

TCEQ Sunset written testimony

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My name is Eric Allmon. For more than 20 years I have participated in the TCEQ permitting process. Initially, I served as an attorney within the TCEQ Office of the Public Interest Counsel. Since 2005, I have worked representing individuals, local citizen groups, national non-profit organizations and international corporations in the TCEQ permitting process. I offer this testimony on behalf of myself and Ingleside on the Bay Coastal Watch Association.

**I. Affected Person Issues**

The Sunset Commission staff have recommended that TCEQ create clearer standards for determining who is considered an affected person. It is a valid concern that unwritten rules of thumb have become treated as virtually binding by the Commission, and I support a transparent process. But, there are significant considerations that must be kept in mind as either the TCEQ or the Legislature seek to adopt further standards for who will (and who won't) be considered an "affected person."

Each federal program administered by the TCEQ (*i.e.*, air quality permitting, water quality permitting, and injection well permitting) requires that Texas provide an opportunity for judicial review equivalent to that that would be available if EPA were itself administering the program. This means that standing to pursue judicial review of TCEQ permit decisions in such programs must be available to all persons with Article III standing without unreasonable procedural burdens. In 1998, when Texas obtained delegated authority to administer the federal water quality permitting program, the Texas Attorney General assured the EPA that Texas Water code § 5.351 provided an independent avenue of judicial review for persons who did not request a contested case hearing.<sup>1</sup> Texas further represented to EPA that decisions on "affected person" status would not be binding on standing to pursue judicial review.<sup>2</sup> EPA granted Texas' delegated authority based explicitly on those representations.

However, in 2016 the Austin Court of Appeals upended those representations. In the case of *Sierra Club and Public Citizen v. Texas Commission on Environmental Quality*, the Austin Court of Appeals held that a person must request a contested case hearing, and be *granted* a contested case hearing in order to pursue judicial review of a TCEQ decision.<sup>3</sup> The Austin Court of Appeals rejected the contention that Texas Water Code § 5.351 provided an independent route of judicial review for persons who were not granted a contested case hearing.<sup>4</sup> In so doing, the Austin Court

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<sup>1</sup> State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas, 63 Fed. Reg. 51164-01, 51170- 51171 (Sep. 14, 1998).

<sup>2</sup> *Id.*

<sup>3</sup> *Sierra Club and Public Citizen v. Texas Commission on Environmental Quality*, 2016 WL 1304928 (Tex. App. – Austin, March 31, 2016)

<sup>4</sup> *Id.* at \*4.

of Appeals held that under the current statutory structure the contested case hearing process is a step in the judicial review process in Texas, and the ability of a person to be considered an “affected person” to obtain a hearing is a requisite to the pursuit of judicial review.

If this holding by the Austin Court of Appeals is correct, then the Legislature must be very careful in crafting the standards for who may be considered an “affected person,” since it would also be creating standards for who may pursue a judicial review under the *Sierra Club* case. Those standards would need to encompass all persons with Article III standing under the United States Constitution. If the Legislature amended Texas Water Code § 5.351 to explicitly allow persons to pursue judicial review of a TCEQ permitting decision even without requesting and obtaining a contested case hearing, then this problem would be avoided. That “safety valve” would ensure that limits on who may be considered an affected person do not create limits on who may pursue judicial review of a TCEQ decision.

As the Legislature examines questions of who may be considered an “affected person,” it would be worthwhile for the Legislature to consider the inequities created by the current limits on who may be considered an affected person with regard to a concrete batch plant standard permit. Texas Health & Safety Code § 382.058(c) limits affected persons for such applications to only persons residing in a permanent residence within 440 yards of the proposed plant. This prevents persons from participating in the permitting process who clearly have impacted interests. For example, at one point a medical facility located immediately across the street from a proposed concrete batch plant was denied party status due to this statute. Likewise, a school located within 440 yards of a plant had no right to seek a hearing. Recently, an RV business with an amenity center located less than 440 yards from a proposed plant was denied party status. Such medical facilities, schools and businesses should have the ability to fully participate in the permitting process. Given the nature of Texas caselaw, it is possible that some would argue that such persons have no right of judicial review, since they have no right to a contested case hearing. This would be a clear violation of the conditions of Texas’ delegated authority over federal programs.

## **II. Enhanced Public Participation**

There are simple but important steps that the Legislature can take to enhance public participation in the TCEQ permitting process.

### **A. Internet Availability of Permit Applications**

Since 2006, TCEQ applications for municipal solid waste facilities and all modifications and amendments to those applications have been available on the internet throughout the permitting process.<sup>5</sup> The applicants for such permits are required to ensure that the applications are posted, so the posting of the applications does not involve any expense by the TCEQ.<sup>6</sup> This

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<sup>5</sup> See 30 TAC §330.57(i)(1).

<sup>6</sup> See, e.g., <https://www.intera.com/permits/>.

posting has greatly facilitated public participation in such applications. For solid waste facilities, the public does not encounter the hurdles that exist for the review of other types of applications. Such hurdles can include limited hours of accessibility, staff at a location who do not know where the application is kept at the location (or aren't aware that it is stored at a location at all), significant distances to drive to a location, and a lack of cooperation by site personnel in allowing copying of material.<sup>7</sup>

There is no valid reason why all TCEQ applications for permits subject to a contested case hearing cannot be posted online.<sup>8</sup> The sophistication required to complete such an application requires involvement of an engineering firm, and any engineering firm with any sophistication has the ability to simply have the electronic permit application documents posted online. TCEQ has previously denied a rulemaking petition seeking adoption of a rule requiring that all individual permit applications be posted on the internet.

This would not only make life easier for the public. It would also make life easier for TCEQ personnel. Currently, if a member of the public wishes to obtain a copy of a permit application from the agency the public must make that request through a public information act request. TCEQ staff must then spend time processing the request, locating the application materials, and communicating those materials to the requester. This results in a cost to the public for the staff time spent, and the diversion of staff time that could have been spent on other tasks. The posting of material on the internet would be a simple means of avoiding these costs. Upon submission to the TCEQ, the application is a public document that belongs to the public. It would be appropriate for the public to have meaningful and efficient access to that document.

**B. Parties should not be effectively barred from discovering an opposing witness's opinions.**

In 2011 and 2015, the Texas Legislature made changes to the contested case hearing process. Experience with those changes reveals improvements that can, and should, be made.

Currently, TCEQ contested cases are subject to a default discovery cutoff that is nonsensical. Pursuant to Texas Water Code § 5.315, all discovery on a party in a TCEQ permitting case must end when the party submits its pre-filed testimony. This has led to absurd results. Unlike state or federal trials, TCEQ permit matters move too quickly for experts to put together expert reports prior to the submission of testimony. Thus, the pre-filed testimony is often the first time that an expert's opinions become fully known. Frequently, an expert does not finally develop their

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<sup>7</sup> In at least one case, a librarian opposed the efforts by a member of the public to make copies of an application stored at a library. In another case, an application was placed in a school library which was closed for a significant portion of the comment period due to Spring Break.

<sup>8</sup> This encompasses all individual air, water, and waste permits. Certain air standard permit applications (like concrete batch plants) are subject to a contested case hearing, which it would be appropriate to require posting on the internet, and certain wastewater general permit applications (such as concentrated animal feeding operations located in the Bosque watershed) are subject to a contested case hearing, which it would be appropriate to require posting on the internet.

opinions until the day that the expert's prefiled testimony is submitted. In most cases, this is not due to any bad faith on the part of the expert or legal counsel. Rather, procrastination is widespread in the modern world. On one occasion, I deposed an expert less than 24 hours prior to the deadline for the submission of the expert's prefiled testimony. In deposition, the expert said on many topics that he had not developed his opinions yet. Once his opinions were disclosed the next day, no discovery regarding those opinions was allowed under 5.315. This is ridiculous. Litigation counsel who generally participate in state and federal trials find such a nonsensical deadline antithetical to a genuine discovery of the relevant facts and opinions.

Texas Water Code § 5.315 should be repealed.

**C. The entirety of the administrative record (including hearsay) should not automatically be admitted into evidence for all purposes.**

Senate Bill 709 provided that the filing of the administrative record creates a prima facie presumption that the draft permit meets relevant regulatory requirements. However, TCEQ has gone beyond this to require, by rule, that the ALJ *shall* admit the administrative record into evidence *for all purposes*.<sup>9</sup> This is directly contrary to the provisions of the Texas Administrative Procedures Act that contested case hearings are to be governed by the Texas Rules of Evidence. The administrative record may contain numerous examples of hearsay, and may contain expert opinions that are properly subject to examination to determine whether they are relevant and reliable. By statute, the Legislature should provide that consideration of the Administrative Record is subject to the Texas Rules of Evidence, just as all other information submitted for consideration in a contested case hearing.

**D. Comments by a member of an organization should allow the organization to request a hearing.**

The limitation that only commenters may request a contested case hearing has had unintended consequences. Local communities will often take time to understand the process, and it may be only individuals that will submit comments during the public comment period, while the community may later form an organization. Under current law, that organization is prohibited from requesting a contested case hearing. This burdens the process with the need for all individuals to separately request a hearing. The process would be much more efficient if the organization could submit a hearing request, identifying the members of the organization who filed comments, with limitation on the organization only having the right to seek a hearing on issues raised by its named members. This would not result in surprise to an applicant, while making the process more straightforward for the public

**III. Lessons from the Pandemic should be acted on.**

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<sup>9</sup> 30 TAC 80.127(h).

The pandemic has forced TCEQ and SOAH to adjust how business is conducted, and many of those changes have proven helpful to fostering public participation. In such instances, TCEQ and SOAH should be allowed to continue to conduct proceedings in a manner that facilitates public participation. This includes entitling parties to the following upon request of one of the parties:

- Virtual hearings
- Virtual depositions
- Virtual public meetings

The conduct of matters virtually has not only assisted the public. TCEQ staff have also had their burdens reduced because attendance at public meetings, and attendance at hearings to testify at witnesses, is significantly less burdensome when the proceeding is conducted virtually.

#### **IV. Environmental Justice should be a greater priority**

Increasingly there is a recognition that environmental impacts are not felt evenly in society, and that some communities bear a disproportionate share of the burden of environmental degradation. This concept is known as “environmental justice” and has long been a factor that Texas is supposed to consider in administering all federally-delegated programs in order to maintain compliance with Title IV of the Civil Rights Act of 1965. Yet, such concerns do not garner sufficient consideration by the TCEQ. For example, TCEQ refuses to consider the evaluation of environmental justice impacts as an issue factor appropriate for referral for a contested case hearing. In the landfill area, TCEQ has held that environmental justice concerns do not warrant consideration in deciding whether to grant or deny a permit. It should be made clear that environmental justice issues are a relevant consideration in TCEQ’s evaluation of permitting decisions.

#### **V. Conclusion**

TCEQ, and the TCEQ staff, bear an enormous responsibility to protect human health and the environment within the State of Texas. In many respects, the agency and staff further this goal well. But, there remains room for improvement. The Sunset process provides that opportunity to evaluate where problems exist, and improvements can be made.