

## Comments and Recommendations of Public Citizen to the Sunset Commission on the Texas Railroad Commission

Based on Public Citizen's 2016 Oil & Gas Regulation Best Practices Study of eight other key states<sup>1</sup>

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We support the continued regulation of the oil and gas industry by the state, and support, in large part, the recommendations in the 2016 Sunset Staff Report. However, because the Railroad Commission has failed in many important ways to protect the public and the environment—key to its core mission—we also have additional recommendations to address those issues.

### Issues and Recommendations

#### Issue 1:

Continue the Railroad Commission of Texas for 12 Years with a Name that reflects the Agency's Important Functions.

- *We agree that the Commission should be renamed to reflect its functions.*
  - What does not fall under the jurisdiction of the RRC? According to a link on its website, the answer is "railroads," and then the public is redirected to the agencies that actually do have jurisdiction. There is no legitimate reason for the agency to keep its current, misleading name. The Commission's concern that a name change would require a constitutional amendment is unfounded and nothing more than a red herring.
  - Most states have agencies with names that better reflect their functions, e.g., Ohio Dept. of Natural Resources, New Mexico Energy, Minerals & Natural Resources Department, West Virginia Dept. of Environmental Protection.
- *We recommend review of the RRC in 6 years rather than 12 years as proposed by Sunset staff.*
  - Allowing another 12 years without review of an agency wholly unable to demonstrate that it is carrying out its mandated responsibilities is reckless and ill advised.

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<sup>1</sup> New Mexico, Colorado, Oklahoma, Wyoming, North Dakota, Ohio, Pennsylvania, and West Virginia

### Our additional recommendations:

- *The legislature should reevaluate the Commission's mission, and require a balancing of interests.*
  - Many states have oil and gas regulation under the environmental agency's umbrella, which results in striking differences in mission statements/mandates, and a much greater attempt to balance interests. Examples:
  - To protect Pennsylvania's air, land and water from pollution and to provide for the health and safety of its citizens through a cleaner environment.
  - We are as committed to protecting public health and the environment as we are to fostering the responsible development of Colorado's oil and gas resources.
  - West Virginia: To support a healthy environment. Legislative finding: Those functions of government which regulate the environment should be consolidated...to carry out the environmental functions of government in the most efficient and cost effective manner, to protect human health and safety and, to the greatest degree practicable, to prevent injury to plant, animal and aquatic life, improve and maintain the quality of life of our citizens, and promote economic development consistent with environmental goals and standards.
- *The structure of the Commission should be changed from elected to appointed commissioners, with specific qualifications to ensure balance and diversity among commissioners required.*
  - Those states with appointed commissioners serve only part-time and generally have specific, required qualifications to ensure balance and diversity. For example, Colorado's Oil and Gas Conservation Commission is made up of the executive directors of the Dept. of Natural Resources and the Dept. of Public Health, plus seven part-time appointed commissioners with required diversity in education, experience, occupation and geographical location. There is also a limit on number of members of the same political party.
- *If the agency continues with full-time elected commissioners, the statute should require that they have no direct or indirect interest in any regulated entity.*
  - Of those states reviewed, only Oklahoma has full-time elected commissioners. Notably, the Corporation Commission has much broader jurisdiction than does the RRC, and the commissioners must have no direct or indirect interest in any regulated entity.
  - Potential for conflicts of interest in policy-making functions and contested case hearings need to be addressed.

- Significant limits should be put on the source, timing and amount of campaign contributions. For example, commissioners should only be able to accept campaign contributions during the time they are actually up for re-election. In addition, they should be prohibited from accepting donations from anyone with a contested case before the commission and would be restricted from running for another office during the first four-and-a-half years of their six-year terms, unless they are willing to resign.
- In Oklahoma there are **limits on campaign contributions**—with a **prohibition on corporate contributions** (except to super PACs, with a \$5,000 limit)—for all elected offices, and in addition, **contributions to Commission candidates, specifically, are limited to 120 days prior to primary and 120 days after general election.**
- *Require the RRC to rely on current peer-reviewed, scientifically sound studies and data, not industry-generated or industry-funded studies.*
  - Misleading statistics and misinformation are found on RRC website relating to water pollution and seismic activity, etc.
  - They emphasize how cutting edge their programs are, but provide little to back that up; and when compared to other states, these claims fall short. Examples:
    - North Dakota requires on-site remote telemetry to monitor water use
    - Oklahoma, Colorado, Wyoming, North Dakota, Ohio and West Virginia all require baseline monitoring of water wells and/or springs in the area prior to permitting.
    - Many states have taken an aggressive approach to the study and prevention of seismic activity related to injection and disposal wells. Even Pennsylvania, which has not experienced increased seismic activity, requires operators to obtain a UIC permit from the EPA to reduce the risk of induced seismicity.
  - No acknowledgment of problems associated with oil and gas development by RRC can be found at the agency or on its website. From all indications, there is very little monitoring conducted compared to other states.
- *Create an environmental advocate position at the RRC.*
  - This is necessary to ensure a balancing of interests, and would be consistent with other Texas agencies, such as the TCEQ and other states that emphasize environmental protection.

## Issue 2

**Contested Hearings and Gas Utility Oversight Are Not Core Commission Functions and Should Be Transferred to Other Agencies to Promote Efficiency, Effectiveness, Transparency, and Fairness.**

- *We support the transfer of contested case hearings to the State Office of Administrative Hearings.*
  - This clearly minimizes potential for the appearance of impropriety and actual conflicts of interest
  - It would reduce cost, and contrary to the arguments of industry and the Commission, there would be no loss of expertise. As was done with other agencies who hearings have been transferred to SOAH, many of the Commission's hearing examiners—including technical, if deemed necessary—would likely be transferred also.
  - Pennsylvania and Ohio use separate hearing boards or commissions with appointed judges, and North Dakota's hearings are presided over by the attorney general's office. Many hearings are conducted by in-house ALJs, although not necessarily within the oil and gas divisions. Oklahoma, for example, uses the Office of Administrative Proceedings, a separate division within the agency.
- *We also support transferring gas utility regulation from the Railroad Commission to the Public Utility Commission.*

## Issue 3

**Oil and Gas Monitoring and Enforcement Need Improvements to Effectively Ensure Public Safety and Environmental Protection.**

- *We support Staff's recommendations—performance measures for the Railroad Commission are essential. Without such measures there is absolutely no way to determine if the agency is carrying out its mandated duties. However, we suggest strengthening them as follows.*

### Our additional recommendations:

- *There is a critical need to increase transparency by requiring the RRC to update monthly, and make available on its website, a searchable database with information relating to inspections, complaints, and enforcement actions, including fines and penalties.*
  - There is an astounding lack of transparency at the RRC compared to other states. Many have searchable databases and statistics on their websites relating to

inspections, complaints, and enforcement actions, by individual operator and in the aggregate. While the RRC is busy on social media putting out self-serving tweets, no useful statistics or information regarding these issues is readily available on their website. Examples of better practices:

- Colorado has easily searchable databases and a wealth of information available online: inspection/incident inquiries; facility inquiries; spill data, updated monthly; spill analysis by year; water-well data, updated monthly; field inspection reports; quarterly and annual enforcement reports.
- In Pennsylvania, the public can search for individual permits, operators, wells/facilities, inspections, and by program, oil and gas production information, permits issued, drilling commence date, county data, operator specific data, as well as inspections, violations and enforcement actions.
- And notably, much more information regarding enforcement issues can be found on the TCEQ website.
- ***Give complainants the right to have a role in the enforcement and decision-making process.***
  - Unlike the Railroad Commission, Colorado allows complainants to track their complaints online, object to decisions finding no violations and the terms of proposed settlements, and request a hearing. West Virginia also provides a role for complainants in certain enforcement matters. The TCEQ allows Texans to track complaints online, as well.
- ***Establish minimum inspector-to-well ratios and assess an annual inspection fee.***
  - Compliance evaluation capability necessarily requires inspections and surveillance procedures independent of information supplied by operators.
  - The Commission should also establish inspection schedules that take facilities with increased risks into account; for example, Ohio inspects injection wells every 12 weeks, at a minimum.
  - The Commission lacks sufficient inspectors to inspect each well even once a year. The Sunset staff reported that two-thirds of leases have gone more than two years without an inspection, and each lease can include thousands of wells. This illustrates the astonishingly low level of oversight, and is simply unacceptable.
  - The Commission should be required to impose an annual inspection fee to help cover the additional costs of hiring the inspectors needed to carry out their mandated duty to protect public health and the environment.

## Issue 4

### Insufficient and Inequitable Statutory Bonding Requirements Contribute to the Large Backlog of Abandoned Wells.

- *We support amending the blanket bond requirements in statute to better reflect risk and increase equitability.*
  - Despite RRC figures indicating the average well plugging cost in FY 2015 was \$5-\$17/ft of actual well depth, plugging bonds for individual wells is set at \$2/ft; and blanket bonds significantly less.
  - Most states have higher bonding requirements, especially for horizontal wells, and some have other bonding requirements in addition to plugging bonds, such as surface bonds to protect surface owners from damage. Colorado is a good example.
  - As the Sunset report notes: State law requires drillers to post bonds to cover the cost to plug the well and to remediate the site, should the operator go out of business. The revenue from these required bonds covered just 15.9 percent of the cost to plug wells in fiscal year 2015. **These insufficient statutory bond requirements have left the Railroad Commission with less funding to plug wells and increased liability, as the cost to plug wells has more than doubled since the bond amounts were set in 1991,** diverting commission funding that could have been used for other needed program improvements. In addition, the **backlog of abandoned wells has increased since 2011 to 9,715 wells.**
  - **In 2015 forty-three E&P bankruptcies have been filed in Texas, representing approximately \$29 billion in cumulative debt and that number is expected to increase.**<sup>2</sup>
  - If Texas does not increase the bonding requirement, the black hole of unplugged wells will continue to grow and the cost of capping and remediation will become a larger red hole in our state budget
- *In addition, the bonding requirements for coal mine reclamation need to be revamped.*
  - Coal mine reclamation fund needs a tune up to avoid Texas getting stuck with half a billion dollars in clean-up costs
  - Moody's estimated the 12 of the 19 coal plants in Texas are losing money because of the low price of natural gas and renewables. Similarly, ERCOT

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<sup>2</sup> HAYNES AND BOONE, LLP OIL PATCH BANKRUPTCY MONITOR June 30, 2016.

projects that many old Texas coal plants will retire over the next 5 years. The re-covering of old coal mines, or “reclamation,” has most often been guaranteed by self-bonding and using the coal plants as collateral. US News and World Report reported on March 23, 2016, that almost [50 coal companies](#) have gone bankrupt since 2012. The taxable and real value of the old coal plants and coal mines in Texas has dropped by more than 60% in Texas over the last 4 years.

- The Sunset Commission should recommend that the RRC update its rules to assure that they conform to federal rules; and require that each of the bonds and guarantors be reevaluated within a year to assure that they have assets of adequate value to cover the reclamation costs.
- *In addition to strengthening bonding requirements, permitting fees should be increased to cover actual costs.*
  - Permitting fees are significantly higher in some states and, as with bonding requirements, are designed to have industry—rather than the public—pay for the costs of doing business.
- *Increase maximum penalties and establish a penalty policy that ensures compliance, deters repeat violations, and takes into account the economic gain from noncompliance.*
  - The stated policy regarding penalties in many states is to set them high enough to ensure compliance in the first place and deter future violations, taking into account economic gain to operators from noncompliance.
  - Examples of maximum penalties:
    - Colorado - \$15,000/day
    - North Dakota - \$12,500/day
    - Ohio - \$20,000/day
    - Pennsylvania - \$75,000 flat penalty imposed plus \$5,000/day
    - Most notably, the Texas Commission on Environmental Quality has a much higher maximum penalty of \$25,000/day

## Issue 5

**Improved Oversight of Texas’ Pipeline Infrastructure Would Help Further Ensure Public Safety.**

- *We support this recommendation, and offer the following additional recommendations.*

- **Update the Commission’s T-4 form** to delineate type oil or other of product; to include points of entry and exit within Texas, and to show tariffs and contracts to prove that it is a common carrier.
- **Give neighbors as well as landowners within 2 miles notice of the route of a proposed pipeline and the right to intervene and appeal the T-4 designation to the agency before it is granted.**
- **Require emergency response plans for pipeline operators** be submitted and reviewed before and not after pipeline operations are allowed to begin transport. Currently, pipeline operators only have to submit emergency response plans after operations begin.
- **Authorize the Commission to require full disclosure of** contents and composition of materials transported for emergency responders. Currently many components are deemed as “proprietary” without full disclosure.
- **Require a more stringent testing and evaluation process of pipelines before they can be repurposed.**
- **Mandate that a Texas Spill Liability Fund** be expanded to cover more substances and intrastate pipelines
- **Expand testing and inspections of Intrastate pipelines.**

## **Issue 6**

**The Railroad Commission’s Contracting Procedures Are Improving, but Continued Attention Is Needed.**

- *We support this recommendation.*

## **Issue 7**

**The Railroad Commission’s Statute Does Not Reflect Standard Elements of Sunset Reviews.**

- *We support this recommendation.*

May 13, 2016

Ken Levine, Director  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, Texas 78111-3066

Dear Mr. Levine:

On behalf of Public Citizen and Texas Campaign for the Environment, I am pleased to submit this response to the Sunset Advisory Commission's Staff Report on the Texas Railroad Commission.

We are very appreciative of the work done by Sunset staff for this review. While we generally support staff's recommendations, we believe much more is needed to address the myriad problems with this agency. Public Citizen has recently done a comparison of regulatory practices among key oil and gas producing states, and the comments and recommendations set out below are based, in large part, on those findings.

Public Citizen and Texas Campaign for the Environment look forward to working with you and your staff as this process continues. Please let me know if we can provide any additional information.

Sincerely,



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Carol S. Birch  
Legislative Counsel  
Public Citizen Texas

# Comments and Recommendations of Public Citizen and Texas Campaign for the Environment to the Sunset Commission on the Texas Railroad Commission

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## Structure of Agency

**Recommendation 1: If the agency continues with full-time elected commissioners, require that they have no direct or indirect interest in any regulated entity, and limit campaign contributions, both in amount and timeframe.**

- Potential for conflicts of interest in policy-making functions needs to be addressed; contested cases are not the only source for such conflicts. Comparisons with other states lead to the inescapable conclusion that RRC commissioners’ ties to industry are clearly reflected in policies and decision making.
- Of those states reviewed, only Oklahoma has full-time elected commissioners. Notably, the Corporation Commission has much broader jurisdiction than does the RRC, and the commissioners must have no direct or indirect interest in any regulated entity. Furthermore, there are **limits on campaign contributions**—with a **prohibition on corporate contributions** (except to super PACs, with a \$5,000 limit)—for all elected offices, and in addition, **contributions to Commission candidates, specifically, are limited to 120 days prior to primary and 120 days after general election.**

**Recommendation 2: If changed from elected to appointed commissioners, require specific qualifications to ensure balance and diversity among commissioners.**

- Those states with appointed commissioners serve only part-time and generally have specific, required qualifications to ensure balance and diversity. For example, Colorado’s Oil and Gas Conservation Commission is made up of the executive directors of the Dept. of Natural Resources and the Dept. of Public Health, plus seven part-time appointed commissioner’s:

“At least two members shall be appointed from west of the continental divide, and, to the extent possible, consistent with this paragraph (a), the other members shall be appointed taking into account the need for **geographical representation** of other areas of the state with high levels of oil and gas activity or

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employment. Three members shall be individuals with substantial experience in the oil and gas industry, and **at least two of said three members shall have a college degree in petroleum geology or petroleum engineering**; one member shall be a **local government official**; one member shall have formal training or substantial experience in **environmental or wildlife protection**; one member shall have formal training or substantial experience in **soil conservation or reclamation**; and one member shall be actively engaged in **agricultural production and also be a royalty owner**. Excluding the executive directors from consideration, no more than four members of the commission shall be members of the same political party.” C.R.S.A. § 34-60-104

**Recommendation 3: Transfer contested case hearings to the State Office of Administrative Hearings.**

- Clearly minimizes potential for the appearance of impropriety and actual conflicts of interest
- States reviewed are all over the map on how contested cases are handled. Only a few states have agencies comparable to SOAH, and those state do not send contested oil and gas cases to those independent agencies for hearing. Many hearings are conducted by in house ALJs, although not necessarily within the oil and gas divisions. Oklahoma, for example, uses the Office of Administrative Proceedings, a separate division within the agency. Pennsylvania and Ohio use separate hearing boards or commissions with appointed judges, and North Dakota’s hearings are presided over by the attorney general’s office.

**Recommendation 4: Change the name to Energy Resources Commission to more accurately reflect the agency’s functions and increase transparency.**

- What does not fall under the jurisdiction of the RRC? According to a link on its website, the answer is “railroads.” And then the public is redirected to the agencies that actually do have jurisdiction. There is **no legitimate reason** for the agency to keep its current, misleading name.
- Most states have agencies with names that better reflect their functions, e.g., Ohio Dept. of Natural Resources, New Mexico Energy, Minerals & Natural Resources Department, West Virginia Dept. of Environmental Protection.

## **Fees/Funding**

### **Recommendation 1: Increase bond amounts to cover actual costs.**

- Despite RRC figures indicating the average well plugging cost in FY 2015 was \$5-\$17/ft of actual well depth, plugging bonds for individual wells is set at \$2/ft; and blanket bonds significantly less.
- Most states have higher bonding requirements, especially for horizontal wells, and some have other bonding requirements in addition to plugging bonds, such as surface bonds to protect surface owners from damage. Colorado is a good example.

### **Recommendation 2: Increase permitting fees to cover actual costs.**

- Permitting fees are significantly higher in some states and, as with bonding requirements, are designed to have industry—rather than the public—pay for the costs of doing business.

### **Recommendation 3: Increase maximum penalties and establish a penalty policy that ensures compliance, deters repeat violations, and takes into account the economic gain from noncompliance.**

- The stated policy regarding penalties in many states is to set them high enough to ensure compliance in the first place and deter future violations, taking into account economic gain to operators from noncompliance.
- Examples of maximum penalties:
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  - Most notably, the Texas Commission on Environmental Quality has a much higher maximum penalty of \$25,000/day

### **Recommendation 4: Require the RRC to track violations and penalties to measure effectiveness of penalty policy.**

## **Transparency**

### **Recommendation 1: Increase transparency by requiring the RRC to update monthly and make available on its website searchable database[s] with information relating to inspections, complaints, and enforcement actions, including fines and penalties.**

- There is an astounding lack of transparency at the RRC compared to other states. Many have searchable databases and statistics on their websites relating to inspections, complaints, and enforcement actions, by individual operator and in the aggregate. While the RRC is busy on social media putting out self-serving tweets, no useful statistics or information regarding these issues is readily available on their website. Examples of better practices:
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  - In Pennsylvania, the public can search for individual permits, operators, wells/facilities, inspections, and by program, oil and gas production information, permits issued, drilling commence date, county data, operator specific data, as well as inspections, violations and enforcement actions.
  - And notably, much more information regarding enforcement issues can be found on the TCEQ website.

## **Inspections/Enforcement**

### **Recommendation 1: Performance measures for the Railroad Commission should be established.**

- Lack of performance measures at the RRC make it impossible to tell what is really going on. We support Staff's recommendation that a strategic plan be developed that tracks and measures the effectiveness of monitoring and enforcement. However, we believe that development of such plan should not be left entirely in the hands of the RRC, which has proven itself incapable thus far.

### **Recommendation 2: Give complainants the right to have a role in the enforcement and decision-making process.**

- Unlike the Railroad Commission of Texas, Colorado allows complainants to track their complaints online, object to decisions finding no violations and the terms of proposed settlements, and request a hearing. West Virginia also provides a role for complainants in certain enforcement matters. The TCEQ allows Texans to track complaints online, as well.

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**Environmental and Public Health Protection**

**Recommendation 1: The legislature should reevaluate the RRC’s mission, and require a balancing of interests.**

- Many states have oil and gas regulation under the environmental agency’s umbrella, which results in striking differences in mission statements/mandates, and a much greater attempt to balance interests. Examples:
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**Recommendation 2: Create an environmental advocate position at the RRC.**

- This is necessary to ensure a balancing of interests, and would be consistent with other Texas agencies, such as the TCEQ and PUC, and other states that emphasize environmental protection.

**Recommendation 3: Require the RRC to rely on current peer-reviewed, scientifically sound studies and data, not industry-generated or industry-funded studies.**

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**Recommendation 4: Require review of the RRC in 6 years rather than 12 years as proposed by Sunset staff.**

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