

June 17, 2022

Ms. Jennifer Jones  
Mr. Robert Romig  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, Texas 78711

Re: Comments on the Sunset Staff Report on the Texas Commission on Environmental Quality

Dear Ms. Jones and Mr. Romig:

Thank you for the opportunity to provide comments on the Sunset staff review of the Texas Commission on Environmental Quality (TCEQ). The non-profit organizations listed below are collectively aligned in working toward an equitable, sustainable and resilient water future for Texas – for the environments, people, communities and economies that all depend on this critical resource. We respectfully submit comments on the staff report and additional recommendations to consider as the Sunset process moves forward.

#### **Comments on Sunset Staff Issues 1, 2, 3, 4 and 5**

We support **recommendation 1.1**. We particularly want to stress that the new public meeting envisioned in the staff recommendation should be timed to maximize the effect of public input. We believe this can be achieved by strategically timing the first public meeting during the technical review process for a permit application, and before internal and administrative decisions are made on the draft permit. The single public meeting that TCEQ sometimes holds after a draft permit has been issued happens at a point when public input has little to no effect on the remainder of the permit application process.

We support **recommendations 1.2, 1.3, and 1.4**. With respect to recommendation 1.3, we wish to clarify that the recommendations related to TCEQ's guidance on affected person determinations would not preclude the ability of the State Office of Administrative Hearings, during the contested case process, or by the courts, in judicial review, to designate affected persons differently than TCEQ guidance.

We offer an additional modification to Issue 1 with respect to public participation in the National Pollutant Discharge Elimination System (NPDES) program. The Clean Water Act requires that public participation be provided for, encouraged, and assisted by states administering their own PDES program.<sup>1</sup> Public participation is specifically anticipated with regard to a determination that issuance of a permit will be consistent with the Tier II

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<sup>1</sup> CWA § 101(e) (33 U.S.C. 1251(e)).

anti-degradation policy.<sup>2</sup> However, TCEQ's processes undermine the intent of these public participation provisions in several ways:

- how the agency considers relevant information provided by the public in the permitting process;
- how the agency fails to provide stormwater pollution prevention plans in response to public information act requests; and
- how the agency fails to require compliance with all numeric water quality criteria for dissolved oxygen.

Each of these shortcomings require changes in agency practice. To remedy this, we urge the Sunset Commission to consider the following modification.

- Repeal section 2003.047(i-1), (i-2), and (i-3), Texas Government Code, to better ensure that effluent limitations in permits comply with applicable water quality standards. TCEQ must also be directed to consider relevant information provided by the public in the permitting process, provide stormwater pollution prevention plans in response to public information act requests, and require compliance with all numeric water quality criteria for dissolved oxygen.

We support staff **recommendations 2.1, 2.2, 2.3 and 2.4**. However, we would note that a number of organizations believe these recommendations must be strengthened with additional requirements related to stronger enforcement practices. Those issues are being raised through separate correspondence on the need for a more robust enforcement and compliance regime.

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.

Local work plans should be revised more often than every 10 years as study results become available, as challenges to implementing adopted flow standards are identified in the permitting process, and as options for affirmative strategies are identified. Unfortunately, without an initial approval of the workplans by the Environmental Flows Advisory Group<sup>3</sup> (EFAG) and without the ongoing support of BBESTs, those initial local

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<sup>2</sup> 40 C.F.R. 122.12(a).

<sup>3</sup> As noted in the staff report, the EFAG approved only the work plan from the Sabine/Neches BBASC. Neither the BBASC nor the associated BBEST has met since the work plan was approved. Most of the other BBASCs continued

work plans have never been updated. As a result, the work plans do not reflect the results of various completed studies and do not reflect challenges identified as the adopted flow standards were applied to specific permit applications.

The recommendation for abolishing and re-establishing BBASCs and BBESTs for each round of adaptive management would be inefficient and counterproductive. There was a steep learning curve for many BBASC and BBEST members and ensuring ongoing involvement of willing members would help to facilitate a well-informed adaptive management process as flow-standards are revised. Although those groups need not be highly active throughout the periods between development of recommendations for revised flow standards, maintaining some level of ongoing participation would ensure that learning is passed forward, even as there is turnover in individual members, from one review cycle to the next. In addition, providing for ongoing updates to local work plans that build on the results of individual studies and monitoring efforts, and on the challenges identified in the permitting process, will set the stage for a successful flow standards revision process. Like the BBASCs, the BBESTs play a critical role as the technical advisors for the BBASCs. The uncompensated members of the BBASCs are not technical experts and need the support of the BBESTs to complete the required work.

The staff recommendation calls for having the EFAG develop a statewide work plan every two years and focuses on state agency input into development of the work plan. It is unclear what, if any, level of local input into that effort is intended, since, under the staff recommendation, individual BBASCs and BBESTs would only be active about once every 10 years. A better approach would be to charge BBASCs and BBESTs with proposing basin-specific, and cross-basin, studies and monitoring efforts for potential inclusion in the biennial work plans. One of the key agreements that underpinned the SB 3 environmental flows process was an effort to ensure that local issues and concerns, which can vary geographically, are considered and addressed.

SB 3 also charges BBASCs with identifying affirmative strategies to help meet environmental flow needs.<sup>4</sup> Because of the time pressure BBASCs faced in developing recommendations for flow standards and draft work plans, those few BBASCs that did consider affirmative strategies were able to do so only on a conceptual level. As part of the adaptive management process, a few studies funded through the TWDB process assessed specific potential affirmative strategies. With a more focused effort going forward that builds on the required EFAG analyses of strategy options yet to be undertaken, potential affirmative strategies for flow protection identified by BBASCs could be considered during the state's water planning and flood planning processes to advance a more holistic approach to water management.

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to meet periodically to provide input to TWDB on recommended studies and to receive feedback on study results. However, particularly with the onset of COVID-19, no meetings have been held recently.

<sup>4</sup> Tex. Water Code §11.02362 (o) directs BBASCs to develop recommendations for "strategies to meet the environmental flow standards."

- 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.

The EFAG is charged with more than just overseeing the process of adoption of flow standards and appointing the members of the Science Advisory Committee and the various Basin and Bay Area Stakeholder Committees. As one of its critical tasks, although one not yet pursued, the EFAG is charged with studying approaches for meeting environmental flow needs through improved administration and enforcement of water rights<sup>5</sup> and through means to incentivize conversion of existing rights to flow protection (generically referred to in SB 3 as affirmative strategies).<sup>6</sup> The ever increasing challenges of effective administration and enforcement are aptly illustrated in TCEQ's June 9 response to recommendation 3.3 of the Staff Report. If it is true, as the agency asserts, that the water made available by canceling unused rights basically would all be used to satisfy other existing rights, then it seems clear we need a more robust enforcement approach than the state currently has outside of watermaster areas. Because so many perpetual water rights, and those with the most senior priority, have been issued without consideration of impacts on environmental flows, implementing set asides and including flow-protection permit conditions in new permits, while critically important, will not be sufficient to protect healthy aquatic ecosystems. Affirmative strategies have to be identified and pursued to address those impacts.

A statutory directive to the EFAG for creation of a panel of flow-protection experts—experts familiar with approaches used in Texas and beyond—to develop recommendations addressing enforcement and flow protection approaches for consideration by the EFAG would help advance this essential undertaking. For nonregulatory protection approaches, the EFAG recommendations should be pursued by BBASCs working on the local level, by water planning and flood planning groups, and by Texas Parks and Wildlife Department (TPWD) in implementing its new responsibilities with the Texas Water Trust.

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<sup>5</sup> Tex. Water Code § 11.0236 (i)(1). Expanded watermaster programs might be one such approach. For much of the state, water rights are administered primarily on an honor system with a complaints-based enforcement approach, which involves little ongoing oversight by TCEQ except during extreme drought. In some areas of the state, primarily areas where competing demands already regularly exceed supply, watermaster programs have been created, either through a court action (Tex. Water Code §§11.401-.409) or a TCEQ decision (Tex. Water Code §§11.451-.458), to ensure day-to-day management consistent with water right authorizations, including flow protection.

<sup>6</sup> Tex. Water Code § 11.0236 (i)(2). As discussed below, regarding Recommendation 3.3, enhanced use of the Texas Water Trust could be one such approach.

- 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.

Each of the state agencies involved in the environmental flows process has specific roles and areas of expertise. Rather than assigning any one agency the task of compiling the draft overall statewide work plan, the Science Advisory Committee (SAC) should be charged with overseeing that exercise. Consistent with existing reporting requirements, the SAC would direct each agency to provide relevant content on the agency's statewide efforts and would incorporate, as determined appropriate, content submitted by BBASCs on activities at the local level. That approach would provide a comprehensive progress report and a guide for work during the upcoming biennium. In addition to identifying both completed and needed studies and monitoring, such work plans also should include updates on the progress made by each of the agencies to advance flow protection. Such updates would cover progress on adopting set asides and implementing flow standards in permitting (TCEQ), on incorporating comprehensive consideration of environmental flow needs into the water and flood planning processes (Texas Water Development Board), and on getting rights placed in the Texas Water Trust (TPWD). To the extent information is available to the SAC, the work plans also should highlight progress made on flow protection through other public and private efforts.

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.

During the meeting held pursuant to Tex. Water Code 35.007, TCEQ and TWDB "identify...those areas of the state that are experiencing or that are expected to experience, within the immediately following 50-year period, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies."

This initial meeting is an important opportunity for the public to provide input and the agencies to consider whether "critical groundwater problems" exist, including within previously designated PGMA's, even after creation of GCDs. The creation of a GCD within a PGMA does not automatically resolve "critical groundwater problems" as described above. This is particularly true if GCDs are not well funded and have limited ability to regulate groundwater production, because, for example, if major pumpers are "grandfathered" and not subject to regulation or because of a proliferation of exempt wells pumping.

As groundwater resources decline in the future due to increased pumping or drought, the PGMA process will be even more important.

- 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.

Local management of groundwater is the state’s preferred approach, and the PGMA process provides a critical opportunity for identifying state-level assistance to facilitate effective local management that ensures groundwater resources are well managed (locally) and drinking water supplies are protected.

With respect to **recommendation 3.3**, we offer the following modifications to avoid unintended impacts and better ensure that the review and cancellation process allows for full consideration of impacts, especially to the environment. In the absence of appropriate safeguards, the threat of an active cancellation process can encourage wasteful use of state water, resulting in reduced stream flows.<sup>7</sup> To help minimize the incentive for water right holders to use water unnecessarily in response to an active water rights cancellation process, it will be critically important to explore the potential for converting some of the potentially canceled rights to flow protection purposes in lieu of cancellation, such as by placing rights in the Texas Water Trust.<sup>8</sup> Placing water rights in the Texas Water Trust, which would only happen on a voluntary basis, would improve flow protection. That improved protection would also benefit new and existing water rights because rights held in the Trust would not be diverted and could be relied upon to help meet environmental flow needs, including by reducing adverse impacts on threatened or endangered species, that might otherwise constrain the exercise of other water rights. Pursuant to HB 2225 from the 87<sup>th</sup> Regular Session,<sup>9</sup> TPWD now is charged with working with water right holders to help get rights placed in the Trust, where they are protected from cancellation.

As acknowledged in the staff report, despite the directive of Water Code Section 11.1471 (a)(2) adopted in 2007, TCEQ has not established any set asides of unappropriated water. Because cancellation of water rights would result in unappropriated water becoming available, TCEQ should be directed, when canceling rights, to assess the potential to set aside that water for flow protection purposes. Water set aside for flow protection as a result of cancellations would

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<sup>7</sup> By diverting water under a right, the water right holder can escape cancellation, regardless of whether the use is efficient.

<sup>8</sup> Tex. Water Code § 15.7031. Rights placed in the Trust, either for a term of years or perpetually, for environmental flow protection are protected from cancellation in recognition of the dedication to use for flow protection. See 30 TAC § 297.71 (b)(3).

<sup>9</sup> See Tex. Parks & Wildlife Code § 12.028.

benefit other water rights for the same reasons discussed above for placement of rights in the Trust. We offer the following modifications to recommendation 3.3.

- 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.

Finally, we support **recommendations 4.1 and 4.2.**

### **New Issues and Recommendations**

In addition to the recommendations identified in the staff report, TCEQ’s operations and effectiveness could be improved in several areas. Below, please find a brief discussion of the issues we are raising and additional recommendations for the Sunset Commission’s consideration.

#### *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 following table is composed of selected, though inexhaustive, examples of long-standing impaired waters with needed TMDLs.

<b>Segment ID – Description</b>	<b>Year First Listed</b>	<b>Impairment</b>
SegID: 2311 Upper Pecos River	2006	• Depressed dissolved oxygen
SegID: 1806 – Guadalupe River Above Canyon Lake	2002	• Bacteria in water
SegID: 0604D – Piney Creek	2004 / 2006	• Depressed dissolved oxygen (2004) • Bacteria in water (2006)

SegID: 2485 – Oso Bay	1996	• Depressed dissolved oxygen
SegID: 2201 – Arroyo Colorado Tidal	2006, 1996, 2008, 2008	• Bacteria in water (2006) • Depressed dissolved oxygen (1996) • Mercury in edible tissue (2008)
SegID: 2491 – Laguna Madre	2010, 1999	• Bacteria in water (2010) • Depressed dissolved oxygen (1999)

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.

The aforementioned impacts are examples pulled solely from the impairments listed in the table above and are not intended to be exhaustive of potential harms from existing and ongoing impairments to Texas waters. 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:

- Direct 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.
- Require 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.
- Require 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. However, the level of naturally occurring phosphorus in the river is lower — much, much lower. A 2007 USGS study found that the total phosphorus level in the river upstream from the outfall of Liberty Hill’s treatment plant was only 0.006 mg/ L. Sampling by the City of Austin’s Watershed Protection Department indicated that the phosphorus level could be as low as 0.003 mg/L. Multiple research studies have shown that adding phosphorus to low-phosphorus streams can cause out-of-control algae blooms.

The text box in the Sunset staff’s report also doesn’t say why affected parties are pursuing a contested case against Liberty Hill. The effect of discharging wastewater that may contain 83 to 167 times more phosphorus than what’s naturally present in the South San Gabriel River has been disastrous. Since TCEQ approved Liberty Hill’s current permit, the river has been regularly clogged with algae, often for more than three miles below the outfall. The algae has been persistent, preventing residents from swimming or fishing in the river. According to a statement by one of the affected parties in the contested case, “The river is only cleared when heavy rains fill the river and wash the water and riverbed clean, such as the flooding in fall 2018. Once the rain stops, algae rapidly returns to the 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.<sup>10</sup> 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

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<sup>10</sup> "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](https://www.tceq.texas.gov/assets/public/waterquality/swqm/assess/20txir/2020_303d.pdf).

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 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.<sup>11</sup> 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.<sup>12</sup> 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

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<sup>11</sup> 40 C.F.R. 122.44(d), applicable to states pursuant to 123.25.

<sup>12</sup> Texas Commission on Environmental Quality. “Procedures to Implement the Texas Water Quality Standards” RG-194, June 2010, at 65-66.

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.

- 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.

- Direct TCEQ to require water quality standards to incorporate non-discharge alternative requirements.

These requirements should be analogous to those set forth in the Pennsylvania Code.<sup>13</sup> 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

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<sup>13</sup> 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.

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.<sup>14</sup>

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 Act<sup>15</sup>, 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.<sup>16</sup>

- 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.

### *Facilitating One Water Approaches*

In Texas and across the country, freshwater sources are dwindling. Yet the demand for freshwater continues to grow due to pressures from development and climate change. One Water is integrated urban water management where communities use all sources of water in the urban landscape – from surface water, groundwater, rainwater, stormwater, and wastewater to promote sustainability, increase water quality, and decrease reliance on source waters important to our environment.

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<sup>14</sup> Texas Administrative Code, Chapter 311, Subchapter J.

<sup>15</sup> Texas Natural Resources Code Chapter 134.

<sup>16</sup> 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.

One Water approaches are an important tool in Texas' efforts to sustainably manage a limited resource. However, because they are innovative tools, regulatory guidance on how communities can build and permit One Water facilities lag behind communities' desires to deploy these strategies, creating uncertainty and expense to navigate a complex and unclear regulatory environment – disincentivizing the integration of these water supply strategies.

- Direct TCEQ to develop comprehensive regulations, including risk-based health and safety standards, to guide local governments in creating onsite non-potable water reuse programs.
- Direct TCEQ to develop a specific permitting program for direct potable reuse facilities. This would build off efforts to develop guidance for direct potable reuse required by SB 905 (87R).
- Require amendment to Chapter 341 of the Health and Safety Code to express a preferred policy for both “regional and area-wide drinking water systems,” (current language) by adding decentralized approaches to managing water resources, where appropriate, to encourage local water reuse.

Currently, Chapter 341 of the Health and Safety code expresses a preferred preference for “regional and area-wide drinking water systems”. While this is appropriate for many communities, particularly for small systems that can struggle with finances and compliance, sometimes a decentralized approach – inherent in One Water – is more appropriate. To meaningfully advance One Water projects in Texas in the future, the state must transition from a water management policy that favors “regionalization” to one that also embraces a decentralized and integrative framework - where the regulatory structure supports the vision that all water sources in the urban water cycle are resources that must be holistically managed.

- Direct TCEQ to develop a specific permitting process for public water systems wishing to use rainwater as a water supply source.

Nothing exists in Texas law or Commission regulations that forbids a public water system from using rainwater as a water supply, but the Commission does not have specific rules that relate to rainwater as a public water supply source. Instead, the Commission treats rainwater as surface water for public drinking water purposes and regulates its quality under the state's public drinking water rules in 30 TAC, Chapter 290. This means that an entity who meets the definition of a public water system and who wishes to use rainwater as a water supply must comply with all of the regulations that are applicable to public water systems, such as treatment, disinfection, monitoring, reporting, and operating requirements. These requirements can be onerous for a small system, such as a small business, a school, or a church.

- Direct TCEQ to directly authorize direct and indirect potable reuse in 341, H&S and require TCEQ to establish guidance.

### *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 and other agencies 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 public property like 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 formal TCEQ 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. Opportunity for that participation can be ensured while maintaining the prohibition on other agencies challenging TCEQ 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.

We very much appreciate the work of staff in their review of TCEQ and the opportunity to submit additional recommendations for consideration. We look forward to working with the Sunset Advisory Commission and the Legislature on TCEQ's Sunset bill. Please reach out to any of the organizations below for more information on these issues. Under separate cover, some of our organizations will also be submitting other recommendations, which are in addition to those found here.

Sincerely,

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