



TEXAS CHEMICAL COUNCIL

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**Written Testimony – TCEQ Sunset
Sunset Advisory Commission Hearing
Austin, Texas
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The Texas Chemical Council (TCC) appreciates the opportunity to submit written testimony to the Sunset Advisory Commission on the Sunset recommendations for the Texas Commission on Environmental Quality (TCEQ). We also commend the Sunset staff for their hard work on the development of their report to the Commission.

TCC is a statewide trade association representing approximately 70 chemical manufacturers operating more than 200 Texas facilities across the state. TCC member companies manufacture hundreds of products that improve the quality of life of Texans and people throughout the world. The chemical industry has invested more than \$50 billion in physical assets in the state and pays over \$1 billion annually in state and local taxes. TCC's members provide approximately 70,000 direct jobs and over 400,000 indirect jobs to Texans across the state. Chemicals are the state's number one export with over \$30 billion in chemical products exported each year to destinations around the world. In the Houston-Galveston-Brazoria (HGB) nonattainment area, TCC member companies together with other industrial sectors have invested more than \$4 billion since 2001 to reduce nitrogen oxide (NO_x) emissions from point sources by more than 80 percent.

Overall, TCC believes that the Sunset Commission staff conducted a balanced review of the TCEQ's functionality while avoiding contentious policy issues, including disagreements between TCEQ and the U.S. Environmental Protection (EPA) over the Texas air permitting program. Going forward, Texas will continue to face many challenges in the form of environmental mandates from EPA. EPA has proposed a lower 8-hour ozone standard, the effect of which could put 29 Texas counties in nonattainment with the federal standard. This nonattainment status is accompanied by stringent permitting requirements for businesses in those counties, making it difficult to attract investment and job growth in those areas. Additionally, EPA's federal greenhouse gas (GHG) rules take effect on January 2, 2011, which will ultimately amount to a construction ban across Texas and the United States, discouraging new capital investment and job growth with little or no benefit to the environment. While Texas has boldly communicated to EPA that it is neither legally allowed, nor inclined, to implement the federal GHG rules because of the dire impact those regulations will have on the Texas economy, Texas businesses will still face the ramifications of the rules through EPA enforcement and promises of delayed permit approvals which will further thwart new investment.

In short, we feel the state has successfully demonstrated significant improvement in air quality and protected our environment while preserving the state's economic vitality. We commend the TCEQ and the Texas Legislature for striking a balance that protects our state's natural resources

while preserving economic investment and high-paying Texas jobs provided by industries like ours.

The following is a brief summary of TCC’s positions with regard to the recommendations offered in the Sunset staff report, followed by more substantive comments and suggestions for revisions.

Issue #1	Continue the TCEQ for 12 years	TCC supports with recommendations
Issue #2	Improve TCEQ’s public assistance efforts	TCC offers recommendations
Issue #3	Redevelop TCEQ’s compliance history program	TCC supports with recommendations
Issue #4	Increase statutory cap for penalties	TCC opposes with recommendations
Issue #5	Expand authority for TCEQ Executive Director to curtail water rights	TCC offers recommendations and questions for clarification
Issue #8	Adjust Title V emissions fee cap	TCC opposes with recommendations

Issue #1: Texas Has a Continuing Need for the TCEQ

Recommendation 1.1: Continue the TCEQ.

TCC agrees that the State of Texas has a continuing need for the TCEQ, the second largest environmental agency in the world. Texas has one of the largest and most diverse economies in the world and has unique challenges. No other state in the United States must balance the growth and prosperity of a large industrial sector while simultaneously protecting and improving the environment. Texas has successfully met this challenge and will continue to make environmental gains while preserving Texas as one of the best places to do business in the nation.

Air quality in Texas has dramatically improved and is continuing to improve. Innovative and successful Texas programs, such as the Texas Emissions Reduction Plan (TERP), in addition to a robust permitting program, serve as a model for the rest of the nation. With regard to mobile source emissions reductions, TERP was created by the Texas Legislature in 2001 to reduce mobile source emissions through a grant program administered by the TCEQ. Through the TERP program to date, TCEQ has allocated over \$775,000,000 to reduce NO_x emissions by over 160,800 tons in the state’s nonattainment areas. TCEQ also implements the “Drive a Clean Machine” program and since 2007, has allocated over \$77 million to replace over 22,000 outdated engines in Central Texas and the HGB and Dallas-Fort Worth (DFW) nonattainment areas. Additionally, through the Voluntary Emission Reduction Permit program and mandatory permitting of all grandfathered facilities, Texas has reduced NO_x emissions by 260,000 tons across the state. As a result, the HGB nonattainment area is on the cusp of attaining the 1997 federal 8-hour ozone standard ten years ahead of schedule.

Texas, which has the highest number of volatile organic compound (VOC) monitors in the country, has also seen a dramatic reduction in VOC emissions. In 2008 and 2009, no monitors in Harris County were above the long-term effects screening level (ESL) for benzene, and all monitors in the Houston region showed a decrease in average benzene concentrations from 2005 to 2008. Additionally, TCEQ targets pollutants and areas of concern through an Air Pollutant Watch List (APWL), which tracks areas where monitored levels exceed ESLs or otherwise indicate an air quality concern. Currently, there are 11 APWL areas in ten Texas counties. Over the last two years, six pollutant concentrations decreased below their respective ESLs and have been removed from the listings. Furthermore, in January 2010, seven more pollutants in five areas met the delisting criteria and the areas were removed from the APWL. This is an almost 50 percent decrease in the number of areas under the APWL program. Such improvements in air quality across Texas are expected to continue despite the state's rapidly growing economy and population.

Recommendation 1.3: Apply the standard Sunset across-the-board requirement for the Commission to develop a policy regarding negotiated rulemaking and alternative dispute resolution.

TCC is concerned with the vagueness of the recommendation that TCEQ develop a policy of "negotiated rulemaking." Texas businesses need regulatory certainty in the state's permitting and enforcement processes. While we support the agency having necessary flexibility to effectively manage the state's environmental quality, we question the need for TCEQ to have "alternative procedures for rulemaking" without more concrete guidance from the Legislature.

Issue #2: TCEQ's Public Assistance Efforts Lack Coordination and Focus

Recommendation 2.2: Focus OPIC's efforts on representing the public interest in matters before the Commission.

The recommendation of the Sunset staff appears to attempt to focus the efforts of the TCEQ's Office of Public Interest (OPIC) on representing the "public interest" in matters before the Commission. TCC questions how the agency defines "public interest." In the event the Sunset Advisory Commission adopts this issue, TCC recommends that the Legislature provide very specific direction to TCEQ on this point.

Issue #3: TCEQ's Approach to Compliance History Fails to Accurately Measure Performance

TCC agrees with all the recommendations listed in the Sunset staff report on this issue and offers the following suggestions to provide further guidance to TCEQ on this issue.

Recommendation 3.1: Remove the uniform standard from statute.

TCC agrees that the uniform standard used to measure compliance history is very problematic. For example, under the current system, a dry cleaning operation and a chemical plant are evaluated under the same formula without regard to the facility's size, complexity or the number of opportunities to be noncompliant with the regulations. A large chemical operation has thousands of opportunities each day to be out of compliance with state and federal environmental regulations. Also, the majority of chemical plants in the state are considered "major sources" and are therefore subject to Title V permit obligations required under the federal Clean Air Act.

TCC supports a compliance history approach that evaluates the regulated community on a sector-by-sector approach. One chemical plant's compliance history should be evaluated as compared to the compliance history of the other chemical plants in the state. Additionally, those chemical plants that are classified as major sources should be compared to those that are also major sources.

Recommendation 3.2: Remove the requirement to assess compliance history of entities for which TCEQ does not have adequate compliance information.

TCC agrees with this recommendation. It is a waste of the agency's valuable resources to classify entities with no compliance information to evaluate. The average-by-default classification is misleading to the public and should also be eliminated from the program.

Recommendation 3.3: Expand the statutory components to allow TCEQ to consider other factors in evaluating compliance history.

TCC agrees with the recommendation that TCEQ be required to consider positive indicators that affect compliance history, such as voluntary or other contributing efforts to do more than the law requires. This recommendation also contemplates including size and complexity as factors in evaluating a facility's compliance history, which TCC wholeheartedly supports. Specifically, TCC supports the staff's recommendation that in determining complexity, TCEQ should consider entities' regulatory requirements and the severity of potential violations. This would address the different regulatory requirements between major and minor sources.

Recommendation 3.4: Direct TCEQ to revise its rules on compliance history.

TCC agrees that TCEQ needs to develop a new compliance history method by rule and make changes to the current points system and formula. However, TCC believes that the agency needs very specific guidance from the Legislature before proceeding down that path. In the 80th Legislative Session (2007), Rep. Wayne Smith filed a compliance history bill (H.B. 2318) that did not pass but which TCC supported and still supports. The bill did the following:

- It provided more flexibility to the agency by eliminating a single uniform standard to determine compliance history for all entities, regardless of size or complexity. This will allow the agency to develop standards appropriately for the type of industry and facility being evaluated.
- Since compliance history is routinely used by the TCEQ in both permitting and enforcement, the bill also included provisions for the use of compliance history, as opposed to simply the evaluation of compliance history.
- It changed the way the TCEQ currently uses Notices of Violation (NOVs) to evaluate an entity's compliance history in the following ways:
 - It clarified that TCEQ may no longer use NOVs in the escalation of penalties unless the agency takes subsequent action on the NOV or unless the entity is classified as a "repeat violator." NOVs are an allegation of a violation and not a final judgment of the merits.
 - It stipulated that if the TCEQ includes an NOV in a listing of an entity's compliance history, the listing must be accompanied by a clarification that an NOV is not a final enforcement action, nor is it proof that a violation has actually occurred.

- It clarified that self-reported deviations or violations may not be included as NOV's in compliance history unless the TCEQ issues an actual written NOV. Final orders or judgments resulting from self-reported violations may be considered in compliance history.
- The bill changed the names of the compliance history classifications from “poor” and “average” to “unsatisfactory” and “satisfactory.” It further directed TCEQ to establish a category of unclassified performers for those entities for which the commission doesn't have enough information.
- It authorized TCEQ to continue using a formula-based approach to evaluate compliance history, provided that the formula takes a more balanced approach at using both positive and negative factors related to the size, operation and complexity of the site being evaluated.
- It modified the criteria the agency must consider in determining whether an entity is a “repeat violator” by directing the agency to consider the following components:
 - The size of the site at which the violations occurred; and
 - Whether the violations are of the same nature and the same environmental media of other violations that have occurred in the last 5 years.
- It stipulated that components used to determine an entity's compliance history may not also be used to determine penalty enhancements or escalations.
- It directed TCEQ to allow an owner or operator of a site 30 days to evaluate compliance history information that is to be posted on the Internet prior to the posting.
- For eligibility under the Regulatory Flexibility program, the bill stipulated that the TCEQ may not exempt an applicant unless the applicant can present evidence to the agency that the alternative the applicant proposes is as protective of the environment and public health as the agency's current method or standard.

TCC urges the Sunset Advisory Commission to review H.B. 2318 from the 80th Legislative Session and use it as a model when revising the current compliance history program.

Issue 4: TCEQ's Enforcement Process Lacks Public Visibility and Statutory Authority

Recommendation 4.1: Require TCEQ to structure its general enforcement policy in rule.

TCC agrees that there are many complicated facets of TCEQ's enforcement process. However, TCC has great concern over any proposal that would thwart or impede the agency's flexibility in the enforcement process. A benefit to keeping the enforcement policies in guidance form, as opposed to rule form, is that the agency maintains the ability to adjust penalties according to the circumstances of each case. This is particularly beneficial for smaller and less sophisticated regulated entities. If the Sunset Advisory Commission agrees with the staff recommendation to direct TCEQ to structure its general enforcement policy in rule, TCC requests that the agency be given very clear parameters on that process and that the agency also be permitted to maintain its current flexibility in the enforcement process.

Recommendation 4.2: Increase TCEQ's administrative penalty caps.

TCC does not support increased administrative penalty caps. That said, our greater concern is over the practice of the speciation of penalties. In the report, the Sunset staff notes that the Attorney General's office utilizes the practice of speciation, which means breaking down the number of violations in an emission or discharge event into its individual components, as a method of increasing civil penalties beyond the current statutory cap of \$25,000 per day. The majority of cases referred to the Attorney General are those where multiple violations have occurred at the same site within the past two years.

The practice of speciation is not explicitly authorized anywhere in statute and in fact, is directly contrary to Texas' environmental laws. In the Texas Clean Air Act, Health & Safety Code § 382.0215, an "emissions event" is defined as "an upset event, or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in the unauthorized emissions of air contaminants from one or more emissions points at a regulated entity." By definition, the single "event" includes multiple emissions. Texas Water Code § 7.052(d) clarifies that "each day that a continuing violation occurs may be considered a separate violation." Therefore, with regard to air-related emissions events, both the TCEQ and the Attorney General are required to treat each daily emissions event as a single violation, no matter how many individual components are included in the emissions event. Accordingly, TCC urges the Sunset Advisory Commission to include a recommendation in its final report that eliminates the ability to use speciation in the calculation of penalties. TCC feels there is enough flexibility within the current structure of the agency's enforcement procedures for the TCEQ to assess the appropriate penalties without the need for speciation.

Issue #5: TCEQ Does Not Have the Tools Necessary to Effectively Protect Surface Water Availability During Drought or Emergency Conditions

TCC neither supports nor opposes the Sunset staff's recommendations with regard to Issue #5, but rather, has the following questions for clarification as to the intent behind many of the suggested provisions.

Recommendation 5.1: Clarify the Executive Director's authority to curtail water use in water shortages and times of drought.

In the report, Sunset staff states that the recommendation would clarify that, only during a water shortage or other emergency, the Executive Director may curtail a water right holder's water use or otherwise allocate water to maximize the beneficial use of state water. Notably, what constitutes a "water shortage or other emergency"? TCC believes the prior appropriation doctrine is clear as to which water rights take precedence in times of water shortage and opposes any attempts to change the water right holder's seniority privileges in any manner. TCC is unclear as to the intent behind this recommendation and encourages the Sunset Advisory Commission to proceed with extreme caution in granting the Executive Director authority to curtail water rights in any situation.

Recommendation 5.3: Authorize TCEQ to require implementation of drought contingency plans during times of a potential water shortage.

TCC is confused by this recommendation and how it would comport with the State Water Plan, groundwater management plans, and the prior appropriation doctrine.

Issue #8: The Statutory Cap on Emissions Limits TCEQ's Ability to Adequately Fund the Title V Air Permit Program

TCC understands that Texas must keep the Title V Operating Permit Fee Account funded or risks losing the program. We also understand that one of the primary reasons that revenue into the account has decreased is due to improved air quality around the state. The fewer the air emissions, the less money is generated into the account. That said, TCC regrets that industry must pay a higher fee in return for working with the state to dramatically improve the state's air quality.

Currently, TCEQ is moving forward with a rulemaking to increase the base fee in the program from \$25 per ton of regulated pollutants to \$35 per ton in order to compensate for loss of revenue coming into the account. TCC understands from TCEQ that this rulemaking will accomplish the goal of keeping the account funded and eliminates the need for any statutory changes. Accordingly, TCC opposes any changes to statute with regard to this issue and recommends that the Legislature allow TCEQ to proceed with its current rulemaking procedure to address this problem.

Conclusion

TCC again appreciates the opportunity to submit written testimony on the Sunset staff report on TCEQ. If you have any additional questions or need clarification, please do not hesitate to contact us.

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