AGC of TEXAS

Highway, Heavy, Utilities & Industrial Branch
JENNIFER WOODARD, Chief Executive Officer

September 9, 2025

Mr. Corey Bowling
MC-205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

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

Dear Mr. Bowling:

The Associated General Contractors of Texas (AGC of Texas) Highway, Heavy, Utilities, and Industrial Branch is an organization comprised of nearly 700 member companies from across Texas, and one of more than 32,000 networking firms comprising the Associated General Contractors of America. AGC of Texas' members build and maintain state, city, and county roads and bridges, as well as civil projects such as airports, bridges, dams, and municipal utilities.

AGC of Texas' members are regulated by the Texas Commission on Environmental Quality (TCEQ) across all environmental media. Their operations can include authorizations that go to public notice. Thank you for the opportunity to comment on these proposed rules.

General Comments

Scope of Rulemaking Should be Relatively Limited. Through laws enacted by the Texas Legislature, Texas has long had among the most comprehensive public participation requirements for permitting in the country (indeed, more robust than the U.S. Environmental Protection Agency's). Extensive reforms were enacted by the Legislature in 1999, 2001, and 2015. TCEQ further significantly enhanced its public participation rules and procedures in 2021.

The changes made by the Sunset Advisory Commission and Senate Bill 1397, 89th Regular Session, were, in comparison, relatively narrow in scope, and in some instances codified into statute current agency practices. The changes that emerged from the Sunset Review process included:

- Requiring the public comment period and deadline to request a contested case hearing for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with consolidated notice, if a public meeting is held (Recommendation 1.1, enacted by Senate Bill 1397, at Health and Safety Code, §382.056(k-2));

- Requiring TCEQ to develop a guidance document that explains what information the commission needs to evaluate whether a person is potentially affected by a permit application and states that each request is reviewed on a case-by-case basis, considering all the factors in its rule, including—but not limited to—distance (Recommendation 1.3, implemented through TCEQ Guidance, GI-649, *Requesting a Contested Case Hearing for Wastewater, Waste, or Air Permits*);
- Requiring TCEQ to post all permit applications and associated materials on TCEQ's website, in addition to any physical posting requirements, once the agency determines the application to be administratively complete and include the website's address in any public notice issued for the permit (Recommendation 1.5, in part; enacted by Senate Bill 1397, at Texas Water Code, §5.1734, codifying agency practice);
- Requiring TCEQ, when posting or sending out notices on all permit applications and permit amendments, to include, at a minimum, the name of the applicant, type of permit, and address of the proposed or existing site (Sunset Commission recommendation, enacted by Senate Bill 1397, at Texas Water Code, §5.129(a)(2), codifying agency practice);
- Requiring TCEQ to provide outreach and education to the public on participating in the permitting process (enacted by Senate Bill 1397, at Texas Water Code, §5.136, and implemented through various TCEQ measures, including instructional videos); and
- Requiring electronic publication of notice, verification of notice by a newspaper, and provision of notice to the appropriate Senator and Representative (enacted by Senate Bill 1397, at Texas Water Code, Chapter 5, Subchapter M-1, codifying agency practice).

Given Texas' already comprehensive public participation processes, and the relatively limited action taken by the Sunset Advisory Commission and the Legislature in 2023, AGC of Texas respectfully comments that a number of the proposed amendments go beyond the direction and deliberations of the Legislature. Except in regard to certain issues identified below (such as clarifying and structural changes), AGC of Texas believes that the most substantive components of the final rules should be largely limited to the recent management and statutory changes made through the Sunset Process.

Effect on Concrete Batch Plants. Texas Health and Safety Code, §382.056(k-2), and the corresponding rules, will (except in relatively rare cases) largely affect applications for the Air Quality Standard Permit for Concrete Batch Plants. Indeed, that standard permit is the only standard permit that will be affected by this requirement. AGC of Texas requests that the Response to Comments on this proposal affirm that:

- air quality standard permits are "off-the-shelf" authorizations issued for specific, well-characterized classes of facilities;
- concrete batch plants are minor sources of emissions, and that plants operating in accordance with the terms and conditions of the standard permit (developed based on a conservative protectiveness review) are protecting human health and the environment; and
- the primary concerns expressed about these types of operations are land-use considerations that are beyond the authority of TCEQ, and, where there is local zoning, such concerns can and have been addressed locally.

Sign Posting and Document Availability Should Only Be Through the Applicable Comment Period. While AGC of Texas agrees that this issue requires clarification, we respectfully oppose the proposed rule changes that require signs and permitting documents to remain posted and available, respectively, until "final action" is taken on a permit application.

- The agency's own public notice instructions currently provided to applicants state that these requirements apply only through "the entire comment period."
- The preamble refers to this as agency "policy," and there appears to be no corresponding statutory requirement in either Water Code, Chapters 5; or Health and Safety Code, Chapter 382. The commission, therefore, has discretion on this policy. The simplest, most transparent, and common-sense requirement would be for sign posting and application availability to be for the duration of the applicable comment period.
- Depending on the type of permit, the volume of comments, the filing of hearing requests, and the time it takes for scheduling on an Agenda, a *significant* amount of time can elapse before any "final action" is taken. Indeed, in some cases, years can pass between publication of first notice and a final action.
- Even an uncontested permit renewal may take up to 270 days for the TCEQ to take final action.
- Signs that are posted for that length of time may be stolen, damaged, or become weathered, and the proposed rules provide no discretion to the executive director to not penalize an applicant for such occurrences beyond that person's control.
- This could also lead to frustration for the public because the information would remain in place well past any opportunity to comment or request a hearing.

For the above reasons, AGC of Texas comments that wherever appropriate in the rules, the language should instead clarify that signs and permitting documents should be posted and available, respectively, through the applicable comment period.

Comments Regarding Determination of Affected Person. At the public comment hearing held on September 8, 2025, comments were made concerning the evaluation of distance restrictions in the determination of "affected person." The comments seemed to indicate that than an applicant should be "bound" by distance representations in their application and barred from amending their application to adjust distance requirements. AGC of Texas would respectfully oppose any amendments to the proposed rules that would effect this policy change.

- This change would be beyond scope of this rulemaking as TCEQ did not propose any changes concerning distance considerations in the relevant sections in 30 TAC Chapter 55.
- Additionally, there are practical reasons why a plot plan may be amended during the technical review process (e.g., access to line power) that should be allowed.
- This would represent a significant policy determination that would go beyond the deliberations of the Legislature.

Public Notice Requirements for Air Quality Permit Applications Can Be Further Consolidated. The proposed rule amendments make a number of clarifying improvements in 30 TAC Chapter 39, Subchapter H (Applicability and General Provisions). Nonetheless, Subchapter H still contains a number of provisions that are specific to air quality permit applications. As currently constructed, a reader must still toggle back and forth between Subchapters H and Subchapter K (Public Notice for Air Quality Permit Applications) in order to fully implement the public notice requirements.

Enough differences and nuances exist between the requirements applicable to air authorizations and other media authorizations that consolidation into a single subchapter could be beneficial to the public and the regulated community. AGC of Texas thus encourages TCEQ to consider consolidating *all* air

quality permit related public notice rules under 30 TAC Chapter 39, Subchapter K. This will reduce redundant language and the risk of rule provisions being in conflict.

Proposed §39.1—Definitions

AGC of Texas supports the proposed definitions of these commonly used terms and view this new section is an example of TCEQ providing clarity to the public. The proposed definitions are consistent with our understanding of how the terms have historically been applied within TCEQ's permitting systems.

Proposed §39.405(g)(1) and (2)—Application Available Until Final Action

As reflected in the general comment made above, the language should be modified to provide that the application should be made available through the applicable comment period.

Proposed §39.409(c)—Extension of Comment Period for Good Cause

The proposed rules state that the executive director may extend any comment period for "good cause." "Good cause" may be different depending on specific circumstances. AGC of Texas requests that in the Response to Comment on this proposal, TCEQ provide examples of the reasons why a comment period may be extended. AGC of Texas further comments that TCEQ clarify proposed subsection (c) to make clear that a person who requests an extension bears the burden for demonstrating "good cause."

Current §39.411(e)(13)—Text of Public Notice for Concrete Batch Plants

In developing our comment on proposed new §39.606(f) (please see below), AGC of Texas notes that this section, for which there is no proposed amendments, should be amended to conform to Health and Safety Code, §382.058(c). That section reads, as follows: *For 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.*

Thus, AGC of Texas respectfully recommends that this rule be reworded, as follows:

(13) notification that only those persons actually residing within 440 yards of a concrete batch plant authorized by the Air Quality Standard Permit for Concrete Batch Plants adopted by the commission under Chapter 116, Subchapter F of this title, may request a contested case hearing as a person who may be affected.

This change would encompass the Legislature's directive that a person "actually" resides within that distance, and that the residence is "permanent." Further, as currently written, the language pre-determines that the person is an "affected person," whereas the statute notes that the person only "may be affected." An "affected person" determination must include whether personal justiciable interests are also demonstrated.

Proposed §39.422—Notice of Extension of Comment Period

Similar to the above comment on proposed §39.409(c), AGC of Texas comments that TCEQ should explain what would constitute "good cause." Additionally, a person that requests a comment extension should bear the burden of demonstrating "good cause."

Proposed §39.604(a)(1)—Size of Signage

As proposed, the rule amendments would increase the size of required signs for air quality permits to 48 inches by 48 inches, effective on or after May 1, 2026. AGC of Texas respectfully opposes this amendment.

- Current signage has proven to be more than adequate to notify the public.
- With the advent of social media and the organized efforts of non-governmental organizations, traditional forms of public notice have already been significantly supplemented.
- Four foot by four-foot signs also raise practical safety concerns, as they may obstruct the view of trucks entering or exiting a site; or, depending on where they are placed in accordance with the rules, obstruct the view of drivers on the public roadway. This issue may be further exacerbated if alternative language signs are also required.
- This requirement may result in more variance requests under §39.604(d).
- This is a substantive recommendation that exceeds the direction and deliberations of the Legislature.

Proposed §39.604(b)—Sign Placement Until "Final Action"

As reflected in the general comment made above, the language should be modified to provide that the application should be made available through the applicable comment period. This, too, in relation to air quality permit applications, goes beyond the deliberations of the Legislature.

Proposed §39.606—Contested Case Hearings and Public Meetings

It does not appear that all of the language in this new section was shown in underline.

Proposed §39.606(c)(2)—Period to Request a Contested Case Hearing for Unsatisfactory Performer

The preamble notes that TCEQ's rules are "silent" as to the impact of a poor compliance history on the comment period. Thus, TCEQ is proposing to specify that if an application for a renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted, and the applicant's compliance history is in the lowest classification under Water Code, §§5.753 and 5.754, then the comment period would be extended to 30 days or within 30 days of the filing of the response-to-comment. Health and Safety Code, Chapter 382, and Water Code, Chapter 5, are also silent on the impact of a poor compliance history on the comment period, while otherwise noting that certain permitting actions are prohibited for such performers. AGC of Texas comments that TCEQ has not provided an adequate reasoned justification for why such applications should be treated differently.

Proposed §39.606(f)—Eligibility to Request a Contested Case Hearing for a Concrete Batch Plant

The proposed amendments state that only a person residing within 440 yards of the proposed plant is an affected person entitled to request a contested case hearing. This implements Health and Safety Code, §382.058(c). This statute has been self-implemented for years, and TCEQ guidance clearly states the requirement. Thus, this amendment may be unnecessary, and should the Legislature amend the statute, its exclusion will save TCEQ a rulemaking.

However, any adopted language should conform to §382.058(c). That section reads, as follows: *For 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.*

Thus, AGC of Texas respectfully recommends that the proposed rule subsection be reworded, as follows:

(f) For applications for a concrete batch plant authorized by the Air Quality Standard Permit for Concrete Batch Plants adopted by the commission under Chapter 116, Subchapter F of this title, only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a contested case hearing as a person who may be affected.

This change would encompass the Legislature's directive that a person "actually" resides within that distance, and that the residence is "permanent." Further, as drafted, the language pre-determines that the person is an "affected person." The statute notes that they only "may be affected." An "affected person" determination must include whether personal justiciable interests are also demonstrated.

Finally, AGC of Texas comments that the 440-yard requirement was established through the legislative process, not through a TCEQ scientific proactiveness review. The distance first appeared in 1985 during the legislature's deliberations on the Texas Air Control Board's Sunset bill (Senate Bill 725, 69th Legislature). AGC of Texas comments that the response to comments affirm that TCEQ air permits are designed and written to be protective of human health and the environment; and that the 440-yard requirement is not an environmental protectiveness measure.

Proposed §55.103(1)(C)—Person Residing within 440 yards of a Concrete Batch Plant

Consistent with previous comments, AGC of Texas respectfully requests that TCEQ ensure this language conforms to Health and Safety Code, §382.058(c). Additionally, as drafted, the language is too general in its reference to concrete batch plants, as only permanent and certain temporary plants go to notice. AGC of Texas recommends that the language read as follows:

(C) For applications for a concrete batch plant authorized by the Air Quality Standard Permit for Concrete Batch Plants adopted by the commission under Chapter 116, Subchapter F of this title, only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a contested case hearing as a person who may be affected.

Proposed §55.103(3)—Definition of Personal Justiciable Interest

AGC of Texas opposes defining "personal justiciable interest" by rule. The concept is already baked into the determination of "affected person," and has been successfully implemented by the agency since at least 1999.

Further, as drafted, the language may misapprehend the significance of the term and suggest an inquiry into legally protected interests that has never been a focus of the "affected person" determination.

Existing law provides the following definition for an "affected person": *a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest* (Texas Water Code, §5.511(a)). That definition is echoed at current 30 TAC §55.103. AGC of Texas makes the following points.

- The proposed new language, "[a]n legally protected interest related to a legal right, duty, privilege, power or economic interest," is at least redundant and may be problematic. The notion that an affected person must articulate an "interest related to a

legal right, duty, privilege, power, or economic interest" is already part of the definition of "affected person." See Texas Water Code, §5.511(a) and the existing §55.103.

- It is important that the interest is within the commission's jurisdiction on the particular application/draft permit (e.g., water quality cannot be considered as part of an air permit, traffic and property values are not relevant, etc.). That is what is meant by "justiciable." The interest must be within the commission's authority on the specific permitting matter—otherwise it is not "justiciable." The proposed new language, "within the jurisdiction and authority of the commission and that can be considered in an administrative hearing or judicial appeal that is related to the draft or proposed permit," may be too expansive in terms of "can be considered" and "related to the…permit." This could invite mischief.
- The significance of it being "personal" is twofold:
    - As stated in the Texas Water Code and the existing rule, an interest common to the general public is not a personal justiciable interest, even if expressed in terms of its personal impacts (e.g., the complaint that a new facility 10 miles away will aggravate the requestor's asthma is an interest common to the general public, even though it is expressed in terms of its impact to the requestor).
    - Sometimes the requestor fails to express the interest in personal terms but speaks on behalf of their neighbors or the community's interests. That fails to demonstrate a "personal" interest, even if the requestor might have been able to demonstrate interests not common to the general public.
- TCEQ more than adequately provides the public guidance on how to request a contested case hearing through GI-649, *Requesting a Contested Case Hearing for Wastewater, Waste, or Air Permits*).

AGC of Texas respectfully comments that the proposed definition should be deleted.

Thank you again for the opportunity to comment on the proposed rules. Please do not hesitate to contact me at (512) 478-4691 if you have any questions or require further information.

Sincerely,

Jennifer Woodard

Jennifer Woodard
Chief Executive Officer