

TEXAS OIL & GAS ASSOCIATION INITIAL COMMENTS

TEXAS SUNSET COMMISSION STAFF REPORT: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

The Texas Oil and Gas Association (TxOGA) is the largest and oldest petroleum organization in Texas, representing over 4,000 members. The membership of TxOGA produces in excess of 90 percent of Texas' crude oil and natural gas, operates 100 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. According to the most recent data, the oil and gas industry employs 315,000 Texans, providing payroll and benefits of over \$30 billion in Texas alone. In addition, large associated capital investments by the oil and gas industry generate significant secondary economic benefits for Texas. TxOGA member companies produce a quarter of the nation's oil, a third of its natural gas and account for over one-fourth of the U.S. refining capacity.

TxOGA thanks the Sunset Staff for all their diligence and hard work. The task of reviewing one of the largest environmental agencies in the world can be overwhelming, but the professionalism and meticulousness with which staff conducted its review should be applauded.

We appreciate the opportunity to offer these initial comments on the Sunset Commission Staff Report on the Texas Commission on Environmental Quality (TCEQ). If you have any questions or need additional information, please contact Deb Hastings at (512) 478-6631 or dhastings@txoga.org.

ISSUE 1

Texas Has a Continuing Need for the Texas Commission on Environmental Quality

Sunset Staff Recommendation:

- Continue the Texas Commission on Environmental Quality for 12 years.
- Transfer the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Railroad Commission.
- Apply the standard Sunset across-the-board requirement for the Commission to develop policy regarding negotiated rulemaking and alternative dispute resolution.

TxOGA strongly agrees that the Texas Commission on Environmental Quality (TCEQ) should be continued for 12 years.

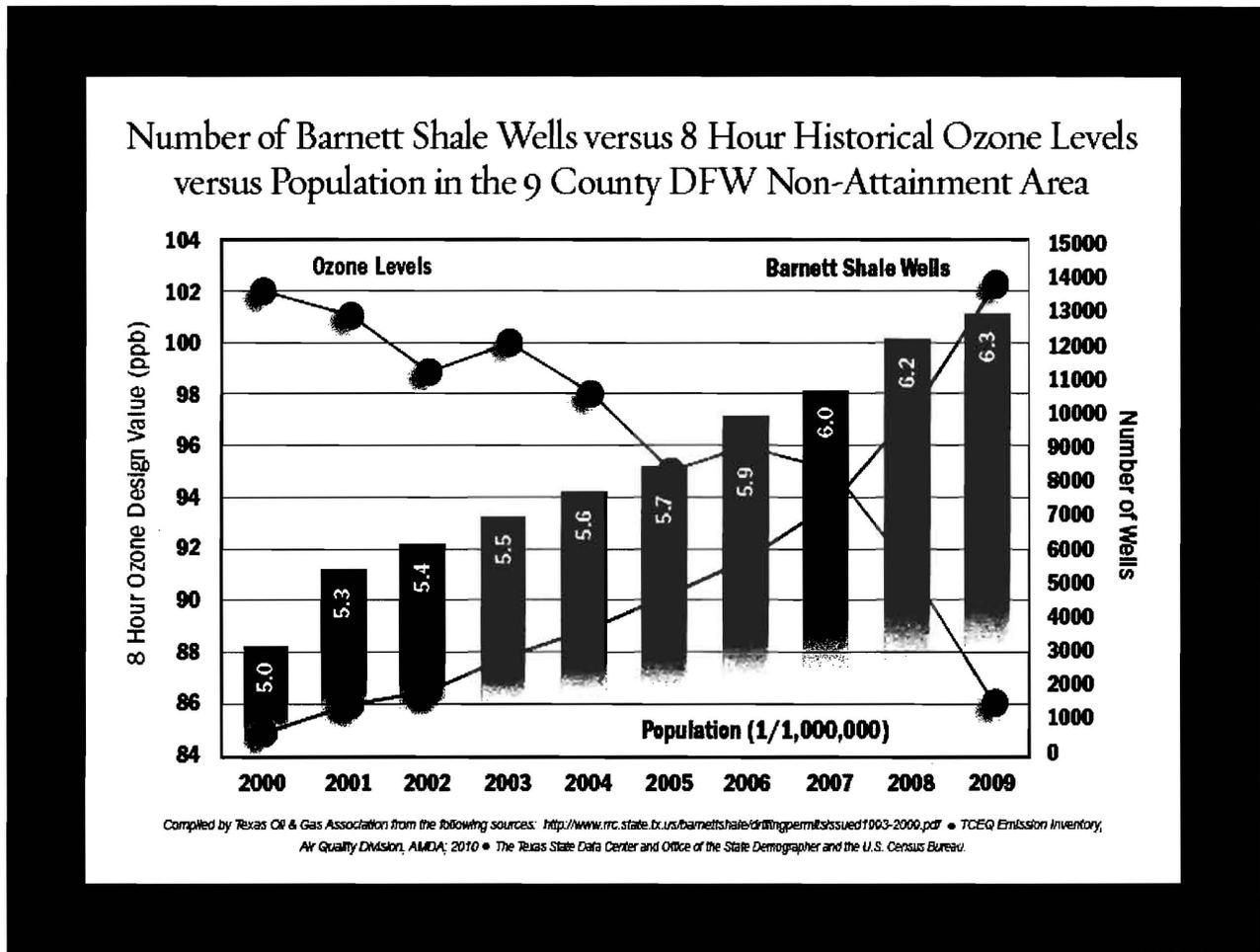
TxOGA believes TCEQ should continue its unique mission to protect our state's human and natural resources consistent with sustainable economic development. The goal is clean air, clean water, and the safe management of waste.

Sunset staff made reference in their report to TCEQ's charge to implement state environmental law while satisfying federal requirements. TxOGA would like to take this opportunity to say

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that TCEQ does a fine job at balancing the sometimes draconian federal mandates with their goal to be consistent with sustaining the State’s economic development.

Sunset staff also made reference to TCEQ overseeing air emissions relating to the oil and gas industry and their initial “flat-footed response” to public concerns about its regulatory responsibilities. TxOGA supports TCEQ’s efforts in addressing the public’s concern, however we strongly urge TCEQ to take a data driven approach to regulating the oil and gas industry. Please see the chart below which shows as population and the number of wells has increased in the Barnett Shale, ozone levels have decreased.



TxOGA agrees with the recommendation to transfer the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Railroad Commission.

TxOGA concurs with the finding in the report that “TECQ’s middleman role in making surface casing recommendations is unnecessary” and we support transferring responsibility to the Railroad Commission of Texas with appropriate funding and staffing.

Issue 2

TCEQ’s Public Assistance Efforts Lack Coordination and Focus

Sunset Staff Recommendation:

- Charge the Executive Director with providing assistance and education to the public on environmental matters under the agency’s jurisdiction.
- Focus OPIC’s efforts on representing the public interest in matters before the Commission.
- Require the Commission to generally define, by rule, factors OPIC will consider in representing the public interest and establish OPIC’s priorities in case involvement.
- Require OPIC to annually report to the Commission on the Office’s performance, budget needs, and legislative and regulatory recommendations.
- Direct TCEQ, in pursuing changes to its website, to provide easy access to information on agency policy and environmental regulatory efforts in plain language.

TxOGA agrees that the TCEQ’s public assistance efforts lack coordination and focus.

Issue 3

TCEQ’s Approach to Compliance History Fails to Accurately Measure Entities’ Performance, Negating Its Use as an Effective Regulatory Tool

Sunset Staff Recommendation:

- Remove the uniform standard from statute and require the Commission to develop a compliance history method to be applied consistently.
- Remove the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information.
- Expand the statutory components to allow TCEQ to consider other factors in evaluating compliance history.
- Direct TCEQ to revise its rules on compliance history.

TxOGA agrees that the TCEQ’s approach to compliance needs to be revisited.

As noted in the report, in 2001 the TCEQ was directed to create a compliance history for each owner or operator regulated under Chapters 26 and 27 of the Texas Water Code, the Solid Waste Disposal Act, the Clean Air Act, and the Radiation Control Act. Creating and

implementing this program has been inordinately time-consuming and resource-intensive for TCEQ while providing neither the TCEQ, the public, watch-dog organizations or even regulated entities any accountable assessment of environmental compliance in Texas. Rather than provide a clear picture of enforcement activities coupled with an associated compliance assessment, the TCEQ's compliance history initiative has been a mammoth waste of time. The compliance score is based on an extremely complex formula which results in designating a small group of regulated entities as "high" performers, a small group of entities as "poor" performers, and the vast majority of entities as simply "average" or "average by default" if no compliance information is available. It compares huge businesses such as petrochemical plants to mom-and-pop businesses and sheds little light, if any at all, on the actual compliance record operations of a facility. And perhaps worst of all, as a result of the compliance history initiative, the TCEQ has removed the inclusion of virtually all subjective, experienced regulatory judgment in determining compliance assessment outcomes. As a result, in many if not most cases, the compliance assessments do not mirror the actual compliance record at the facility; any possibility of real and measurable improvements in compliance in Texas has been negated and improvements in environmental protection are ignored.

Regarding the specific recommendations under Issue 3:

TxOGA generally agrees with Recommendation 3.1.

We concur with removing the uniform standard from statute. However, we suggest that the Legislature provide clear guidance to the TCEQ for developing a new compliance history method. Further, we agree that the new method be developed through the rulemaking process with participation and extensive input from regulated entities.

TxOGA agrees with Recommendation 3.2 removing the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information.

TxOGA agrees with Recommendation 3.3 expanding the statutory components to allow TCEQ to consider other factors in evaluating compliance history.

TxOGA generally agrees with Recommendation 3.4.

As stated above, TxOGA agrees with developing the new compliance history methodology through rule provided there is clear guidance from the Legislature and provided that the rulemaking process includes opportunity for participation and extensive input of regulated entities.

Issue 4

TCEQ's Enforcement Process Lacks Public Visibility and Statutory Authority

Sunset Staff Recommendation:

- Require the Commission to structure its general enforcement policy in rule and publically adopt its resulting enforcement policies.
- Increase TCEQ's administrative penalty caps.
- Authorize TCEQ to assess administrative penalties for dam safety violations.
- Authorize TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.

TxOGA believes that TCEQ has been effective in its enforcement practices and has recently improved functions.

In 2005, TCEQ conducted a review of the enforcement process which resulted in improvements to the division. Specific items which were improved include monthly enforcement summaries, increase in fines, as well as becoming more detailed in investigations. TxOGA believes these changes have been adequate, but we would suggest improvements in the following areas:

- Emissions inventory, TCEQ should not penalize those who self-report.
- Emissions events, TCEQ should require that an emissions event for a reportable quantity be reported as soon as practicable, but not later than the close of the first business day after discovery.

Regarding the specific recommendations under Issue 4:

TxOGA disagrees with the first part of Recommendation 4.1 and agrees with the second part.

As noted in the report, "TCEQ's enforcement program involves many different, detailed operational policies that interact together, ranging from its enforcement initiation criteria to its penalty policy." Further, the Sunset staff recognizes that the agency "needs to be able to adjust policies as needed" which we believe is the very reason it should remain a policy. Rules tend to be very rigid with little flexibility and resulting in the kind of problems that currently exist in the compliance history such as treating mom-and-pop businesses the same as large operations.

However, we agree that TCEQ should make the enforcement policy more transparent and accessible to the public as well as regulated entities.

TxOGA disagrees with Recommendation 4.2 increasing TCEQ's administrative penalty cap. We disagree with making TCEQ administrative penalty caps and civil penalty caps equivalent. Administrative penalties are assessed as a result of a matter that has been handled at the agency whereas civil penalties are assessed when cases have elevated to involvement of the Attorney General. These distinctions are purposeful and we believe they should remain.

Further, we disagree with any increase in penalty caps. The \$10,000 per day, per violation amount is consistent with other agencies and we do not see any justification for a 150% increase.

TxOGA agrees with Recommendation 4.4 authorizing TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.

Issue 5

TCEQ Does Not Have the Tools Necessary to Effectively Protect Surface Water Availability During Drought or Emergency Conditions

Sunset Staff Recommendation:

- Clarify the Executive Director's authority to curtail water use in water shortages and times of drought.
- Require water rights holders to maintain monthly water-use information and allow the Commission to access that information upon request.
- Authorize TCEQ to require implementation of drought contingency plans during times of a potential water shortage.
- Require TCEQ to evaluate the need for additional watermaster programs.

TxOGA supports providing TCEQ with the tools necessary to protect surface water availability during drought or emergency conditions.

TxOGA supports each of the recommendations provided that they are implemented through the rulemaking process so that water right holders and other stakeholders have the opportunity to provide input.

Issue 6

Gaps in Petroleum Storage Tank Regulation and Remediation Fee Expiration Threaten the State's Ability to Clean Up Contaminated Sites

Sunset Staff Recommendation:

- Require previous tank owners or operators to share responsibility, as appropriate, for contamination from leaking PSTs.
- Prohibit delivery of certain petroleum products to uncertified tanks and provide for administrative penalties.
- Reauthorize the PST remediation fee, change the current fee levels to caps, and authorize the Commission to set fees in rule.
- Expand use of the remediation fee to allow TCEQ to remove non-compliant PSTs that pose a contamination risk.

TxOGA does not support continuation of the PST program in its current structure. However, we recognize the importance of continuing to fund the program to ensure proper compliance. If the PST program is continued, we recommend revamping it to ensure that sites are remediated in a timely and cost-efficient manner similar to the Oil Field Cleanup Program administered by the Railroad Commission.

Issue 8

The Statutory Cap on Emissions Limits TCEQ's Ability to Adequately Fund the Title V Air Permit Program

Sunset Staff Recommendation:

- Authorize TCEQ to administratively adjust the annual emissions tonnage cap for the Air Emissions Fee when necessary to adequately fund the Title V Operating Permit program.

TxOGA disagrees with Recommendation 8.1 authorizing TCEQ to adjust the emissions tonnage cap for the Air Emission Fee.

The report states that "Revenue from the fee has steadily declined as industries have more effectively controlled their emissions, and in fiscal year 2009 revenues fell below needed expenditures to support the program. In fiscal year 2010, the fee returned \$30.6 million while program costs totaled \$34.6 million, a \$4 million shortfall." We suggest that there may be a problem in administration of the program if costs have increased while emissions have declined. TxOGA recommends that before increasing a fee on industries that have successfully reduced emissions, the TCEQ provide to the Sunset Commission and the Legislature a full accounting and justification of program expenditures. Further, we recommend any increase in fees be subject to the rulemaking process with participation and extensive input from regulated entities.