

Comments by the Friends of Hondo Canyon on the Sunset Review Report of TCEQ

We appreciate the Sunset Review Commission's excellent, fair and comprehensive review evaluating the Texas Commission on Environmental Quality (TCEQ). TCEQ is an essential agency. We need an effective agency to manage pollution in our state and to issue 'best practice' management permits. The comments below are in no way supporting or recommending reductions in funding for TCEQ; rather they are meant to strengthen the agency and to ensure that the public concerns are adequately addressed.

The Sunset Review has identified several problematic shortcomings, but falls short on naming the single policy problem that is responsible for these shortcomings: TCEQ, while charged with the role to protect and preserve environmental quality in Texas, is often rendered incapable of managing its job due to decisions of the executive director and upper level management to override staff science and common sense in favor of economic development.

ISSUE A: The Commissioners must retain the power to improve TCEQ.

From Page 1, Sunset review: ***"The Commissioners' lack of visibility in and ownership of TCEQ decision making has only inspired further frustration and distrust among both the regulated community and environmental advocates."***

We see this issue from a different perspective. In November 2021, our community group petitioned the TCEQ for a rule change to protect twenty-two (22) pristine stream segments in Texas from receiving treated domestic wastewater discharge.

The rule petition asked that TCEQ no longer consider applications for direct discharge of treated domestic wastewater effluent into the few classified stream segments (<1%) that have naturally undetectable phosphorus levels. Several TCEQ permits authorizing direct discharge of such treated domestic wastewater have been issued in these segments – resulting in extreme degradation and miles long algae blooms. These pristine stream segments simply cannot manage this type of wastewater effluent without harm.

Over 1300 public comments regarding the Rule Petition were received; only 6 comments opposed the rule change. No one provided oral testimony in opposition to our petition at the public Agenda Meeting on March 30, 2022. At the Agenda Meeting, TCEQ's Director of Water presented grossly incorrect statistics regarding the number of permits ("60" versus actually "16") that would not be able to expand their discharge volumes if the petition was approved. During their deliberations, the Commissioners stated they did not wish to make a ruling that would be viewed too great a 'lift' by legislators, yet all stated in no uncertain terms that these pristine streams needed urgent action to protect them. We the public were unaware that the Commissioners were unable to discuss their thoughts regarding our petition unless this discussion was held in a public forum. In the 2-1 decision, the rule change petition was denied, but all Commissioners agreed that an urgent stakeholder meeting should be held to find ways within the current TCEQ rules to protect these streams.

Despite 3 months of calls and individual meetings with each of the Commissioners to ask for follow-up action, TCEQ's Office of Water, who was deemed responsible for action, delayed and delayed. On June 8, 2022, an announcement of a tentative workshop date of August 31, 2022 was made. This workshop date is 5 months after the Agenda Meeting, a delay that belies the urgency expressed by the TCEQ Commissioners. The failure of both the Executive Director and the Office of Water to respond to the Commissioners' request for an urgent stakeholder meeting supports the Sunset Commission's observation, but suggests a different root cause to this problem.

Proposed Solution, Issue A:

Enforce the organizational chart depicted in Self Examination Report Section VI, page 95! The Executive Director, himself a former Commissioner, must bow to the authority of the Commissioners. In our specific situation, the Executive Director must oversee and ensure that the Commissioners request for an urgent public stakeholder meeting to protect these few remaining pristine stream segments be conducted, and this meeting results in meaningful changes in the permitting process that will protect these streams. The Commissioners stated in their denial that TCEQ already has the capability to protect these streams. Why these mechanisms have not been put in place, spearheaded by the Executive Director and the Office of Water, based on the ample evidence that permitted wastewater discharges have caused significant water quality degradation, is inexcusable. The Commissioners, who review contested permits, must retain oversight of the TCEQ permitting process to ensure that errors in issuing permits that cause unacceptable pollution are corrected in a timely and efficient manner.

ISSUE B: Landowner rights must be openly acknowledged and protected. (identified in Sunset Review under Issue 1 and Issue 2)

From Page 1. *"The agency often faces a frustrated public demanding action, but not always understanding TCEQ does not regulate every industrial practice and may not be able to prove a regulatory problem has occurred. On the other side, TCEQ faces industries that suggest most objections to their operations stem not from a provable environmental or public health issue, but from a "not in my back yard" (NIMBY) perspective that merely wants to prevent industrial activity in their own communities."*

From Page 13 *"Subject to certain federal and state requirements, TCEQ sets standards for what amount of pollution can be safely emitted into the air or discharged into the water, and how waste is managed."*

From Page 14, *"Many Texans both distrust and misunderstand TCEQ and the entities it regulates."*

From page 14. ***“TCEQ’S commission delegates certain key decisions that directly impact public health and natural resources to staff, further degrading public trust and transparency.”***

From Page 16. ***“As a result, by the time TCEQ proposed a draft permit, staff have essentially determined the draft permit terms comply with regulatory requirements, and only public comments on the adequacy of TCEQ’s technical or administrative review are likely to affect the permit.”***

From Page 29 ***“Once again, the Sunset review found TCEQ’s efforts do not effectively discourage violations and would benefit from adjustments to better incentivize compliance and focus attention on the riskiest actors.”***

From Page 37 ***“Increasing demands from the public to respond to nuisance complaints about facilities or conduct that poses little risk to public health or natural resources detract from TCEQ’s ability to inspect and investigate riskier facilities. Various statutory provisions, and most TCEQ-issued permits, include a prohibition against creating a nuisance, requiring TCEQ to respond to nuisance complaints.”***

The Sunset Commission has tried to address the failure of TCEQ to respond to public concerns, but even the Sunset’s assessment of the problem omits the elephant in the room: **Landowner Rights.** Both industry and the public understand full well that once a TCEQ permit is approved, very little will be done to address any unintended consequences of the permitted pollution.

Landowner rights are violated at all steps of TCEQ proceedings, creating ample opportunities for TCEQ to change their strategy, and actively engage the public in the decision making process.

PRE-APPLICATION. The TCEQ permitting process begins with encouraging an applicant to meet with TCEQ prior to submitting their application. Since TCEQ states that reduction in neighboring property values is not a valid reason to object to a permit, TCEQ is explicitly allowing applicants, both public and private, to use this “NIMBY” umbrella to hide their intention to conduct the most economically feasible means to send their pollution to neighbors as opposed to ensuring its treatment or management does not cause harm.

Landowners are not naïve. It is not simply the appraised value of their property and neighbors interests they wish to avoid seeing devalued. It is how a specific permit alters a landowner’s proximity to pollution that is the problem. This needs to be part of the pre-submission process: a factual discussion of the pollution problems associated with a particular permit, and what methods are available to the applicant to mitigate them. Landowner rights are violated when TCEQ considers permits to discharge treated domestic wastewater into pristine streams that are known to cause water quality degradation . Landowner rights are violated when TCEQ considers concrete batch plants and quarries permits that cause excessive noise and air pollution due to placement of such activity on acreages of insufficient size. The pre-application meeting should address these issues up front.

PUBLIC COMMENT PERIOD. Landowner concerns to be addressed by TCEQ are summarily dismissed in the formal “Response to Comments” from the Executive Director’s

office. TCEQ's response is that TCEQ is the 'expert' in this area, and the draft permit complies with all necessary requirements to minimize pollution. Specifically, the public has been summarily told that any draft permit modification must be made by the applicant, and not TCEQ.

Shifting the responsibility to make reasonable changes in the draft permit from TCEQ to the applicant has become so rife in the TCEQ culture that when an application contains factual errors, TCEQ accepts the errors even when challenged during the public comment period with facts presented by landowners. For example, in a recent water rights permit, the applicant denied the existence of a spring fed source to a longstanding impoundment – calling the creek 'ephemeral.' Despite extensive proof to the contrary, TCEQ's Office of Water has followed the dictum "the applicant knows best" and accepted that it is up to the applicant to describe and define their property, *even when that definition deprives downstream landowners of their rights to the historical flow of state waters from these headwater springs.*

The sunset report describes 'staff' as being responsible for the policy of refusing to modify a draft permit, but in my community's experience, the scientific staff are reasonable employees who understand that science should direct policy. It is the middle and upper management staff that are responsible for the failure to modify a draft permit based on credible concerns from the public. For example, when past experience indicates that effluent parameters proposed in a wastewater discharge permit has been found to result in stream degradation repeatedly, it is foolhardy for TCEQ management to continue to ignore citizens seeking stream water quality protection and recommend issuance of discharge permits containing such unprotective parameters.

PERMIT OVERSIGHT AND ENFORCEMENT. Landowners have experienced firsthand that once a wastewater discharge permit is issued, little recourse is available to correct and monitor problems. Landowner complaints regarding algal blooms can be dismissed as a 'nuisance' complaint if the permittee has been in compliance with the permit parameters. There is no regulatory process to properly address treated domestic wastewater permits when they have been associated with a distinct and unacceptable degradation in water quality. Permits have been issued based on TCEQ models containing imprecise inputs, resulting in the failure to predict the degradation of downstream water quality that has occurred, and will continue to occur, if the model is not corrected. The failure of TCEQ to update these computer model inputs, based on real life experience, is unacceptable.

Proposed Solution, Issue B:

Pre-Application. The Sunset Commission has proposed a solution – to place the applicant (instead of TCEQ) within the crosshairs of the public by conducting a public meeting prior to the issuing of a draft permit. This pre-draft permit public meeting could potentially allow the applicant to hear and measure the public's concerns and, hopefully, become fully acquainted with shortcomings in the TCEQ's staff rationale of having failed to utilize best science in its recommendations. Such a meeting could indeed be helpful, as long as TCEQ's sunset request to abandon in-person public meetings is not granted. Many of these challenging permit applications are associated with rapid population

growth in rural areas, e.g. the Texas Hill Country, where reliable internet access is unavailable, and many landowners are not comfortable with navigating the internet. A pre-draft public meeting with true dialogue might lead to the applicant to agree to more neighborly solutions to mitigate offsite pollution of neighboring properties.

Public Comment Period. The current TCEQ Executive Director's boilerplate Response to Comments process must not continue. If the public raises a scientific concern, then TCEQ's scientific staff should address the issue with a scientific response, not the middle and upper management response that simply state "we know what we are doing." If the TCEQ scientists find validity to the concern, then this should trigger a change in how permits are evaluated.

Permit Oversight and Compliance. Improving permit compliance would be another step acknowledging landowner rights. The TCEQ is reluctant to publish non-compliance with permits. Multiple NOV's might be issued, but the NOV's do not count towards the violators record. Later in the Sunset Review, it is explained that TCEQ proportions violations according to the graduated risk of the permit. We, the public, find this unacceptable. Every NOV should be counted as a strike against the permittee. It is only then that the public have some voice. The Sunset Review Commission has, in fact, recognized that non-compliance to procedures is not universally enforced. We, the public, agree, and want this changed. All complaints resulting in a NOV should be counted.

ISSUE C: Water impoundments rules are outdated and are causing harm. (Identified in Sunset Review as Issue 3)

The Sunset review focused on water rights permits, and omitted a significant problem: the current Texas Water Code allows any landowner to impound up to 200 acre-feet of state water for any reason. When a dam is built, it alters many significant factors – creating a barrier for fish spawning, increasing evaporative and seepage losses of water, reducing downstream environmental flow – to name a few.

Proposed Solution, Issue C:

There is no reasonable justification for continuing to have a 200 acre feet impoundment limit. Large ranches are being subdivided. A limit of 25 acre feet would be more appropriate. The 25 acre-feet limit is consistent with the pumping limit for a domestic and livestock well, which under common law, is exempt from the water rights adjudication process.

Respectfully submitted,
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