BEFORE THE ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR ACTION REGARDING DEFICIENCIES IN THE TEXAS AIR PERMITTING PROGRAM RELATED TO ENVIRONMENTAL JUSTICE & PUBLIC PARTICIPATION

Executive Summary

Petitioners seek EPA's intervention to remedy systemic and long-standing failures by the Texas Commission on Environmental Quality (TCEQ) to comply with public participation and environmental justice obligations under the Clean Air Act and Title VI of the Civil Right Act. Petitioners[1] include frontline community groups from Port Arthur to El Paso who are disproportionately harmed by these failures in TCEQ's air permitting practices and statewide organizations from across Texas that advocate for environmental justice and public health. Until EPA requires Texas to correct the deficiencies identified in this Petition, Texas will continue to perpetuate discriminatory practices and ignore input from the communities most harmed by air pollution.

In particular, the Petition addresses the following practices in TCEQ's air permitting program that violate the Clean Air Act and Title VI of the Civil Rights Act. First, TCEQ refuses to evaluate the environmental justice impacts of its permitting decisions. Second, TCEQ's practices and regulations unlawfully restrict the public's ability to participate in permitting proceedings by: (1) limiting access to judicial review of permits, (2) allowing applicants to withhold public information during the comment period, and (3) allowing operators to use unenforceable permits by rule to authorize new construction, modifications, and emissions increases without any meaningful opportunity for public participation.

EPA's intervention is necessary to ensure that Texas' delegated air permitting program complies with federal law. Petitioners request that the EPA initiate a Title VI compliance review and a SIP Call to review TCEQ's practices and require TCEQ to modify its regulations to comply with these federal laws.

I. Violations Raised in the Petition

1. TCEQ Refuses to Evaluate Environmental Justice Impacts of Air Permits

In Texas, communities of color and low-income communities are disproportionately harmed by industrial air pollution. Individuals and organizations from frontline communities across the state

[1] Petitioners include: Port Arthur Community Action Network, San Antonio Bay Estuarine Waterkeeper, Diane Wilson, Familias Unidas del Chamizal, Shrimpers and Fishermen of the RGV, Alliance for Fairness and Progress, West Dallas 1, t.e.j.a.s., Air Alliance Houston, Texas Campaign for the Environment, Environmental Integrity Project, Sierra Club Lone Star Chapter, and Sierra Club.

have asked TCEQ to evaluate the environmental justice impacts of individual air permits before authorizing them, as required by federal environmental and civil rights laws.

However, TCEQ consistently refuses to conduct any environmental justice analysis, frequently asserting that environmental justice impacts of individual permits are "not relevant to the issuance of [a] permit." In a recent filing with EPA, TCEQ further explained that environmental justice reviews are too burdensome to conduct for the second largest permitting program in the country stating "[s]uch a requirement would be resource-intensive, especially for a state such as Texas, with a robust permitting program second only in scope to the EPA's."

EPA's involvement is necessary to correct TCEQ's systemic refusal to conduct any environmental justice review in its air permitting program. The size of Texas' air permitting program and its widespread, harmful impacts on environmental justice communities across the state make prompt compliance with federal environmental and civil rights laws all the more important.

2. TCEQ Unlawfully Obstructs Public Participation in Air Permit Proceedings

The Petition raises three significant barriers to public participation in TCEQ's air permit proceedings that are unlawful under the Clean Air Act.

i. TCEQ Prevents Judicial Review of its Air Permits by Requiring Participation in Contested Case Hearings

The Clean Air Act entitles any person who has commented on a permit application and meets the criteria of federal Article III standing to judicial review of that air permit. But, in recent court proceedings, TCEQ has successfully argued that persons seeking judicial review of air permits must first participate in an administrative trial proceeding called a "contested case hearing." The rules governing contested case hearings are not a part of Texas' EPA-approved air permitting program.

Under Texas law, only "affected persons" may participate in Texas' contested case hearings. Yet TCEQ has a pattern and practice of interpreting "affected person" for standing purposes in a way that is substantially more narrow than federal Article III standing principles. For example, TCEQ arbitrarily presumes that people who live more than one mile from a facility seeking an air permit are not affected persons. Further, the agency does not recognize recreational interests at all. The added state-law procedural hurdle of demonstrating standing under Texas' overly-restrictive "affected person" requirement and participating in a contested case hearing is a significant barrier to the public's right to judicial review of air permits in violation of the Clean Air Act.

ii. TCEQ Allows Applicants to Withhold Public Information as "Confidential"

Texas law and the Clean Air Act allow applicants to withhold confidential information to prevent disclosure of trade secrets and sensitive business information. However, this privilege is balanced against the Clean Air Act's public participation mandate and its provisions making permit requirements and emissions data public information as a matter of law. Emissions data includes information necessary to determine the identity, amount, frequency, concentration, or other

characteristics of emissions standards or limits established or proposed pursuant to the Act, such as source limits and standards in individual permits, emission calculation methods and data, and enforceable representations in permit applications. Public access to permit terms and emissions data is necessary to facilitate opportunities for public participation guaranteed by the Clean Air Act.

Operators and applicants in Texas routinely designate this kind of public information "confidential." Because Texas presumes that all information marked "confidential" may be withheld from public disclosure under state laws that are inconsistent with the Clean Air Act and because TCEQ does not have a process for evaluating claims of confidentiality for consistency with federal law, members of the public seeking access to this *public* information are often unable to obtain it, even after going through the time-consuming process for challenging claims of confidentiality under Texas state law. Texas' failure to establish a process that ensures timely public access to *public* information is an impermissible burden on public participation rights guaranteed by federal law.

iii. TCEQ's General Permit Program Authorizes Large and Complex Emissions Without Public Notice and Opportunity to Comment

EPA has allowed state permitting authorities to create streamlined procedures for permitting insignificant projects at minor sources of air pollution by issuing generic authorizations for narrowly-defined source or project categories. These generic authorizations are often referred to as general permits or permits by rule. Because, in theory, the terms and potential applicability of such generic authorizations are clearly defined when they are issued, EPA has not required state permitting authorities to provide opportunities for public participation when these generic authorizations are claimed for specific projects. Instead, the public may only participate at the time the generic authorization is issued.

Texas' Permit by Rule ("PBR") program is not limited to insignificant projects and may be used to authorize multiple cumulatively significant projects at the largest major sources in the state. Moreover, Texas PBRs are not well-defined and EPA has recognized that many of the most frequently-claimed PBRs are practicably unenforceable. Where there is no PBR available for a proposed project, Texas allows operators to mix and match PBRs to create a piecemeal authorization. In cases where generic limits established by PBRs may trigger federal preconstruction or Title V permitting requirements, Texas' PBR program rules allow operators to establish project-specific limits subject to project-specific monitoring requirements. All of these factors work together to render opportunities for public participation at the time the terms of a PBR are established meaningless. Accordingly, Texas' PBR program fails to comport with federal public participation requirements.

II. Requested Remedies

To remedy these long-standing violations, Petitioners request that EPA initiate a Title VI compliance review and a SIP Call to review TCEQ's lack of environmental justice review and unlawful barriers to public participation in the Texas air permitting program. Petitioners specifically ask that EPA take the following actions:

1. Initiate a compliance review under Title VI of the Civil Rights Act of 1964 and the Clean Air Act to review TCEQ's lack of environmental justice review in air permitting and require TCEQ to modify its regulations to include an environmental justice review in all air permit reviews.

2. Issue a SIP call pursuant to Clean Air Act § 110(k)(5) to correct public participation deficiencies, including:

   A. Require revisions in statutory provisions incorporated in Texas' SIP to clarify that judicial review of permitting decisions is available to anyone who commented on the permit and would have standing under Article III of the U.S. Constitution, and require TCEQ to adopt regulations clarifying that participation in a contested case hearing is not required to exhaust administrative remedies for purposes of appealing TCEQ permitting decisions in state court.

   B. Require revisions to the Texas Public Information Act and Texas Clean Air Act to clarify that "emission data" as defined by the federal Clean Air Act is public information under Texas law and may not be exempted from disclosure as "confidential" and require TCEQ to adopt regulations to assure timely public access to information as required by the Clean Air Act, including:
      - Public access to emission data as defined under federal law,
      - Public access to all information that constitutes a permit term or condition or is necessary to make a permit term or condition practicably enforceable,
      - A process for resolving any claims of confidentiality in a timely manner. For information related to permits or permit applications, the process should assure all public information is available at the time an application is noticed or subject to a public comment period.

   C. Require TCEQ to adopt regulations governing permits by rule ("PBRs") and to revoke or revise existing PBRs to be consistent with the new regulations, including:
      - Limit the use of PBRs to true minor sources,
      - Require an opportunity for public comment on a source's eligibility for a claimed PBR,
      - Require that PBRs include: (1) technically accurate emission limits for all sources and projects eligible for coverage under the PBR and (2) monitoring, testing, and recordkeeping requirements sufficient to make those emission limits practicably enforceable, and
      - Require EPA approval before a new PBR or change to an existing PBR is made effective.