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VIA ELECTRONIC SUBMITTAL

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Corey Bowling
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Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Texas Industry Project Comments on Proposed Public Notice Rule (2024-003-039-LS)

Dear Mr. Bowling:

The Texas Industry Project (“TIP”) appreciates the opportunity to submit comments on the Texas Commission on Environmental Quality’s (“TCEQ”) proposed revisions to 30 Texas Administrative Code (“TAC”) Chapters 39 and 55 (the “Proposal”). TIP is composed of more than 50 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, transportation, and national defense industries with operations in Texas.

As reflected in the proposed preamble, the Proposal implements changes required by Senate Bill (“SB”) 1397. In particular, SB 1397 amended Texas Health and Safety Code 382.056(k-2) and Texas Water Code §5.1734 and directed TCEQ to “require the public comment period and deadline to request a contested case hearing for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with a consolidated notice of receipt of application and intent to obtain permit (NORI) and notice of application and preliminary decision (NAPD), if a public meeting is held” and post permit applications on its website. Related to the Sunset review process of the agency, TCEQ was directed “to develop a guidance document that explains what information the commission needs to evaluate whether a person is potentially affected by a permit application.”¹ TCEQ subsequently issued TCEQ Publication GI-649 entitled “Requesting a Contested Case Hearing”, which comprehensively steps through the process for requesting a contested case hearing by an affected person, including examples of what is required to demonstrate a personal justiciable interest.²

¹ Texas Commission on Environmental Quality, *Sunset Implementation Table with Status*, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Mar. 13 2025, <https://www.tceq.texas.gov/downloads/publications/external-facing-sunset-implementation-table-with-status.pdf>.

² Office of General Counsel Division, *Requesting a Contested Case Hearing for Wastewater, Waste, or Air Permits*, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Oct. 2024, <https://www.tceq.texas.gov/downloads/agency/decisions/participation/gi-649-contested-case-hearing-wastewater-waste-air.pdf>.

Concurrent with the development of the required revisions, the Proposal also notes that TCEQ engaged in a stakeholder process for the rulemaking and as a result “received many comments and suggestions for changes to improve the agency’s public participation rules.” While TIP appreciates TCEQ’s efforts to make the rules less confusing and more helpful to the public, TIP is concerned that the rule changes, as proposed, may have potential unintended implications and create additional confusion. TIP respectfully offers the following comments intended to make the rules more clear and helpful to the TCEQ, the regulated community and the public.

I. 39.405 General Notice Provisions

A. 39.405(g)(1)-(3) Copy of Application

The addition of and emphasis on the application remaining available for the “entirety of” the comment period in (g)(1) and “continuously” available until the commission has acted on or referred an application to the State Office of Administrative Hearings (“SOAH”) in (g)(2) and (g)(3) lacks clarity. Current requirements ensure that a copy of the administratively complete application is available locally for the 30-day period following the publication of the NORI and then an updated technically complete application, together with updates to the administratively complete application and documents reflecting the Executive Director’s review thereof, is available for 30 days following publication of the NAPD. The applicant is in a position to assure compliance with this requirement by checking on the application at the beginning and end of two discrete comment periods. The applicant is then required to verify such compliance in contemporaneous public notice verifications filed with TCEQ to be included in the administrative record to support permit issuance. This two-step process is the one envisioned and required by sections 5.552 and 5.553 of the Texas Water Code and section 382.056 of the Texas Clean Air Act.

The proposed changes raise several concerns. First, the proposal could be interpreted to require availability of the administratively complete application from the date of the NORI up to and including the end of the public comment period on the application. This date would extend the requirement to maintain the administratively complete application past the point in time when the technically complete application is required to be made available. Such a duplicative requirement would be confusing to the public. Second, the technically complete application is required to be made available from the date of the NAPD until the commission has taken final action on the permit or the commission refers the permit to SOAH. TIP is concerned that the required end point lacks clarity and does not address referral of the application to SOAH by the applicant. Final action by the commission on an application may not occur until after the conclusion of a contested case hearing and the language does not address the appropriate end point if the applicant directly refers an application.

Third, the extension of the requirement to maintain a copy of the administratively complete application for longer than the initial 30-day comment period after the NORI and the use of the term continuously in the proposed rule changes raises questions about how and when revisions, clarifications or updates to an application should be added to the locally available copy. The

technical review of an application is an iterative process where staff seeks responses to deficiencies and clarifications to the application and the applicant responds and refines its proposal. Technical review can take many months, and for some applications, years. Updates to the application can take the form of formal application supplements and revisions as well as clarifications provided by letter or electronic mail, and the application is not technically complete until the Executive Director issues her preliminary decision to issue the permit. The proposed changes could be interpreted to suggest contemporaneous supplementation of a locally available application with each correspondence is required during the technical review period, which is not the apparent intent.

The attached Appendix offers TIP's suggestions to improve the clarity and intent of the proposed changes in this rulemaking. In reviewing the totality of the proposed changes, TIP believes all interested persons would be best served by selecting a consistent time period for the affected public notice requirements, one that commences on the first publication of the NORI and ends on the last day of the public comment period, as defined in section 55.152 of the TCEQ's rules and consistent with proposed section 39.409(b). That would provide more notice than required by the relevant statute statutes and ensure that the public is only apprised of information that is relevant to open public comment periods on applications. It also allows applicants to verify substantial compliance with applicable public notifications requirements in contemporaneous filings to be included in the administrative record supporting a final permit decision.³

TIP recommends that the commission align the prescribed date for which the availability of physical and electronic applications, as well as sign-postings, must remain available. Setting a unified end date will simplify and allow the public to readily track the respective availability of applications in a public place as well as electronically posted applications and sign postings. This alignment would be appropriate for sections 39.405(g), 39.405(l) and 39.604(b). TIP's suggested alignment of the timeframe for the availability of applications also ensures consistency and clarity of specific pending application availability, particularly for sites with multiple pending applications.⁴

With respect to section 39.405(g), TIP also recommends deleting the requirement to keep the administratively complete application in place after the NAPD is published and confirming the current requirement to include "any subsequent revisions to the application" in section 39.405(g)(2) to commence only with the publication of the NAPD, which announces the availability of the technically complete application. That version of the application would necessarily include any supplements, revisions, and clarifications to the administratively complete version. While this is not the apparent intent of the proposed rule change, there should be no

³ Under section 80.118 of the TCEQ's rules, the administrative record for an application is to include public notices related to the application as well as affidavits of such notices. A proposed requirement that would extend the requirement to satisfy public notice requirements that extend to the date of final commission action creates a risk that the administrative record will be incomplete.

⁴ Alternatively, and less preferentially, the end point should be aligned to represent *the earlier of the* date on which the commission has taken final action on the application or the commission *or the applicant* has referred the application to the State Office of Administrative Hearings.

requirement to continuously update the administratively complete application during the technical review period.

B. 39.405(l) Electronic Copy of Application

TIP appreciates the additional guidance in the proposed rule on the implementation of the new statutory requirement for the posting of an electronic copy of the application. TIP believes that electronic availability of the application will provide greater public access to application materials than the requirement in section 39.405(g). TIP comments to ensure that the requirements for posting do not become a vehicle for complaints in the event the strict five business day timeline is not met or the agency's website for hosting the applications is not available for temporary periods of time. TIP also seeks clarification on the protection of information submitted as confidential in an application and a mechanism for the Executive Director to document its compliance with this requirement for the record.

As mentioned in our comments for section 38.405(g), TIP recommends that the commission align the availability of the electronic copy of the application with that of the physical copy and sign-postings. The proposed rules state that the electronic copy of the application needs to remain posted until "final action is taken on the application and there is no further opportunity to request commission or judicial review." TIP is concerned that having the application posted for a period of time past the designated period for public comment when the public is able to participate will be confusing and have the unintended consequence of implying that individuals may appear and participate well past the comment deadline.

II. 39.411 Text of Public Notice

TIP requests the commission revise section 39.411 as proposed to require notice language clarifying that if no comments are timely submitted by a person (or association meeting the requirements of 30 TAC §55.205) to the TCEQ during the public comment period, then that person or association may not be named an affected person or association by the commission or SOAH. This is consistent with Government Code § 2003.047(e-1) which provides that issues referred by the commission to SOAH "must have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner." This is also consistent with sections 55.203(c)(6) and 55.205.(b)(1) of this title. While an Administrative Law Judge may consider *an issue* not referred by the commission "if there are good reasons for the failure to supply the information" during the comment period, this does not provide authority for additional persons or associations who did not timely comment to subsequently be granted a hearing and be named a party by either the commission or SOAH. Also for additional clarity, TIP suggests that the commission include in its description of how to request a contested hearing that a requester must specifically request a *contested case hearing*. This will ensure consistency with the commission's October 2024 guidance which provides that the hearing request must specifically request a contested case hearing, or it will be treated as a comment.

III. 39.604 Sign-Posting

A. 39.604(a)(1)

While TIP acknowledges the intent of this proposed revision to make the signs easier to read, the much larger size-posting requirements raise practical concerns. First, increasing the font size to no less than three inches may preclude posting the required notice content for the corresponding dimensions (48" x 48")⁵ as there may be too much content to accommodate such font. One option is to consider requiring only certain key words be presented in the larger font size. Second, increasing the sign size presents visibility concerns at major industrial sites where multiple concurrent sign postings, in English and alternative language, are often required. Signs must be located within "ten feet of every property line paralleling a public highway, street, or road . . . and visible from the street and spaced at not more than 1,500- foot intervals" per 30 TAC §39.604(c). A typical major industrial facility may have 10 or more concurrent air permitting actions requiring notice, with multiple signs posted for each permitting action. The presence of so many signs at the proposed larger size threaten visibility to plant access points and raise site-specific space limitations. For example, depending on the configuration, multiple units at co-located facilities may affect an applicant's ability to comply with current sign posting location requirements. Lastly, TIP observes that section 39.510(b)(1), the rule upon which proposed 39.604(a)(1) is modeled, applies to inactive municipal solid waste permits which do not involve multiple units and permitting actions such as a petrochemical complex.

B. 39.604(b)

The proposed requirement to have signage remain in place from the date of publication of the NORI and remain in place and legible until final action is taken on the permit application will have several unintended consequences. This proposed change substantially enlarges the statutory requirement in section 382.056(c) of the Texas Clean Air Act that signs need only be posted for a 30-day period after the NORI is published. Final action on an application after a contested case hearing can take three years or longer. At the point of final issuance, the comment period would have been concluded years before during the public comment period. There is no further opportunity for public comment after the close of the public comment period, which may prompt confusion regarding the public's ability to participate in the process or readily identify which permitting actions are open and available for comment. Signs will also deteriorate in adverse weather conditions, especially along the Gulf coast. While applicants recognize and address when signs require replacement, the commission should not proceed with a rule revision when such signs do not serve to allow meaningful public participation as is the case where a sign is required to remain posted beyond the public comment period.

An additional concern with retaining the sign posting until action has been taken on the permit application is that large sites with multiple permit applications may result in multiple sign postings for several years making it difficult to readily determine which sign corresponds with a pending public comment period or place visibility constraints on limited access points to plant

⁵ Consideration of alternative smaller dimensions than 48' by 48' may mitigate these concerns.

sites. A continuous concentration of signage at a large site can have the inadvertent effect of diminishing the effectiveness of sign-postings. Simply stated, the signs will become indistinguishable, with new permits and old permits similarly noticed, which is contrary to the intended goal of making public participation rules less confusing. Accordingly, TIP respectfully recommends that the commission only lengthen the current requirement for sign posting (and physical and electronic availability of applications) to the period that coincides with the public comment period. This alignment serves the public interest and allows compliance to be verified in the administrative record using established public notice verification procedures.

IV. 39.606 Contested Case Hearings and Public Meetings

A. 39.606(a)

TIP acknowledges the intent of identifying -- in one section -- key public participation requirements, including the universe of applications for which there is an opportunity to request a contested case hearing and specific timing requirements for certain contested case hearing requests. Consistent with the objective of making the rules less confusing, TIP suggests the commission specify in rule that any application exempt from public notice requirements, such as public notice de minimis air permit applications, is not subject to public comment, public meeting, reconsideration, or contested case hearing opportunities. As such, the agency should not apply any public participation-related provisions to no-notice amendment applications. This is consistent with Texas Health and Safety Code § 382.0518(h) which provides that the §382.056 requirements do not apply to applicants for air permit amendments "...if the total emissions increase from all facilities authorized under the amended permit will meet the de minimis criteria defined by commission rule and will not change in character." Absent clarification, TIP's concern is the potential for delay and uncertainty if comments or requests nevertheless are submitted on public notice de minimis applications.

TIP also seeks clarification on the processing and issuance of these types of applications, as they should not be subject to the opportunity for any person or association to submit comments, request a public meeting, request reconsideration, or request a contested case hearing. The proposed changes to the rules should also confirm current practice that views the Executive Director as having the authority to issue such permits, without commission action, when no opportunity for reconsideration or contested case hearing is allowed.

Similarly, for clarity, TIP respectfully recommends the commission include language in 39.606(a) that recognizes the statutory limitation in Texas Health and Safety Code § 382.056(g) which states that the commission may not seek further public comment or hold a public hearing on amendments, modifications, or renewals that "...would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted." To this end, TIP seeks clarification on the processing and issuance of a no increase renewal. First, such applications should not be subject to the opportunity for any person or association to request a public meeting, to request reconsideration, or to request a contested case hearing. The proposed changes to the rules should clarify this. The proposed changes to the rules should also conform

the authority of the Executive Director to issue such permits, without commission action, as no opportunity for reconsideration or contested case hearing is allowed. This would afford efficiency in the air permitting process by not having to schedule applications for commission consideration, which understandably adds time given the commission's workload. If a person or association is aggrieved by the Executive Director's decision, a motion to overturn is available.

TIP also offers clarification regarding those permit actions not subject to the opportunity for a contested case hearing, including stand-alone PAL permit applications.

B. 39.606(d)

Similar to its comments to proposed §39.606(a), while TIP suggests that contested case hearing request requirements be addressed exclusively and comprehensively in the established structure of Chapter 55, rather than identifying select provisions in (1) and (2) with a catch-all phrase referencing "form requirements," if TCEQ adopts such changes it should clarify the requirement that a hearing request include reference to the timely relevant and material issues raised by the commenter. TCEQ's recent contested case hearing request guidance document better informs the public on how to go about requesting a contested case hearing than a truncated excerpt of existing rules.

C. 39.606(h)

Consistent with the objective to make the public participation process less confusing, TIP recommends that §39.606(h) be revised to be consistent with §55.154(c) and federal law which provide that the commission shall hold a public meeting upon request of an interested person only for Prevention of Significant Deterioration (PSD), Nonattainment (NA) and Hazardous Air Pollutant (HAP) permit applications.

V. 55.103 Definitions

A. 55.103(3)

TIP requests that TCEQ decline to adopt proposed 30 TAC §55.103(3), which would define "personal justiciable interest" based on key concepts from Texas Water Code 5.115 but with additional terms. While the intent is laudable, TIP strongly urges the commission to forego the addition of terms and phrases that may inadvertently expand or constrain the application of the statutory definition of affected person. This statutory definition has been in place for and interpreted by courts for over 25 years. As noted previously, the commission has helpful guidance in place as of October 2024 with RG-649. This guidance document includes examples of the requirements to demonstrate a personal justiciable interest. TIP believes the best place to assist the public with understanding what constitutes a "personal justiciable interest" is in RG-649 rather than the rule.

We appreciate your consideration of the foregoing comments. If you have any questions, please contact me at derek.mcdonald@bakerbotts.com.

Respectfully,

A handwritten signature in black ink, appearing to read 'Derek R. McDonald', with a stylized, flowing script.

Derek R. McDonald

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