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Via email to lola.fender@senate.texas.gov, jennifer.jones@sunset.texas.gov, and robert.romig@sunset.texas.gov.

CC: Lola Fender, Drew Graham
Sen. Nathan Johnson, Lani Lappinga
Sen. Angela Paxton, Laura Stowe
Sen. Charles Perry, Katherine Thigpen
Sen. Drew Springer, Jr., Jonathan Mathers
Vice Chair Justin Holland, Robert Paulsen, III
Rep. Terry Canales, Curtis Smith
Rep. Keith Bell, Georgeanne Palmer
Rep. Craig Goldman, Amanda Robertson
Rep. Travis Clardy, Sloan Byerly

Re: Comments by Community Advocacy Organizations on the Sunset Staff Report on the Texas Commission on Environmental Quality (TCEQ)

Dear Chairman Schwertner, Commission Members and Staff:

The undersigned organizations appreciate the opportunity to comment on the Sunset Commission Staff report of the Texas Commission on Environmental Quality. We are members of a working group that has advocated on TCEQ Sunset since last year. We submitted comments, for example, on the TCEQ to the Sunset Commission staff in December of last year. See <https://www.citizen.org/article/our-proposal-to-reform-the-tceq/>. We also organized a series of four People's Hearings on TCEQ Sunset that received comment from ninety-two people. We are separately submitting transcripts of those comments

We write today to provide our comments on the Sunset Commission staff report on the TCEQ. Our comments are informed by our collective experience working in environmental policy and by the comments we have gathered from people across Texas.

We have grouped our comments into three sections. Those where we agree with the Sunset Staff report, or generally agree but believe that additional modifications are needed, those where we disagree and additional issues which were not adequately addressed by the

Commission's staff report. On one issue we can not reach a consensus - whether the agency should be continued at all.

Among our organizations, there is a lack of agreement as to whether the TCEQ should be continued for another 12 years in part because of distrust with the agency and their failure to protect public health and to implement and enforce federal and state laws and statutes. We would suggest that if the agency is continued, that the agency be put under an additional sunset review in the 2027-28 cycle to see if they have improved their effectiveness.

I. General Agreement

A. Regarding Issue 1: we agree that TCEQ lacks transparency and opportunities for meaningful public input.

In terms of the Sunset's recommendations on Issue 1, we are in support of the three main recommendations, including:

- Recommendation 1.1. Clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit.
- Recommendation 1.2. Direct the commission to vote in a public meeting on key foundational policy decisions that establish how staff approach permitting and other regulatory actions.
- Recommendation 1.3. Direct TCEQ to develop a guidance document to explain how it uses the factors in rule to make affected person determinations.

We would note that while we support these recommendations in general, some additional modifications are needed on Recommendation 1.3 to comply with federal law.

Texas's minor and major New Source Review permitting programs implement federal Clean Air Act requirements and must provide opportunities for public participation consistent with the federal Clean Air Act, EPA's regulations establishing public participation requirements for permitting programs implementing the Act, and provisions in Texas's federally-approved State Implementation Plan. The Clean Air Act requires that New Source Review air permitting programs must include an opportunity for judicial review of air permit decisions in state court. This right of 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. Texas's State Implementation Plan incorporates provisions in the Texas Clean Air Act providing a right to appeal Commission decisions to state court and the Texas Attorney General has represented to EPA 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."

The TCEQ is violating the Clean Air Act, its State Implementation Plan, and its representation regarding the rights of Texans to appeal TCEQ decisions to state court by using its contested case hearing process—which EPA has not approved as part of Texas's State Implementation Plan—to burden the right, guaranteed by federal law, to appeal air permitting decision to state

court. Specifically, the TCEQ has taken the position that, in cases where state law provides an opportunity for a contested case hearing, any person who wishes to appeal the TCEQ's final decision must first request a contested case hearing, be designated by the TCEQ as an affected person authorized to participate in the contested case hearing, and participate in the contested case hearing. This exhaustion requirement, based on a state-law process, that EPA has not approved may not be used to limit the federal right to appeal TCEQ air permitting decisions in state court.

While the TCEQ touts its contested case hearing process as an extra opportunity for meaningful public participation that federal law does not require, the process is not actually implemented in this way. Instead, the TCEQ reads its state-law "affected person" requirements, which identify the factors the Commission should evaluate when deciding who has standing to participate in a contested case hearing, to establish constraints that are significantly more stringent than standing requirements established by Article III of the United States Constitution. For example, the TCEQ has consistently refused to recognize aesthetic, recreational and economic interests that would clearly satisfy Article III standing requirements as sufficient to establish a justiciable interest consistent with "affected person requirements" under Texas state law. Additionally, the Commission routinely denies contested case hearing requests submitted by people who live more than a mile away from the permitted source based on a presumption that such people are not affected by air pollution in a way that is distinguishable from the general public. This presumption is not supported by science, is not required by any applicable regulation or statute, and operates as an arbitrary constraint on public participation in the air permitting process.

While Commenters support Sunset's recommendation 1.3, this recommendation alone will not remedy the TCEQ's longstanding failure to provide opportunities for public participation required by federal law. Consistent with the federal Clean Air Act and the Texas State Implementation Plan, the Texas Legislature should revise the Texas Clean Air Act to: (1) provide that unless and until Texas's contested case hearing process and affected person requirements are approved as part of Texas's federally-approved State Implementation Plan, participation in a contested case hearing is not a prerequisite for judicial review of the TCEQ's air permitting decisions; and (2) establish affected-person criteria that are not more restrictive than standing requirements in Article III of the United States Constitution.

B. Regarding Issue 2: we agree that TCEQ's compliance monitoring and enforcement processes need improvements. We do not believe the recommendations go far enough.

We agree with the report's conclusion that the compliance monitoring and enforcement programs need improvement.

Within the existing compliance history framework, we agree that the key recommendations are improvements. With the caveat that our preference would be eliminating compliance history in favor of a stronger approach to enforcement across the board, we agree with each of the key recommendations in issue 2:

- Requiring TCEQ's compliance history rating formula to consider all evidence of noncompliance.
- Deemphasizing site complexity as a mitigating factor.
- Regularly update compliance history ratings (the "ITC problem" identified by TCEQ ED Toby Baker)
- Consider all violations when classifying an entity as a repeat violator.
- Annual confirmation of the operational status of permits.
- Reclassify recordkeeping violations based on the potential risk and severity.

Our chief concern is that enforcement actions—fines—are not large enough to change the behavior of large companies. TCEQ's fines for polluters are capped at \$25,000 per incident per day, a cap that was increased from \$10,000 during the last Sunset review of the TCEQ in 2011. But the TCEQ rarely, if ever, levies the maximum available fine. The fines it does levy are simply a cost of doing business for the largest companies. It takes a billion-dollar corporation about 13 minutes to generate \$25,000. The problem of the disparate treatment by the agency of violators of different sizes was thoroughly investigated in [this article](#) by Naveena Sadasivam for the Texas Observer.

In addition, many of our organizations, as well as local governments have been forced to take action against major corporations for repeated failures to obey the law by routinely violating their permits. Thus, as an example, the Sierra Club and Environment Texas have used provisions of the Federal Clean Air Act to bring citizen enforcement suits against refineries such as Chevron, Shell Energy, Pasadena Refining and Exxon-Mobil, and have either settled with these facilities or gone to court. While it is good that such provisions exist in federal law, these organizations were forced to act because TCEQ chose to ignore repeated violations and failed to take adequate action.

Thus, we would request that the following additional changes be made to TCEQ authority through statutory provisions:

- Raising the maximum daily penalty from \$25,000 to \$50,000 with an annual inflation index going forward;
- Additional fines or maximums should be established for any violations that lead to major injuries or fatalities;
- Requiring that the economic benefit of noncompliance be recovered. Currently, TCEQ does not fully require that the economic benefit of non-compliance be captured in any total penalty assessed, but only bumps up a fine by 50% if there was more than a certain amount of economic benefit from the entity violating the law. Instead, TCEQ should recover the full economic benefit of non-compliance (up to the maximum penalty) where there was an economic benefit gained by the company;
- Speciating pollutants to require that pollutants be considered as separate violations;
- Requiring that TCEQ conduct both an annual physical inspection of facilities holding major permits, as well as an annual review of industrial facility reports to assess potential violations for enforcement action. Minor facilities could be placed on a two (or longer)

cycle depending upon their potential impact to citizens, the environment and public health. We must assure that major facilities are both physically inspected and reviewed for violations each year. TCEQ must have a public plan that lays out these timelines.

C. Regarding Issue 3: we agree that oversight of water could better protect the state's scarce resources, and generally support those recommendations with some modifications

We support **Recommendation 3.1**, and offer the following modifications to the staff recommendation to better develop and adopt environmental flow standards.

- Modify the recommendation to provide for an ongoing, and specifically defined, role for Basin and Bay Area Stakeholder Committees (BBASCs) and Bay and Basin Expert Science Teams (BBESTs) in development, and revision, of local work plans and identification of affirmative strategies to help meet flow needs rather than abolishing those bodies and creating them anew every 10 years to develop new recommendations for revised flow standards and work plans.
- Modify the recommendation to include direction to the Environmental Flows Advisory Group to act on the unfulfilled statutory directive to address improved water right enforcement approaches and methods for facilitating affirmative flow-protection strategies by requiring the EFAG to establish an environmental flows management advisory panel to develop specific recommendations on those tasks for consideration by the EFAG.
- Provide for a more robust approach for development of statewide work plans and progress updates by directing the Science Advisory Committee, working with state agencies along with BBESTs and BBASCs, to recommend biennial work plans for consideration and approval by the EFAG.

We support **Recommendation 3.2** and offer the following modifications to make this public meeting, and ultimately, the PGMA process more meaningful, resulting in more effective management of groundwater.

- The recommended public meeting should be held at a regular, and predictable, interval to increase the potential for public participation, including by GCD representatives.
- Topics covered should include evaluation of whether “critical groundwater problems” still exist within delineated PGMA and of recommendations for how to resolve these problems, such as identifying data gaps and modeling needs, funding deficiencies, and ineffective governance structures.
- When considering whether to delineate a new PGMA or expand an existing one, TCEQ and TWDB should work more closely and deliberately with local communities and GCDs in and adjacent to the proposed PGMA to ensure the most effective governance structure.

We support Recommendation 3.3, but offer the following modifications:

- Before initiating cancellation proceedings, direct TCEQ to identify, in consultation with TPWD, rights potentially subject to cancellation that, instead, should be prioritized for consideration of placement in the Texas Water Trust.
- Direct TCEQ to establish a process for evaluating the potential of water made available from canceling specific rights to be set aside for environmental flow protection.

D. Regarding Issue 4: We agree with directing TCEQ commissioners to take formal action on OPIC's rulemaking recommendations.

The Office of Public Interest Counsel (OPIC) is an important representative of the public interest. Despite this role, OPIC is often dismissed or ignored by the commissioners when decision making. We agree with the recommendation to address OPIC rulemaking recommendations each year.

OPIC has made recommendations in the past that clearly should have been implemented by the TCEQ. In the August 14, 2018 biennial report to the TCEQ (available [here](#)) OPIC recommended an amendment to the statute defining "affected person"--an issue that exists to this day and is found in the Sunset report. TCEQ could not have implemented this law change itself, but the agency could have supported legislation that did, or at least speak to the issue in front of the legislature. Instead, bills have been heard for several sessions without comment from TCEQ or action from the legislature (see, e.g. HB 289 at the April 19, 2021 hearing of the House Committee on Environmental Regulation [here](#)).

II. General Disagreement

A. Regarding Issue 1: We disagree with the cause of public "distrust and confusion" and with the proposed solution.

As a coalition of advocates working on the environment and public health across Texas, we have spoken with thousands of people across the state who are impacted by the TCEQ's decisions. We regularly meet environmental community organizations that have formed for the sole purpose of engaging TCEQ on a single permit fight, or with complaints about a single facility. The people who join these organizations are forced to become experts in the TCEQ. Not because they have an interest in environmental policy, but because their lives, their family's lives and their community depends on it.

It is reductive to call people forced into advocacy to protect their quality of life "NIMBY" complainers who are "confused and frustrated" with the agency. There is plenty of confusion about how the TCEQ operates. We support many of the recommendations in this report--such as posting permit applications online--that will increase public access and dispel confusion. But failing to understand the position of community experts who have engaged with the TCEQ for years and come away experts is dangerous.

Why is it dangerous? Because it leads to half solutions that will not solve the agency's problems. Recommendation 1.1 of this report is to hold the first permit hearing *before* a draft permit is issued. This recommendation gets at a real problem--pointless and frustrating community meetings--but fails to offer a real solution.

One of the more common industrial classifications to send up in a public meeting is the concrete batch plant. The vast majority of concrete batch plants are issued standard permits—which have a fixed set of terms and conditions that are not modified by the agency in the permitting process. What is the benefit of a public meeting on a permit with fixed terms? Even a meeting earlier in the process doesn't provide a real opportunity to improve the permit.

The solution seems designed to assuage public “frustration” without actually changing the permitting process. We recommend not only that the first public meeting be held before the draft permit is issued, but also that:

- All permits—including standard permits—have the option to be amended to address public concerns.
- Permits include a response to comments that clearly indicates each instance of a permit being amended in response to a public comment.

In summary, the agency must distinguish between citizens who are confused due to a lack of experience or information, and citizens who have developed expertise over months or years of engagement with the agency. Failing to do so will perpetuate the lack of public confidence for which TCEQ is so well known.

B. Regarding Issue 1: we disagree with the usefulness of a vote on “key foundational policy decisions.”

We believe a meeting and vote on “key foundational policy decisions” will be of limited utility. The TCEQ's policies are evident in its actions. Here are a few examples:

- The acceptable cancer risk level is 1 in 100,000, contrasted with the EPA's 1 in 1,000,000.
- Only 3% of self-reported unauthorized pollution events are subject to enforcement.
- Permits are routinely granted over the objections of community, and in some cases, and Administrative Law Judge.
- Toxicology standards are systematically weakened.
- The agency refuses to discuss environmental justice or use the term.
- The agency will not consider climate change when making policy.

We are recommending more fundamental changes in approach than will be achieved with a public vote.

C. Regarding Issue 2: we disagree that guidance will solve the problems created by the affirmative defense.

The affirmative defense is used by companies to avoid enforcement for illegal air pollution. While Texas billed the defense as narrow one, available only upon a thorough demonstration of eligibility, the affirmative defense is established by a minimal showing of diligence on the part of

the offending party, this is not how it is implemented. As the Sunset Report indicates, the affirmative defense has been granted for between 80 and 90 percent of all unauthorized emission events between 2017 and 2021. The TCEQ uncritically accepts claims of the defense, even in cases involving repeat offenders. So long as the affirmative defense remains in place, polluters have little reason to fear consequences for failing to prevent unauthorized releases of dangerous pollution. In this way, the affirmative defense disincentivizes investment in effective maintenance practices and equipment improvements that would protect the public from unauthorized pollution during malfunctions and unplanned maintenance events.

We previously recommended eliminating the affirmative defense in Texas. The EPA proposed in 2016 to remove the affirmative defense from its implementation of the federal Clean Air Act. This proposal was reissued in March 2022 ([see here](#)). About its proposal, the EPA wrote:

Emergency affirmative defense provisions allow sources to avoid liability in enforcement proceedings by demonstrating that violations of certain emission limitations were caused by an “emergency” situation. All such affirmative defense provisions are inconsistent with the enforcement structure of the CAA, following the reasoning of the D.C. Circuit’s 2014 *NRDC v. EPA* decision.

Right now, Texas is at odds with the federal government in its use of the affirmative defense. The recommendation to issue guidance about its use will not resolve this conflict. We renew our recommendation that the affirmative defense be eliminated in Texas.

III. Our Additional Recommendations

In addition to the proposed modifications to the issues, and additional recommendations directly related to public participation, compliance and enforcement, water, and the role of OPIC, there were several issues that were not adequately addressed in the Sunset report.

A. Remove economic development from the TCEQ’s mission.

The TCEQ’s mission is “to protect our state’s public health and natural resources consistent with sustainable economic development.” The TCEQ is the only state environmental agency that has economic development in its mission. We recommend this mission be changed, as the goal of the agency should only be protection of public health and natural resources. We also believe this approach to regulation—ensuring a business-friendly climate first—is a source of many of the TCEQ’s problems.

B. Environmental Justice and Cumulative Impacts

The absence of any discussion of environmental justice or environmental racism is a glaring omission in the staff report. The TCEQ itself has almost pathologically avoided using the words “environmental justice” in favor of the term “environmental equity.” Now the Sunset Commission has done the same in its report.

Ignoring environmental justice robs the report of essential context. We must identify and confront the reality that low-income communities of color are home to more industrial facilities, suffer from more pollution, experience more co-vulnerabilities such as lack of health care, and experience poorer overall health than wealthy, white neighborhoods. Pretending this problem doesn't exist will only make it worse.

The problem of the cumulative impacts of polluting facilities is an environmental justice phenomenon. Although there was extensive discussion of this problem during the months the agency was under review, it is not addressed in the report.

One of our recommendations addressed this problem: give the commissioners additional authority to deny a permit that is administratively and technically complete if considerations of justice ("equity") suggest it should not be issued, and require the Commission to actually implement currently-existing requirements regarding such issues. For example, 42 U.S.C. 7503(a)(1)(5) of the federal Clean Air Act requires applicants seeking authorization to construct a new major source or a major modification to an existing source located in a nonattainment area to "demonstrate[] that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." This existing provision of federal law, which is included in Texas's federally-approved State Implementation Plan, is calculated to address just the kind of social and environmental disparities faced by environmental justice communities in non-attainment areas. Yet, the TCEQ does not actually have a process for evaluating social and environmental costs for projects subject to this requirement and has consistently failed to give it any effect.

Without a significant policy change, TCEQ will continue to approve permits for polluters in Black, Brown, and low-wealth communities without regard for the cumulative and historical impacts of those permits on their health and quality of life for decades. The economic strain of poor health - from lost productivity, medical costs, hospitalizations, and even premature death - cannot and should not be second to private industry.

C. "No Means No" Provision for Permits with Significant Notices of Deficiency

TCEQ staff often spend significant time and resources fixing deficient permit applications. Neither in the permit procedures and guidelines nor in statute are there specific provisions about when a permit application that does not meet the requirements for TCEQ to be considered administratively and technically complete for possible approval is the permit considered "dead" or withdrawn. Indeed, often applicants continually come back to the TCEQ with changes and proposals, leading to a constant barrage of back and forth and which is a burden both on TCEQ staff but also on the public which is put in the position of not knowing whether a permit application is about to be approved for public input. We believe that either through statute or management directives, TCEQ should have a policy that applicants should only be given two rounds of opportunities to fix deficient applications after which the application would be declared

null and void and the applicant would be required to begin the permit application process anew – with required payment of a new application fee. This has been an issue in all program areas, but particularly in the air program.

D. Science Matters: follow it

We have major issues with the agency's continual denial of basic science. First, they appear to have no process in place to regularly assess the need to update scientific health-based standards for air or water toxics, and worse, appear to actively oppose efforts to improve these standards. For years, while considering potential changes to the regulations of ethylene oxide, TCEQ staff conducted frequent meetings with industry representatives in secret, and relied on their information to arrive at weak proposed standards. Worse, TCEQ then refused efforts by organizations to get copies of those documents on which their proposal was based. Similarly, ambient standards for toxics like hydrogen sulfide were set decades ago, even though the science would support a review and establishment of more protective standards. Other examples include water quality nutrient standards, failure to implement anti-degradation standards, and the selective use of outdated effects screening levels.

We recommend that the Legislature direct TCEQ to be required to review and update ambient air quality standards for pollutants that are not already covered by the federal government, and their effects screening levels every three years in a public process.

In addition, we believe that TCEQ needs to stop using state resources to challenge settled science and the federal government. The TCEQ should not use state resources, including those that come from Texans in the form of taxes and fees, to undermine science and the U.S. Environmental Protection Agency (EPA). We understand that this is part of a larger trend of antagonism between Texas and the federal government. But this is not something the Texas Commission on Environmental Quality should encourage or support. We recommend the agency rely on settled science and not spend state resources to undermine the EPA or the federal government.

The agency spent \$2.6 million on consultants to undermine the 2015 review of the ozone National Ambient Air Quality Standard (NAAQS). This effort included the agency's Chief Toxicologist famously stating that ozone pollution was not a concern because most people spend "90% of their life indoors." This effort culminated in a hearing before the U.S. House Committee on Science, Space, and Technology.

The TCEQ has also systematically weakened guidelines it uses to assess the impact of toxic air pollutants on communities. The Center for Public Integrity analyzed the TCEQ's reviews of air pollution guidelines from 2007 to 2014. During those seven years, forty-five chemicals were reviewed. Two-thirds of the chemical standards reviewed were weakened. This means that, two times out of three, the public had less protection from toxic chemicals after the TCEQ's work.

Some in Texas leadership engage in climate denialism, a position that the TCEQ has at least tacitly accepted over the years. When the agency is clear about its position on the climate crisis, it is one of inaction. In a recent review of state agency policies on climate, WFAA received a statement from TCEQ that concluded, “the agency does not use climate change projections to evaluate future impact on air quality.”

E. Water Quality Standards Must Be Prioritized

Texas’s Surface Water Quality Standards (SWQS) have long been piecemeal of different years’ standards. During the EPA’s review of the 2018 Standards, TCEQ was still using portions of standards from 1997, 2000, 2010, and 2014 for the Texas Pollutant Discharge Elimination System (TPDES) program. By TCEQ’s own admission on its website, TCEQ regularly fails to implement and gain EPA approval of the most current water quality standards, resulting in a situation where water quality standards are unpredictable and cobbled together across multiple revision years. TCEQ is presently undergoing its 2022 revision of the SWQS, and will once again be submitting the standards to EPA for review and approval. It’s imperative that TCEQ be required to adopt current SWQS for both permit and standards predictability as well as potential impacts to public health and the environment.

In addition to the SWQS generally, there are a number of specific water quality issues where more statutory and management direction is needed for the TCEQ to fulfill its mission of protecting Texas’s natural resources and the environment. TCEQ’s operations and effectiveness could be improved in several areas.

Total Maximum Daily Load Program

The Clean Water Act §303(d) requires that state agencies develop and implement TMDLs for impaired waters. The purpose of the TMDL program is to reduce pollution in streams, rivers, lakes, and estuaries that already suffer an impairment for a specific pollutant. Specific impairments in water quality can range from those that may be harmful to human health (bacteria in water or mercury in edible tissue) to those that primarily affect aquatic life (depressed dissolved oxygen).

There is an outstanding backlog of TMDLs, some of which correspond with water bodies that have been listed as impaired waters since the 90s.

The impacts of a given impairment can vary widely. Waters that suffer from impaired dissolved oxygen can lead to stress, decline, or death in aquatic wildlife populations. Additionally, depressed dissolved oxygen levels is the primary cause of fish kills in Texas. Those waters that suffer from a bacterial impairment can cause human illness that ranges from mild to moderate on average, but may be severe for vulnerable populations as a result of recreation. Finally, human consumption of mercury from edible tissues (fish or shellfish) has a negative impact on health. Mercury is a neurotoxin, and mercury poisoning has health effects that range from mild to severe, including effects such as loss of peripheral vision; "pins and needles" feelings, usually in the hands, feet, and around the mouth; lack of coordination of movements; impairment of speech, hearing, walking; and/or muscle weakness. Additionally, mercury poisoning has effects that specifically affect the unborn, infants, and children, including impacts to cognitive thinking,

memory, attention, language, fine motor skills, and visual spatial skills. With a long list of potentially adverse effects as well as a long list of outstanding TMDLs at TCEQ, the need is clear for more timely and regular TMDL establishment.

Therefore, we recommend that the Sunset Commission:

- Directs TCEQ to contract with a qualified entity to audit the effectiveness and existing barriers to effective implementation of the Total Maximum Daily Load program, as well as develop clear solutions to address the outstanding TMDL backlog.
- Requires development of an appropriate list of priority-setting criteria that includes the impacts of given impairments on: social vulnerability of impacted communities, time a segment has been on the 303(d) list without TMDL development, severity of impact to endangered and threatened species, and severity of human health and other environmental impacts. This process should be open to public participation.
- Requires timely development of TMDLs.

Domestic Wastewater Discharge Regulation

A box titled “2022 Wastewater Treatment Plant Example” appears at the bottom of page 17 of the Sunset staff’s report on TCEQ. The text refers to “a recent contested case for a permit for a wastewater treatment plant” in order to describe the lack of clarity about which parties could be certified as affected parties. The text does not identify the wastewater treatment plant, but TCEQ has had only one pending contested case for a domestic wastewater discharge permit this year — the permit held since 2016 by the city of Liberty Hill, and currently up for renewal by TCEQ. Liberty Hill’s existing permit allows the city to discharge treated sewage with 0.5 milligrams per liter (mg/L) of total phosphorus into the South San Gabriel River.

Despite the lax pollutant limits in its permit, Liberty Hill has been unable to stay even within these requirements. The affected party’s request for a contested case hearing states that the city’s worksheets and EPA ECHO data show that Liberty Hill has exceeded its total phosphorus permit limits for at least 928 violation days from November 1, 2015 through June 30, 2020. The city has also racked up multiple violation days for ammonia nitrogen, solids (TSS), oxygen demand (CBOD), and E. coli.

Most of the streams in the Hill Country have the same characteristics as the South San Gabriel River: low to intermittent water volume, with extremely low levels of naturally occurring phosphorus, flowing through rocky channels with limited vegetation. Adding more phosphorus to streams like these is a recipe for out-of-control algae growths. Treated wastewater effluent contains much more phosphorus than these streams, since phosphorus is a byproduct of the treatment process itself.

That is why a diverse range of stakeholders has supported a rule that would end new wastewater discharge permits on the state’s last remaining pristine streams, while allowing development to continue with the issuance of permits for land application of effluent and authorization for the beneficial reuse of effluent. HB 4146, a bill that would have established this rule, was passed by the House on a bipartisan 82-61 vote in the 2021 Legislative Session. The Pristine Streams Petition, which asked TCEQ to adopt a similar policy through its internal rulemaking process, was considered by the agency’s commissioners earlier this year but rejected on a 2-1 vote. However, all three commissioners agreed that the 22 classified stream segments that would be protected by the rule are treasures for the whole state that deserve more protection.

We recommend that:

- TCEQ should be directed to adopt a rule that would end the issuance of new wastewater discharge permits on all classified stream segments in the state with levels of naturally occurring phosphorus below 0.06 milligrams per liter, as indicated in 90% of water quality testing data as recorded by the agency in the past 10 years. In addition, TCEQ should encourage prospective developers in pristine stream basins to utilize TLAP permits for wastewater land application and Chapter 210 authorization for the beneficial reuse of water.

Nutrient Criteria Standards

Nutrient pollution results from dangerously high levels of nitrogen and phosphorus in waterways. Besides harming wildlife and the economies that depend on them, nutrient pollution also threatens human health when people consume toxic drinking water, eat polluted fish, and swim in polluted water. Recurring blooms of toxic blue-green algae from an abundance of nutrients have resulted in the death of multiple pet dogs and led the City of Austin to place permanent warning signs around Lady Bird Lake. This is a problem across the state. According to the 2020 Texas Integrated Report, over 100 Texas water bodies are impaired due to depressed dissolved oxygen levels, while close to 300 are impaired from bacteria.¹ Though this is a problem across the state, the discharge of treated wastewater poses a unique threat to streams in the Hill Country as evidenced by recent algae growths clogging rivers and infecting lakes.

Over half of all states – not including Texas – have adopted at least partial numeric criteria for total nitrogen and/or total phosphorus in surface waters. Texas has not yet implemented numeric criteria for surface water quality standards. Instead, there are narrative criteria, antidegradation requirements placed on permit applications, and watershed regulations – together which fail to be protective of our water resources. The TCEQ does produce a report on water quality in water bodies by measuring chlorophyll, phosphorus, and nitrate nitrogen. The agency has also started developing numeric nutrient criteria, and has adopted such criteria for 75 reservoirs based on their chlorophyll levels. The TCEQ is now working to develop numeric criteria for streams, rivers, and estuaries across the state. Despite funding studies since 2001 that would help Texas set specific phosphorus and nitrogen water quality standards, however, the TCEQ to date has largely failed to adopt numeric nutrient water quality standards – leading to the continued degradation of natural ecosystems and threats to human health throughout the state.

- Direct TCEQ to adopt numeric limits for total phosphorus and total nitrogen that would cover all streams with low naturally occurring levels of these substances, and to develop limits that would prevent any increase in eutrophication (algae growth) in these streams.

Antidegradation rules set by the TCEQ and the US Environmental Protection Agency (EPA) outline substantive standards, however following TCEQ's checklist of procedures for antidegradation review does not assure compliance with these substantive standards. The US EPA recommends numerical criteria be established based on section 3-4(a) of

¹ "2020 Texas Integrated Report - Texas 303(d) List (Category 5)," Texas Council on Environmental Quality (2020), https://www.tceq.texas.gov/assets/public/waterquality/swqm/assess/20txir/2020_303d.pdf.

the Clean Water Act and suggests being more precise in identifying nutrient levels based on smaller geographic scales.

- Direct the TCEQ to use nutrient monitoring data to determine whether to add more protective nutrient limits to existing permits when they come up for renewal.
- Direct the TCEQ to include strict nutrient limits in new wastewater discharge permits, especially when cumulative discharges have the potential to significantly harm naturally occurring nutrient levels in receiving water bodies.

Antidegradation Policy for Water Quality Standards

Under federal law, each Texas Pollutant Discharge Elimination System (TPDES) permit must contain any requirements necessary to achieve the state's water quality standards.² Each state's water quality standards must include an "anti-degradation" policy, and every TPDES regulatory decision must comply with that policy.

A *de minimis* exemption may be used as a significance threshold before undergoing the Tier II antidegradation review. However, the significance threshold cannot undermine the purposes of a Tier II review. TCEQ's Water Quality Standards Implementation Procedures contain examples of where degradation is "likely to occur" or unlikely to occur based on considerations such as the consumption of the receiving water's assimilative capacity.³ The situations where degradation is deemed "likely" are exceedingly narrow, however, and the implementation procedures state that even discharges falling within these examples may not constitute degradation. Thus, the guidance set forth in the Implementation Procedures is effectively useless in providing the public an objective standard for when a discharge would be found to result in a greater than *de minimis* lowering of water quality.

To our knowledge, TCEQ, in practice, universally finds that applications for a new or amended TPDES permits result in less-than *de minimis* lowering of water quality. TCEQ thereby exempts all TPDES applications from a demonstration that the proposed discharge is necessary for important social or economic development. TCEQ's unreasonable interpretation of the term "*de minimis*" has created an exemption that swallows the rule. so long as it doesn't undermine the purposes of a Tier II review.

- The commission should direct TCEQ to either remove or objectively define the "*de minimis*" exemption and require meaningful alternatives analysis.

Experience has established that the current wording of the TCEQ water quality standards, as interpreted by TCEQ and generally upheld by Texas courts, is inadequate to ensure a proper Tier II anti-degradation review. To correct this deficiency, either the "*de minimis*" exception contained in 30 TAC § 307.5(b)(2) must be entirely removed, or the term "*de minimis*" must be explicitly defined by rule in an objective manner that enables meaningful evaluation and comment by the public. An approach defining "*de minimis*" consistent with the standard set forth in the King Memo would be a step toward resolving this issue.

- The Commission should direct TCEQ to require water quality standards to incorporate non-discharge alternative requirements.

² 40 C.F.R. 122.44(d), applicable to states pursuant to 123.25.

³ Texas Commission on Environmental Quality. "Procedures to Implement the Texas Water Quality Standards" RG-194, June 2010, at 65-66.

These requirements should be analogous to those set forth in the Pennsylvania Code.⁴ Measures are needed to ensure that performance of an alternatives analysis is embodied in TCEQ's normal processing of TPDES applications. Imposing this requirement in Texas would go far toward resolving the water quality issues being experienced in clear Hill Country streams, where re-use and land application of domestic wastewater are feasible alternatives to direct discharges.

Stormwater Regulation for Aggregate Mining

Surface mining of aggregates can have significant negative impacts on surface water and groundwater resources. Quarrying consolidated limestone without proper best management practices in place makes our state's aquifers vulnerable to severe pollution. Gravel and sand mining along our rivers, without proper best management practices, makes our waterways less resilient to flooding, increasing the vulnerability of downstream communities, as we saw in the Houston area during and after Hurricane Harvey.

Because there are no general requirements for reclamation of aggregate mines in Texas, the problems that mining in our state creates for our water resources endure in perpetuity, long after the lifespan of the mine, and no one is responsible to remediate them.

As a partial strategy to address this issue, the TCEQ adopted new rules for sand mines in the San Jacinto River basin last year.⁵

However, the threats that improper mining activities pose to Texas's water resources are significant throughout the state; a one-river- or one-aquifer-at-a-time approach to regulating aggregate mining is inefficient and ineffective.

Thankfully, the appropriate set of comprehensive surface mining regulations already exists, and already exists in Texas, for surface coal mining. The Texas Surface Coal Mining and Reclamation Act⁶, if applied to aggregate mining, would serve very well. In fact, all 50 US states are required by federal law to adopt a similar set of surface coal mining regulations and 35 of the states apply the regulations to aggregate mining, as well, realizing that it benefits their states to have one set of consistent regulations for all surface mining activities.⁷

⁴ 25 Pennsylvania Code (Pa. Code) § 93.4c, sets forth procedures for implementation of anti-degradation requirements. For High Quality or Exceptional Waters, these procedures include a requirement that an applicant, "shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge." Under the Pennsylvania Regulations, if a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.

⁵ Texas Administrative Code, Chapter 311, Subchapter J.

⁶ Texas Natural Resources Code Chapter 134.

⁷ States that have adopted comprehensive regulations for aggregates mining include: Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

- Direct TCEQ to increase regulatory efficiency, consistency, and effectiveness for the aggregates industry by expanding the rules of TAC Chapter 311 Subchapter J to cover sand and gravel mining in all Texas rivers basins.
- Direct TCEQ to study the Texas Surface Coal Mining and Reclamation Act and incorporate key ideas not presently reflected in TAC Chapter 311 Subchapter J, into the new expanded regulations, applicable statewide.

F. Air Quality Monitoring

Whereas TCEQ typically meets the federal minimum regulatory requirements for air quality monitoring outlined at 40 CFR 58.10 and corresponding Appendices, they continue to overlook explicit direction from the EPA to apply an environmental justice analysis to its ambient air monitoring planning as follows: *“For future plans, including next year’s plan we encourage TCEQ to continue to evaluate areas with environmental justice concerns related to ambient air monitoring. Where possible, please add detail to the plan discussing the environmental justice considerations taken into account related to the ambient air quality network.”* In TCEQ’s 2022 Air Monitoring Network Plan (ANMP), there is no explicit analyses of either the cumulative impact of pollution or the siting of ambient air monitors in response. Residents and local organizations in these neighborhoods continue to take it upon themselves to monitor their local-level air quality through community air monitoring programs.

According to its own report released in January 2022, TCEQ does not consistently monitor industrial air pollution immediately before and after severe weather events, when real-time information about health and environmental harm is needed most. This is yet another example of TCEQ using risk estimation methodologies that do not benefit communities and result in less protection when there should be more. For example: in this report, TCEQ drew premature conclusions about how they should monitor natural disasters based on a a limited dataset. Moreover, drawing the conclusion that monitoring efforts should be curtailed due to previous logistical and technical challenges is short-sighted. Having identified their shortcomings, TCEQ should apply this information to improve *in situ* disaster air monitoring. It is clear that TCEQ does not have a resilient storm-ready air monitoring system and has not been held accountable to create one. This leaves a significant gap in air quality at the times when the community and the environment are the most vulnerable.

Furthermore, there continues to be minimal accountability from TCEQ to communities in regards to the results of air monitoring. TCEQ must make transparent the data on how it is applying monitor data to address local polluters. It is critical that ambient air monitoring in overburdened communities is used to hold the sources of such pollution accountable to meeting National Ambient Air Quality Standards (NAAQS).

G. State Agency Party Status in TCEQ Permitting Actions

In 2011, as part of the TCEQ Sunset bill, the Legislature adopted a House Floor Amendment that resulted in state agencies, including TPWD, being prohibited from contesting any proposed

TCEQ permit by participating in a contested case hearing, except when the agency is the applicant. Until that time, TPWD had been an active participant in contested-case hearings on applications for significant water right permits and, less frequently, for waste discharge permits as necessary to protect the State's natural resources.

The loss of the right to participate in hearings greatly reduced the ability of TPWD to provide expertise and perspective on permitting decisions that could adversely affect water quality or quantity and adversely impact the State's natural resources, including state parks and wildlife management areas. More broadly, this limitation has diminished the State's ability to protect and conserve its natural resources because the entities with the greatest knowledge of those resources and potential impacts are prevented from participating in the decision process. When there is a contested-case hearing, only the parties are allowed to present evidence, engage in discovery, cross-examine witnesses, and provide legal argument about what is required to comply with applicable law. Because the TCEQ commissioners are required to base their decisions only on the evidence in the record from the hearing, the commissioners do not have the benefit of the expertise of TPWD and other agencies to inform those decisions.

This shortcoming can be corrected without setting up the potential for other state agencies to challenge final decisions made by TCEQ when the agency is not the applicant. Prior to TCEQ's final decision, participation of other state agencies in the decision process is necessary to allow the TCEQ commissioners to make fully informed decisions.

- Amend Section 5.115 (b) of the Texas Water Code as follows:

A state agency that receives notice under this subsection may ~~submit comments to the commission in response to the notice but may~~ not contest the issuance of a permit or license by the commission by seeking judicial review of the decision, unless the state agency is the applicant.

H. Equitable Fee and Funding Structure

TCEQ runs a number of programs in waste, air and water, and more than 80 percent of TCEQ's revenues are paid for through annual program fees, application and permit fees. However, within individual fees and programs, there are wide discrepancies on the sufficiency of fees to support the program needs (rule development, permit writers, inspection, enforcement, etc), and there are often equity issues where large users or polluters are paying less on a per-volume basis than smaller entities or polluters. Some of these fee amounts are set statutorily and others are set by TCEQ. There is a need to look broadly at TCEQ's annual and permit fees in all programs and make changes to assure that revenues are sufficient and that the fees are equitable. We would note for example that within the air program, currently major air permit fees are capped at \$75,000 and the main annual fee for major sources – based on emissions of criteria pollutants – is capped at a maximum of 4,000 tons per pollutant, meaning large polluters are paying significantly less in annual fees compared to small polluters. While some cap might be reasonable, we would suggest raising the maximum permit fee and the maximum tons that can be assessed the air emissions fee, while also looking at the levels of the annual inspection fee.

The issue in the water program is perhaps even more egregious. While the legislature and TCEQ have made some small steps to increase fees and revenues in the water program, given the vast number of lakes, stream miles, coast lines, and groundwater resources of Texas, overall water rights, wastewater discharge permit fees, and annual fees are too low to support the need of the agency. In addition, the three main annual fees – the Public Health Service Fee, the Consolidated Water Quality Fee and the Water Use Assessment Fee – are not equitable, as large public utilities, water rights users and wastewater discharge permit holders pay a proportionally low amount of total revenues. The agency should be directed to raise fees overall by at least 100 percent and directed to arrive at a more equitable distribution of those fees between large and small public utilities, water rights and wastewater discharge permit holders, and the Legislature must look at caps that prevent equitable funding structures. In addition there are large categories of water rights holders that are exempt from paying fees, and those entities should be providing at least some revenues to help our state agency manage water quantity and water quality.

IV. Conclusion

We appreciate the opportunity to provide these comments. We welcome the opportunity to discuss our positions further. If you would like to do so, please contact Adrian Shelley, Texas Director of Public Citizen. He can be reached through email at [adrian](mailto:adrian@citizen.org) or by phone at [713-702-8063](tel:713-702-8063).

Respectfully,

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