the permit, focused on whether the draft permit meets the legal and technical requirements to be issued. Holding two distinct meetings would help ensure the public has a meaningful opportunity to comment directly to TCEQ and the permit applicant before the agency finalizes the permit.[31]

While this recommendation would add an additional public meeting to the permit process, only a fraction of the permits TCEQ handles — 24 in fiscal year 2021 — typically generate public meetings. This small step would help reduce confusion, increase transparency, and create more opportunities for meaningful public participation in the permitting process, moving towards restoring trust that TCEQ considers public input in its decisions. Clarifying the criteria for substantial public interest as recommended above could be part of helping the TCEQ determine which permits should generate public meetings.

[29] TCEQ Staff Report at 16.

[30]

[31] TCEQ Staff Report at 22.

3. Transcription of Comments at Public Meeting

To ensure its language access responsibilities are met, under Rule §55.154, TCEQ is responsible for making an audio recording or written transcript of the public meeting available to the public. If a written transcript is prepared under this Rule by the agency, it should also be made available in Spanish and English. Further, an audio recording of Spanish translation provided at the public meeting should be made and made available to the public in addition to English audio recording.

Further, TCEQ should amend Rule §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.

4. Providing Security at Public Meetings and Public Hearings

SB 1397 allows the TCEQ to request an applicant provide uniformed security at a public meeting or hearing to provide for the safety of all attendees. TEX. WATER CODE § 5.585. Better Brazoria suggests that the TCEQ needs to explain what criteria it will consider on determining when it should have security at a public meeting or public hearing. Further, it is important that the security be utilized to protect the public and not in a manner that serves to intimidate the public from entering or participating in the meeting. For example, it should not be an overwhelming presence, and the TCEQ should not utilize officers with live ammunition.

5. Virtual Options for Meetings

Hybrid Meetings

To make meetings more accessible, TCEQ's amendments should 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. For public meetings, TCEQ should offer video participation for all attendees and an open chat with a "Question and Answer" feature.

F. PUBLIC COMMENTS - PROPOSED CHANGES TO RULES TO EXTEND COMMENTS

Better Brazoria welcomes the addition of the requirements in the Section 382.056 of the Texas Health and Safety Code to hold open the public comment period and period for which a contested case hearing may be request for the permit application for at least 36 hours after the end of the meeting.[32] This extension needs to be available for all permits that generate a minimum number of attendees at the public meeting or public hearing and/or that allow for contested case hearing request. First, TCEQ and/or the applicant may disclose information at the public meeting or hearing important to the public comment or would necessitate further review. Second, many people often first learn of the permit at the public meeting and need more time to consider what comments that they would like to submit. Third, often these meetings are held in

[32] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A1.

the evening and by the time the meeting is over and the proposed commenter returns, it is too late to finalize comments that evening and such work necessarily needs to carry over another day. For these reasons, extending the comment period for 36 hours after the meeting and hearing makes sense on all permits.

G. REQUIRE COMPLETE RESPONSE IF TCEQ CITES JURISDICTIONAL LIMITATIONS

TCEQ often cites jurisdictional limitations in response to public comments. Better Brazoria seconds the recommendation from the Sunset Advisory Commission that TCEQ, upon receiving public comments that are not under the jurisdiction of the agency, answer the comment with information on the agency or organization with the relevant jurisdiction.[33] This directive would apply to public comments processed under Rule §55.156(b)(1), Public Comment Processing, and Rule §55.253(b)(1), Public Comment Processing (Subchapter G).

H. CLARIFY TIMING ON FILING REQUEST FOR JUDICIAL REVIEW NOT UNTIL 30 DAYS AFTER MOTION FOR REHEARING DENIED

TCEQ rules governing Commission action on a Request for Reconsideration, Contested Case Hearing or a Hearing Request must be clarified to prescribe timing to file a petition for judicial review. Better Brazoria urges the Commission to add in additional language to the regulations clarifying that any petition for judicial review should be filed 30 days after a Motion for Rehearing is decided. The applicable regulatory text of the two rules in need of clarification is excerpted below with further rationale following.

1. Rule §55.211, Commission Action on Request for Reconsideration and Contested Case Hearing

> (f) If all requests for reconsideration or contested case hearing are denied, § 80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed not later than 25 days after the date that the commission's final decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, § 2001.142 and § 80.276 of this title (relating to Request for Extension to File Motion for Rehearing), by agreement under Texas Government Code, § 2001.147, or by the commission's written order issued pursuant to Texas Government Code, § 2001.146(e). If the motion is denied under § 80.272 and § 80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, § 5.351 or Texas Health and Safety Code, § 361.321 or § 382.032, or under the APA.

30 TEX. ADMIN. CODE § 55.211(f).

[33] Sunset Advisory Commission, TCEQ Staff Report with Final Results, Final Results at A5.

2. Rule §55.255, Commission Action on Hearing Request

> (e) If all requests for contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed not later than 25 days after the date that the commission's final decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142 and §80.276 of this title (relating to Request for Extension to File Motion for Rehearing), by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable), the commission's decision is final and appealable under Texas Water Code, §5.351, Texas Health and Safety Code, §401.341, or under the APA.

30 TEX. ADMIN. CODE § 55.255(e).

Historically, protestants challenging a TCEQ decision have been taxed with filing its Motion to Rehearing at the same time its judicial review lawsuit must be filed in court. This concurrent timing is problematic for two reasons. First, the administrative record is still open during the Motion to Rehearing period because other parties may be filing responses and replies. In the Better Brazoria's experience, the Motion to Rehearing process can produce important evidence and arguments that need to be incorporated into a pleading for judicial review. Second, the concurrent timing leaves the protestant in a complicated position to file a lawsuit before administrative remedies are truly exhausted before the agency—which could potentially moot or damage the Protestant's ability to challenge the agency's decision. Because the regulations are unclear, a Protestant, despite following all prescriptive regulations and filing both a Motion to Rehearing and its pleading for judicial review, may still be left in the precarious position where an opponent is claiming their petition isn't ripe for review.

Better Brazoria urges the TCEQ to adopt clarifying regulations that a petition for judicial review should be filed **30 days after** a Motion to Rehearing under §80.272 and §80.273 is decided. Thus, protestant would not need to file petition under Texas Water Code, §5.351, Texas Health and Safety Code, §401.341, or under the APA until 30 days after the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) as already stated in the rule.

I. THE COMMISSION SHOULD FOLLOW THE ALJ'S RECOMMENDATION.

Commissioners regularly vote to approve a permit even after an administrative law judge (ALJ) has recommended denial or made reasoned modifications to a draft permit, which the Commission fails to accept. At times, Commissioners have asserted that an ALJ decision was wrongly decided and remanded it for a revised opinion. The Commissioners should respect the ALJ's role in the process and abide by his or her recommendation.

J. CLARIFY THE RULES ON WHETHER A CONTESTED CASE HEARING IS A PREREQUISITE TO JUDICIAL REVIEW.

The limits of judicial review and the corresponding exhaustion requirements are unclear from the current rules. Specifically, 30 Texas Administrative Code § 55.255(a) and 30 Texas Administrative Code § 55.211(f) require clarification.

Better Brazoria requests that 30 Texas Administrative Code § 55.255(a) be clarified to explain that while the determination of the validity of a hearing request may not be subject to the APA, it is a final Order that is subject to judicial review under the applicable provisions from the Texas Water Code, § 5.351 or the Texas Health and Safety Code, § 361.321 or § 382.032. As is, the text currently reads:

> The determination of the validity of a hearing request is not, in itself, a contested case subject to the Texas Administrative Procedure Act (APA).

30 TEX. ADMIN. CODE § 55.255(a).

The current regulatory text, however, omits that the determination of a hearing request is subject to judicial review under applicable provisions from the Texas Water Code, § 5.351 or the Texas Health and Safety Code, § 361.321 or § 382.032. This explanatory text should be added to the regulation to eliminate uncertainty and provide a path for a Protestant to challenge a hearing request that it believes was wrongly decided by the TCEQ.

Additionally, often, a decision to approve or deny a permit is simultaneously issued with the denial of a contested case hearing request. Because the denial of a contested case hearing request (in many permitting scenarios) is the culmination of the administrative process, the resulting scope of judicial review should include all the contents of the final order. Explained more: the rules should clarify that the final order—in total—resulting from a permitting action is subject to judicial review.

Judicial review of a decision to deny a contested case hearing request and to issue a permit should not be limited to one or the other, particularly where both of those findings are in the same order. But regardless of whether the denial of a contested case hearing request and a permit's approval are part of the same order, the scope of judicial review should include challenging the contested case hearing request as well as the permit's approval. These two decisions are inextricably connected. *See Tex. Comm'n on Env't Quality v. Sierra Club*, 455 S.W.3d 228, 235, (Tex. App.—Austin, 2014, pet. denied) ("In making a decision regarding affected-person status, TCEQ enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application.").

Moreover, because the TCEQ implements federally delegated programs, specifically the Clean Water Act and the Clean Air Act, these programs must allow a person with standing before the court to pursue issues they would be entitled to litigate under the federal acts, pursuant to Article III. For example, judicial review of errors that are pure questions of law, judicial review of the permit's approval, judicial review of a decision on their affected person status before the agency, and any other final decision related to a permitting action.

Next, regulatory exhaustion requirements require clarification. Applicable to this rulemaking are the requirements from 30 Tex. Admin. Code § 55.211(f) and § 55.255(e) related to Commission action on Request for Reconsideration, Request for Contested Case Hearing, and Hearing Request. The below text should be clarified to ensure that exhaustion requirements are spelled out in the regulatory text. The exhaustion requirements must be consistent with requirements in the federally delegated programs, and accordingly, a contested case hearing cannot be a prerequisite to judicial review.

> (f) If all requests for reconsideration or contested case hearing are denied, § 80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed not later than 25 days after the date that the commission's final decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, § 2001.142 and § 80.276 of this title (relating to Request for Extension to File Motion for Rehearing), by agreement under Texas Government Code, § 2001.147, or by the commission's written order issued pursuant to Texas Government Code, § 2001.146(e). If the motion is denied under § 80.272 and § 80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, § 5.351 or Texas Health and Safety Code, § 361.321 or § 382.032, or under the APA.

30 TEX. ADMIN. CODE § 55.211(f).[34]

Because regulatory exhaustion requirements are not spelled-out, Better Brazoria has seen a variety of requirements be thrown up as roadblocks to judicial review. Most commonly, it is argued that a contested case hearing must be awarded and completed as a prerequisite to judicial review. Better Brazoria advocates against contested case hearings as a prerequisite to judicial review for several reasons. First, the regulations do not plainly state that a contested case hearing must be both awarded and completed. Second, some permitting decisions have no right to a contested case hearing.[35] So, in those cases, where a contested case hearing is not available, a protestant may not have any avenue to challenge the permitted facility in their community. Third, requiring a contested case hearing as a prerequisite to judicial review contravenes TCEQ's obligations under the applicable federally delegated programs—the Clean Water Act and the Clean Air Act.

For example, under the Clean Water Act, 40 C.F.R. §123.30, the TCEQ must provide an opportunity for judicial review of the Commission's final approval or denial of a TPDES permit, and this approval cannot be tied to whether a contested case hearing was conducted. Importantly, 40 CFR §123.30 also requires that the opportunity for judicial review must mirror what would be federally available for a National Pollutant Discharge Elimination System (NPDES) permit. And,

[34] Full text of 30 TAC Rule § 55.255(e), Commission Action on Hearing Request, is omitted because it is identical to text from 30 TAC Rule § 55.211(f) quoted above.
[35] *See e.g.,* 30 TEX. ADMIN. CODE § 55.201(i)(1-10) (Applications that have no right to a contested case hearing.)

more, the EPA approved the NPDES program based on the following understanding of the avenues of judicial review available to a Protestant:

> EPA is determining approval of this element of the Texas program on the basis that a direct appeal to civil judicial courts is provided for permitting actions under Texas law and the civil courts will determine standing based on the common law. The public is not required to file for an evidentiary hearing. Therefore, there is a direct avenue of appeal via the public comment process [Texas Water Code § 5.351], and EPA is basing its evaluation of standing on that appeal right.
>
> State of Texas Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System; Texas, 69 Fed. Reg. 51164-71, 51170-51171 (1998).

Similarly, in the air permitting context, EPA approved TCEQ's Title V Operating Program. This approval required the submission of a Texas Attorney General Opinion supporting that the TCEQ was still providing sufficient access to judicial review. The Attorney General explained that the program's judicial review provisions followed Article III of the United States Constitution. In the Attorney General's 2001 submission to the EPA for approval of the program, the Attorney General stated that, "(a)ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution."[36] TCEQ further clarified that the Attorney General's statement is also applicable "for every action of the commission subject to the Clean Air Act." 40 Tex. Reg. at 9655. As such, the TCEQ rules prescribing exhaustion must be amended to clarify that judicial review is as expansive as what would be federally available—and is available for both Texas Pollutant Discharge Elimination System (TPDES) Permitting actions and Texas Clean Air Act actions without having been awarded and completing a contested case hearing.

This issue has been ongoing but never resolved in TCEQ regulations. In 2015, TCEQ promulgated rules to implement Senate Bills 709 and 1267, both adopted by the 84th Texas Legislature. During that rulemaking, the EPA specifically asked TCEQ to clarify what the significance and relationship was of a contested case hearing to judicial review. EPA's request for clarification and concern stemmed from the *Sierra Club & Public Citizen v. Tex. Comm'n on Env't Quality*, which included a complicated procedural history, but included a confused holding that a contested case hearing is a required before seeking judicial review. No. 03-14-00130-CV, 2016 WL 1304928 (Tex. App.—Austin Mar. 31, 2016, no pet.).

EPA expressed concern to the TCEQ that making a contested case hearing a prerequisite to judicial review could jeopardize both the TPDES program's ability to comply with the requirements of 40 Code of Federal Regulations §123.30 and authorized air permitting program's ability to meet Federal Clean Air Act ("FCAA") requirements, including FCAA, §502(b)(6). 40 Tex. Reg. 9651, 9654 (Dec. 25, 2015). In turn, TCEQ assured EPA that a contested case hearing **was not** a prerequisite to judicial review—however, TCEQ did not further

[36] Section XIX, Supplement to 1993, 1996, and 1998, Statements of Legal Authority for Texas's FCAA Title V Operating Permit Program by the Attorney General of the State of Texas (October 29, 2001).

revise its rules, and the case law is continuing to perpetuate the problematic notion that a contested case hearing is required prior to seeking judicial review.[37]

In many cases, rather than relying on the text of the rules for the formula to seek judicial review, or even relying on the TCEQ's interpretation quoted above, the State of Texas via attorneys representing TCEQ in judicial review proceedings rely on cases like: *Sierra Club & Public Citizen v. Tex. Comm'n on Env't Quality*, No. 03-14-00130-CV, 2016 WL 1304928 (Tex. App.—Austin Mar. 31, 2016, no pet.) and *Tex. Dep't of Protective & Regul. Servs. v. Mega Child Care, Inc*., 145 S.W.3d 170, 196 (Tex. 2004) etc. for the premise that judicial review **is not available** unless a party undergoes a contested case hearing. This request for stakeholder input is an opportunity to clarify the administrative exhaustion requirements and ensure those requirements are consistent with statutory obligations from federal Clean Water Act and the federal Clean Air Act.

TCEQ explains judicial review as follows:

> A person seeking judicial review under any authority must have exhausted the available administrative remedies, including complying with applicable commission rules regarding motions for rehearing or reconsideration, e.g., §§50.119, 55.211, and 80.272. **Requesting or participating in a CCH is not among the exhaustion requirements for judicial review of permit actions under TWC, §5.351 or THSC, §382.032.**

40 Tex. Reg. at 9656 (emphasis added). Better Brazoria requests that the rules be clarified to reflect the TCEQ's statements quoted above. Without this clarification, community members and groups who diligently track and comment on a permit are locked out of the judicial review process. Community members are foreclosed from judicial review hardly able to survive a plea to jurisdiction based on the faulty premise—not recorded in the regulations—that a contested case hearing must be awarded and completed prior to judicial review. Opponents to a community member's suit for judicial review, including the attorneys representing TCEQ, rely on case law interpreting TCEQ rules to require a contested case hearing as a prerequisite to judicial review. But there are no such rules explicitly stating this requirement, and no rules define what judicial review prerequisites are beyond a Motion for Rehearing. In fact, the rules more prescriptively explain the exhaustion requirements. "If all requests for reconsideration or contested case hearing are denied, § 80.272 of this title (relating to Motion for Rehearing) applies…[and] If the motion is denied under § 80.272 and § 80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, § 5.351 or Texas Health and Safety Code, § 361.321 or § 382.032, **or under the APA**." 30 TEX. ADMIN. CODE § 5.211(f) (emphasis added).

Operatively, the TCEQ regulations may function by providing two avenues for judicial review: (1) under the Texas Administrative Procedure Act § 2001.001 *et seq.*(APA); and (2) a direct

[37] This practice of arguing that a contested case hearing is a prerequisite to judicial review is pervasive and continues on. *See e.g.* Brief of Respondents TCEQ and Jon Niermann in His Official Capacity as Chairperson of the TCEQ at 44-5, *Shrimpers and Fisherman of the RGV and Vecinos Para El Bienestar de la Comunidad Costera v. Tex. Comm'n on Env't Quality and John Niermann*, 968 F.3d 419 (2020) (No. 19-60558), 2019 WL 5296555 at *45-6.

appeal to state court based on comments pursuant to the Texas Water Code § 5.351 or the Texas Health and Safety Code § 361.321 or § 382.032.To the extent these statutes provide discrete avenues for judicial review of different kinds of final Commission decisions, the rules need to be clarified about which statute provides judicial review for which kind of decision. If APA procedures only apply to the judicial review of a final decision resulting from a contested case hearing, the regulatory text must include clarification of the same. Or, alternatively, if the Texas Water Code and Texas Health and Safety Code provide judicial review of final Commission decisions not resulting from a contested case hearing, then the regulatory must include this clarification. Additionally, the regulations should define a final Commission decision for purposes of judicial review.

Better Brazoria urges the TCEQ to ensure the promulgated regulations continue to follow TCEQ's responsibilities under federally delegated programs, and accordingly that the regulatory text be revised to specifically exclude a contested case hearing as a judicial review prerequisite.

K. ENSURING THAT TCEQ PROPERLY TRACKS COMPLIANCE HISTORY SO THAT THE OPPORTUNITY FOR CONTESTED CASE HEARING IS NOT THWARTED IMPROPERLY.

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.

Additionally, Rule §55.201(i)(5)(E) 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.

Importantly, the TCEQ should take steps to ensure a complete review of compliance history. First, a compliance history must be fully reviewed for the appropriate period and considered by the agency in determining whether a right to a contested case hearing exists before the issue is taken up by the Commission. Second, investigations by local authorities, such as the City or County governments, should also be included in any review of an applicant's compliance history. Third, name changes by the owner or operational lapses in the facility should not impact the review of the facility's compliance history to the extent that they appear to be efforts to whitewash a facility's compliance history.

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.

IV. CONCLUSION

Lone Star Legal Aid and Better Brazoria appreciate the opportunity that TCEQ is providing to stakeholders through this informal comment period to inform the agency in its proposed rulemaking to amend 30 Texas Administrative Code Chapter 39, Public Notice; and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comments. Please do not hesitate to contact the undersigned counsel to the extent any of these proposed revisions require additional explanation or information. Lone Star Legal Aid looks forward to the next round of public engagement on this process and TCEQ's draft of its proposed revisions.

Respectfully submitted,

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