



June 22, 2022

Texas Sunset Advisory Commission  
PO Box 13066  
Austin, TX 78711

To Whom It May Concern:

We submit these comments on behalf of Save Our Springs Alliance, a non-profit organization that has worked to protect the Edwards Aquifer for nearly three decades. We appreciate the opportunity to provide comments on the Sunset Commission's staff report on the Texas Commission on Environmental Quality (TCEQ), and we are writing to make two recommendations to the Commission. These recommendations address some of the items raised under Issue 1 of the staff report and would improve the TCEQ's public engagement process while contributing to TCEQ's mission of environmental protection.

First, we would remind TCEQ of the Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency (EPA) and TCEQ delegating the Texas Pollutant Discharge Elimination System (TPDES) program to TCEQ. When reviewing a permit application under this program, TCEQ – according to the MOA – is required to “transmit the draft permit to EPA at the same time as it issues public notice.”

In our organization's years of experience with such cases, TCEQ frequently violates this requirement in the MOA by sending TPDES applications and draft permits to EPA much earlier than any public notice or chance for public comment is provided. EPA then approves the application and draft permit despite not having received public input. Then, when any public hearing ultimately does take place, TCEQ refers to the approval from EPA as a justification for approving the draft permit. This is not the correct order of operations. We recommend instead that TCEQ comply with the MOA and provide the public with the opportunity to submit comments in such a time frame that they may be considered by EPA; we urge TCEQ to wait and send TPDES draft permits to EPA when the public has had time to comment so that the EPA may provide more meaningful review of the draft permit.

A recent example of this violation occurred in the case of an application from Kendall West Utility for a TPDES permit. The application and draft permit were provided by TCEQ to EPA five weeks prior to the publishing of the public notice for the draft permit. Thus, TCEQ deprived the public of the opportunity to provide EPA with information about the draft permit that may have informed EPA's review of the draft permit. We advise that TCEQ adhere to the requirements of the MOA in such cases going forward.

*Austin's water watchdog since 1992*

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Our second point considers how TCEQ determines “affected persons” in wastewater permit applications. The MOA between the TCEQ and the EPA states that “TCEQ shall...not oppose intervention in a contested case enforcement hearing on a TPDES permit by a citizen who has standing to intervene pursuant to 30 TAC §80.109.” That section in the Texas Administrative Code cites §55.203, which provides a list of factors to be considered when determining if a person is a suitable party to a lawsuit with claim to injury.

We recommend clearer direction for applying these factors when determining affected persons status and standing, to include specifically the protection of recreational interests. We suggest looking to the U.S. Supreme Court and following federal law on this issue, a course of action that is well within the bounds of TCEQ’s MOA with EPA, which states: “The TCEQ shall operate the TPDES program in accordance with the Clean Water Act as amended, applicable federal regulations, applicable TCEQ legal authority, applicable state statutes and rules, and taking into consideration published EPA policy.” Under such guidance from federal law, we posit that TCEQ can and should broaden their interpretation of affected persons to include all Texans who recreate in an affected waterbody and explicitly grant affected persons status based on recreational harm, not just the property interests of adjacent, downstream landowners.

We Texans have a rich and beautiful history with our natural resources. We have been able to swim, fish, and otherwise use our local waters for generations, and we deserve the right to continue to do so for generations to come. Since *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), harm to a plaintiff in an environmental suit can be based upon recreational interests—and the loss of recreational opportunities, especially when the lawsuit involves a specific resource and concrete harms. Texans should have the opportunity to protect their waterways from pollution and other threats, even if they do not own property within an arbitrary distance of one mile from a discharge site.

Thank you for considering these comments.

Sincerely,

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