

Mark Friesenhahn

MJF's Testimony on the SAC Staff draft report

06/22/22 SAC Public Hearing in Austin

My name is Mark Friesenhahn. I live on a pecan farm in SW Comal County that is surrounded by about 20 APOs, all within stone throwing distance. I know APOs pretty well; technically, operationally, environmental regulatory and as an affected party. I'm representing myself and TRAM.

Thank you for your work in this important effort to assess the TCEQ. And thanks to Robert Romig and his staff for the hard work put into drafting the report. From several meetings with them and a tour of APOs near my farm in March, we glimpsed their work to develop specific and actionable recommendations. I worked in a group conducting safety critical assessments and know first-hand this is hard work.

Our initial reaction to the SAC staff report is that it is headed in the right direction to address some inefficiencies within the TCEQ. Recommendations under the report Issues 1-4 are significant and timely.

However, based on TRAM's in-depth assessment of the TCEQ ([in our January 2022 report of 64 recommendations to the SAC staff](#)), and the Legislature's own assessment in the 2020 House Interim Committee on APOs, we believe the Sunset staff's recommendations fall short of addressing the significant needs for reform.

The TCEQ is broken and needs to be fixed. We strongly believe that numerous changes are needed to accomplish this. The staff draft report stating "the TCEQ Commissioners have become reluctant regulators" is a good starting point for repairs.

TCEQ has swung too far from its core mission "to protect our state's public health and natural resources". Why is this? It needs to swing back to faithfully fulfill its mission. A well-functioning TCEQ representing us all is sorely needed.

We clearly understand the workings of the TCEQ, its duties limited by regulations and that the SAC's charge is to address changes to TCEQ procedures and processes. From our vantage point, you SAC Commissioners are positioned to address process and procedural changes and legislative and regulatory changes from your individual positions in the state legislature.

It's high time to address these deficiencies, limitations and issues arising from conflict between industry and the public. We need your help to do this.

Other TRAM members will testify on some of our specific concerns. Separately, we are submitting:

- Our suggested changes to the SAC draft report recommendations. With these, we are "good to go" on most all the recommendations
- Several high priority recommendations from our Jan 2022 report that we strongly feel should be included in your final report

Thank you. Any questions?



June 22, 2022

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

RE: Comments and Additional Recommendations on the Sunset Advisory Commission Staff Report on the Texas Commission on Environmental Quality

Dear. Ms. Jones and Mr. Romig,

On behalf of Texans for Responsible Aggregate Mining (TRAM) we welcome the opportunity to provide comments and additional recommendations on the Sunset Staff report of the Texas Commission on Environmental Quality (TCEQ). This letter provides TRAM comments on the draft report and additional recommendations we feel strongly should be added as the Sunset process moves forward and your report is finalized by the SAC Commissioners.

The member organizations listed below form TRAM, a coalition aligned around the goal of creating healthier and safer Texas communities, as well as a more efficient aggregate and concrete industry, by working to adopt state standards for best management practices in the industry.

Overall Response to Staff Report

Our initial reaction to the Sunset Advisory Commission (SAC) staff report is that it is headed in the right direction to address some inefficiencies with the TCEQ. Recommendations under the report Issues 1-4 are significant and timely. We thank the Sunset Advisory Commission staff for their diligent work and for their time meeting with our members. TRAM appreciates your work to critically assess the TCEQ and develop important observations, conclusions and data that support your specific and actionable recommendations. Some of us TRAM members have served in similar assessment team roles, and appreciate the work involved.

However, based on TRAM's in-depth assessment of the TCEQ, captured in our January 2022 report of recommendations to the Sunset Advisory Commission staff, as well as the Texas Legislature's own assessment of the current regulatory framework for the aggregate and concrete industry, as reflected in the study produced by the 2020 House Interim Committee on Aggregate Production Operations (APOs), we believe the Sunset staff's recommendations fall short of



addressing the significant needs for reform of the agency. The TCEQ is broken and needs to be fixed. We strongly believe that numerous changes need to be added to your report to accomplish this. Your report states that the “TCEQ Commissioners have become reluctant regulators.” This is an accurate and reasonable assessment, and a good starting point for repairs. We understand that the SACs charge is to addresses changes to procedures and processes within the TCEQ, but not directly address legislative/regulatory changes. From our vantage point, the five (5) Texas Senators and five (5) Representatives on the SAC are positioned to address both areas: process and procedural changes from the SAC and legislative and regulatory changes from their individual positions in the state legislature. This should be communicated to the SAC Commissioners.

The TCEQ has swung too far from its core mission “to protect our state’s public health and natural resources”, seemingly to appease industry. TRAM fully supports Texas’s growth and recognizes the importance of aggregate and concrete production, as well as other industries, to that growth. However, we know that a well-functioning TCEQ, faithfully fulfilling its mission, would result in equity for all stakeholders involved which would lead to healthier, safer, and more desirable communities and industries better aligned with the concerns of the communities in which they operate. Therefore, we request that the Sunset Advisory Commission call for a six-year continuance of the TCEQ, rather than the usual twelve-year, so the legislature has an opportunity to track the agency’s progress sooner. The importance of the TCEQ’s work and the degree to which they have drifted from their core mission warrant this more frequent oversight.

Furthermore, with specific regard to surface mining of aggregates, regulatory responsibility should be in the hands of an agency that has the authority, expertise, and capacity to regulate large mining activities comprehensively and effectively. At present, the Railroad Commission of Texas (RRC) is better positioned to serve in this role, as they already oversee surface mining of coal and other minerals comprehensively and effectively, under the Texas Surface Coal Mining and Reclamation Act. We believe that the RRC could similarly provide the necessary oversight of mining operations for the aggregates industry, complementing the TCEQ’s continued specific regulation of air pollution. *Alternatively*, with proper authority, staffing, training, and oversight, the TCEQ could oversee both the mining operations and the permitted air pollution.

TRAM’s Comments on Sunset Staff Recommendations - Issues 1, 2, 4, and 5

Issue 1 - Policies and Process

We support recommendation 1.1, *Direct the Texas Legislature to clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit*. We believe this recommendation is very important. We noticed that Toby Baker’s written response to this recommendation indicates that the TCEQ “assumes” this recommendation to apply only



to case-by-case permits. We believe that the Sunset staff's intention was to apply this recommendation to all TCEQ permits and it should therefore be clarified by the Sunset Advisory Commission. Additionally, when scheduling a new public meeting, as the staff recommends, it is important to maximize public input. We believe this can be achieved by strategically timing the first public meeting during the technical review process for a permit application, before internal and administrative decisions are made on the draft permit. It is also not clear in the language of the Sunset staff recommendation whether public interest or legislator requests would be necessary to prompt both meetings or just the second meeting.

We support recommendation 1.2, *Direct the commission to vote in a public meeting on key foundational policy decisions that establish how staff approach permitting and other regulatory actions.* We encourage the Commission to give additional guidance as to what constitutes "key foundational policy decisions."

We support recommendation 1.3, *Direct TCEQ to develop a guidance document to explain how it uses the factors in rule to make affected person determinations.* We also believe that an affected person determination, for air pollution, must take into account proximity to the pollution source, prevailing winds, the concentration of air pollution permits already granted in the area, and the vulnerability of the parties (particularly if they are children, elderly, or people with chronic health conditions).

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

We support recommendation 1.5, *Direct TCEQ to review and update its website to improve accessibility and functionality.* We would also like to see the TCEQ go further, to create a user-friendly mobile phone application through which users could submit complaints and upload photos, see a calendar of upcoming events, browse compliance histories, receive notifications on public applications and permit violations, and so forth.

We support 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.* Advisory committees that include the populace - not just agency personnel and industry - would be a positive step forward in developing transparency and public trust in the agency. These advisory committees could provide much needed input on rulemaking, the permit process, and any number of other issues.



We support, with revisions, recommendation 2, *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.* We believe the following should be added to further increase the effectiveness of TCEQ's compliance history database:

1. Add Geographical Information System data and mapping capability to compliance score results.
2. Add capability to search by Standard Industrial Classification code or North American Industrial Classification System code to allow for the comparison of individual facilities' compliance ratings to those of other operators within the same industry, in Texas.
3. Add capability to search by company, so that all of a particular company's Texas operations' compliance histories can be viewed together.
4. Every facility that receives a permit from TCEQ must have a compliance score.
5. Any time a violation has occurred, compliance history rating of the offending industry needs to be updated immediately.
6. Self-reported violations should appear in the database, as well.

We support recommendation 2.2, *Require TCEQ to consider all violations when classifying an entity as a repeat violator.*

We support recommendation 2.3, *Require TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operational status.*

We support recommendation 2.4, *Direct TCEQ to reclassify recordkeeping violations based on the potential risk and severity of the violation.*

We oppose, as written, recommendation 2.5, *Direct TCEQ to develop and implement clear guidance to evaluate affirmative defense requests for air emissions.* We suggest that affirmative defense be modified to encourage industry self-reporting but not have that be the basis for non-violation. Self-reported violations should appear in the compliance history record.

We oppose recommendation 2.6, *Direct TCEQ to modify its approach to nuisance complaints to make better use of the agency's investigative resources.* This recommendation raises concerns for us that the public would be further discouraged from reporting issues and potential violations to the TCEQ. Perhaps a useful approach would be better messaging from the TCEQ to the public, educating the public on who to turn to for various types of complaints.



We support recommendation 4.1, *Direct OPIC to consider developing and using umbrella contracts to procure expert assistance.*

We support recommendation 4.2, *Direct TCEQ commissioners to take formal action on OPIC's rulemaking recommendations.* We offer additional recommendations regarding OPIC in the following section.

Issue 5 - Continuing Need for TCEQ

As stated, we believe TCEQ is an important agency that is far adrift from its mission statement. If this round of the TCEQ Sunset Review and the next legislative session don't succeed in getting TCEQ to more effectively meet the first two parts of its mission statement 1) "to protect human health" and 2) "to preserve our natural resources," and put less emphasis on the last part 3) "consistent with sustainable economic development," and if they don't improve their permitting process, their enforcement and compliance monitoring, and their website, they should come up for another more stringent review in six years, not twelve.

Additional Recommendations

In addition to the recommendations identified in the staff report, TCEQ's operations and effectiveness could be improved in several areas. In our report to the SAC staff (Issues & Recommended Changes to TCEQ for Sunset Advisory Commission Consideration, TRAM Sunset Advisory Commission Special Projects Group, January 2022), we offered 64 recommendations addressing needed changes to the TCEQ. Some of these, plus the intent of several others, are included in your report. We identified several recommendations from our January report that should be included in your final report. Three of these are priority recommendations: Empowerment of the TCEQ to effectively oversee aggregate production operations, Consideration of cumulative impacts, and Election of TCEQ Commissioners. A brief discussion of each is below, followed by additional recommendations for the Sunset Commission's consideration.

Empowerment of the TCEQ to effectively oversee aggregate production operations

Empower the TCEQ to effectively carry out its responsibilities on an ongoing and sustainable basis, with regards to APOs, by:

1. Putting in place obligatory Statewide Best Management Practices (BMPs) for APOs. BMPs should be reviewed and updated at least every five years and all permits should be reviewed at the same interval and be reconditioned to reflect any changes to BMPs.



2. Implementing comprehensive APO legislation in Texas including requirements for air quality monitoring, water conservation, safe road access, reclamation, noise monitoring, lighting controls like the Surface Mining Control and Reclamation Act (SMCRA) that governs APO mining in most states.

Regulatory authority and responsibility for aggregate production operations should be entrusted to those with the appropriate expertise and regulatory capacity. Currently, in our view, the Texas Railroad Commission is better suited to surface mining issues. However, with concerted effort and application of the Surface Mining Control and Reclamation Act, the TCEQ could become an effective regulating agency for APOs.

Consideration of cumulative impacts

Amend air quality permitting process to consider cumulative impacts of existing permits. TCEQ should have the authority to deny permits based on holistic considerations in service of its mission to protect public health and natural resources. We recommend an amendment to the Texas Clean Air Act to clearly grant this authority. In conjunction, TCEQ should liberally apply the concept of “affected party.”

Election of TCEQ Commissioners

TRAM strongly maintains that the TCEQ Commissioners should be beholden to Texans and not just state leadership. TCEQ Commissioners should be selected by popular vote, same as the Texas Railroad Commissioners.

Additional Recommendations

- Public meetings should be held in person, with a remote option, whenever practical or necessary. Remote attendance should be available through Zoom or a comparable, user friendly, video conference platform. The platform should include a call-in only option.
- TCEQ should end the current procedure of public meetings with a non-recorded “Q&A” portion followed by a recorded comment portion. This model leads to confusion and difficulty among inexperienced members of the public. The whole meeting should be on the record.
- For Geological Assessment (GA) of Karst systems over the Edwards Aquifer: 1) Establish numerical criteria for relative water infiltration rate; 2) Require objective measurements for each Karst feature in Geological Assessment (GA) of Karst systems.
- The TCEQ Processes and Organizational Chart dated 1-1-22 should be revised to put the Office of Public Interest Council on equal standing with the Executive Director. Budgeting should reflect the change by giving OPIC a comparable policy and legal staff to that of the Executive Director.



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.

Sincerely,

Mark Friesenhahn

Texans for Responsible Aggregate Mining

TRAM Member Organizations

Air Alliance Houston
Bayou City Waterkeeper
Bayou Land Conservancy
Boerne To Bergheim Coalition For a Clean Environment
Comal Environmental Education Coalition
Coalition for Responsible Environmental Aggregate Mining
Double Horn Improvement Association
Gunter Clean Air
Hill Country Alliance
Katy Prairie Conservancy
Kerr County Conscience

Lake Houston Area Grassroots Flood Prevention Initiative
Midlothian Breathe
No Neighborhood Concrete Plant
PODER
Preserve Mineola
Preserve Our Hill Country Environment
Save Lake LBJ
Save Sandy Creek
Save Wilbarger Bend
Signal Hill Area Alliance
The Watershed Association