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

TABLE OF CONTENTS

I. PETITIONERS 4

II. EPA'S RESPONSIBILITY TO OVERSEE TEXAS' AIR PERMITTING PROGRAMS UNDER THE CLEAN AIR ACT 6

III. TCEQ FAILS TO CONDUCT ANY ENVIRONMENTAL JUSTICE REVIEW IN AIR PERMITTING 8

A. An Environmental Justice Review in Air Permitting is Required Under Executive Orders and Title VI of the Civil Rights Act 9

B. TCEQ Does not Conduct *any* Environmental Justice Review in Permitting 12

C. Corrective Action Required 14

IV. TCEQ UNLAWFULLY RESTRICTS PUBLIC PARTICIPATION IN AIR PERMITTING 14

A. Public Participation Deficiency #1: TCEQ Fails to Meet the Minimum Requirements for Judicial Review of Air Permit Decisions 15

i. Federal law Requires Access to Judicial Review of Air Permit Decisions at Least as Broad as Article III Standing 16

ii. Requiring Participation in a Contested Case Hearing to Exhaust Administrative Remedies Illegally Limits Access to Judicial Review of Air Permits Because it Restricts Standing More Narrowly Than Article III 19

iii. Corrective Action Required 35

B. Public Participation Deficiency #2: TCEQ Fails to Require Disclosure of Public Information as Required by the Clean Air Act 36

i. TCEQ's Failure to Vet Applicant Claims of Confidentiality Undermines the Public's Right to Participate in Air Permitting Decisions 38

ii. TCEQ's Failure to Vet Applicant Claims of Confidentiality Prevents Citizen Enforcement of Clean Air Act Requirements 45

iii. Corrective Action Required 46

C. Public Participation Deficiency #3: TCEQ Unlawfully Approves Thousands of "Permits by Rule" Each Year Without any Meaningful Opportunity for Public Participation or Enforcement 47

i. EPA's Public Participation Requirements for Permitting Programs 49

ii. Deficiencies in TCEQ's PBR Program 52

iii. Corrective Action Required 58

V. CONCLUSION 59

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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

The Clean Air Act is intended to protect the public and environment from the harmful effects of air pollution. While states are primarily responsible for implementing and enforcing the Clean Air Act's permitting program, Environmental Protection Agency ("EPA") is responsible for reviewing and approving state programs and for overseeing state implementation of federal requirements. Texas' failure to comply with basic Clean Air Act requirements has resulted in densely populated urban areas in the state, such as the Houston, Galveston, and Brazoria areas, existing in a state of perpetual nonattainment with health and welfare-based federal standards. And the evidence is clear that people of color, communities comprised of people living near or below the poverty line, and other marginalized populations are disproportionately hurt by this industrial pollution, in violation of Title VI of the Civil Rights Act.

It falls to those living in vulnerable communities to advocate for their own interests and to EPA to require Texas to correct its flawed programs. As this petition explains at length, Texas' implementation of its federal air programs unlawfully diminishes opportunities for public participation required by the Clean Air Act and EPA's implementing regulations. Texas' flawed implementation of public participation processes illegally limits the ability of environmental justice communities to participate in the permitting process and to protect the health and welfare of their communities.

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Accordingly, Port Arthur Community Action Network, San Antonio Bay Estuarine Waterkeeper, Diane Wilson, Familias Unidas del Chamizal, Shrimpers and Fishermen of the RGV, Citizens Alliance for Fairness and Progress, West Dallas 1, Texas Environmental Justice Advocacy Services (t.e.j.a.s.), Air Alliance Houston, Texas Campaign for the Environment, Environmental Integrity Project, Sierra Club Lone Star Chapter, and Sierra Club (collectively, "Petitioners") petition the Administrator of the Environmental Protection Agency, pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., and its implementing regulations, to address Texas' failure to properly implement and comply with public participation and environmental justice requirements in its federally delegated air permitting programs. Until EPA requires Texas to correct the deficiencies identified in this petition, the environmental justice communities most harmed by the state's policies will be unable to fully participate in the permitting process and will lack recourse for Texas' issuance of permits that fail to protect their communities' health and welfare.

The Texas Commission for Environmental Quality ("TCEQ") is the state agency charged with administering Texas' air permitting programs. Its practices and regulations unlawfully restrict the public's ability to participate in permitting proceedings by limiting access to judicial review of permits, allowing applicants to withhold public information during the comment period, and by allowing operators to authorize construction of new and modified equipment at major and synthetic minor sources using unenforceable permits by rule ("PBRs") that do not provide any opportunity for meaningful public participation. It also refuses to evaluate the environmental justice impacts of its permitting decisions even when concerns are raised by public comments. These practices by TCEQ violate the Clean Air Act and Title VI of the Civil Rights Act. It is vital that the public is informed of the consequences of TCEQ's permitting actions and has meaningful opportunities

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guaranteed by federal laws to advocate for public health and environmental protections in air permitting.

Many of these issues have been raised in previous petitions with the EPA.[1] A petition filed in September 2021 and currently pending with EPA also includes overlapping issues related to public participation and access to judicial review of permitting decisions in TCEQ's water permitting program.[2] Yet, these issues remain unresolved.

The Administrative Procedure Act requires EPA to conclude the matter raised in this petition within a reasonable time.[3] Given the long-standing nature and seriousness of the deficiencies raised, including harms to frontline environmental justice communities, Petitioners request that EPA expedite resolution of this matter.

I. PETITIONERS

This complaint is filed by the following organizations:

1. **Port Arthur Community Action Network** is a nonprofit corporation advocating for environmental justice in Port Arthur, Texas.
2. **San Antonio Bay Estuarine Waterkeeper** is a volunteer-run, local affiliate of the national Waterkeeper Alliance whose mission is to protect Lavaca, Matagorda and San Antonio Bays and to educate the public about these ecologically important ecosystems. **Diane Wilson** is the Executive Director of Waterkeeper and a fourth-generation fisherwoman and

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[1] *See e.g.* Petition by the Galveston Houston Association for Smog Prevention et.al., In the Matter of: Petition for EPA Action Addressing Texas' Air Permitting Program Deficiencies (Aug. 28, 2008); *see also* First Supplemental Petition by the Galveston Houston Association for Smog Prevention et.al., In the Matter of: Petition for EPA Action Addressing Texas' Air Permitting Program Deficiencies.

[2] Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Texas by Petitioners Environmental Integrity Project et. Al. (Sept. 23, 2021).

[3] 5 U.S.C. § 555(b).

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shrimper who works to protect the environmental quality of the estuarine resources in Calhoun County.

3. **Familias Unidas del Chamizal** is a community organization from the Chamizal neighborhood of El Paso that works to protect the health and safety of households in the neighborhood.
4. **Shrimpers and Fishermen of the RGV** is a membership organization of individuals who live, work, and recreate around the Brownsville Ship Channel in Cameron County, which is part of the Rio Grande Valley ("RGV") along the Texas-Mexico border.
5. **Citizens Alliance for Fairness and Progress** is a community advocacy group of residents from the Hillcrest and Washington-Coles neighborhoods of Corpus Christi, Texas founded out of concern for the deteriorating conditions in the neighborhoods as a result of heavy industry.
6. **West Dallas 1** is an unincorporated Texas Nonprofit Association organized for the purpose of empowering neighborhood associations, leaders and residents to unite and advocate on several issues including, but not limited to, issues impacting their membership's health, safety, and welfare.
7. **Texas Environmental Justice Advocacy Services (t.e.j.a.s.)** is a non-profit organization whose goal is to promote environmental protection through education, policy development, community awareness, and legal action. T.e.j.a.s.'s guiding principle is that everyone, regardless of race or income, is entitled to live in a clean environment.
8. **Air Alliance Houston** is a non-profit advocacy organization working to reduce the public health impacts from air pollution and advance environmental justice.

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9. **Texas Campaign for the Environment** is a membership organization dedicated to informing and mobilizing Texans to protect their health, their communities, and the environment. TCE works to promote strict enforcement of anti-pollution laws designed to stop or clean up air, water, and waste pollution.

10. **Environmental Integrity Project** is a non-partisan, non-profit environmental watchdog with offices and programs in Washington, D.C. and Austin, Texas dedicated to improving implementation and enforcement of federal and state anti-pollution laws.

11. **Sierra Club** is the nation's largest grassroots environmental organization, with millions of members and supporters. In addition to protecting every person's right to get outdoors and access the healing power of nature, the Sierra Club works to promote clean energy, safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and legal action. **Sierra Club Lone Star Chapter** is the oldest grassroots environmental organization in Texas and has over 20,000 members.

II. EPA'S RESPONSIBILITY TO OVERSEE TEXAS' AIR PERMITTING PROGRAMS UNDER THE CLEAN AIR ACT

The Clean Air Act ("CAA") is designed to protect and improve the nation's air quality and public health into the future.[4] As part of its scheme to accomplish its expansive and forward-looking environmental and public health goals, the CAA requires sources of air pollution to obtain permits that limit emissions of pollution to levels that are protective of public health.[5] The CAA allows states to issue federal air pollution permits as long as the state's permitting program meets

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[4] Clean Air Act, 42 U.S.C. § 7401(b)(1); *see* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1676 (1970).

[5] 42 U.S.C. §§ 7410(a)(2)(C), 7475, 7503.

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minimum federal standards and is approved by the EPA in a State Implementation Plan ("SIP").[6] States develop SIPs to attain and maintain health and welfare-based National Ambient Air Quality Standards ("NAAQS") promulgated by the EPA and meet other requirements under the CAA, including Prevention of Significant Deterioration ("PSD") requirements. See 42 U.S.C. § 7410(a).

Texas' SIP was initially approved by EPA in 1972.[7] Since then, many revisions have been incorporated.[8] The Texas Commission on Environmental Quality ("TCEQ") is responsible for implementing the Texas SIP, including issuing air permits in Texas.

EPA has a continuing obligation to oversee Texas' Clean Air Act air permitting programs to assure they comply with the CAA and that they are being properly implemented and enforced by the state. Whenever EPA finds that a SIP is substantially inadequate to comply with the CAA, EPA "shall require the State to revise the plan as necessary to correct such inadequacies."[9] If EPA determines that its approval of a SIP or a SIP revision was a mistake and that the SIP fails to comply with federal requirements, EPA must act to reverse the erroneous approval.[10] In cases where EPA finds that a state is failing to enforce its approved SIP or permit program, the Administrator must notify the state of its failure and, if the state fails to timely correct its failure, EPA must take direct action to ensure compliance with federal law.[11]

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[6] 42 U.S.C. § 7407(a).

[7] 37 Fed. Reg. 10842, 10895-10898 (May 31, 1972); *see* TCEQ, *SIP: Texas, January 26, 1972*, https://wayback.archive-it.org/414/20210527181818/https://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1972-SIP/Texas_1972SIP.pdf (last visited February 11, 2022)

[8] *See* 40 C.F.R. § 52.2270 (listing provisions in the Texas SIP and identifying dates when each such provision was approved by EPA); *see also* TCEQ, *Texas SIP Revisions*, https://www.tceq.texas.gov/airquality/sip/sipplans.html (last visited February 11, 2022).

[9] 42 U.S.C. § 7410(k)(5).

[10] 42 U.S.C. § 7410(k)(6).

[11] 42 U.S.C. § 7413(a)(2).

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Texas is implementing an air permitting program that is different, and less stringent, than the approved SIP with regard to environmental justice and public participation requirements. In addition, there are provisions in the approved SIP that are inconsistent with the CAA and EPA guidance, as well as implementation issues that prevent Texas from assuring compliance with the Clean Air Act.

III. TCEQ FAILS TO CONDUCT ANY ENVIRONMENTAL JUSTICE REVIEW IN AIR PERMITTING

In Texas, communities of color and low-income communities are disproportionately hurt by industrial air pollution. A ProPublica study showed that the cities of Freeport, Port Arthur, Longview, Port Lavaca, and Laredo in Texas were hotspots for hazardous industrial air pollution that causes cancer.[12] In each of these cities the percentage of Hispanic/Latino, Black/African American, and/or low-income populations exceed that of the State of Texas.[13] The ProPublica study also identified the city of Houston as a hot spot for cancer-causing industrial air pollution.[14] An independent study confirmed that this air pollution is disproportionately experienced by communities of color and low-income communities in the Houston area.[15] Similar concerns have

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[12] Al Shaw, The Most Detailed Map of Cancer-Causing Industrial Air Pollution in the U.S., ProPublica (Nov. 2, 2021, Updated March 15, 2022), available at https://projects.propublica.org/toxmap/; *see also* Lylla Younes, et. al, Poison in the Air, ProPublica (Nov. 2, 2021), available at https://www.propublica.org/article/toxmap-poison-in-the-air (explaining significance of map).

[13] In Texas 12.9% of the population is Black/African American, 39.7% is Hispanic/Latino, and 13.9% lives in poverty. By comparison, in Freeport 17.6% of the population is Black/African American, 64% is Hispanic/Latino and 25.5% of the population lives in poverty. In Port Arthur 42.2% of the population is Black/African American and 26.7% of the population lives in poverty. In Longview 22.6% of the population is Black/African American and 18.6% of the population lives in poverty. In Port Lavaca 64.4% of the population is Hispanic/Latino. In Laredo 95.5% of the population is Hispanic/Latino and 23.9% of the population lives in poverty. U.S. Census Bureau, Quick Facts, available at https://www.census.gov/quickfacts/fact/table/laredocitytexas,portlavacacitytexas,longviewcitytexas,portarthurcitytexas,freeportcitytexas,TX/PST045221.

[14] Al Shaw, *supra*.

[15] Sustainable Systems Research, LLC, Evaluation of Vulnerability and Stationary Source Pollution in Houston, (Sept. 2020), available at https://www.nrdc.org/sites/default/files/houston-stationary-source-pollution-202009.pdf; *see also* Yukyan Lam et al., Toxic Air Pollution in the Houston Ship Channel: Disparities Show Urgent Need for

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been raised about air pollution in other environmental justice communities across the state, from Corpus Christi's Refinery Row[16] to West Dallas,[17] and Brownsville[18] to El Paso.[19]

Despite evidence that air pollution disproportionately harms communities of color and low-income communities in Texas, TCEQ refuses to review the environmental justice consequences of its permitting actions. Ignoring its obligations to comply with Title VI and Executive Orders regarding environmental justice reviews, the agency repeatedly asserts that neither federal nor state law requires such a review. EPA must intervene. Unless EPA requires Texas to conduct environmental justice reviews as part of the air permitting process, Texas' air permitting programs will continue to disproportionately harm communities of color and low-income communities.

A. An Environmental Justice Review in Air Permitting is Required Under Executive Orders and Title VI of the Civil Rights Act

Protecting low-income and minority communities from harms to their health and environment was enshrined as a federal priority in 1994 by Executive Order 12898.[20] The

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Environmental Justice, NRDC (Aug. 31, 2021), available at https://www.nrdc.org/resources/toxic-air-pollution-houston-ship-channel-disparities-show-urgent-need-environmental (explaining significance of study)

[16] Aman Azhar, In Corpus Christi's Hillcrest Neighborhood, Black Residents Feel Like They Are Living in a 'Sacrifice Zone', Inside Climate News (July 4, 2021), Available at https://insideclimatenews.org/news/04072021/corpus-christi-texas-highway-infrastructure-justice/.

[17] Darryl Fears, Shingle Mountain: How a pile of toxic pollution was dumped in a community of color, Washington Post (Nov. 16, 2020), available at https://www.washingtonpost.com/climate-environment/2020/11/16/environmental-racism-dallas-shingle-mountain/.

[18] Carmen Rocco and Dolly Lucio Sevier, Air Pollution a concern if LNG comes to the Valley, Rio Grande Guardian (Sept. 7, 2016), available at https://riograndeguardian.com/roccosevier-air-pollution-a-concern-if-lng-comes-to-valley/; Gus Bova, Bridge to Nowhere, Texas Observer (Sept. 16, 2019), available at https://www.texasobserver.org/liquefied-natural-gas-rio-grande-valley-endangered-pollution/ (discussing concerns about air pollution impacts if three proposed LNG export terminals are built near the low-income *colonia* of Laguna Heights, which is home to many Mexican immigrants who work in the area's hotels and restaurants)

[19] Isa Gutierrez et al., 'Like a Dumping Ground': Latina moms in Texas border city are fighting air pollution, NBC News (Feb. 22, 2022), available at https://www.nbcnews.com/news/latino/-dumping-ground-latina-moms-texas-border-city-are-fighting-air-polluti-rcna16789.

[20] Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf.

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Executive Order requires federal agencies to "make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [] programs, policies, and activities on minority populations and low-income populations."[21] Executive Order 12898 also calls on agencies to identify and address discriminatory effects of proposed projects on the health or environment of minority populations.[22]

In 2021, Executive Order 12898 was amended by Executive Order 14008, which states in part that "[a]gencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities[.]"[23] Executive Order 13390 further cemented these previous executive orders by reiterating the policy goal of prioritizing and "advance[ing] environmental justice."[24]

In addition to the Executive Orders, Title VI of the Civil Rights Act of 1964 prohibits programs and activities that receive federal financial assistance from engaging in discrimination on the basis of race, color, or national origin.[25] EPA's regulations implementing Title VI bars recipients of federal financial assistance from the EPA from intentional discrimination and from practices that have the effect of discriminating on the basis of race, color, national origin, or sex.[26] In relevant part, these regulations require recipients of financial assistance to avoid siting or permitting facilities in locations that would have "the purpose or effect of excluding individuals

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[21] *Id.*
[22] *Id.*
[23] Executive Order 14008, Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.
[24] Executive Order 13390, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021), https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis.
[25] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*
[26] 40 C.F.R. § 7.35.

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from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex."[27] Thus, EPA regulations are intended to combat environmental laws, policies, public participation practices, and decisions that, despite apparent neutrality, may create unintentional discriminatory consequences that violate Title VI.

Under the Environmental Justice Executive Orders and Title VI, EPA and TCEQ are obligated to consider the impacts of proposed permits on environmental justice populations and to take actions to "advance environmental justice." The EPA's Environmental Appeals Board has held that EPA and state agencies that issue federal permits under delegated authority from EPA must complete an environmental justice analysis pursuant to Executive Order 12898 prior to issuing federal air permits.[28] Under Title VI, TCEQ and other recipients of EPA funding must ensure that their actions, such as permitting and siting decisions, do not have discriminatory effects.[29] Indeed, recent letters from EPA to state and local permitting agencies in Chicago and Michigan cautioned that proposed permits in overburdened, environmental justice communities raised "significant civil rights concerns" and recommended that "the state conduct a robust analysis to assess the full environmental justice implications of siting this facility in a community already overburdened by pollution, and then use that analysis to inform any permitting decision."[30]

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[27] 40 C.F.R. § 7.35(c). EPA's authority to ensure compliance with Title VI "includes the authority to ensure the activities they fund that affect human health and the environment, do not discriminate on the basis of race, color, or national origin. Therefore, agencies can use their Title VI authority, when appropriate, to address environmental justice concerns." U.S. EPA, "Title VI EJ Comparison" accessed July 10, 2020, https://www.epa.gov/sites/production/files/2015-02/documents/title-vi-ej-comparison.pdf.

[28] *See In re Prairie State Generating Company*, 13 E.A.D. 1, 123 (EAB 2006); *In re Knauf*, 8 E.A.D., at 174-75.

[29] 40 C.F.R. § 7.35.

[30] Letter from Michael Regan, Administrator, U.S. EPA, to the Hon. Lori E. Lightfoot, Mayor of Chicago (May 7, 2021), available at https://aboutblaw.com/XnS; *see also* Letter from Cheryl Newton, Acting Regional Administrator of EPA Region 5, to Mary Ann Dolehanty, Air Quality Division, Michigan Department of Environment, Great Lakes and Energy (Sept. 16, 2021), available at https://www.deq.state.mi.us/aps/downloads/permits/PubNotice/90-21/90-21Ajax_EGLE_EPA_Permit_Comment_Letter.pdf.

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B. TCEQ Does not Conduct *any* Environmental Justice Review in Permitting

Despite repeated requests from environmental justice communities across the state, TCEQ refuses to conduct any environmental justice analysis as part of its federally-delegated permitting programs. In response to concerns raised by Texas residents from Port Arthur to Manchester to Brownsville to El Paso that the TCEQ's permitting practices are disproportionately harming environmental justice communities across Texas, TCEQ repeatedly asserts that environmental justice concerns have no place in its permit reviews. For example, in response to comments regarding whether impacts to an environmental justice community had been adequately considered for a new concrete batch plant in Houston, the TCEQ stated:

> This issue... is not relevant to issuance of the permit. No TCEQ permitting rules address environmental equity issues such as the location of permitted facilities in areas with minority and low-income populations, disparate exposure to pollutants of monitoring and low-income populations, or the disparate economic, environmental, and health effects on minority and low-income population. Therefore, the environmental justice issue cannot be addressed in proceedings on this application and cannot be considered relevant and material to the commission's decision on this application.[31]

Similarly, in response to comments raising environmental justice concerns regarding a proposed oil refinery in Brownsville, Texas, the TCEQ stated:

> Air permits evaluated by the agency are reviewed without reference to the socioeconomic or racial status of the surrounding community. Although there are no TCEQ rules addressing environmental equity issues, such as the location of permitted facilities in areas with minority and low-income populations, disparate exposures of pollutants to minority and low-income populations, or the disparate economic, environmental, and health effect on minority and low-income populations, the TCEQ has made a strong policy commitment to address environmental equity.[32]

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[31] Executive Director's Response to Hearing Requests and Requests for Reconsideration Brief for Texas Concrete Enterprise Ready Mix, Inc., Permit No. 150603; TCEQ Docket No. 2018-1663-AIR.

[32] Executive Director's Response to Comments, Jupiter Brownsville, LLC, Permit Nos. 147681, PSDTX1522, and GHGPSDTX172, at page 39 of 60.

ED_014358_00000023-00012

Despite overtures of a "strong policy commitment to address environmental equity," TCEQ has made it abundantly clear that it believes environmental justice reviews in permitting are neither required nor necessary. In a recent response to a Title VI Civil Rights Complaint concerning TCEQ's unwillingness to address unreasonably high sulfur dioxide emissions from Oxbow Calcining's facility in Port Arthur, Texas, TCEQ repeatedly emphasized that no federal law requires or even allows an environmental justice review of permit applications.[33] This ignores the Federal Executive Order mandates to identify the discriminatory effects of federal programs, and Title VI prohibitions against discriminatory impacts in federally funded programs.

Moreover, TCEQ's "strong policy commitment" is further contradicted by its own explanations of why environmental justice reviews are not worth TCEQ's time or trouble: "[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 EPA's."[34] According to the TCEQ, these kinds of resource-intensive reviews are unnecessary because "[f]ederal and state laws and regulations require the Texas New Source Review ("NSR") and Title V air permitting programs to be protective of human health and the environment for all communities at the fenceline."[35] This response ignores the reality that environmental conditions in Texas often fail to protect human health, and that harms caused by the state's failure to effectively regulate pollution are

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[33] Exhibit A, Response of Texas Commission on Environmental Quality to Title VI Complaint, EPA File No. 02R-21-R6 at pages 1 ("neither the NSR or Title V processes, with their focus on compliance with air quality standards (e.g., NAAQS), allow a disparate impact review."); *see also id.* at 4, 8, "Neither the [Federal Clean Air Act] nor EPA in its properly promulgated regulations, including 40 CFR § 7.35, require a separate disparate impact analysis for individual actions under TCEQ and EPA permitting programs. Further, TCEQ relies on the requirements of in its own properly promulgated EPA-approved rules, which do not require the consideration of factors such as the location or socioeconomic status of surrounding communities…"; *see also id.* at 6 "No federal or state law or regulation requires or authorizes TCEQ to conduct a disparate impact analysis during the permitting process."; *see also id.* at 7 ("A Title V review does not require a modeling review or a disparate impacts analysis. The federal regulations that govern how state agencies conduct Title V programs do not allow those agencies (e.g. TCEQ) to require that level of additional analysis,")

[34] *Id.* at 4, 9

[35] *Id.* at 4-5, 8

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disproportionately borne by people of color and the poor.[36] It is clear that TCEQ will continue to ignore factors leading to these disproportionate harms until EPA intervenes.

C. Corrective Action Required

Petitioners request that EPA initiate a Title VI compliance review[37] and a SIP Call[38] to review TCEQ's lack of environmental justice review in the Texas air permitting program and require TCEQ to modify its regulations to include a robust environmental justice review in all air permit reviews, including minor New Source Review, Nonattainment New Source Review, Prevention of Significant Deterioration ("PSD"), and federal operating ("Title V") permits.

IV. TCEQ UNLAWFULLY RESTRICTS PUBLIC PARTICIPATION IN AIR PERMITTING

The CAA and EPA's regulations specify minimum public participation requirements for air permits.[39] These requirements are meant to give community members a voice in the administrative process that governs environmental and health issues affecting their communities. Meaningful public participation is particularly important for environmental justice communities who often face additional obstacles to participation in agency decision-making processes due to "linguistic, institutional, cultural, economic, historical, or other potential barriers."[40]

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[36] *See* fn. 12-19 *supra*.

[37] 40 C.F.R. §§ 7.110, 7.115, 5.605; *see* U.S. EPA External Civil Rights Compliance Office, *Process and Criteria for Prioritizing and Selecting Affirmative Compliance Reviews* (January 6, 2022), available at https://www.epa.gov/system/files/documents/2022-01/01-06-20-ecrco-process-for-prioritizing-and-selecting-affirmative-compliance-reviews.pdf ("the regulations specify that EPA may periodically conduct compliance reviews to assess the practices of recipients to determine whether they comply with nondiscrimination statutes and regulations.")

[38] 42 U.S.C. § 7410(k)(5).

[39] 40 C.F.R. §§ 51.161, 51.166(q).

[40] Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act*, at 13 ("Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures.").

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TCEQ routinely violates the public participation requirements of the CAA as a matter of practice and of policy. This petition highlights three major public participation deficiencies in TCEQ's federally delegated air permitting program:

1. TCEQ restricts access to judicial review in state court of permits to only those individuals who can meet TCEQ's narrow "affected person" requirements and participate in a contested case hearing;

2. TCEQ allows permit applicants to withhold broad portions of application materials as confidential; and

3. TCEQ permits substantial increases of emissions without notice or opportunity for public comment through the use of permits by rule (PBRs).

A. Public Participation Deficiency #1: TCEQ Fails to Meet the Minimum Requirements for Judicial Review of Air Permit Decisions

Federally-delegated state programs must include an opportunity for judicial review of air permit decisions in state court.[41] This right to appeal must extend to anyone who has participated in the state's federally-approved administrative process who satisfies the standing requirements established by Article III of the United States Constitution.[42] Consistent with this requirement, Texas' federally-approved SIP provides a right to appeal air permit decisions to state court[43] and

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[41] Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia— Prevention of Significant Deterioration Program, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (to be codified at 40 C.F.R. pt. 52) ("The EPA believes that Congress intended … [an] opportunity for state judicial review of PSD permit actions to be available to … those members of the public who can satisfy threshold standing requirements under Article III of the Constitution.") (citing Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977 (1977 Legislative History) 3892 (1977) ("[i]n order to challenge the legality of a permit which a State has actually issued, or proposes to issue, under [the PSD provisions of the CAA]... a citizen must seek administrative remedies under the State permit consideration process, or judicial review of the permit in State court.").

[42] *Id.*

[43] *See* 40 C.F.R. § 52.2270(e) (incorporating historical versions of the Texas Clean Air Act providing "person[s] affected by *any ruling, order, decision, or other act of the board* may appeal by filing a petition in a district court of Travis County.") (emphasis added). Subchapter F (Judicial Review) and other parts of this version of the Texas Clean Air Act incorporated into the Texas SIP are available electronically at: https://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1976-SIP/1976_sip_section_v.pdf

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the Texas Attorney General has affirmed 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."[44]

While Texas' SIP appears to comport with these requirements, the state is using a process that EPA has not approved to improperly limit the public's right to challenge air permitting decisions in state court. Specifically, Texas law recognizes the right of "affected persons" to request an administrative hearing—referred to as a "contested case hearing" to challenge the state's proposal to approve an air permit application.[45] These hearings, and the process to obtain them, are not a part of Texas' EPA approved SIP.

The criteria for "affected persons" entitled to participate in these administrative hearings are much narrower than the standing requirements established by Article III. This illegally restricts Texans' access to judicial review of TCEQ issued permits because TCEQ contends, and state courts have held, that where a contested case hearing is available to "affected persons", a party must participate in one before challenging the agency's decision to issue an air permit in state court.

i. Federal law Requires Access to Judicial Review of Air Permit Decisions at Least as Broad as Article III Standing

The CAA requires the availability of judicial review of EPA permitting decisions in federal court and judicial review of federally-delegated state permitting decisions in state court.[46] EPA has made it clear in its review of state implementation plans that opportunity for state judicial review "is necessary to ensure an adequate and meaningful opportunity for public review and

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[44] *See id.* (citing Section XIX, Supplement to 1993, 1996, and 1998, Statements of Legal Authority for Texas' FCAA Title V Operating Permit Program by the Attorney General of the State of Texas (Oct. 29, 2001)).
[45] Tex. Water Code § 5.556(a); 30 Tex. Admin. Code §55.200 *et seq.*
[46] *See* fn 41 *supra.*

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comment on all issues within the scope of the permitting decision, including environmental justice concerns and alternatives to the proposed source."[47] Moreover, this opportunity for state judicial review of permit actions must, at a minimum, be available to those members of the public who can satisfy standing requirements under Article III of the Constitution.[48]

Federal courts have held that to satisfy Article III's standing requirements, a plaintiff must show "injury in fact," causation, and redressability;[49] that an Article III standing inquiry should not be resolved on the merits of a plaintiff's claim;[50] and, that recreational, aesthetic, and economic interests are injuries that can give a petitioner standing in environmental cases.[51]

EPA has determined that state laws that restrict access to judicial review of CAA permits more narrowly than Article III standing are impermissible. In 1996, EPA proposed to disapprove Virginia's SIP in a rulemaking due to inadequate allowance for judicial review where Virginia's statutory provisions and case law extended judicial review of PSD permits to only persons who had suffered an "actual, threatened, or imminent injury" and "such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized …."[52] EPA explained that:

> EPA interprets existing law and regulations to require an opportunity for state judicial review of PSD permit actions under approved PSD SIPs by permit applicants and affected members of the public in order to ensure an adequate and meaningful opportunity for public

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[47] Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia— Prevention of Significant Deterioration Program, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (to be codified at 40 C.F.R. pt. 52).

[48] *Id.*; *see also Virginia v. Browner*, 80 F.3d 869, 878–79 (4th Cir. 1996) (holding that the EPA reasonably required Article III standing in a state's implementation of judicial review under the Title V permitting provisions of the CAA).

[49] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

[50] *Williamson v. Tucker*. 645 F.2d 404, 415-16 (5th Cir. 2981) ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court (assuming that the plaintiff's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.")

[51] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.,* 528 U.S. 167, 183–84 (2000).

[52] Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia – Prevention of Significant Deterioration Program, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996).

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> review and comment on all issues within the scope of the permitting decision, including environmental justice concerns and alternatives to the proposed source. The EPA believes that an opportunity for public review and comment as provided in the statute and regulations, is seriously compromised where an affected member of the public is unable to obtain judicial review of an alleged failure of the state to abide by its PSD SIP permitting rules. Accordingly, all such persons, as well as the applicant, must be able to challenge PSD permitting actions in a judicial forum.[53]

EPA also noted that where it is the permitting authority, citizens may seek judicial review of PSD permitting decisions as long as they meet Article III standing requirements and that Congress did not intend that citizens' rights "would be diminished upon the EPA approval of a state's PSD program."[54] EPA similarly disapproved of Virginia's Title V air permitting program, noting, "[t]he Virginia statute, as well Virginia case law does not enable a party who meets the minimum threshold standing requirements of Article III of the U.S. Constitution access to the Commonwealth's court system."[55]

EPA's Title V permitting decision was challenged and the Fourth Circuit Court of Appeals agreed with EPA that the CAA requires that "states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution" and that requiring the interest to be "pecuniary and substantial" restricts standing in a way that is not in accordance with Article III.[56] The court also highlighted the importance of access to judicial review, noting that "[w]hen citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised."[57]

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[53] *Id.* 1882.
[54] *Id.* (citing CAA legislative history).
[55] Clean Air Act Disapproval of Operating Permits Program; 59 Fed. Reg. 31183 (June 17, 1994).
[56] *Com. of Va.*, 80 F.3d at 876; *see* 42 U.S.C. § 7661a(b)(6).
[57] *Id.* at 880.

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Virginia's Legislature then amended the governing statute to remove the requirement that a person demonstrate injury to a "pecuniary and substantial interest," while adding the language that a person may seek judicial appeal, "if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution,"[58] which corrected that particular deficiency, and ultimately led to EPA approving of Virginia's Title V and PSD programs.[59]

ii. Requiring Participation in a Contested Case Hearing to Exhaust Administrative Remedies Illegally Limits Access to Judicial Review of Air Permits Because it Restricts Standing More Narrowly Than Article III

Texas restricts judicial review of major and some minor new source review permitting decisions by limiting access to only those persons who participate in the state's contested case hearing process. Contested case hearings are trial-type proceedings conducted by the State Office of Administrative Hearings in which an Administrative Law Judge hears evidence and makes a recommendation as to whether an environmental permit meets all legal and technical requirements and will protect human health and safety, the environment, and physical property.[60] Unlike other portions of Texas' public participation regulations, the contested case hearing process or affected person criteria have not been submitted to EPA for approval as part of the Texas SIP.[61]

Texas courts have held a person who fails to request *and* participate in a contested case hearing in a matter that is eligible for a contested case hearing fails to exhaust administrative remedies for purposes of judicial review. For example, in *Sierra Club and Public Citizen v. TCEQ*,

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[58] VA CODE ANN. § 10.1-1318.

[59] Clean Air Act Full Approval of Operating Permit Program; Virginia, 66 Fed. Reg. 62961-1 (2001); Approval and Promulgation of Air Quality Implementation Plan; Commonwealth of Virginia – Prevention of Significant Deterioration Program, 63 Fed. Reg. 13795 (March 23, 1998)

[60] Public Participation in Environmental Permitting: Applications Filed on or after September 1, 2015, TCEQ (2015), https://www.tceq.texas.gov/assets/public/comm_exec/pubs/gi/gi-445.pdf.

[61] *See* 40 C.F.R. § 52.2270(c) (incorporating provisions from Texas' Chapter 39 and 55 public participation regulations, but not from its Chapter 80 contested case hearing regulations).

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petitioners Sierra Club and Public Citizen requested but were denied a contested case hearing on Southwestern Electric Power Company's (SWEPCO) application for a renewal and amendment of their wastewater discharge permit.[62] Sierra Club and Public Citizen then sought judicial review of TCEQ's decision to grant the permit.[63] The district and appellate courts found they lacked subject matter jurisdiction for the challenge because the petitioners had not exhausted their administrative remedies:

> Appellants were... required to demonstrate that they were affected persons... and fully participate in a contested case hearing before seeking judicial review of the merits of SWEPCO's permit under Section 5.351. Absent such exhaustion of remedies, appellants were jurisdictionally barred from challenging the factual bases supporting the permit in district court.[64]

TCEQ (as represented by the Texas Attorney General) has repeatedly argued in cases seeking judicial review of TCEQ air (and water) permitting decision that persons who did not participate in a contested case hearing have not exhausted administrative remedies and should, therefore, be denied judicial review. For example, in *Sierra Club and Public Citizen v. TCEQ*, TCEQ argued that "[t]he statues and rules afforded Appellants an opportunity to challenge the merits of the application if they had shown that they were 'affected persons.' ... They failed to establish the threshold issue and thereby failed to exhaust an available administrative remedy."[65]

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[62] *See Sierra Club and Public Citizen v. TCEQ*, No. 03–14–00130–CV, 2016 WL 1304928, *1 (Tex. App.—Austin 2016, no pet.) (mem. op.); *see Rawls v. Tex. Comm'n on Envtl. Quality*, No. 11-05-00368CV, 2007 WL 1849096, at *1, *1–4 (Tex. App.—Eastland June 28, 2007, no pet.) (mem. op.) ("[N]ot requesting a contested case hearing constitutes a failure to exhaust administrative remedies."); *accord Friends of Canyon Lake, Inc. v. Guadalupe–Blanco River Auth.*, 96 S.W.3d 519, 526–27 (Tex. App.—Austin 2002, pet. denied)).

[63] *Id.*

[64] *Id.* at *4; *see also Rawls,* 2007 WL 1849096, at *1, *1–4 ("[N]ot requesting a contested case hearing constitutes a failure to exhaust administrative remedies."); *accord Friends of Canyon Lake, Inc. v. Guadalupe–Blanco River Auth.*, 96 S.W.3d 519, 526–27 (Tex. App.—Austin 2002, pet. denied) (requesting a contested case hearing was required to exhaust administrative remedies and establish jurisdiction for judicial review of a water permit).

[65] Appellee TCEQ's Corrected Brief at 14–15, *Sierra Club and Public Citizen v. TCEQ*, No. 03–14–00130–CV, 2016 WL 1304928 (Tex. App.—Austin 2016), 2014 WL 4795605 at *14–15; *see also* TCEQ's Appellee's Brief at 12, *Harvey Lee Kunze v. TCEQ*, No. 03-13-00851-CV, 2014 WL 2778988 (Tex. App.—Austin June 5, 2014, no pet.) (arguing the court "could not consider challenges to the merits of a permit if those issues were not raised in a contested case hearing.").

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Recently in 2019, TCEQ similarly asserted in briefing to the U.S. Fifth Circuit Court of Appeals that a court may not consider a challenge to TCEQ's decision on the merits of a PSD air permit unless the matter had first undergone a contested case hearing at the TCEQ.[66]

It is clear from these cases and from TCEQ's repeated arguments in state and federal courts that TCEQ is deliberately using the unapproved contested case hearing process to improperly narrow the scope of who has a right to appeal the agency's permitting decisions to state court.

a. Only Extremely Narrowly Defined "Affected Persons" Can Participate in Contested Case Hearings

Texas law provides that only an "affected person," may participate in a contested case hearing. [67] State law defines "affected persons" eligible to participate in a contested case hearing more narrowly than standing criteria established by Article III of the Constitution. Because only "affected persons" who have requested and participated in a contested case hearing may challenge TCEQ permitting decisions in court, Texas state law "affected person" criteria improperly narrow the right to appeal TCEQ permitting decisions included in the Texas SIP.

An "affected person" is defined as "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing."[68] Further, "[a]n interest common to members of the general public does not qualify as a

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[66] Exhibit B, *Shrimpers and Fisherman of the RGV and Vecinos Para El Bienestar de la Comunidad Costera v. TCEQ and John Niermann,* No. 19-60558, Brief of Respondents TCEQ and Jon Niermann at pp.44-45, United States Fifth Circuit Court of Appeals.

[67] *See* Tex. Water Code § 5.556(a) ("A person may request that the commission reconsider the [permitting decision] or hold a contested case hearing."); *see also* Tex. Water Code § 5.556(c) ("The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person...").

[68] TEX. WATER CODE § 5.115(a).

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personal justiciable interest."[69] The Texas Water Code and TCEQ's regulations implementing the Water Code direct TCEQ to consider the following factors when making affected person determinations:

> (1) whether the interest claimed is one protected by the law under which the application will be considered;
>
> (2) distance restrictions or other limitations imposed by law on the affected interest;
>
> (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
>
> (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
>
> (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
>
> (6) 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
>
> (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.[70]

In 2015, the Texas Water Code and the TCEQ's regulations were amended to allow the commission to consider the following kinds of merits evidence when making affected person determinations:

> (1) 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;
>
> (2) the analysis and opinions of the executive director; and

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[69] TEX. WATER CODE § 5.115(a); *see also* 30 TEX. ADMIN. CODE § 55.203 ("For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.").

[70] 30 Tex. Admin. Code § 55.203(c).

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(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.[71]

TCEQ contends that the 2015 amendments to Texas Water Code Section 5.115 and 30 Tex. Admin. Code § 55.203 were "intended to limit the number of contested-case hearings" and rendered prior case law applying the affected person standard inapplicable.[72] In this way, TCEQ is using state-law affected person criteria to limit the right to appeal TCEQ permitting decisions in state court. This use of state-law to narrow federal rights under the SIP improperly circumvents the SIP revision process established by the CAA.[73]

b. TCEQ Repeatedly Uses an Arbitrary Distance of One Mile From a Requestor's Property When Determining Affected Person Status and Relies on Distance More Than any Other Factor

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.[74]

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[71] *Id.* at § 55.203(d).
[72] Exhibit B, Brief of Respondents TCEQ and Jon Niermann, at 37–38.
[73] 42 U.S.C. § 7410(i), (k), (l); *see also* 40 C.F.R. § 51.105.
[74] *See e.g.* Exhibit C, 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

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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").[75] 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.[76] The majority of remaining 17% of requesters that were granted affected party status lived just slightly over a mile from the proposed facility.[77]

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

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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).

[75] *See* Exhibit E, Table of Outcomes for Affected Person Requests from January 2016 to April 2021. These percentages were culled from the TCEQ Executive Director'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.

[76] 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.

[77] *See* TCEQ Agenda Meeting (June 4, 2020) ("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 (April 28, 2021) ("The Executive Director 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 (June 12, 2019) (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.")

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Mountain Sand Eagle Ford, LLC. The TCEQ Executive Director ("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).[78]

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.[79] 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."[80] In particular, Mr. Dunn's reply to the ED's recommendations clarified that large portions of his property were within one mile of the facility.[81]

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.[82] Sarah Elizabeth Ingram, one of the requesters, lived 1.21 miles from the Portland Cement Facility that was requesting a permit for a modification.[83] The ED

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[78] TCEQ, Executive Director's Response to Hearing Requests for Docket No. 2021-0403-AIR at 8 (April 5, 2021).
[79] TCEQ, An Interim Order concerning TCEQ Docket No. 2021-0403-AIR at 1 (2021).
[80] TCEQ Agenda Meeting (April 28, 2021).
[81] 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.
[82] TCEQ, Executive Director's Response to Hearing Requests for Docket No. 2021-0051-AIR at 6 (February 12, 2021).
[83] *Id.*

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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.[84] 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."[85] 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.[86] 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."[87] The Commissioners decided that Ms. Ingram would not be affected differently than the general public. [88]

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[84] *Id.*
[85] Email from Sarah Elizabeth Ingram to TCEQ, Comment on Permit Number 8996 (July 25, 2019).
[86] *Id.*
[87] TCEQ Agenda Meeting (March 21, 2021).
[88] TCEQ, An Interim Order concerning TCEQ Docket No. 2021-0051-AIR (2021).

c. For Some Permits, Texas Sets a Statutory Distance Requirement for Participation in Contested Case Hearings

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.[89] 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.[90] 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.[91]

d. TCEQ Limits Participation in Contested Case Hearings to Those With a Property Interest and Ignores Requestors' Aesthetic and Recreational Interests When Determining Affected Person Status

Moreover, TCEQ ignores 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.[92]

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[89] TEX. HEALTH & SAFETY CODE § 382.058(c).

[90] *Id.*

[91] *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 Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.").

[92] *See* Exhibit C, 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 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.").

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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.[93]

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."[94] 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.[95] 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.[96] TCEQ's Executive Director recommended Ms. Burnell be denied affected person status because of the distance between her *home* and the proposed terminal.[97] The TCEQ Commissioners similarly only mentioned the distance of Ms. Burnell's *home* from the proposed terminal in their denial.[98] TCEQ

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[93] *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).
[94] Executive Director's Response to Hearing Requests at 1, 13, TCEQ Docket No. 2019-0624-AIR.
[95] Email from Enrique Valdivia, Erin Gaines, and Kathryn J. Youker to TCEQ, Comment on Permit No. 139561 (April 24, 2019).
[96] *Id.*
[97] Executive Director's Response to Hearing Requests at 13, TCEQ Docket No. 2019-0624-AIR.
[98] TCEQ Agenda Meeting (June 6, 2019).

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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.[99] 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."[100] 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.[101] 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.[102] 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.[103]

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[99] Email from Hilton Kelley to TCEQ, Comment on Permit No. 124775 (March 31, 2015).
[100] Executive Director's Response to Hearing Requests at 6, TCEQ Docket No. 2018-1239-AIR.
[101] 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.
[102] *Id.*
[103] TCEQ Agenda Meeting (Jan. 19, 2019).

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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,[104] but also that 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.[105] 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."[106] The Commissioners agreed, finding that Ms. Copeland did not establish how she would be affected differently than the general public.[107]

e. TCEQ's Ability to Consider the Merits in Granting or Denying Contested Case Hearings is More Expansive Than That Permitted in Pre-trial Article III Standing Determinations

In 2015, the Texas Legislature's passage of Senate Bill 709 allowed the TCEQ Commissioners to consider the merits of the underlying application when deciding whether to grant or deny contested case hearing requests.[108] Since the passage of SB709, the Commissioners have repeatedly decided that, based on representations in a permit application, the permit will result in no harmful emissions past the fence line and have limited "affected persons" determinations based on that decision. For example, when considering the hearing requests made on the Holcim (US), Inc. application discussed *supra*, a Commissioner stated that the applicant

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[104] Email from Ellen Copeland to TCEQ, Comment on Permit No. 151562 (Sept. 11, 2018).
[105] Executive Director's Response to Hearing Requests at 6, TCEQ Docket No. 2019-0061-AIR.
[106] *Id.*
[107] TCEQ Agenda Meeting (Feb. 27, 2019).
[108] S.B. 709, 84th Leg. (Tex. 2015). This law has not yet been reviewed by the EPA as it is not part of Texas' SIP.

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claimed the new emissions would be "safe at the fence line" as part of his reasoning for denying requests from individuals that lived 1.21, 1.36, and 1.51 miles from the polluting facility.[109]

Similarly, on March 20, 2022, TCEQ denied multiple requests for a contested case hearing on a proposed permit for Max Midstream Texas, LLC's Seahawk Crude Terminal in Point Comfort Texas. After dismissing the majority of requests because of the distance of the requester's home from the facility, one Commissioner stated that a family living one and three-quarters of a mile away was a "closer call" as to whether they were entitled a contested case hearing but wasn't entitled a contested case hearing in part because "this is a Clean Air Act minor source authorization."[110] But the question of whether the terminal was a minor or major source of air pollution was the central issue raised by the parties requesting a contested case hearing.[111] In order to determine that no requesters were harmed differently than the general public because the permit authorized a minor source of emissions, TCEQ had to first resolve this disputed issue of fact in favor of the applicant.

TCEQ's authority under state law to deny contested case hearing requests by resolving the very issues requestors would have pursued through the contested case hearing process nullifies this basic purpose of the administrative proceedings and turns the normal federal evidentiary and Article III standards required to establish standing at the outset of an environmental case on their

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[109] TCEQ Agenda Meeting (March 21, 2021).
[110] TCEQ Agenda Meeting (March 30, 2022).
[111] Indeed, requestors had filed a detailed expert report supporting their comments that the synthetic minor emission limits proposed by the applicant were not practically enforceable and that those limits, therefor, did not prevent the project from triggering major NSR preconstruction permitting requirements. Comments and Contested Case Hearing Request Concerning Max Midstream Texas LLC's Application for Air Quality Permit No. 162941 Authorizing the Construction of New and Modified Facilities at its Seahawk Terminal in Point Comfort, Texas (Aug. 17, 2021).

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head.[112] Moreover, as participation in a contested case hearing is necessary under Texas law for administrative exhaustion prior to judicial review, TCEQ's resolution of merits issues as a basis for denying a contested case hearing request also serves to insulate the resolution of that issue from judicial review.

f. TCEQ's Shifting Standards for "Affected Person" Status Leads to Long and Expensive Preliminary Hearings Before a Commenter can Participate in a Contested Case Hearing and Then Judicial Review

Typically, the TCEQ Commissioners make a determination at a public hearing that a requestor qualifies as an affected person and then either grant or deny the contested case hearing request in a written order without providing reasons for the determination. The TCEQ Commissioners sometimes, however, refer the determination of who qualifies as affected persons to Administrative Law Judges at the State Office of Administrative Hearings ("SOAH"). The preliminary hearing in these referred matters have in recent cases become extended hearings, taking several hours, and requiring the requestor to assemble substantial resources to prevail on the issue of standing, if contested by the applicant and/or the agency. Commenters who wish to appeal the Commission's authorization of a permit should be able to do so without incurring these additional expenses.

These unique preliminary hearings effectively require legal representation not only because requesters are expected to put on evidence of their harm in a litigation-like proceeding and face

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[112] *See LaFleur v. Whitman*, 300 F.3d 256, 270 (2nd. Cir. 2002) ("There can be no question that petitioner Cohen is likely to be exposed to emissions from the facility. … Petitioner Cohen has Article III standing even if the ambient level of SO2 remains within the NAAQS."); *Cedar Point Oil,* 73 F.3d at 557 (injury-in-fact necessary for standing in environmental cases "need not be large, an identifiable trifle will suffice"); *see also* O'Connors Fed. Rules Civil Trials Ch. 3-F §5.1(2) ("If the factual allegations are plausible [at the motion to dismiss phase], the court cannot decide disputed fact issues—that is, the court must assume that all plausible facts contained in the complaint are true.")

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cross examination,[113] but also because of the lack of clarity in the standard for evaluating whether a requester is an affected person. For instance, TCEQ's ED recently took the position at a Commissioners 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,[114] which is defined to include all emission sources.[115] 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.[116] 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.[117]

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[113] *See e.g.* Preliminary Hearing Transcript (November 16, 2021) in SOAH Docket No. 582-22-0201; TCEQ Docket No. 2021-0942-AIR at 18:11-20 (Applicant's counsel objecting to the use of declarations as evidence of standing and asking the ALJ for live witnesses for purposes of cross examination.)

[114] 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 Executive Director'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 Executive Director'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.").

[115] 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.*

[116] 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).

[117] *Id.*

Similarly, Petitioner Port Arthur Community Action Network ("PACAN") recently had to prove its affected person status in a preliminary hearing that lasted almost seven hours and required presentation of one organizational representative and three separate experts, all subject to lengthy cross examination.[118] Lengthy briefing and argument were required after the applicant's counsel introduced substantial confusion regarding the definition of "general public" and the comparison required by the statute that the proposed affected person had "interests not common to the general public" as to what the scope of the general public should be in this consideration. In her order finding that PACAN had organizational standing to challenge the permit, the administrative law judge ("ALJ") recognized the uncertainty of Texas law regarding affected person determinations stating that "[b]eyond this list of factors and the requirement that a person demonstrate a personal justiciable interest not common to members of the general public, neither the Water Code nor any Commission rules specify any particular procedure by which the Commission or an ALJ must make the "affected person" determination regarding whether to admit a person as a party."[119]

This uncertainty in the law stems from TCEQ's often unexplained and increasingly narrow interpretation of affected person status in practice, which is inconsistent with Article III standing principles defined through federal caselaw. Moreover, the Commissioners' recent practice of referring the issue of affected person status to SOAH leads to extensive preparation and potentially lengthy and expensive standing hearings before a party can even participate in a contested case hearing, let alone seek judicial review of a permit in Texas courts. Commenters should be able to seek judicial review of a permit's terms without having to expend these additional resources to participate.

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[118] *See* Transcript from Preliminary Hearing SOAH Docket No. 582-22-0201 (November 16, 2021).
[119] Order No. 1, SOAH Docket No. 582-22-0201 at 2.

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iii. Corrective Action Required

The Texas Health and Safety Code § 382.032 and Texas Water Code § 5.351 govern judicial review of TCEQ decisions.[120] Given TCEQ's practice of narrowly interpreting "affected person" criteria to prevent challenges to its permitting decisions, EPA should require Texas to revise the statutory provisions incorporated into the SIP in the same manner as Virginia's judicial review statute was amended to provide standing for judicial review of agency decisions consistent with Article III of the Constitution:

> A petitioner is considered affected if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Commission and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.[121]

Moreover, to prevent TCEQ from using its state law contested case hearing process to burden access to state court provided by the Texas SIP, EPA must require TCEQ to revise its public participation regulations to clarify that participation in a contested case hearing is not required to exhaust administrative remedies for purposes of appealing TCEQ permitting decisions in state court.[122]

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[120] While these provisions are not a part of the Texas SIP, an older version of Texas CAA providing a right to appeal decisions of the Commissioners and the Executive Director is included in the SIP.

[121] *cf.* VA CODE ANN. § 10.1-1318.

[122] As an alternative remedy to ensure access to judicial review of TCEQ decisions as required by the Clean Air Act, TCEQ could agree to amend its contested case hearing provisions, including adding a provision consistent with the judicial review provision from the Virginia Code above to ensure that affected person status is as broad as Article III standing, and include its contested case hearing procedures in the SIP for EPA-approval.

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B. Public Participation Deficiency #2: TCEQ Fails to Require Disclosure of Public Information as Required by the Clean Air Act

In order to effectively participate in agency decision making under the Clean Air Act, as the CAA intends, members of the public must be able to access certain kinds of information. For example, to enforce CAA requirements members of the public must be able to access information about which requirements apply to a particular source as well as information necessary to determine compliance with each such requirement. And to participate in the permitting process members of the public must have timely access to information explaining which requirements a particular project may trigger, how non-applicability of other requirements has been determined, as well as information demonstrating compliance with applicable requirements.

Accordingly, federal law provides that emissions data may not be withheld from the public as confidential.[123] Emissions data broadly includes any "information necessary to determine the identity, amount, frequency, concentration, or other characteristics" of emissions standards or limits established or proposed pursuant to the CAA.[124] This broad definition encompasses source limits and standards in CAA permits, emission calculation methods and data, and enforceable representations in air permit applications. These federal law provisions limit the right of applicants and state permitting authorities to rely on state law to withhold information from the public as "confidential." As the Attorney General of Texas held long ago, "emissions data supplied to the Texas Air Control Board may not be treated as confidential under any provision of the Texas Clean Air Act or the Open Records Act," and "the Board is required to disclose such information upon request."[125]

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[123] 40 C.F.R. § 2.301(f); *see also* 42 U.S.C. §§ 7414(c).
[124] 40 C.F.R. § 2.301(a)(2)(i).
[125] *See, e.g.*, *Attorney of Texas General Opinion H-539* at 2-3 (1975) (available at https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/1975/jh0539.pdf).

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Yet, air permit applicants routinely mark application materials confidential and Texas' regulations implementing the CAA do not establish any process for the TCEQ to evaluate these claims for consistency with the Clean Air Act's requirements.[126] With very few exceptions, this means that unless and until a member of the public specifically requests a particular document marked "confidential," that information will remain inaccessible to the public. And even in cases where a member of the public specifically requests a document that has been marked "confidential," Texas' lengthy administrative process of referring public requests to the Texas Attorney General to evaluate claims of confidentiality fails to ensure members of the public have timely access to important information that is public information under the Clean Air Act.

Texas' SIP and its Title V program thus fail to ensure public access to these kinds of information, as required by federal law. As we explain below, this failure renders Texas' programs inconsistent with public participation requirements established by the CAA and its implementing regulations in two keyways – 1) it undermines the public's right to participate in air permitting decisions and 2) it prevents citizen enforcement of the Clean Air Act.

EPA must require Texas to revise its SIP to establish a process for the TCEQ to promptly vet claims of confidentiality for consistency with public information requirements in the CAA and EPA's regulations implementing the Clean Air Act. This process must ensure that members of the public have access to all public information in air permit applications for the entire duration of any public comment period required by the Clean Air Act.

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[126] While the TCEQ's 30 Tex. Admin. Code Chapter 1 General Provision regulations acknowledge that the TCEQ may disagree with a claim of confidentiality, those rules do not instruct the TCEQ to do anything more than inform that submitter of such disagreement and provide that the TCEQ may—but is not required to—submit the matter for consideration by the Texas Attorney General. 30 TEX. ADMIN. CODE § 1.5(d)(3).

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i. TCEQ's Failure to Vet Applicant Claims of Confidentiality Undermines the Public's Right to Participate in Air Permitting Decisions

Information necessary to facilitate meaningful public participation in the preconstruction permitting process is routinely withheld from the public because it has been marked by an applicant as "confidential".[127] TCEQ does not have a process for promptly vetting claims of confidentiality for consistency with public information requirements in the Clean Air Act. Even when a member of the public specifically requests access to documents that have been marked "confidential," TCEQ claims it must refer the request to the Texas Attorney General and continue to withhold the information unless and until the Texas Attorney General determines that it is not exempted from disclosure by state law.[128] This is so, even though the Texas Attorney General has already directed the TCEQ to disclose emissions data "upon request."[129]

However, this current process interferes with public participation rights under the CAA permitting process because, as explained below: 1) the referral process takes too long to ensure

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[127] *See, e.g.*, Goodyear Tire and Rubber Co. Air Permit Amendment Application, Permit. No. 6618 (Feb. 1, 2012) (Labeling emissions calculation methodology, Best Available Control Technology, Technical Application Tables, and Emissions Calculations as "confidential".) Available at https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=1134458&Rendition=Web; Cabot Corporation TCEQ Permit By Rule Registration, Project No. 194401.0289 (Aug. 2020) (labeling process and projects descriptions, and emissions data and calculations, as confidential); Permit Nos. 19806 & PSDTX1586 (identifying the total production throughput and total loading transfer rate of polyisobutylene as confidential); Permit Nos. 107153, PSDTX1328M2, & N260 (labeling vents in equipment as confidential); Permit No. 127838 (labeling daily polymer production records as confidential business information); Permit No. 144873 (labeling material loading restrictions in permit application as confidential); Permit Nos. 8097 and PSDTX138M6 (labeling reports made for permit compliance determinations as confidential); Permit No. 1733A (loading limits, planned MSS activities, and usage of solvents, cleaners, and lubricants, are confidential); Permit No. 2612 (process throughput limits are confidential); and Permit No. R-3836 (annual chemical throughputs are confidential).

While the TCEQ's failure to vet applicant claims of confidentiality may be subject to review on a case-by-case basis for major sources as part of the Title V permitting process, this opportunity comes too late to prevent circumvention of major NSR preconstruction permitting requirements by projects relying on suspect data and unreliable calculation methods to arrive at inaccurate representations regarding a source's potential to emit. It also comes too late to ensure compliance with pollution control requirements, like Best Available Control Technology ("BACT") and Lowest Available Emission Rate ("LAER"), that are determined on a case-by-case basis as part of the NSR permitting process.

[128] 30 TEX. ADMIN. CODE § 1.5(d)(2).

[129] *See* fn. 131, *supra*.

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timely access to public information necessary to facilitate meaningful participation in the permitting process and 2) in practice, the Texas Attorney General declines to consider whether requested information is public information under federal law and kicks the determination back to TCEQ.

a. Attorney General Review of Confidentiality Claims is Not Timely

For most air permit applications, the public has a maximum of 30 days from the date public notice of an application or draft permit is published to obtain files related to the project, review the files, and prepare and submit written comments. The Texas Attorney General referral process fails to protect the public's right to participate in air permitting projects where key information has been improperly marked "confidential," because, even those requests for such information filed immediately after notice of the application will not be resolved until long after the comment period closes.

After receiving a request for application information marked "confidential," TCEQ has 10 business days to forward the request to the Texas Attorney General.[130] Once the Texas Attorney General receives the request, their office has 45 business days to decide whether the applicant has made a prima facie case that the information is protected by Texas state law and may give itself an additional ten business days if it explains why the extension is necessary.[131] Once the TCEQ receives a decision from the Texas Attorney General indicating that requested information must be disclosed to the requestor, the TCEQ must provide access to the relevant documents within 10 business days. If all parties comply with these deadlines and there are no state holidays during the

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[130] TEX. GOV'T CODE § 552.301(b).
[131] *Id.* at § 552.306(a).

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response period, a person requesting air permit application information that was improperly designated "confidential" under Texas state law should expect to wait approximately 90 days (counting weekends) to receive the requested records. Accordingly, a member of the public who requests application information marked "confidential" in order to comment on a pending application or draft permit immediately after notice of the application or draft permit is published will receive the improperly withheld information (if it is even provided) approximately *two months after* the comment period has closed.

In one extreme case, after 117 days, the Attorney General initially determined that 132 pages of documents marked confidential by the applicant and sought by requestor, Citizens for Clean Air & Clean Water, was *nonconfidential.*[132] The applicant then appealed that decision to district court under the Texas Public Information Act, tying up the determination and preventing release of all of the documents at issue for over a year.[133] Eventually, without judicial involvement, the parties agreed that confidentiality protections applied to only 9 pages of the 132 pages withheld because it reflected "vendor information."[134] Needless to say, by the time the requestor received the documents, after having to intervene in a state court lawsuit, the comment period for the original July 2, 2020 public information request had closed.

In many cases, the public's inability to access application information does not just limit the scope and quality of their comments, it also effectively forecloses the right to seek judicial review of the agency's permitting decisions. As discussed in Section VI.A., *supra*, under current Texas law, any person who failed to raise issues during the comment period and request a contested

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[132] OAG, Letter Ruling OR 2020-26823.
[133] Case No. D-1-GN-20-006792, *Gladieux Metals Recycling, LLC v. Attorney General of Texas and Texas Comm'n on Envt'l Quality* in the 345th Judicial District Court of Travis County, Texas.
[134] *Id.,* Final Order (August 24, 2021).

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case hearing during the relevant comment period fails to exhaust their administrative remedies and may not appeal a permitting decision to state court.[135]

(1) Neither the TCEQ Nor the Texas Attorney General Resolve the Question of Whether Information Marked "Confidential" is Public Information Under Federal Law.

Texas Attorney General ("AG") decision letters evaluate an applicant's claim of confidentiality against *state law* requirements. These decision letters may require disclosure of requested information in cases where an applicant fails to provide timely comments in support of the claim of confidentiality or in cases where the applicant's comments fail to establish a prima facie case that the documents are protected from public disclosure by Texas law. These letters, however, rarely, if ever, decide the question of whether the requested information is public information under the CAA or EPA's regulations. Instead, these decision letters merely punt the issue back to TCEQ by directing the TCEQ to release any information the AG determined may be withheld as confidential under Texas law, but which is public information under federal law. While the AG letters to the TCEQ include this direction, they do not direct the TCEQ to determine whether any responsive information marked "confidential" is public information under federal law.

One recent example highlights the absurd and vicious cycle this creates. Environmental Integrity Project submitted a records request to obtain information marked as confidential that was

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[135] For applications concerning the proposed construction of a new minor or synthetic minor source or a minor modification to an existing major, synthetic minor, or minor source, the right to request a contested case hearing expires if no party requests a hearing during the 30-day comment period following submission of an application. Thus, if an operator of an existing major source wants to circumvent major NSR requirements by misrepresenting increases resulting from the project, it can effectively foreclose judicial review on that circumvention by marking the information necessary to identify this misconduct "confidential." In such cases, an interested member of the public will not be able to obtain the information during the initial public comment period and, even the Texas Attorney General eventually decides that the information must be made public, that decision will come after the right to request a contested case hearing has expired.

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necessary to review an application for a major modification to Dow Chemical Company's Freeport Chemical Plant.[136] The request was referred to the Texas Attorney General by TCEQ, and the resulting Attorney General decision letter stated:

> Upon review, we find Dow has demonstrated that the information at issue constitutes trade secrets. Accordingly, the commission must generally withhold the information we marked under section 552.101 of the Government Code in conjunction with section 382.041 of the Health & Safety Code and section 552.110(b) of the Government Code. However, we note, under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. *See* 42 U.S.C. 7414(c). Similarly, we find emission data must be made available even if the data is otherwise excepted under conflicting state provisions, including section 552.110(c) of the Government Code. *See English v. Gen. Elec. Co.*, 469 U.S. 72, 79 (1990) (noting state law is preempted to the extent it actually conflicts with federal law). We note that emission data is only subject to the release provision in section 7414(c) of 42 of the United States Code if it was collected pursuant to subsection (a) of that section. *See id.* Thus, **to the extent that any of the information at issue constitutes emissions data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release such information in accordance with federal law.**[137]

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[136] NSR Permit No. 153106/N268M1.

[137] *Texas Attorney General Letter Decision*, OR2021-27093, dated October 1, 2021 at 2-3. This exact or similar language is repeated in other Attorney General Rulings. *accord Texas Attorney General Letter Ruling* OR2005-11581 ("After reviewing DuPont's arguments and the submitted information, we find that DuPont has generally made a prima facie case that the information at issue meets the definition of a trade secret and has demonstrated the factors necessary to establish a trade secret claim. Moreover, we have received no arguments that would rebut this claim as a matter of law. However, we note that emissions data must be made available to the public pursuant to the federal Clean Air Act. See 42 U.S.C. § 7414(c)"); *Texas Attorney General Letter Ruling OR2012-05605* ("Upon review of BP's arguments, we conclude BP has made a prima facie case demonstrating that the information we have marked constitutes trade secrets. Accordingly, the commission must generally withhold this information under section 552.101 of the Government code in conjunction with section 382.041 of the Health and Safety Code and section 552.110(a) of the Government Code. However, we note that under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. See 42 U.S.C. 7414(c). We note that emission data is only subject to the release provision in section 7414(c) of title 42 of the United States Code if it was collected pursuant to subsection (a) of that section. *See* Id. Thus, to the extent any of the marked information constitutes emissions data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release such information in accordance with federal law."); *Texas Attorney General Letter Ruling OR2002-7140* ("Accordingly, we conclude that the commission must withhold those portions of the information at issue that Continental has marked pursuant to section 552.110 of the Government Code. We note, however, that the information at issue contains information relating to emissions. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. See 42 U.S.C. § 7414(c). Thus, to the extent that the marked information constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information in accordance with the federal law.").

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In response to the Texas Attorney General's decision, TCEQ released several redacted documents that had previously been marked "confidential" in their entirety.[138] These documents included redactions of information that EIP believed was emissions data, as defined by 40 C.F.R. § 2.301(a)(2)(i). For example, the documents redacted the number of fugitive components authorized by Dow's permits along with the represented emissions from these components as well as the identity of certain combustion units and information about the amount of volatile organic compounds ("VOC") those units emit.

Accordingly, EIP followed-up by email with the TCEQ asking when the agency would decide whether additional redacted information was emission data.[139] After TCEQ initially responded that "[n]one of the redacted information contains emissions data,"[140] EIP followed up to ascertain the basis of that determination,[141] and TCEQ's response indicates that the TCEQ did not conduct any review to determine whether redacted information was emission data because the TCEQ incorrectly believed that the "determination was made by the attorney general."[142]

EIP then forwarded TCEQ the Texas Attorney General's decision letter cited above, indicating that TCEQ must release any information responsive to EIP's request that is emission data, as defined by federal law.[143] In response, TCEQ's Public Information Counsel abandoned the claim that the question of whether redacted information is emission data was resolved by the

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[138] Exhibit F, Redacted Dow Documents for Permit No. 153206/N268M1.

[139] Exhibit G, Emails between Gabriel Clark-Leach, Laura Stephens, and Lena Roberts Re: TCEQ PIR No. 21-62579, dated October 13, 2021 ("The AG letter indicates that emissions data may not be withheld as confidential, even if it otherwise qualifies for an exemption to disclosure under state law. I believe much of the redacted information in the file you sent is emissions data. When will the TCEQ make a determination re: which portions of the response material marked "confidential" constitutes emissions data that must be publicly available under federal law?")

[140] *Id.* Email from Laura Stephens to Gabriel Clark-Leach Re: TCEQ PIR No. 21-62579, dated October 13, 2021.

[141] *Id.* Email from: Gabriel Clark-Leach to Laura Stephens Re: TCEQ PIR No. 21-62579, dated October 14, 2021.

[142] *Id.* Email from Lena Roberts, TCEQ Public Information Counsel to Gabriel Clark-Leach Re: TCEQ PIR No. 21-62579, dated October 14, 2021.

[143] *Id.* Email from: Gabriel Clark-Leach to Lena Roberts, TCEQ Public Information Counsel Re: TCEQ PIR No. 21-62579, dated October 14, 2021.

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Texas Attorney General, and instead made the remarkable claim that emissions calculations filed with a permit application were not submitted to the agency under 42 U.S.C. § 7414(a) of the Clean Air Act:

> Emissions data is only subject to the release provision in section 7414(c) if it was collected pursuant to subsection (a), *i.e.*, for the purpose of developing implementation plans (SIPs) or developing standards of performance for NSR permits, etc. The information redacted from the requested documents was not collected by TCEQ for that purpose. Only the speciated emissions calculations were redacted; the emissions data (total emissions and emissions averages) was not redacted or withheld.[144]

TCEQ's response was incorrect on the facts and the law. Redactions included information beyond speciated emissions calculations,[145] and emissions calculations submitted with an air permit application are clearly submitted pursuant § 7414(a), which covers information obtained for the purpose of "carrying out any provision [in the Clean Air Act]." As importantly, these inconsistent emails demonstrate that TCEQ was not even aware that the question of whether information marked "confidential" was public information under federal law had not been resolved by the Texas Attorney General.

TCEQ's failure to resolve the question of whether information marked "confidential" is public information as a matter of federal law is a recurring barrier to public participation in CAA permitting that EPA must correct. TCEQ's failure to establish a process that ensures members of the public have timely access to air permit application information made public by the CAA during the public comment period renders Texas' air permitting public participation process inconsistent with EPA regulations.[146]

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[144] *Id.* Email from Lena Roberts, TCEQ Public Information Counsel to Gabriel Clark-Leach Re: TCEQ PIR No. 21-62579, dated October 14, 2021.

[145] Information identifying combustion units for which calculations were submitted and information about total fugitive VOC emissions (hourly and annual), along with fugitive component counts were also redacted.

[146] 40 C.F.R. § 51.161.

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ii. TCEQ's Failure to Vet Applicant Claims of Confidentiality Prevents Citizen Enforcement of Clean Air Act Requirements

TCEQ's failure to vet applicant claims of confidentiality also undermines the public's right to enforce CAA requirements established to protect public health. EPA has recently issued several Title V orders for specific permits issued by TCEQ flagging TCEQ's improper practice of issuing permits with confidential emission limits and operating requirements.[147] For example, in its recent order objecting to the Title V permit for ExxonMobil's Baytown Chemical Plant, EPA wrote that "limitations on production" designated confidential by NSR permits incorporated by reference into ExxonMobil's Title V permit "must be enforceable by citizens in addition to EPA[,]" and that "[b]ecause the production rates or limitations are confidential, the public does not know what these applicable requirements are, negating the ability of citizens to enforce these conditions."[148] EPA also determined that emissions calculations for 48 Permit By Rule registrations incorporated by reference into ExxonMobil's Title V permit were improperly marked "confidential."[149] As EPA explained, these calculations, which include enforceable operating limits and production limits as well as information about how ExxonMobil must determine compliance with emission limits, "are emissions data under CAA 114(c) and 40 C.F.R. § 2.301(a)(2)(i)(B), and should not be treated as confidential."[150]

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[147] *In the Matter of Dow Chem. Co., Dow Salt Dome Operations*, Order on Petition No. VI-2015-12, dated February 18, 2020 (objecting to Title V permit's incorporation of confidential NSR permit limits on injection rates); Objection to Title V Permit No. O1669, Shell Oil Company, Deer Park Refinery, dated September 16, 2021 ("In responding to this objection, TCEQ should review the permitting action … in order to determine if the relevant emissions data, standards, or limitations and calculation methodologies and inputs required to determine compliance were transferred into the non-confidential version of the NSR permitting record.").

[148] Objection to Title V Permit No. O2269, dated January 23, 2020 at 4.

[149] *Id.*

[150] *Id.* Emissions calculations submitted with a PBR registration are often the only way for anyone to determine how compliance with PBR requirements is assessed. This is so because most Texas PBRs fail to specify how an operator must determine compliance with PBR requirements and Texas' PBR General Requirement Recordkeeping rule, 30 Tex. Admin. Code § 106.8, leaves it to the operator's discretion to decide how to assess compliance with PBR requirements in the many cases where claimed PBRs do not mandate a particular method.

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TCEQ, as a matter of policy, does not believe that it is obligated to ensure that applicable requirements in its NSR permits are enforceable by members of the public. In an administrative hearing on a permit authorizing construction of a new major source of air pollution in San Patricio County, Texas, the petitioners raised the issue that emissions calculations methods were improperly designated as confidential in the permit application and that the permit's failure to make them available to the public undermined the public's right to enforce the permit's emission limits.[151] In response, TCEQ's Executive Director simply denied that members of the public are entitled to enforce permit requirements:

> The general public is not expected to be able to determine compliance with each individual source in a complex facility. Rather, members of the public should refer any concerns regarding compliance to the TCEQ regional office or other government agency with authority to investigate those concerns.[152]

TCEQ's current referral system to the Texas Attorney General to evaluate applicant's claims of confidentiality is woefully inadequate to protect public participation and enforcement rights. EPA must step in to address this systemic barrier to public participation in Texas and ensure that TCEQ either complies with the Clean Air Act' public disclosure requirements or its federally delegated authority to issue air permits is revoked.

iii. Corrective Action Required

To address these systemic deficiencies, EPA should issue a SIP-call pursuant to 42 U.S.C. § 7410(k)(5) requiring revisions to the Texas Public Information Act and Texas Clean Air Act to

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[151] Exhibit H, *Closing Brief of Tex. Campaign for the Env't. and the Sierra Club*, TCEQ Docket Nos. 2018-0899-AIR and 2018-0900-AIR at 21-23.

[152] Exhibit I, Executive Director's Reply to Closing Arguments, TCEQ Docket Nos. 2018-0899-AIR and 2018-0900-AIR at 4.

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clarify that "emissions data" as defined by the federal Clean Air Act is public information under Texas law and may not be exempted from disclosure as "confidential."

EPA should also require TCEQ to promulgate regulations establishing a process that ensures timely access to all information that is public information as a matter of law under the CAA and EPA's regulations implementing the Clean Air Act. Such public information includes emissions data, as defined by EPA's regulations, and includes any representations that will constitute enforceable permit terms under TCEQ's regulations.[153] This process must include provisions for TCEQ to vet claims of confidentiality made by applicants and operators for consistency with federal law at the time they are filed with the agency and before referring any remaining state law confidentiality issues to the Texas Attorney General for review. This process must ensure that all public information is available to members of the public at the time that any permit application or draft permit is noticed and remains available for the entirety of any public comment period for a TCEQ air permit.

C. Public Participation Deficiency #3: TCEQ Unlawfully Approves Thousands of "Permits by Rule" Each Year Without any Meaningful Opportunity for Public Participation or Enforcement

Texas' Permit by Rule ("PBR") program is the most widely used preconstruction permitting mechanism in the state by a wide margin.[154] It is used to authorize thousands of construction projects each year, including projects at major sources and synthetic minor sources, located in attainment areas and non-attainment areas. This widespread use of PBRs to authorize changes at

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[153] This includes 30 Tex. Admin. Code §§ 106.6(b), 116.116(a), 116.615(2), and 116.721(a).

[154] According to the TCEQ's Biennial Report to the 87th Legislature for Fiscal Years 2019 and 2020, the TCEQ processed 7,780 PBRs in FY 2019 and FY 2020, while processing 227 New Source Review permits and 914 New Source Review permit amendments during that same period). TCEQ's *Biennial Report to the 87th Legislature FY 2019-FY 2020*, SFR-057/20, dated December 2020 at 69, Figure B-1. This figure only represents PBR projects that were registered. Many PBRs do not require registration with the TCEQ and may be claimed to authorize construction without any review by the TCEQ.

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major sources and to equipment that has the potential to emit significant quantities of air pollution is a big problem, because Texas PBRs are almost uniformly practically unenforceable.[155] This failure is even more problematic, because unenforceable PBRs are used to authorize emissions increases from major sources and significant emissions units without any meaningful opportunity for public participation. Due to the number of PBR authorizations claimed each year, the public is not notified about or given the opportunity to comment on the vast majority of emission authorizations issued to major and synthetic minor sources in Texas each year.

The permitting process used to authorize construction of a new major source of air pollution or major modifications to existing sources of pollution requires TCEQ to establish a source-specific permitting document that contains special conditions and emission limits that are often specifically tailored to the project being authorized. By contrast, TCEQ's PBR program is supposed to create a streamlined approach to authorize construction and modification of insignificant projects using generic authorizations established by rule in the Texas Administrative Code. But in practice, Texas' PBR program allows operators to craft source-specific conditions and limits to avoid triggering more stringent CAA requirements. These source-specific requirements are often based on inadequate information and are practically unenforceable.

In addition, while project-specific permits authorizing the construction of a new major source or a major modification to an existing source require the applicant to publish notice of the

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[155] EPA has recognized this problem in a series of Title V objections addressing the use of PBRs at major sources of air pollution. *See, e.g., In the Matter of Motiva Enterprises Port Arthur Refinery,* Order on Petition No. VI-2016-23 (May 1, 2018) at 23-26; Objection to Title V Permit No. 02269, ExxonMobil Corporation, Baytown Chemical Plant at 7-10 (January 23, 2020); *In the Matter of Sandy Creek Services*, Order on Petition No. III-2018-1 at (June 30, 2021) at 10-16; *In the Matter of BP Amoco Chemical Company*, Order on Petition No. VI-2017-6 (July 20, 2021) at 33-37; *In the Matter of Blanchard Refining Company*, Order on Petition No. VI-2017-7 (August 9, 2021) at 18-23; *In the Matter of Phillips 66 Company*, Order on Petition No. VI-2017-16 (September 22, 2021) at 11-17; *In the Matter of Oak Grove Management Company*, Order on Petition No. VI-2017-12 (October 15, 2021) at 14-20; *In the Matter of Premcor Refining Group Inc.*, Order on Petition No. VI-2018-4 (November 30, 2021) at 13-19.

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project and to solicit public comments at least twice during the permitting process, there is no notice or opportunity for members of the public to comment on projects authorized by PBR. TCEQ contends that public notice and comment for PBR projects is unnecessary because PBRs are only available to authorize projects that the TCEQ has determined do not have the potential to significantly affect air quality and because members of the public have an opportunity to comment on PBRs at the time their generic terms are adopted into the Texas Administrative Code. However, in practice PBRs may be used to authorize nearly any kind of project at nearly any kind of source because the generic terms that constitute these PBRs are often so vague. This vagueness also makes it impossible for members of the public to determine how these permits will be used, rendering the public participation for PBR projects inconsistent with EPA's public participation requirements.[156]

i. EPA's Public Participation Requirements for Permitting Programs

EPA's regulations provide that state major and minor preconstruction permitting programs must: "[r]equire the State or local agency to provide opportunity for public comment on information submitted by owners and operators[,]" including "the agency's analysis of the effect of construction or modification on ambient air quality[,]" and "the agency's proposed approval or disapproval."[157] Thus, members of the public must receive notice and have an opportunity to comment on this information submitted by the applicant where a generic authorization does not specifically identify: the kind of source or process it may be claimed to authorize, the amount of pollution such sources and processes may emit under the claimed permit, and in cases where applicants must supply project-specific information for the permitting agency to determine the effect of construction or modification on ambient air quality.

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[156] *See* 40 C.F.R. § 51.161.
[157] 40 C.F.R. § 51.161(a).

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To ensure that the terms of PBRs (or general permits) are generic enough to provide meaningful opportunities for public participation at the time they are promulgated, EPA has provided the following criteria for PBR program general rules:

> (1) general permits apply to specific and narrow categories of sources; (2) sources electing coverage under general permits where coverage is not mandatory, provide notice or reporting to the permitting authority; (3) general permits provide specific and technically accurate (verifiable) limits that restrict the potential to emit; (4) general permits contain specific compliance requirements; (5) limits in general permits are established based on practicably enforceable averaging times; and (6) violations of the permit are considered violations of the state and federal requirements and result in the source being subject to major source requirements.[158]

Consistent with these criteria, EPA has repeatedly warned that PBRs should not be available to large and complicated sources of pollution.[159] Complicated sources of air pollution do not lend themselves to coverage by a PBR, because the kinds of equipment that constitute these sources, the specific processes this equipment implement, the kinds of raw materials and feedstocks transformed by these process, the kinds and amounts of pollution resulting from the operation of this equipment, and the methods for determining compliance with emission limits for such sources may vary widely from source to source, or even within a single source.

Similarly, EPA has counseled against the use of PBRs to authorize projects involving major or synthetic minor sources that have the potential to significantly diminish air quality.[160] Indeed,

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[158] *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits*, Kathie A. Stein, Director EPA Air Enforcement Division ("Enforceability Memo"), dated January 25, 1995 at 10. Available electronically at: https://www.epa.gov/sites/default/files/2015-07/documents/potoem.pdf

[159] John Seitz, Director, Office of Air Quality Planning and Standards, and Eric Schaeffer, Director, Office of Regulatory Enforcement, *Potential to Emit Guidance for Specific Source Categories* ("PTE Memo"), dated April 14, 1998 at 4. Available electronically at: https://www.epa.gov/sites/default/files/2015-07/documents/lowmarch.pdf

[160] *Review of New Sources and Modifications in Indian Country*, 76 Fed. Reg. 38,748, 38,770 (July 1, 2011) ("We also disagree with the commenter that would like us to allow the use of general permits for synthetic minor sources since these sources are major sources until they are approved to construct under a synthetic minor source permit. We believe that the size and amount of emissions from these sources warrants a case-by-case review of the source and their proposed emission limitations.").

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EPA has determined that in some cases PBRs should not be used to authorize projects at true minor sources in cases where emissions authorized by PBR would approach major source thresholds.[161]

Even with these constraints, establishing specific practically enforceable PBR terms and technically accurate emission limits sufficient to ensure that projects authorized by a PBR will not cause violations of SIP control strategies or interfere with attainment and maintenance of national standards is very difficult. This is so because permitting agencies—in most cases—cannot know in advance how many projects will be authorized under the PBR or where they will be located (unless the PBR may only be applied in areas specified by the rule). Thus, EPA emphasizes that PBRs should only be used to authorize well-defined and relatively simple projects at true minor sources such as gas stations or dry cleaners that that do not have the potential to contribute to significantly to local air pollution concentrations and that will emit pollutants with similar characteristics and warrant similar permit terms.[162]

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[161] PTE Memo at 4 ("For sources with numerous categories at the plant site and/or that emit amounts just below the major source threshold, EPA believes that there is generally no feasible way to ensure their minor source status without a case-by-case permitting process.")

[162] 76 Fed. Reg. 38,768

General permits may be issued to cover any category of numerous similar sources, provided that such sources meet the appropriate criteria. For example, permits can be issued to cover small businesses such as gas stations or dry cleaners. General permits may, in some circumstances, be issued to cover discrete emissions units, such as individual solvent cleaning machines at industrial complexes.

In addition, in setting criteria for sources to be covered by general permits, your reviewing authority will consider the following factors. First, categories of sources or emissions units covered by a general permit should be generally homogenous in terms of operations, processes, and emissions. All sources or emissions units in the category should have essentially similar operations or processes and emit pollutants with similar characteristics. Second, the sources or emissions units should be expected to warrant the same or substantially similar permit requirements governing operation, emissions, monitoring, recordkeeping and reporting.

see also PTE Memo at 4 ("In identifying source categories to be covered within this guidance, the EPA included those categories for which a single type of activity tends to dominate emissions, and for which most sources in the category actually emit at levels well below their potential, and well under the major source thresholds."); EPA, Background Document: Air Quality Permit by Rule for New or Modified True Minor Source Auto Body Repair and Miscellaneous Surface Coating Operations in Indian Country, dated March 23, 2015 (Available at https://www.epa.gov/sites/default/files/2017-03/documents/autobody_background_document_version_1.0_0.pdf).

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ii. Deficiencies in TCEQ's PBR Program

TCEQ's failure to follow EPA's recommendations for PBR programs has resulted in several important deficiencies. As EPA's recent Title V orders demonstrate, the agency is already aware that some of these deficiencies exist. Specifically, EPA has repeatedly found that generic PBR requirements incorporated by reference into Title V permits fail to make it clear how claimed PBRs apply to the permitted source, how much and what type of pollution apply to specific units at a permitted source from claimed PBRs, and how compliance with applicable PBR emission limits is to be determined. Because this kind of source-specific information is not contained in claimed PBRs promulgated by TCEQ, EPA has directed TCEQ to require operators to provide it as part of the Title V permitting process.[163]

But if such source-specific information is necessary to establish how claimed PBRs apply to specific sources, how much and which pollutants a source is authorized to emit, and to identify how compliance with emissions limits are determined and enforced, then the notice and comment opportunity provided when generic PBR terms are established does not satisfy EPA regulations.[164] Additionally, because the generic terms of Texas PBRs do not contain source-specific terms or information used to establish such terms for purposes of avoiding more stringent federal pollution control requirements, members of the public must have an opportunity to comment on information the TCEQ relies upon to determine whether source-specific PBR requirements successfully render more stringent federal pollution control requirements inapplicable and whether air quality impacts from such emissions from major sources or significant emission units at synthetic minor sources

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[163] *See* Exhibit J, Letter from Tonya Baer, TCEQ, Deputy Director, Office of Air to David Garcia, EPA Region 6, Director, Air and Radiation Division, Re: Permits by Rule Programmatic Changes (May 11, 2020).

[164] 40 C.F.R. § 51.161(a). Requiring that members of the public have an opportunity to comment on this kind of "information submitted by owners and operators."

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are acceptable.[165] This information is "information about the agency's analysis of the effect of construction or modification on ambient air quality" and "the agency's proposed approval or disapproval" that must be subject to public notice and comment requirements.[166]

a. Case-Specific Registrations

Several Texas PBRs require operators to submit case-specific registrations to establish that projects authorized under a PBR will comply with all applicable PBR requirements. For example, under the "General" PBR that is available for use for the broad category of "facilities," the operator must provide notice of the project to the TCEQ (but not to the public) if a project will result in emission increases of five tons per year or greater. This notice must include "a description of the project, calculations, data identifying specific chemical names, limit values, and a description of pollution control equipment, if any."[167] Many other PBRs have similar notice requirements.[168] Members of the public have no opportunity to review and comment on the project-specific information contained in these notices which are intended to demonstrate that potential project will not violate SIP control strategies, including applicable PBR emission limits.

b. Project Specific Air Modeling

Similarly, several Texas PBRs require operators to perform project-specific air quality modeling analyses to demonstrate that projects will not result in unacceptable air quality impacts.[169] Such modeling is necessary because these PBRs are not specific enough to exclude

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[165] *See* 30 Tex. Admin. Code § 106.6 (allowing operators to claim source-specific emission limits that are lower than generic limits in PBR rules to avoid otherwise applicable federal requirements).
[166] *See* 40 C.F.R. § 51.161(a).
[167] 30 Tex. Admin. Code § 106.261(a)(6).
[168] *Id.* at §§ 106.262(a)(3), 106.224(5), 106.352(f)(5)(B), (6)(B), (7), (l)(5), 106.396, 106.263(e)(7), 106.478(7), 106.454(1)(A)(i).
[169] See, e.g., 30 Tex. Admin. Code §§ 106.225 (Semiconductor Manufacturing), 106.512 (Stationary Engines and Turbines), 106.352 (Oil and Gas Handling and Production Facilities).

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projects that have the potential to result in unacceptable air quality impacts. The fact that TCEQ must conduct additional modeling to determine whether projects eligible for authorization under a PBR indicates that the terms of the PBR alone are not sufficient to prevent violations of applicable SIP control strategies and interference with the attainment and maintenance of national standards. Under EPA regulation, the public has a right to notification of the air-modeling and an opportunity to comment on its content.[170] However, for emissions authorized by these PBRs, the public is denied that right.

c. Certifications of Source Specific Limitations

TCEQ's rule at 30 Tex. Admin. Code § 106.6 allows owners and operators to certify source-specific emission limits lower than the generic limits established by the TCEQ's regulations to avoid triggering major NSR preconstruction permitting requirements or other potentially applicable federal requirements.[171] This rule directs operators to submit certified registrations identifying the source-specific emission limits claimed by the operator and to include documentation of the basis of the operator's emissions estimates and a written statement certifying that the maximum emission rates listed on the registration reflect "the reasonably anticipated maximums for operation of the facility."[172] The rule, however, does not require certified registrations to be submitted prior to construction of a project, nor does it require any review or approval by the TCEQ or review or comment by the public.

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[170] *See* 40 CFR § 51.161.

[171] 30 TEX. ADMIN. CODE § 106.6. TCEQ guidance directs operators to certify PBR emissions in the following cases: (1) to establish emission increases at an existing major source that are less than applicable major NSR significance thresholds; (2) to include control or reductions, limited hours, throughput, and materials or other operational limitations which are less than the potential to emit ("PTE"); (3) for projects at sources subject to NOx cap and trade requirements or which relies on controls to comply with any state or federal regulation; and (4) for projects that resolve compliance issues and are the result of a commission or EPA order. PBR Guidance at 32. Texas' PBR rules, however, do not mandate compliance with this policy.

[172] *Id.* at § 106.6(d).

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In the past EPA has correctly determined that this kind of process is incompatible with CAA requirements:

> A [general permit or PBR] rule that allows sources to submit the specific parameters and associated limits to be monitored may not be enforceable because the rule itself does not set specific technical limits. The submission of these voluntarily accepted limits on parameters or monitoring requirements would need to be federally enforceable. Absent a source-specific permit appropriate review ***and public participation o[n] the limits***, such a rule is not consistent with the EPA's enforceability principles.[173]

TCEQ's current PBR program ignores this longstanding EPA guidance and routinely denies the public an opportunity to participate in the permitting process where source-specific emission limitations are set. TCEQ may argue public participation is not necessary in cases where a source-specific certification establishes limits that are more stringent than those contained in an applicable rule, but this would miss the point. Operators claim more stringent emission limits than required by a PBR to avoid even more stringent federal pollution control requirements. In cases where a source or unit has the physical capacity to emit pollution in quantities that exceed federal major source thresholds or other federal applicability thresholds, members of the public must have an opportunity to review the source specific limits taken to avoid federal requirements to ensure that they are actually achievable, and that the authorization establishes monitoring and testing requirements sufficient to make the emission limits practically enforceable.

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[173] Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits, Kathie A. Stein, Director EPA Air Enforcement Division ("Enforceability Memo"), dated January 25, 1995 at 8. (Available at https://www.epa.gov/sites/default/files/2015-07/documents/potoem.pdf). (emphasis added).

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d. Source's Ability to Use Multiple PBRs to Authorize Emissions allows for Complex Permitting Should be Subject to Notice and Comment

TCEQ allows permit applicants to claim multiple PBRs for a single project. This practice allows for complex modifications to existing permits without any of the public participation of source-specific permitting. This mix and match process allows operators to piece together existing PBRs to form an authorization for source and project categories that are not included in TCEQ's PBR regulations. For instance, at its chemical plant in Freeport, Dow was able to authorize a complicated project to increase production at its polyurethane copolymer section solely with PBRs.[174] Dow achieved this by claiming four separate PBRs to authorize two new storage tanks, update fugitives, and authorize maintenance, startup, and shutdown emissions from the new tanks and other pieces of the process.[175] This impacted several different emissions units, facilities, and activities at the plant.[176] Because none of Texas' PBRs authorized this kind of project, members of the public did not have an opportunity to comment on whether this kind of project was the proper subject of a PBR authorization when each of the PBRs claimed for this project were promulgated.

Dow is not the only operator to mix and match PBRs in this way to form new authorizations for complex projects at major and synthetic minor sources. This is a widely used practice that highlights how Texas' PBR program undermines effective public participation. Because such customized patchwork PBRs are not included in the Texas Administrative Code, operators must

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[174] Dow SPC Plant, Production Project PBR Registration, dated August 8, 2014 at 10. (Available at https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=567910&Rendition=Web).

[175] *Id.*

[176] *Id.* (the fugitive area, the MeCl2 wash operation, a loading rack, a flameless thermal oxidizer, plant clearing with the flameless thermal oxidizer, equipment opening, pipe clearing emissions, and centrifugal pump clearing emissions.)

provide information to TCEQ explaining how various claimed PBRs work together to authorize the proposed project. This is "information submitted by the owner or operator" that must be subject to public participation requirements.[177] Members of the public must receive notice of and an opportunity to comment on this kind of combined PBRs project.

e. Texas' PBR Program Authorizes Extensive Cumulative Emissions Without Public Notice and Opportunity to Comment

Texas PBRs are routinely claimed to authorize multiple projects at some of the largest sources of pollution in the United States and to authorize construction of synthetic minor sources. While Texas' PBR General Requirements prohibit the use of PBRs to authorize the construction of a new major source or major modification,[178] the rules fail to require the TCEQ to limit the kinds of sources and projects eligible for a PBR to those that do not have the potential to trigger major NSR preconstruction permitting requirements or to establish maximum emission limits for PBR projects below all potentially applicable major source thresholds. Specifically, many of the emission limits for PBR uses ("PBR thresholds") are higher than applicable major source or major modifications thresholds.

What's more, the PBR emission limit applies to "facilities" and a single source may have hundreds of different facilities. This means that emissions which exceed major source or major modifications thresholds may be authorized by PBR at multiple facilities at a single source, all without a notice to the public or an opportunity to comment on the authorization.

The only source-wide constraint in these general requirements is that at least one facility at the source must have undergone source-specific permitting before emissions at a single source

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[177] 40 C.F.R. § 51.161.
[178] 30 TEX. ADMIN. CODE § 106.4(a)(2), (3).

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can exceed the PBR thresholds.[179] In practice, this is not a true constraint. For example, ExxonMobil's Baytown Technology and Engineering Complex is permitted to emit 80 tons per year ("tpy") of VOCs even though only a single facility at its site has been through a source-specific permitting process that authorized less than a single tpy of VOC emissions.[180] Similarly, Dow's Freeport Chemical Plant, a major source of attainment and nonattainment pollutants located in the Houston - Galveston - Brazoria nonattainment area has *508* active PBR registrations.[181] Emissions authorizations of this scale should be reviewed on a case-by-case basis and subject to public notice and comment. Otherwise, it is impossible to ensure projects will not violate SIP control strategies or national standards at these sources. [182]

iii. Corrective Action Required

Petitioners ask EPA to issue a SIP-call to Texas requiring the state to reform its PBR permitting program to satisfy public participation and preconstruction permit review requirements. Specifically, Petitioners request that EPA require TCEQ to make the following changes to its PBR program:

- Consistent with EPA's general permit rule for Indian Country, Texas' regulations should provide members of the public to comment on a source's eligibility for a PBR at the time a PBR is claimed;

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[179] 30 TEX. ADMIN. CODE § 106.4(a)(1).

[180] *See* Permit and Technical Review Document for Permit No. 142313, Project No. 257045. Notably, ExxonMobil only went through that single source-specific permitting process to avoid the source-wide limitation established in 30 Tex. Admin. Code § 106.4(a)(1); *the VOC emissions from that facility had already been authorized by a PBR.* Permit and Technical Review Document for Permit No. 142313, Project No. 257045.

[181] Exhibit J, Table of Effective PBRs at Dow Chemical Company's Freeport Chemical Plant.

[182] This change is also necessary to conform Texas' Chapter 106 PBR regulations with the Texas Clean Air Act provision granting the TCEQ authority to issue PBRs. TEX. HEALTH & SAFETY CODE § 382.057(a) ("The commission may not exempt any modification of an existing facility defined as 'major' under any applicable preconstruction permitting requirements of the federal Clean Air Act or regulations adopted under that Act.").

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- Consistent with EPA guidance and its program rules for Indian Country, Texas' PBR General Requirements regulations at Chapter 106, Subchapter A should limit the availability of PBRs to true minor sources;[183]

- Consistent with EPA's Indian Country Rules and EPA guidance, Texas' PBR General Requirements should be revised to establish specific criteria sufficient to ensure that PBR promulgated by TCEQ establish technically accurate emission limits for all projects eligible for authorization under each PBR;

- Texas' General PBR regulations should be revised to establish criteria for ensuring that each PBR specifies monitoring, testing, and recordkeeping requirements sufficient to make applicable PBR emission limits practically enforceable; and

- EPA should require the TCEQ to revoke or revise existing PBRs that fail to comply with these criteria and should require that all individual PBRs be submitted to EPA for SIP approval before they are effective.

V. CONCLUSION

Industrial facilities in Texas, and the harmful air pollutants and safety hazards they produce, disproportionately burden low-income communities and communities of color. In Texas, the disproportionate impacts to these environmental justice communities are not considered in the permitting process, in violation of federal civil rights requirements. Texas also routinely ignores these communities' concerns and imposes barriers that prevent their meaningful participation in air permitting processes. Texas will not change its programs without EPA's intervention. EPA has both the authority and obligation to remedy these violations under the Clean Air Act and Title VI of the Civil Rights Act.

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[183] In the alternative, if EPA disagrees and believes that PBRs should be available to major source and synthetic minor sources, EPA should require Texas to: (1) limit the availability of PBRs to major sources and synthetic minor sources to projects and units that do not have the potential to emit pollution at rates equal to applicable netting triggers; and (2) establish source-wide limits on the amount of total pollution that may be authorized by PBR at such sources to applicable netting triggers.

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Therefore, Petitioners ask that EPA conduct a Title VI compliance review of Texas' air permitting program and initiate a SIP Call to require changes to Texas' air permitting program that ensure environmental justice communities are protected and able to fully participate in the permitting process.

We request to meet with you at your earliest convenience. Please contact designated representatives Gabriel Clark-Leach (gclark-leach@environmentalintegrity.org, 425-381-0673) and Erin Gaines (egaines@earthjustice.org, 512-720-5354) who will coordinate with Petitioners and their representatives. We look forward to hearing from you soon.

Respectfully Submitted,

[*signature blocks on next page*]

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