



December 16, 2010

The Honorable Glen Hegar
Chairman
Sunset Advisory Commission
P.O. Box 13066
Austin, TX 78711

Re: Sunset Advisory Commission Staff Report for the Texas Commission on
Environmental Quality (TCEQ)

Dear Chairman Hegar:

I appreciate the opportunity to provide written comments regarding Sunset Advisory Commission Staff Report on the Texas Commission on Environmental Quality (TCEQ). These comments supplement the oral testimony I provided during the December 15, 2010 hearing of the Sunset Advisory Commission.

The Texas Petroleum Marketers & Convenience Store Association (TPCA) is a statewide trade association representing companies engaged in the wholesale and retail distribution of motor fuels and convenience store operations. These companies own operate or supply approximately 10,000 retail outlets with motor fuels. Additionally, our member companies own and operate over 4,500 stores throughout the state of Texas.

TPCA and its membership have been closely involved in the development and implementation of the Texas Commission on Environmental Quality's (TCEQ) petroleum storage tank (PST) program. Throughout the program's history, our association and members have invested much time and resources to upgrade, replace, assess and remediate petroleum storage tank facilities in accordance with the state and federal laws.

TPCA supports the reauthorization of the Texas Commission on Environmental Quality for an additional twelve years. The remainder of our association's written comments are specifically addressed to Issue 6 of the Staff Report regarding TCEQ's PST program.

Recommendation 6.1 – Require previous tank owners or operators to share responsibility for contamination from leaking PST's

Recommendation 6.1 provides that TCEQ should be given additional statutory authority to compel previous PST owner / operators to pay for remediation activities attributable to their ownership or operation of the PST. TPCA supports the concept of holding persons who are responsible for a release accountable for cleaning up the release.

However, TPCA is concerned that the recommendation as presented is too broad and may have unintended consequences that encumber the sale and financing of facilities used for the sale, storage and transportation of motor fuels. Liability for previous tank owners should be tightly circumscribed in statute and only arise upon a finding of an omission or negligence by the previous tank owner. Purchasers of properties containing PST's should not be relieved of their responsibility to exercise due diligence when purchasing these types of properties.

TPCA also disagrees with the report's recommendation that previous owner / operators bear the burden of proof in defending liability. As noted below, Texas law governing PST's found in Subchapter I, Chapter 26 of the Water Code holds current owner / operators responsible for PST's. The burden of proof must remain with the current PST owner / operator to defend liability for undertaking corrective action. Purchasers of PST facilities and subsequent owners should not be provided an incentive to not exercise due diligence when buying property.

Current law requires sellers of properties containing PST's to provide written disclosure of the responsibilities associated with PST registration and construction notifications to purchasers¹. This written notification must include the following:

- (a) Names and addresses of seller and purchaser
- (b) Number of tanks
- (c) Description of each tank (capacity, tank material and product stored)
- (d) Facility identification number
- (e) Certification statement required by TCEQ

Purchasers are required to update the TCEQ's PST registration within 30 days of sale.

Parties buying these facilities are well aware of the presence of PST's and the risk of contamination as a consequence of their presence. Purchasers are provided records associated with the PST's (tank tightness tests, line leak reports, etc) as well as an opportunity to conduct an environmental assessment of the facility. There are times when a purchaser may elect to waive these opportunities either to save money on the purchase or to accelerate the closing date. If a purchaser elects to not perform normal due diligence, the seller of the facility should not be held responsible for the purchaser's decision should contamination subsequently be discovered. If a property containing PST's is sold "as is" and accompanied by the proper written disclosures, TCEQ should

¹ 34 Texas Administrative Code §334.9

not be permitted to hold a former owner responsible for a release discovered after the facility has changed ownership.

Chapter 26, Subchapter I, of the Water Code includes several provisions authorizing TCEQ to require PST owner/operators to pay for corrective action associated with contamination. Owner / operators are responsible taking corrective action². Owner / operators may voluntarily undertake corrective action and seek contributions from other responsible parties³. If a site has multiple owner / operators (including previous owners), TCEQ may file suit in Travis County and request the district court to apportion costs⁴.

Subchapter I also authorizes TCEQ to seek cost recovery for funds it expends to address contamination⁵. The statute also defines the terms “owner” and “operator” and provides means for demonstrating or rebutting PST ownership⁶.

TPCA is also concerned about how this recommendation would impact those PST owner / operators explicitly exempted from liability by Chapter 26 including lenders⁷, corporate fiduciaries⁸ and taxing units⁹.

Any statutory changes to implement Recommendation 6.1 should include a requirement that TCEQ recognize and respect contractual agreements between parties apportioning responsibility and liability for a site which may or may not be impacted by a release from a PST at the time of contract. In addition, the implementation should include a thorough review and consideration of existing statutes to ensure the consistency of the TCEQ’s approach, especially those already providing a private cause of action.

Recommendation 6.2 – Prohibit delivery of certain petroleum products to uncertified tanks and provide for administrative penalties

TPCA supports Recommendation 6.2 provided TCEQ incorporate provisions to validate delivery certificates through the Internet and change how it calculates administrative penalties associated with violations of the delivery prohibition.

TPCA was a lead proponent of prohibiting the delivery of motor fuels into uncertified PST’s. The association worked with legislative leaders during the 1999 legislative session to pass HB 2815 which established the delivery prohibition into uncertified tanks..

² §26.3513, Texas Water Code

³ *ibid*

⁴ *ibid*

⁵ §26.355, Texas Water Code

⁶ §26.348(7), §26.348(8), Texas Water Code

⁷ §26.3514, Texas Water Code

⁸ §26.3515, Texas Water Code

⁹ §26.3516, Texas Water Code

In implementing HB 2815, TCEQ adopted administrative penalties which assessed violations on a per delivery basis. These penalties were set at either \$500 per delivery or \$1,000 per delivery depending on the nature of the underlying violation. In some cases, PST owner / operators and fuel carriers were faced with administrative penalties running into the hundreds of thousands of dollars for one facility. The amount of some of these penalties was disconcerting considering the fact that in many cases there was no actual harm to the environment, only a violation associated with paper work.

The Sunset Report provides that “reinstating common carrier liability would add an estimated \$560,000 to General Revenue from administrative penalties for violating the law”. TPCA would recommend that TCEQ’s scheme for administrative penalties for these violations be amended to distinguish those violations not accompanied by an actual release or harm to the environment and others that do. Administrative penalties for these types of violations should be consistent with comparable penalties for violations associated with documentation.

Recommendation 6.3 – Reauthorize PST remediation fee, change current fee levels to caps and authorize TCEQ to set fees in rule.

TPCA supports the recommendation to reauthorize the PST remediation fee. TPCA opposes the recommendation to establish fee caps in statute and authorize TCEQ to set fees in rule.

The amount of the fee should be set in such a manner that the unexpended balance currently found in the remediation fund (\$140 million) is gradually drawn down. The Sunset Report notes that if the fee were to not be renewed, the program could still continue for five years with no new funding.

The power to set the fee should remain with the legislature and not be delegated to TCEQ. The fee should be reviewed every biennium and established based upon dialog between UST owner / operators, TCEQ and the legislature.

6.4 Expand use of the remediation fee to allow TCEQ to remove non-compliant PST’s that pose a contamination risk.

TPCA supports this recommendation provided the use of PST funds to remove non-compliant tanks is limited to extraordinary circumstances involving a threat or risk to public health or the environment.

TPCA members have expended millions of dollars during the course of the TCEQ’s PST program to remove non-compliant PST’s. In the late 1980’s TCEQ records documented approximately 160,000 PST’s in Texas. Today, there are approximately 60,000 PST’s located at around 25,000 sites. PST owner / operators are responsible for the removal and replacement of approximately 100,000 PST’s during the 23 year history of the TCEQ’s PST program.

Average costs to remove a PST may exceed \$6,500 per PST and involve site review permits from both local and state government agencies. Because a site usually contains multiple PST's, removal costs may approach over \$20,000 per site.

TPCA is concerned that the adoption of Recommendation 6.4, absent strong statutory safeguards, will provide an undue financial advantage to those businesses or individuals who knowingly fail to appropriately manage their PST's or fulfill their responsibilities as owner / operators. As stated above, the time and costs associated with removing PST's are significant. TCEQ should not be permitted to relieve some PST owner / operators from these responsibilities absent compelling circumstances.

Thank you again for this opportunity to provide comments regarding TCEQ's PST program.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Newton", written over the word "Sincerely,".

Chris Newton

President, Texas Petroleum Marketers & Convenience Store Association