

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 9, 2022

Ms. Jennifer Jones  
Executive Director  
Texas Sunset Advisory Commission  
P.O. Box 13066  
Austin, Texas 78711

Dear Ms. Jones:

On behalf of its three commissioners, executive management, and staff, I am pleased to present the Texas Commission on Environmental Quality's response to the Texas Sunset Advisory Commission Staff Report.

To begin, we would like to express our appreciation for the many hours of hard work the Sunset staff dedicated to this review. As the review team noted in its report, the programs the TCEQ is charged with administering are complex. There are at least 45 programs described in the agency's self-evaluation report, covering topics as wide-ranging as dry cleaner remediation, stationary air monitoring, dam safety, landscape irrigation and tax relief for pollution control equipment. We are appreciative of their efforts to visit some of our 22 regional and satellite offices and observe a few of the approximately 250,000 regulated facilities with active TCEQ authorizations. We also appreciate their attending many of the various agency events held during the course of their review, including public meetings on permit applications, commission agendas, contested case hearings, stakeholder meetings, and the annual TCEQ Environmental Trade Fair. Throughout all of this, they frequently met with our staff and executive management and attended presentations developed for them by every program area.

Given the breadth of the responsibilities the agency is charged with, we commend the review team for its efforts to gain an understanding of what is within our statutory responsibilities and what is not. We believe this is vitally important, because as is reflected in the report, a lack of understanding of the limits of the agency's authority can lead to frustration on the part of the public.

While we question some of the word choices and opinions expressed by the Sunset staff, we welcome the opportunity to take a fresh look at our processes and take any measures needed to improve the way we do business and interface with the public. The work performed by this agency is vital to the protection of the state's natural resources. We're proud of the work we do and have a shared interest in increasing accessibility of our data and the transparency of our processes.

As the Sunset report noted, the agency is facing increasing demands and vacancies. Given these resource challenges, and additional resource needs to implement certain recommendations as discussed below, the agency is evaluating its staffing and funding needs. When appropriate, we will address these topics with the Sunset Commission and the legislature.

We offer our comments below for the Sunset Commission's consideration and look forward to further discussion on these issues and recommendations.

## **1 TCEQ's Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.**

1.1 Statutory - Clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit.

TCEQ defers to the legislature on this recommendation. Based on its wording, TCEQ assumes the recommendation is directed at case-by-case permit applications, which are subject to two notices. An initial notice is made after the application is declared administratively complete and the second notice issues once the draft permit has been prepared. Currently, there is an opportunity for a public meeting on such applications, which is generally held after the draft permit is issued. In addition, there is a right to a contested case hearing for persons or entities that demonstrate they are an affected person. The agency anticipates that requiring another public meeting (i.e., when the application is administratively complete) would increase the permit processing timeframes. Further, that early in the process, TCEQ will not have developed a working knowledge of the permit application. Because of this, staff may be unable to answer questions from the public, which can lead to frustration. The agency anticipates a request for additional funds to support a meeting facilitator, staff time and travel expenses.

1.2 Management Action - Direct the commission to vote in a public meeting on key foundational policy decisions that establish how staff approach permitting and other regulatory actions.

TCEQ is neutral on this recommendation. The agency will review processes to determine areas where the Commission has an opportunity to publicly adopt policy standards.

1.3 Direct TCEQ to develop a guidance document to explain how it uses the factors in rule to make affected person determinations.

TCEQ is neutral on this recommendation. The agency will develop a guidance document that supports affected person status as defined by statute and rule.

1.4 Direct TCEQ to adopt a policy guiding its rule review process to ensure that identified deficiencies in the rules are addressed.

TCEQ agrees with this recommendation. The agency will adopt a rule review process and post it on the agency's webpage. A copy will be provided to the Sunset Commission by April 12, 2023.

1.5 Direct TCEQ to review and update its website to improve accessibility and functionality.

TCEQ agrees with this recommendation. The agency has made strides to improve the public's interaction through its website, such as moving to web-based technology, improving navigation, and incorporating responsive design. Additional funding and resources will be needed to implement this recommendation.

1.6 Direct TCEQ to evaluate its current use of advisory committees to provide more public involvement in rulemaking and other decision-making processes, and continue advisory committees by rule, as appropriate.

TCEQ is neutral on this recommendation. The agency will evaluate its use of advisory committees and amend associated rules, as appropriate.

## **2 TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable.**

2.1 Require TCEQ's compliance history rating formula to consider all evidence of noncompliance while decreasing the current emphasis on site complexity, and direct the agency to regularly update compliance history ratings.

TCEQ defers to the legislature on this recommendation. Additional funding and resources will be needed to upgrade the compliance history database to incorporate additional violations and more frequently calculate compliance history ratings.

2.2 Require TCEQ to consider all violations when classifying an entity as a repeat violator.

TCEQ defers to the legislature on this recommendation. Additional funding will be needed to update the compliance history database.

2.3 Require TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operational status.

TCEQ defers to the legislature on this recommendation. Additional funding will be needed to update the databases that store permitting information to allow entities to report their operational status.

2.4 Direct TCEQ to reclassify recordkeeping violations based on the potential risk and severity of the violation.

TCEQ agrees with this recommendation. The agency will evaluate the Enforcement Initiation Criteria for recordkeeping violations and adjust as needed.

2.5 Direct TCEQ to develop and implement clear guidance to evaluate affirmative defense requests for air emissions.

TCEQ agrees with this recommendation. In FY 2020, the agency initiated a review of its emissions event investigation process, including an examination of affirmative defense evaluations. To promote consistency, the agency created a centralized Emissions Event Review Section to review all reported emissions events. Continuing with these efforts, and in response to this recommendation, the agency will ensure that there is clear guidance for evaluating affirmative defense claims and an agency-wide approach to provide transparent and consistent evaluations.

2.6 Direct TCEQ to modify its approach to nuisance complaints to make better use of the agency's investigative resources.

TCEQ agrees with this recommendation.

## **3 TCEQ's Oversight of Water Could Better Protect the State's Scarce Resources.**

3.1 Remove the abolishment clause for the E- Flows Advisory Group and E- Flows Science Advisory Committee, and require the advisory group to adopt a biennial statewide work plan for adaptive management updates of environmental flow standards.

TCEQ defers to the legislature on this recommendation. The TCEQ supports adaptive management for environmental flows in the water rights process and will continue to provide this support and follow the adaptive management process outlined in statute.

3.2 Statutory - Require TCEQ to hold its annual meeting regarding priority groundwater management area studies in a public setting.

TCEQ defers to the legislature on this recommendation.

3.3 Management Action - Direct TCEQ to conduct a comprehensive study of its water usage data and initiate cancellation proceedings for water right permits with nonuse over 10 years.

The TCEQ will continue to review its water use data annually to ensure that the data is accurate and can be used to support the water rights permitting program, including maintaining the Water Availability Models (WAMs).

The TCEQ disagrees that the statute requires the agency to cancel water rights for nonuse after 10 years. While the Water Code addresses cancellation as both mandatory and discretionary, the Code Construction Act resolves this ambiguity in favor of allowing the agency the discretion to cancel water rights as appropriate.

The agency also disagrees with assertions in the report that the cancellation of water rights will result in water available for new users or the environment. The agency recently completed a validation review of the a previous cancellation study for three river basins - the Neches, Colorado, and Nueces - that range from wetter parts of the state in East Texas to drier parts of the state in South Texas. The validation review simulated the cancellation of the estimated cancellable rights in the WAM for each of the three basins. The review found that any water that may result from cancellation would be available and subject to existing water rights in the respective WAMs. In fact, those existing water rights are already benefitted by the nonuse. But while the WAMs with the simulated cancellations indicate greater reliability for existing water rights, the results of the validation review show that the remaining unappropriated water, after simulated cancellation, is too intermittent and unreliable for most projects. In addition, the agency's review shows no significant changes to river flows or to flows to the bays and estuaries.

Finally, TCEQ anticipates that pursuing cancellation of water rights would be a costly and lengthy process that will engage the resources of the TCEQ, the State Office of Administrative Hearings, the Office of the Attorney General, and the courts.

#### **4 TCEQ and OPIC Lack Certain Transparent and Efficient Processes for OPIC to More Effectively Represent the Public's Interest.**

4.1 Management Action - Direct OPIC to consider developing and using umbrella contracts to procure expert assistance.

TCEQ is neutral on this recommendation. OPIC has begun exploring the use of an umbrella contract as a potential tool for hiring experts.

4.2 Management Action - Direct TCEQ commissioners to take formal action on OPIC's rulemaking recommendations.

TCEQ is neutral on this recommendation.

#### **5 The State Has a Continuing Need for the Texas Commission on Environmental Quality.**

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5.1 Statutory - Continue the Texas Commission on Environmental Quality for 12 years and remove the Sunset date of the agency's enabling statute.

TCEQ agrees with this recommendation.

5.2 Statutory - Update the standard across-the-board requirement related to board member training.

TCEQ agrees with this recommendation.

5.3 Statutory - Update the standard across-the-board requirement regarding the separation of duties of commissioners from those of staff.

TCEQ agrees with this recommendation.

Thank you for the opportunity to provide comments on the Sunset staff report. We look forward to working with the Sunset Commission and the legislature to carry out the measures identified in the Sunset review process.

Sincerely,

A handwritten signature in black ink, appearing to read "Toby Baker". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Toby Baker  
Executive Director