ACT

Alliance for a Clean Texas

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Air Alliance Houston
Baptist Christian Life Commission
Caddo Lake Institute
Clean Water Action
Environmental Defense
Environmental Integrity Project
Environment Texas
Greater Edwards Aquifer Alliance
Hill Country Alliance
National Wildlife Federation
Public Citizen
Re-Energize Texas
SEED Coalition
Sierra Club
Texas Campaign for the Environment
Texas Center for Policy Studies
Texas Impact
Texas League of Conservation Voters

Dear Mr. Levine,

Thank you for the opportunity to provide comments on the Sunset Advisory Commission's staff report on the Texas Commission on Environmental Quality. The Alliance for a Clean Texas appreciates the opportunity to participate in the Sunset review process and would like to thank the Sunset staff for its professionalism, consideration and cooperation throughout the review process.

Attached please find ACT's comments on the staff report. They are submitted on behalf of the ACT partner organizations. Individual organizations may choose to submit comments separately on issues of particular concern to that organization. While ACT encourages these additional comments, the attached document represents ACT's only official comment on the staff report.

ACT appreciates the inclusion of these comments in the Sunset Advisory Commission hearing materials for the December 15th and 16th public hearing on TCEQ. Representatives from ACT partner organizations will testify at the hearing and look forward to answering any questions the Commission may have. Please contact me directly if any questions arise before the hearing; I will be happy to direct you to the person best able to provide an answer.

Again, thank you for the care and time you and your staff have put into the evaluation of the Texas Commission on Environmental Quality. This review represents an invaluable opportunity to consider the future health of the people and the environment of Texas.

Sincerely,

Lize Burr
Coalition Coordinator

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Attachment: Alliance for a Clean Texas Comments on the Sunset Staff Report on the Texas Commission on Environmental Quality

Alliance for a Clean Texas Comments on the Sunset Staff Report on the Texas Commission on Environmental Quality

Introduction

The Alliance for a Clean Texas (ACT) would like to thank the Sunset Commission staff for their very thoughtful and detailed analysis and recommendations regarding the Commission review of the Texas Commission on Environmental Quality (TCEQ). Many of the staff's recommended changes proposed in their report would, ACT believes, result in positive changes to TCEQ's ability to effectively and efficiently carry out its mission.

ACT generally agrees with the Sunset staff's analyses and findings that criticisms of TCEQ's approach to regulation, including permitting and enforcement, often lie with the Commission's policies in place at any given time and its implementation of the statutory authorities and tools it has for its use. But we strongly disagree with the "blanket" proposition that "the decision of how and when to use them is rightly in the hands of the Commission, appointed by the Governor, and responsible and accountable for setting policy direction and making decisions on regulatory cases that come before them." We believe the Sunset staff's failure to "delve into the overarching issues relating to environmental *policy*" has led to significant deficiencies in the assessment of TCEQ's use of its authorities and tools and the impact that TCEQ has on environmental quality and public health. The staff's focus only on the agency's "operational functions," with a stated goal of putting "structures in place to ensure TCEQ has a more robust and focused public assistance function and can effectively identify and take action against regulated entities as appropriate to enforce State law and agency regulations," leads to numerous failed opportunities to truly address areas where TCEQ is not doing all it reasonably can or should to meet its responsibilities.

We understand that the current policy of the Sunset Advisory Commission is to limit Sunset review to simply identification and elimination of waste, duplication, and inefficiency in government agencies, and to avoid any consideration of policy issues. That policy has been fully respected and followed by the Sunset staff in its analyses, findings and recommendations. Yet, we respectfully disagree with such a significantly limiting policy, and believe that the true role of the Sunset process is to "create a unique opportunity for the Legislature to look closely at each agency and make fundamental changes to an agency's mission or operations if needed." 1

By analyzing policy issues, and making findings and recommendations on any deficiencies and/ or needed clarifications or improvements, the Sunset staff and the Sunset Advisory Commission would not only meaningfully assist the Legislature in its continuing oversight of all aspects of a state agency—structure, organization, procedure and policy—but also meaningfully address all the criteria established by the Legislature for the Sunset process to determine whether a public need exists for the continuation of a state agency or for the performance of the functions of

[1] Sunset Advisory Commission Website

the agency,2 including such things as the efficiency and effectiveness with which the agency committee operates, and the promptness and effectiveness with which the agency addresses complaints concerning entities or other persons affected by the agency.

The Sunset staff admits that "room exists for visiting some issues confronting the Commission," but fails to fully and meaningfully address these issues by asserting that the staff "cannot substitute its judgment for the Commission's, or the Legislature's as a whole, in larger matters involving environmental policy." We submit that the Sunset staff's full and meaningful identification and analysis of all issues confronting the Commission and making recommendations to the Legislature as to how TCEQ can more adequately and appropriately carry out its duties and responsibilities is not "substituting its judgment" for the Commission or the Legislature. Rather, it is effectively doing what the Sunset process is intended to do—– "giving the Legislature the information needed to draw conclusions about program necessity and workability."3

Since the Sunset staff has regrettably declined to identify and analyze policy-related issues which significantly affect the manner and effectiveness of TCEQ in carrying out its duties and responsibilities, and has failed to make any recommendations as to how any policy-related deficiencies can be addressed or improvements made, ACT presents a number of such issues in the section below entitled "Additional Issues Not Addressed by Sunset Staff Report." **ACT strongly believes that if the Sunset Advisory Commission will address these issues and make appropriate or necessary changes relating to them, many of the issues and problems that citizens face regularly when dealing with TCEQ in permitting, enforcement and public health protection matters can be addressed.**

The Sunset Advisory Commission should recommend to the Legislature that the issues identified below and in the section "Additional Issues Not Addressed by Sunset Staff Report" be addressed.

1. The Air Pollutant Watch List should be adopted into rule as this program interacts with multiple divisions at the agency and serves as one of TCEQ's most critical tools in reducing ambient levels of air toxics around the state.
2. Similar to APWL, Effects Screening Levels are critical toxicological guidelines used in multiple divisions of the agency and should therefore be adopted into rule. TCEQ should be required to evaluate and consider the cumulative effects on ambient air quality, public health and property from all air contaminant emissions from any facility or proposed facility with the air contaminant emissions from other facilities within a prescribed distance. This analysis should be formalized and adopted in rule.
3. TCEQ should be required to evaluate and consider the cumulative effects on ambient air quality, public health and property from all air contaminant emissions from any facility, or proposed facility with the air contaminant emissions from other facilities within a proscribed distance. This analysis should be formalized and adopted in rule.
4. TCEQ should be clearly authorized to deny an air permit upon initial request or upon renewal for good cause. The agency should also be clearly authorized to impose

[2] Texas Government Code, Sec. 325.011

[3] Sunset Advisory Commission Website

additional requirements in air permits upon renewal under certain circumstances.

5. Require applicants to hold an early public meeting when an application for a new industrial hazardous waste and municipal solid waste facility is submitted. TCEQ would only have to provide written and online materials, as the onus would be on the applicant to hold and publicize the public meeting.
6. Raise the existing $1.25 per ton Solid Waste Disposal fee on landfilling and adjust it every five years to account for inflation. This would allow TCEQ to perform its responsibilities to evaluate MSW applications, enforce the MSW laws, disburse funds to the COGs for local grants, track recycling rates across the state and provide for more robust statewide recycling efforts, which will create economic development, jobs and improve the state's tax base.

Issue 1: ***Texas Has a Continuing Need for the Texas Commission on Environmental Quality.***

Finding that the:

- the State has a continuing interest in tailoring environmental regulation to Texas;
- TCEQ is the most appropriate agency to perform the State's myriad environmental regulatory activities; and,
- TCEQ performs reasonably well, given the difficulty of its environmental responsibilities,

the Sunset staff has recommended to the Sunset Advisory Commission that TCEQ be continued for 12 years.

ACT Recommendations on Issue 1:

The Sunset Advisory Commission should not adopt recommendation 1.1. Instead, the Commission should recommend to the Legislature that TCEQ be continued for 6 years.

ACT Comments on Issue 1:

ACT agrees that TCEQ should be continued, but questions whether it should be continued for a period shorter than 12 years to allow for meaningful follow-up review by the Legislature on implementation of all recommended/adopted changes resulting from the Sunset process, as well as implementation efforts and any resulting issues relating to numerous and significant impending environmental and public health initiatives and/or regulations; e.g. tighter federal ozone standards and greenhouse gas emissions regulations.

ACT disagrees with the Sunset staff's findings that TCEQ "performs reasonably well, given the difficulty of its environmental responsibilities." To the contrary, ACT believes that TCEQ fails to adequately protect the public health and environment in numerous respects, and more changes to TCEQ's statutory authorizations, policies, processes and procedures are necessary to address these deficiencies and failures.

Texans all across the State regularly and routinely voice their frustrations with how TCEQ has failed, and continues to fail, to adequately protect their health, their property, their environment and their quality of life. Citizens to whom TCEQ is charged to serve and protect constantly cite experiences where TCEQ:

- ignored clear evidence that a proposed pollution source would affect their health or livelihood;
- ignored the cumulative impacts of combined emissions sources in an area;
- failed or refused to issue restrictive permits, amendments, and renewals, unless agreed to by the permittee or applicant;
- failed to effectively act when a polluter emitted far more that it was permitted;
- assessed fines or other enforcement directives that were meaningless or ineffective to address noncompliance;
- failed to adequately notify the public of pollution sources that would affect their health and quality of life, and prohibiting or restricting the public's participation in permitting

and enforcement decision-making
- ignored or refused to implement federal laws and regulations designed to protect public health and the environment;
- overruled recommendations of TCEQ staff and/or SOAH administrative law judges in permitting and enforcement matters.

ACT does agree with the Sunset staff that the State needs regulation to protect the environment and public health, and that Texas' citizens, environment and economy benefit from having a state agency to protect air and water quality, manage water quantity, ensure proper disposal of waste, and clean up contaminated sites. But ACT submits that TCEQ is not doing all it reasonably can or should to meet these responsibilities. The Sunset staff's findings and recommendations confirm that very fact in a number of respects.

ACT argues that Sunset staff should have recommended refining TCEQ's mission by inserting a statement of purpose in the agency's enabling legislation. The staff report describes its own purpose as recommending "putting structures in place" to help TCEQ do a better job carrying out its statutory functions, but without a more precise mission, TCEQ will always be forced to choose between conflicting priorities, diminishing its effectiveness and causing it always to fall short of expectations.

The staff report states "The challenges and criticisms the agency must face are an inevitable part of its job balancing the often competing interests of protecting the environment without unduly affecting the State's economy." Sunset staff identified these competing interests of environmental protection and economic development from language in TCEQ's mission statement. However, that mission statement is merely a self-assigned description cobbled together from the mission statements of the various agencies that preceded TCEQ, with no specific legislative direction.

Most states are very clear that their environmental regulatory agencies exist to protect public health and the environment. Few mention economic considerations at all, and of those that do mention economic considerations, most are clear that economic development must be consistent with protecting human health and the environment, and not the other way around as TCEQ's mission statement suggests.

The Legislature should clarify and codify the purpose of TCEQ as being the protection of human health and the environment, and not the promotion of economic development. TCEQ's mission statement should be concise and unambiguous. We recommend the following language as accomplishing the historical goals of Texas environmental agencies, being in the mainstream of other states, and embodying the theme of existing law: "The mission of the Texas Commission on Environmental Quality is the protection of public health and the environment."

ACT agrees that the agency generally has the appropriate range of statutory tools and authority to ensure environmental quality and protect public health, but also agrees that there are needed changes in a number of areas. We commend the Sunset staff for identifying and recommending needed statutory and regulatory changes in the areas they chose to analyze.

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

Finding that:

- TCEQ's public assistance functions are not coordinated or well-defined;
- OPIC's broad responsibilities prevent it from effectively focusing its efforts and can place it in potentially conflicting roles;
- OPIC's unique accountability structure results in challenges in demonstrating its effectiveness; and
- TCEQ has an opportunity to provide better public information on environmental issues and its role in environmental protection and regulation,

the Sunset staff has recommended to the Sunset Advisory Commission that

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

ACT Recommendations on Issue 2:

The Sunset Advisory Commission should not adopt recommendations 2.1 & 2.2.
The Sunset Advisory Commission should adopt recommendations 2.3 with proper legislative guidance to the Commission.
The Sunset Advisory Commission should adopt recommendations 2.4 & 2.5

ACT Comments on Issue 2:

ACT agrees with the Sunset staff that effective public assistance is a vital function of TCEQ. The Staff accurately recognizes that environmental matters are complex, and the public faces substantial challenges in navigating the processes and procedures used by TCEQ. ACT agrees that there is room for improvement in TCEQ's efforts to assist the public.

<u>Recommendations 2.1 & 2.2:</u>

ACT does not agree with the staff's recommendation to remove public assistance during the contested case hearing process from the Office of the Public Interest Counsel. It is important to recognize that OPIC's protection of the public interest by preserving the integrity of the permitting process equals or exceeds its role in taking a position on the issues presented. In every case, the public has an interest in ensuring that the record before the Commission is as complete as possible. In every case, OPIC's facilitation of public input through answering procedural and process questions furthers the public interest.

In considering whether to transfer OPIC's current public assistance functions to the Executive Director, it is important to recognize the conflicts held by the Executive Director's Staff. In contrast to OPIC, the Executive Director has by definition already taken the position that a permit should be issued if a hearing is being held. TCEQ's process of developing negotiated permits only strengthens the pride of ownership held by the Executive Director's staff with regard to draft permits. Often, the public is seeking to provide information that contradicts the ED's position, or which challenges a policy adopted by the ED in recommending that a permit be issued. Any conflict that OPIC faces in assisting the public during the permitting process is only multiplied many times over if the Executive Director's staff is expected to perform this function.

It is further inappropriate to strictly limit OPIC's role to matters directly before the Commission. TCEQ utilizes a variety of regulatory mechanisms that generally avoid formal consideration by the Commission, such as standard permits or permits by rule. The use of these mechanisms may raise important issues in a particular case. While it is likely to remain the exceptional case, it is important to preserve OPIC's ability to become involved in such matters when the public interest warrants..

The Sunset Commission staff notes that both the Texas Department of Insurance and the Public Utility Commission are statutorily charged to educate and assist the public affected by their regulatory actions. Importantly, the efforts of both of these agencies are augmented by an independent public counsel's office. In the case of these public counsels' offices, the Sunset staff has acknowledged the benefits of an independent office to serve as a resource and advocate for the affected public. Texas has a similar interest in ensuring that the public is protected as TCEQ exercises its considerable authority over environmental issues in Texas. ACT believes that the best approach in the environmental arena is the same as the best approach in the insurance and utilities arenas – an independent advocate for the public that does not report to the regulatory agency.

ACT recommends that TCEQ's OPIC be removed from TCEQ and merged with the Office of the Public Utility counsel, with separate deputies for utility matters and environmental matters. Such a merger would enable OPIC to avoid the current conflict that exists between its need to represent the public interest and the pressures which OPIC inherently faces as part of TCEQ to support TCEQ's position.

Recommendations 2.3

If OPIC is to remain in TCEQ, ACT supports Recommendation 2.3, requiring the Commission to define factors to be considered in representing the public interest and establishing standard's for OPIC's involvement in matters considered by TCEQ, as an effort to focus OPIC's use of the limited resources it has available. The Legislature should provide clear guidance for TCEQ Commission in implementing this recommendation, however. OPIC's ability to independently pursue the public interest needs to be preserved. Establishing factors to be considered by OPIC in representing the public interest, and participating in cases, should serve to add transparency to OPIC's operations, rather than serve as a tool for the Commission to unduly control OPIC's role.

By statute, the Legislature should require that the Commission include the following factors to be considered as OPIC represents the public interest:

ACT agrees with the Staff's recommendation that the Commission be required to establish by rule factors to be considered by OPIC in determining whether to participate in a matter as a party. ACT further recommends that the Legislature identify a non-exclusive list of these factors by statute, to include::

- the consistency of the proposed action with applicable law
- the potential for a case to create precedent
- amount of air emissions, waste water pollutants, waste disposal, or water right to be authorized
- the level of public interest in a matter
- whether all parties are represented
- the ability of the parties involved to ensure a complete record
- cumulative impacts

OPIC should retain the discretion. to participate and pursue the public interest as necessary under the circumstances of a particular case

Recommendation 2.4

ACT recommends that the annual report by OPIC should be submitted to the legislature, in the report OPIC should discuss the trends and patterns which it may have observed in the functioning of the agency, suggest legislative and regulatory changes,

If OPIC is maintained within TCEQ, ACT supports recommendation 2.4, requiring OPIC to file an annual report to the Commission. OPIC serves an important and independent role within the agency, but its placement within the Commissioner's Cluster often means that its functioning is lost in larger agency. Requiring OPIC to report on its need to contract on outside technical expertise and legislative recommendations will help the public and the Legislature to evaluate the efforts being made by OPIC to carry out the authority granted to it by the legislature that appears to have gone unused up until this point. For example, it is difficult to determine whether OPIC has not used technical experts because it has not been allotted funding for such experts by the Commission, or if the Commission has not allotted funding for OPIC to use technical experts because OPIC has not requested it. The suggested report would make both OPIC and the Commission accountable on such questions. ACT does not see a need for legislative changes to be included every year, but instead a report on such changes once a biennium prior to a regular legislative session should be adequate.

ACT supports recommendation 2.5, that TCEQ improve its website. TCEQ should fully utilize its website to convey both its policies, and the status of pending applications. In some areas, TCEQ already requires that applicants make their applications available over the Internet, and ACT recommends that this requirement be expanded to any application for an individual permit. Additionally, TCEQ should take full advantage of electronic forms of communication in providing information to the public. Members of the interested public should be able to

subscribe to an electronic mailing list for all notices related to a facility. Allowing persons to generally request notice by electronic mail in lieu of written notice could potentially decrease mailing costs for the agency, and also decrease costs associated with the mailing of large documents, such as responses to comments on a permit application.

Issue 3: ***TCEQ's Approach to Compliance History Fails to Accurately Measure Entities' Performance, Negating Its Use as an Effective Regulatory Tool.***

Finding that the:

- TCEQ's one-size-fits-all approach to compliance history does not accurately or fairly reflect regulated entities' environmental performance;
- without accurate classifications, TCEQ cannot use compliance history as an effective regulatory tool, making it harder for the agency to punish bad actors and reward good ones; and,
- statute does not address other factors that can enhance TCEQ's evaluation of compliance history,

the Sunset staff has recommended to the Sunset Advisory Commission that the

- the uniform standard be removed from statute and TCEQ required to develop a compliance history method to be applied consistently;
- the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information be removed;
- the statutory components be expanded to allow TCEQ to consider other factors in evaluating compliance history; and,
- TCEQ be directed to accordingly revise its rules on compliance history.

ACT Recommendations on Issue 3:

The Sunset Advisory Commission should adopt recommendations 3.1, 3.2, 3.3 & 3.4.

ACT Comments on Issue 3:

ACT generally agrees with the Sunset staff findings and recommendations relating to compliance history. ACT presented to the Sunset staff the issue that TCEQ's current compliance history formula is not required by statute and is too complex.[4]

When adopted by the Legislature in 2001, the compliance history review and classification process at TCEQ was intended to be a comprehensive and uniform assessment of the regulated community's environmental compliance performance, thereby holding these entities accountable within existing permit and enforcement guidelines as well as within new regulatory structures that provide incentives to exceed minimum regulatory expectations. However, TCEQ's current compliance history rules and processes have been widely criticized by both the regulated community and environmental and public interest organizations, and even TCEQ itself has problems with the current compliance history statute, rules and processes, based on its experience implementing the program. There is little disagreement among interested parties that Water Code Section 5.753(a) should be revised to address the concerns about the compliance history formula and calculation.

The compliance history review and classification process at TCEQ has failed to provide a

[4] TCEQ Air Permitting and Enforcement --- Improving Texas' Air Quality Through the Sunset Review Process"; June 2010

meaningful and effective tool to use in tailoring permitting and enforcement decisions and in determining eligibility for voluntary incentive programs. It is too complex; too standardized with regard to a regulated entity's size, complexity, and pollution media; and too often based on inadequate compliance information. The statutory requirement for a uniform standard to be developed to evaluate compliance history has led to an inflexible, one-size-fits-all approach, resulting in a system that does not accurately measure performance and effectively precluding TCEQ from using compliance history to meaningfully target regulation. ACT agrees with the Sunset staff that these features have "stripped compliance history classifications of meaning" and "negated the practical use of this important regulatory tool." For instance, under the current policy, Notices of Violation automatically count against a facility's compliance history, while the more serious Notices of Enforcement do not.

ACT agrees with the Sunset Staff recommendations to remove from statute the "uniform standard" requirement and the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information, along with expanding the statutory components to allow TCEQ to consider other factors in evaluating compliance history. ACT likewise agrees that TCEQ should be directed to revise its rules on compliance history to reflect all statutory changes and to develop a compliance history method to be applied consistently and meaningfully. Through such rule-making processes, in which all interested stakeholders can participate, a more effective and meaningful compliance history review and classification process can be put in place to effectuate the original intent of the Legislature.

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

Finding that the:

- TCEQ's enforcement policies are unclear, limiting regulated entities' and the public's ability to understand TCEQ's enforcement decisions;
- statutory limits on administrative penalties hinder TCEQ's ability to take effective enforcement action against some violators; and,
- statutory restrictions on the use of Supplemental Environmental Projects prevent TCEQ from using this enforcement tool to improve the environment,

the Sunset staff has recommended to the Sunset Advisory Commission that the

- TCEQ be required to structure its general enforcement policy in rule and publicly adopt its resulting enforcement policies;
- TCEQ's statutory administrative penalty caps be increased; and,
- TCEQ be authorized to consider Supplemental Environmental Projects for local governments that would improve the environment.

ACT Recommendations on Issue 4:

The Sunset Advisory Commission should adopt staff recommendation 4.1 to require TCEQ to structure its general enforcement policy in rule and publicly adopt its resulting enforcement policies.

The Sunset Advisory Commission should adopt staff recommendation 4.2 to increase statutory administrative penalty caps. Additionally, the Sunset Advisory Commission should recommend to the Legislature that the statutory penalty caps should be reevaluated and adjusted as necessary every five years to account for inflation. The Sunset Advisory Commission should also recommend to the Legislature that TCEQ should be specifically authorized to calculate penalties for multiple violations in a single event based on the speciated components when violations result from significant/severe events that occur over a short duration with documented or potential significant harm to human health or the environment. Accordingly, statutory penalty caps should apply to each component violation, not the total event.

The Sunset Advisory Commission should adopt staff recommendation 4.4 to authorize TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.

ACT Comments on Issue 4:

ACT generally agrees with the Sunset staff findings and recommendations relating to TCEQ's enforcement processes. ACT presented a significant number of enforcement-related issues to the Sunset staff for their review and recommendations.[5] Even though we are pleased that the Sunset staff found merit in some of the issues and recommendations we presented relating to enforcement effectiveness and transparency, we are disappointed that their findings and

[5] TCEQ Air Permitting and Enforcement, 2010

recommendations fall far too short in truly identifying and addressing all of the enforcement-related issues that preclude or inhibit TCEQ's ability to effectively enforce environmental laws, regulations and permits in Texas.

Regrettably, here again, the Sunset staff has declined to identify and analyze policy-related issues which significantly affect the manner and effectiveness of TCEQ in carrying out its enforcement duties and responsibilities, and has failed to make any recommendations as to how any policy-related deficiencies can be addressed or improvements made. Accordingly, ACT presents a number of such issues in the section below entitled "Additional Issues Not Addressed by Sunset Staff Report." ACT strongly believes that if the Sunset Advisory Commission will address these issues and make appropriate or necessary changes relating to them, many of the issues and problems that citizens face regularly when dealing with TCEQ in enforcement matters can be addressed.

ACT strongly agrees that TCEQ's enforcement policies are unclear, limiting regulated entities' and the public's ability to know and understand how TCEQ makes its enforcement decisions. Furthermore, ACT also agrees that without a clear penalty policy, TCEQ or SOAH, which conducts hearings on TCEQ's enforcement cases, risk inconsistency in enforcement actions or decisions. ACT presented this very significant issue and recommendation to the Sunset staff for their review and recommendations.[6]

TCEQ has developed, adopted and utilized numerous enforcement policies to effectuate and administer the statutory administrative penalty authority and its directives. For the most part, these policies have been compiled into TCEQ's Penalty Policy document, which has never been adopted into rules. However, some policies that are regularly and routinely utilized in enforcement arise outside of even that formal document.

Water Code Sec. 5.103 requires TCEQ to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of this state. It also requires that TCEQ must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. Likewise, the Sunset staff is correct that other statutes also require TCEQ's enforcement policies to be adopted as rules, since they are "statements of general applicability that implements, interprets, or prescribes law or policy; describes the procedure or practice requirements of the agency; and are written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions."[7] TCEQ's Penalty Policy and other related enforcement policy statements or documents are certainly an "agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency."

ACT submits that there are significant benefits to adopting the Penalty Policy and other enforcement policies by rule, including, but not limited to:

- putting penalty policy in rule will allow the agency to settle more non-contested cases as

[6] TCEQ Air Permitting and Enforcement, 2010

[7] Texas Government Code, Sections 2001.003(6), 2001.004, 2001.005

rules afford less room to negotiate, thus saving agency resources;

- adding strength at a SOAH hearing or judicial proceeding on penalty recommendations or assessments if the Penalty Policy is in rule rather than simply a policy document;
- providing clarity/simplification of all the agency's enforcement policies through the rule-making process and incorporation of all policies approved by the Commission;
- providing more uniform enforcement recommendations and decisions;
- providing a transparent, reasoned justification for the policies through rulemaking under the Administrative Procedures Act;
- addressing EPA concerns about enforcement during the public participation component of the rulemaking process; and,
- no statutory changes are required.

To accomplish all these benefits, as well as comply with state law, TCEQ should be required to promulgate the Penalty Policy and all other general enforcement policies in rule, incorporating all currently existing internal guidance documents/memos relating to penalty policies and other enforcement matters into the formal Penalty Policy rule. The agency can then supplement/ clarify the Penalty Policy rules through guidance documents, if determined to be necessary or appropriate, thus maintaining flexibility for agency discretion. ACT strongly supports the Sunset staff recommendation that in adopting these rules and policies, TCEQ should consider and make clear its approach to and use of all its statutory enforcement tools including, but not limited to, its approach to speciation and economic benefit in calculating penalties, as well as when it will use some of its other tools, such as emergency shut-down authority.

Accordingly, ACT strongly agrees with the Sunset staff's recommendation 4.1 that TCEQ be required to structure its general enforcement policies in rule and publicly adopt its resulting specific enforcement policies.

ACT strongly agrees that TCEQ's statutory administrative penalty caps be increased. This was one of the fundamental and significant enforcement issues and recommendations ACT submitted to the Sunset staff for their review and recommendations.[8]

ACT agrees that the current statutory caps on the agency's administrative penalty amounts prevent TCEQ from taking effective enforcement action and appropriately sanctioning the most severe environmental violations. As clearly directed by the Legislature, an agency's administrative penalty authority should reflect the severity of the violation and serve as a deterrent to violations of law.[9] Yet, too often TCEQ is precluded from assessing warranted penalty amounts truly reflective of the nature and seriousness of some violations under TCEQ's jurisdiction that have significant impacts to public health and the environment, only because these warranted higher penalties exceed the amounts the agency is currently authorized to assess. In such egregious cases, TCEQ has been forced to lower otherwise warranted higher penalties down to the statutory cap.

[8] TCEQ Air Permitting and Enforcement, 2010

[9] Texas Water Code, Section 7.053

A perfect example of this problem arises from the statutory requirement that TCEQ must consider the economic benefit gained through the violation when assessing a penalty.[10] When economic benefit of noncompliance is considered, the statutory penalty caps often prevent the calculated penalty, adjusted for the economic benefit received by the violator, from being an amount adequate to address the particular violation(s) and/or provide an appropriate deterrent effect. In a significant number of violation instances, if economic benefit of noncompliance is completely and meaningfully considered and included in the calculated penalty, the final assessed administrative penalty would most likely exceed the statutorily mandated cap.

In an effort to more appropriately address significant violations, TCEQ has often been forced to refer the cases to the Office of Attorney General (OAG) for civil penalties and injunctive relief because of the OAG's higher penalty authority. In cases such as these, TCEQ is forced to take the more time-consuming and expensive route of civil enforcement through the OAG to appropriately sanction violators, thus frustrating the legislative intent that administrative enforcement proceedings result in swift, appropriate action against violators while keeping agency enforcement cases out of the courts. In these instances, TCEQ cannot avail itself of the administrative penalty process because the fines it is authorized to assess would be too low to adequately sanction or deter future noncompliance. It is recognized by all that, regardless of any increase to TCEQ's administrative penalty caps are, certain egregious cases will doubtlessly arise which require referrals to the OAG. However, if TCEQ had an equivalent penalty authority to that of the OAG, it could refer fewer cases and take fuller advantage of the administrative enforcement processes, making TCEQ comparable to other regulatory agencies that have higher statutory administrative penalty caps.

ACT fully understands that the Sunset staff recommendation to increase the statutory penalty caps does not, in itself, intend for TCEQ to automatically assess the maximum penalty for violations simply because the cap is higher, but rather contemplates TCEQ revising its penalty policy to include the higher authorized caps. As urged by ACT, this would allow TCEQ to assess penalties to the higher cap level for the most serious violations if the penalty calculation, according to established agency penalty policy, warrants an increased penalty given the severity of the violation involved and to better serve as a deterrent to future violations.

Accordingly, ACT strongly agrees with the Sunset staff's recommendation 4.2 that TCEQ's statutory administrative penalty caps be increased as set forth in the Staff Report.

However, there is one very significant aspect relating to the statutory penalty caps not addressed by the Sunset staff that ACT strongly believes should be considered by the Sunset Advisory Commission and ultimately the Legislature.

Water Code Sec. 7.052 sets the maximum penalties that may be assessed per violation per day. Statutory penalty caps can be significantly problematic in at least one specific enforcement situation. Permits issued by TCEQ specifically list separate and distinct pollutant parameters as permit limitations. If an entity does not comply with any specific permit parameter, that is

[1] Texas Water Code, Section 7.053(3)(D)

a violation. So, if an entity has 10 specific pollutant parameters that are regulated by its permit and 5 of those specific parameters are violated in a significant pollution event, that is reasonably 5 separate violations under Sec. 7.052. If penalties are calculated for the multiple violations in a single event based on the separate pollutant parameters, the statutory cap would apply to each violation. In the example above, the maximum daily penalty should reasonably be $50,000 --- 5 violations x $10,000/day per violation (using the current penalty cap of $10,000).

When violations result from significant and severe events that occur over a very short duration, such as unauthorized air emissions events or wastewater bypasses, with significant documented harm to human health or the environment, statutory penalty caps may prevent the calculated/ assessed penalty from being an amount adequate to address the severity and nature of the particular violation(s) and/or provide an appropriate deterrent effect. Here, **speciation**, the process of assessing penalties for multiple violations in a single, short-term event based on the speciated components of the emission or discharge, could reasonably help offset the limitations imposed by any statutory penalty cap. If a penalty is calculated only on the basis of the single event, the total assessed penalty cannot exceed the daily statutory cap. But, if penalties are calculated for the multiple violations in a single event based on the speciated components, the statutory cap would apply to each violation.

TCEQ applies speciation when calculating penalties in most water quality violations; i.e. a noncompliant wastewater discharge is assessed penalties for each parameter violated, such as biochemical oxygen demand, total suspended particles, nitrogen, dissolved oxygen, etc. However, TCEQ does not speciate when calculating penalties in other media violations, especially air violations, while the OAG does apply speciation when pursuing civil penalties in judicial enforcement proceedings referred to that office by TCEQ.

ACT strongly believes that TCEQ should be specifically authorized to calculate penalties for multiple violations in a single event based on the speciated components when violations result from significant/severe events that occur over a short duration, with documented or potential significant harm to human health or the environment. In these instances, penalties would be calculated for multiple violations in a single event based on the speciated components, with the statutory cap applying to each component violation, not the total event.

With regard to **Supplemental Environmental Projects** (SEPs), ACT agrees that TCEQ should be authorized to consider SEPs for local governments that would improve the environment. This was one of the enforcement issues and recommendations ACT submitted to the Sunset staff for their review and recommendations.[11]

Water Code Sec. 7.067 currently prohibits TCEQ from approving a SEP project that is necessary to bring a respondent into compliance with environmental laws, that is necessary to remediate environmental harm caused by the respondent's alleged violation, or that the respondent has already agreed to perform under a preexisting agreement with a governmental agency. A SEP must directly or indirectly benefit the environment above and beyond legal compliance requirements. If federal, state, or local law requires the project being proposed to be carried out,

[1] TCEQ Air Permitting and Enforcement, 2010

the project cannot qualify as a SEP; nor can a SEP be used to fix the problems that are the basis of the enforcement action taken by TCEQ.

Current TCEQ policy also provides that a SEP cannot generally be located "on-site"; i.e. at the actual site of the facility that committed the violations. However, there are three exceptions to this rule, so long as the SEP is not necessary to bring the respondent into compliance with environmental laws and is not necessary to remediate the environmental harm caused by the respondent's violation: (1) cities, counties or other governmental entities may perform a SEP within their jurisdiction; (2) nonprofit organizations may also be eligible to perform a SEP on-site when the benefit to the environment far outweighs the benefit to the nonprofit organization; and (3) if the project would make the respondent eligible for a Proposition 2 tax exemption and the respondent agrees not to apply for this tax exemption. Also, TCEQ policy requires that the SEP project must follow, not precede, an enforcement action. SEP credit will not be approved for a project already completed, already included in a respondent's budget or already committed to be undertaken.

Although these statutory and policy limitations are well-founded in most violation situations, they can be problematic at times when local governments are involved who often have limited financial resources. In these situations, compliance initiatives could likely be furthered if the respondent local government was allowed to commit to SEP projects that would enable it to come into compliance quicker or remediate any harm already caused by the violation(s). Accordingly, ACT agrees with the Sunset staff's recommendation 4.4 that TCEQ should be authorized to consider SEPs for local governments that would improve the environment. ACT believes that the current TCEQ SEP policies applicable to local governmental entities should be revised to rovide more discretion/flexibility in the approval/use of SEP projects on-site and when a project has already been completed, already included in a respondent's budget or already committed to be undertaken.

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

Finding that the:

- TCEQ's statutory authority to curtail or suspend water rights in emergencies is unclear;
- TCEQ lacks authority to use its water management tools as intermediate steps to prevent more severe water rights restrictions; an,
- TCEQ does not strategically evaluate the need for additional watermaster programs,

the Sunset staff has recommended to the Sunset Advisory Commission that

- the Executive Director's authority to curtail water use in water shortages and times of drought should be clarified;
- water rights holders be required to maintain monthly water-use information and allow TCEQ to access that information upon request;
- TCEQ be authorized to require implementation of drought contingency plans during times of a potential water shortage; and,
- TCEQ be required to evaluate the need for additional watermaster programs.

ACT Recommendations on Issue 5:

The Sunset Advisory Commission should adopt recommendations 5.1, 5.2, 5.3 & 5.4.

Issue 6: ***Gaps in Petroleum Storage Tank Regulation and Remediation Fee Expiration Threaten the State's Ability to Clean Up Contaminated Sites.***

Finding that:

- gaps in PST regulation allow some responsible parties to avoid paying for damage caused by leaking PTSs, shifting more costs to the state;
- TCEQ's ability to regulate and remediate leaking petroleum storage tanks is threatened by the expiration of the PST remediation fee; and,
- statute limits TCEQ's ability to prevent potential groundwater contamination from identified non-compliant PSTs,

the Sunset staff has recommended to the Sunset Advisory Commission that

- previous tank owners be required to share responsibility, as appropriate, for contamination from leaking PSTs;
- the delivery of certain petroleum products to uncertified tanks be prohibited and provide for administrative penalties;
- the PST remediation fee be reauthorized, the current fee levels be changed to caps, and TCEQ be authorized to set fees in rules; and,
- the use of the remediation fee be expanded to allow TCEQ to remove non-compliant PSTs that pose a contamination risk.

ACT Recommendations on Issue 6:

The Sunset Advisory Commission should adopt recommendations 6.1 & 6.4.
The Sunset Advisory Commission should adopt recommendation 6.2, with the additional recommendation that penalties should accrue to the program.
The Sunset Advisory Commission should adopt recommendation 6.3, with the additional recommendation that caps be indexed to the cost of construction price.

ACT Comments on Issue 6:

Several of ACT's partner organizations participated in the development of the PST program in the late 1980's and monitored this program through the 1990's. We believe that the program has been largely successful although a variety of problems have plagued its administration from its inception. The sunset review points out several current programmatic flaws, including:

- Gaps in PST regulation allow some responsible parties to avoid paying for damage caused by leaking PSTs, shifting more costs to the State;
- federal law requires states with EPA-delegated PST programs, like Texas, to prohibit common fuel carriers from delivering to uncertified underground PSTsand take enforcement action against violators, but Texas law does not provide TCEQ with this authority;
- expiration of the PST remediation fee threatens TCEQ's ability to regulate and remediate leaking petroleum storage tanks;
- TCEQ estimates that approximately 650 sites requiring state funds for remediation will still remain after 2011;
- Statute limits TCEQ's ability to prevent potential groundwater contamination from

identified non-compliant PSTs; and

- although TCEQ can use state remediation funds to check for contamination, it cannot use those funds to remove tanks until it confirms contamination has actually occurred; restricting the funds in this way potentially blocks TCEQ from being able to prevent or mitigate groundwater contamination at those sites

Issue 7: ***TCEQ Lacks Guidance on How to Fund the Texas Low-Level Radioactive Waste Disposal Compact Commission.***

Finding that the:

- The Legislature has little budget oversight over the Compact Commission, whose actions will have significant impact on the environmental and financial health of Texas

the Sunset staff has recommended to the Sunset Advisory Commission that

- the Compact Commission's funding mechanism be clarified.

ACT Recommendations on Issue 7:

The Sunset Advisory Commission should adopt staff recommendation 7.1 to have revenue allocated by TCEQ's rule-based compact waste disposal fee be remitted to a newly created General Revenue Dedicated Account, which would receive only the portion of the disposal fee allocated to cover Compact Commission operations.

Additionally, the Sunset Advisory Commission should recommend to the Legislature measures that would increase improve oversight of the Compact Commission, including making the annual budget reporting by the Compact Commission publicly available and providing legislative guidance on reasonable and allowable expenditures to the Compact Commission. Legislative oversight needs to be increased and explicit, particularly given the Compact Commission's failure to provide a long-overdue annual report.

ACT Comments on Issue 7:

In 1993, Texas formed a Compact with the states of Maine and Vermont to dispose of radioactive waste in a facility to be built in Texas. Maine later withdrew. The Texas Low-Level Radioactive Waste Disposal Compact Commission is a separate legal entity from the State, and is not a state agency. It has six members who represent Texas and are appointed by the Governor and two members who represent Vermont. While TCEQ sets maximum volume and total radioactivity to be accepted through the site license, the Compact Commission is currently proposing a controversial import/export rule regarding radioactive waste to be disposed of in Waste Control Specialists' (WCS) Compact facility in Andrews, Texas. The rule would expand to allow waste to come in from 36 or more other states instead of just the Compact States of Texas and Vermont.

The licensee, Waste Control Specialists (WCS), expects to have the site ready to accept Compact waste within the next nine months. Statute provides that the Compact Commission be funded by a portion of waste disposal fees, which are yet to be adopted by TCEQ in rule. However, statute does not specify how this funding will flow to the Compact Commission, or what portion of the fees would fund the Compact Commission.

The Sunset Staff notes that since Texas holds liability for radioactive compact waste brought

into the state, the Compact Commission's decisions related to the volume, radioactivity and source of waste to be accepted into the Compact site will be important to the State's long-term environmental and financial health. Indeed part of the rationale for the proposed import and export rule supported by some commissioners is to generate application and evaluation fees to support the agency given the failure to provide them adequate resources.

Given the ambiguity of TCEQ's and the Compact Commission's current funding arrangement and statute, the time is appropriate for the legislature to consider how the funding mechanism between the State and the Compact Commission will be structured.

The Sunset Staff report accurately lays out important concerns regarding Texas taking title and responsibility for radioactive waste accepted into the WCS Compact facility by a private operator. These wastes "can be radioactive for a long time and potential future contamination could not only have a severe impact to the environment and human health, but to the state, which bears the ultimate financial responsibility for maintaining and cleaning up the compact waste disposal facility site."

The shift from a State owned facility to a private for-profit venture has "created a different dynamic, bringing to light potential gaps in legislative oversight on how decisions related to acceptance of commercial low-level radioactive waste to the compact waste disposal facility will be made...the State continues to have an interest in ensuring these decisions will protect the state financially and environmentally." The Sunset report points out the cumbersome budgeting structure, noting that reimbursing the Compact Commission is "untenable on a long-term basis, as it inappropriately places TCEQ in the position of determining what expenditures are appropriate, and wastes TCEQ resources to oversee Compact Commission reimbursements."

While ACT agrees with the staff recommendation regarding funding the Compact Commission, the Sunset staff should have made additional recommendations regarding the Compact Commission. The Compact Commission should not be allowed to circumvent TCEQ's authority to establish license conditions, including the volume and source of the waste nor to provide a revenue source for a Compact Commission without clear revenues. Indeed the rationale for establishing a Texas Compact was to limit the states that might want to take advantage of the Texas waste site, not become the "solution" for the nation's radioactive dilemma. Additional statutory clarification is needed to give the decision about whether imports are allowed from other states to the Legislature through adding additional Compact party states, and only allow imports in an emergency situation. The Legislature should clarify that it is TCEQ and not the Compact Commission that decides the volume and radioactivity and source of waste allowed by the license.

Additional ACT Recommendations on Issue 7:

- The Compact Commission should be reviewed as part of the 2013 Sunset Review, as this quasi-public entity may or may not be the appropriate agency for overseeing radioactive waste shipments to Texas.

Prohibit the Texas Low-Level Radioactive Waste Compact Commission from expanding the Andrews

County radioactive waste dump to accept wastes from any state other than the Compact States of Texas and Vermont, unless additional states actually join the Texas Compact through legislative action and pay a requisite fee and accept their financial responsibility or in emergency situations. Texas bears the ultimate responsibility for maintaining and cleaning up the compact waste disposal site. The Compact Commission currently proposes an import/export rule that would open up the site to waste from around the nation, which could come from 36 or more states, increasing Texas' financial and environmental risks without necessarily requiring that additional states shoulder their fair share of the financial burden and risks. The proposal also circumvents TCEQ's authority to be the agency in charge of licensing limits on volumes and sources of wastes. The rule should not be considered until an independent analysis of potential volume and risk and transportation risk is completed and TCEQ and the Compact Commission have had time to review it.

Additional ACT recommendations:

- ***Prohibit the Texas Low-Level Radioactive Waste Compact Commission from expanding the Andrews County radioactive waste dump to accept wastes from any state other than the Compact States of Texas and Vermont, unless additional states actually join the Texas Compact through legislative action and pay a requisite fee and accept their financial responsibility. Texas bears the ultimate responsibility for maintaining and cleaning up the compact waste disposal site. The Compact Commission currently proposes an import/export rule that would open up the site to waste from around the nation, which could come from 36 or more states, increasing Texas' financial and environmental risks without necessarily requiring that additional states shoulder their fair share of the financial burden and risks.***

- ***The Compact Commission should be reviewed as part of the 2013 Sunset Review, as this quasi-public entity may or may not turn out to be the appropriate agency for overseeing radioactive waste shipments to Texas***

- ***The Legislature should hold hearings on the financial impacts and increased environmental risks if Texas is opened up to radioactive waste shipments from states other than the Compact states of Texas and Vermont.***

- ***The Legislature should also hold hearings on the emergency preparedness of first responders that may potentially have to deal with accidents involving radioactive waste during and after disposal as well as during transit to disposal sites.***

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

Finding that:

- Texas may be in jeopardy of losing federal approval of the Title V air permitting program if fee revenue is not increased; and,
- increasing the Air Emissions Fee to raise the needed revenues contributes to the inequitable treatment of industry,

the Sunset staff has recommended to the Sunset Advisory Commission that TCEQ be authorized to administratively adjust the annual emissions tonnage cap for the Air Emissions Fee when necessary to adequately fund the Title V Operating Permit program.

ACT Recommendations on Issue 8:

The Sunset Advisory Commission should adopt staff recommendation 8.1 relating to adjusting the annual air emissions tonnage cap applicable to the Air Emissions Fee.

ACT Comments on Issue 8:

ACT generally agrees with the Sunset staff findings and recommendations relating to adjusting the annual air emissions tonnage cap applicable to the Air Emissions Fee.

This very insightful recommendation would authorize TCEQ to adjust the annual air emissions tonnage cap when necessary to adequately and equitably fund the air operating permit program. ACT agrees that even though TCEQ has the authority to increase the fee amount above its current level, the statutory tonnage cap of 4,000 tons per year of emissions significantly limits, if not precludes, adequate funding for the Title V air permitting program. This is a significant circumstance, given that the Air Emissions Fee is designed to cover costs of the air permitting program, including promulgating regulations, reviewing permit applications, modeling and monitoring emissions, enforcing permits, and preparing emissions inventories. Furthermore, the statutory tonnage cap makes any fee increase inequitable since facilities emitting above the cap pay considerably less on a per-ton basis than facilities with emissions less than the cap. ACT would also point out another significant benefit from allowing adjustment to the tonnage cap – besides allowing more adequate and equitable funding for the air operating permit program, authorizing TCEQ to adjust the annual air emissions tonnage cap will also help create an additional incentive for air emissions sources to reduce their emissions, and thus reducing their fee costs.

Water and Wastewater and Utility Regulation Transfer
Supplement to the Sunset Staff Report on the Public Utility Commission

The State Could Benefit From Combining Regulatory Functions Related to Gas and Water Utilities in the Public Utility Commission.

Finding that:

- with its core mission of utility oversight, PUC's expertise and structure are focused on handling rate-related regulation efficiently and fairly; and
- although rate making functions at the Railroad Commission and TCEQ are working, transferring these duties to PUC offers potential benefits from aligning the State's regulation within one agency,

the Sunset staff has recommended to the Sunset Advisory Commission that

- the Public Utility Commission be continued for be continued for 12 years;
- gas utility regulation be transferred from the Railroad Commission to the PUC;
- contested gas utililty cases be required to use the State Office of Administrative Hearings;
- responsibility for regulating water and wastewater services be transferred from TCEQ to PUC;
- the existing water and wastewater utility application fees be eliminated and the Water Utility Regulatory Assessment Fee should be adjusted to pay for utility regulation at PUC;
- OPUC be required to represent residential and small commercial interests relating to water and wastewater utilities, contingent on the transfer to PUC;
- PUC be required to make a comparative analysis of statutory ratemaking provisions under its authority, contingent on any transfers, to determine opportunities for standardizations; and,
- PUC be required to analyze the staffing requirements, contingent on any transfers, and report potential changes in staffing needs to the Legislative Budget Board and the Governor's budget office.

ACT Recommendations on the Supplement to the Sunset Staff Report on the Public Utility Commission:

The Sunset Advisory Commission should not adopt recommendation S1.1. Instead, the Commission should recommend to the Legislature that PUC be continued for 6 years.

The Sunset Advisory Commission should adopt recommendations S1.2, S1.4, S1.5, S1.7 & S1.8.

The Sunset Advisory Commission should adopt recommendation S1.3 with the additional recommendation that it be expanded to include enforcement hearings as well.

The Sunset Advisory Commission should adopt recommendation S1.6 with the recommendation that recommendation be modified to provide for a similar fee be assessed on consumers of gas and water utilities similar to the fee collected on the sale of electricity used to fund OPUC, as additional funding will be required.

ACT Comments on the Supplement to the Staff Report on Public Utility Commission:

ACT supports the recommendation to transfer utility regulation to PUC. ACT partner organizations have argued for these changes for several sunset cycles as way to reduce costs, increase professionalism, and to begin the discussion about using gas more efficiently. This recommendation would transfer the responsibility that resides at the Railroad Commission for gas utilities to PUC. Under the recommendation, PUC would administer these regulations under the same original and appellate jurisdiction over rates as currently exists at the Railroad Commission. The transfer would include the Railroad Commission's existing efforts regarding utility rates and services, consumer complaints, reports, and audits. Generally, the same regulatory approaches that exist now in gas utilities statutes would continue to apply at PUC, including provisions for interim rate adjustments, cost-of-service adjustments, and cost-recovery surcharges. Collection of the Gas Utility Tax would also transfer to PUC. ACT believes, to assure that the agency merger is working well, PUC should undergo Sunset review in six years instead of twelve.

ACT also agrees with the recommendation that contested gas utility cases be heard in SOAH. Using commission staff as hearings officers has lead to many allegations of conflicts of interest at this and other agencies. SOAH was created in response to similar allegations at other agencies, and has served to professionalize and depoliticize hearings. This recommendation would remove the option in law to have contested gas utility cases heard at SOAH, and instead require them to be heard at SOAH, the same as all other utility cases. This recommendation would apply regardless of whether gas utility regulation is ultimately transferred to PUC. As with other agencies using SOAH, the responsible agency would maintain final authority to accept, reverse, or modify a proposal for decision made by a SOAH judge. However, ACT recommends that enforcement hearings be moved to SOAH as well.

ACT has long argued for transferring regulation of water and wasterwater rates and services from TCEQ to PUC, as a way of reducing costs and professionalizing hearings. Water ratemaking was part of the PUC until the creation of the water commission. This recommendation would transfer TCEQ's existing authority for water and wastewater utilities regarding retail, wholesale, and sub-metering rates; Certificates of Convenience and Necessity; reporting requirements; and consumer assistance and complaints to PUC. Regarding rates, PUC would assume the same original and appellate jurisdiction as it currently exists at TCEQ to ensure that retail public utility rates, operations, and services are just and reasonable. To administer these regulations, PUC would have the same reporting requirements as TCEQ for these utilities, including annual service and financial reports and tariff filings, as well as information about affiliate interests. PUC would have responsibility for providing consumer

assistance and resolving complaints regarding regulated water and wastewater services. Ongoing efforts would also be needed to coordinate responsibilities for service standards and the sharing of information and utility data between the two agencies.

The recommendation to expand the role of OPUC to represent the interests of residential and small commercial consumers in water and wastewater utilities matters should be adopted, but only if regulatory oversight is transferred to PUC, as specified in Recommendation S 1.4. Under this recommendation, OPIC would not be involved in water and wastewater utility matters at PUC. If the realignment of utility regulations at PUC does not occur, OPIC would retain its existing authority to represent the public interest in water and wastewater utility matters that remain at TCEQ. Finally, ACT welcomes the recommendation that would require a report to the Legislative Budget Board and the Governor's budget office at the same time PUC submits its Legislative Appropriations Request for the 2014- 2015 biennium. The report should detail any staffing changes, including reductions that the agency recommends related to savings from consolidated functions. This recommendation gives PUC the opportunity to gain first-hand knowledge about the programs transferred and the staffing required to meet program needs.

Additional Issues Not Addressed by Sunset Staff Report

Since the Sunset staff has regrettably declined to identify and analyze policy-related issues which significantly affect the manner and effectiveness of TCEQ in carrying out its duties and responsibilities, and has failed to make any recommendations as to how any policy-related deficiencies can be addressed or improvements made, ACT presents a number of such issues in the sections below. All of these unaddressed issues and recommendations were presented to the Sunset staff for their review and recommendations.[12] ACT strongly believes that if the Sunset Advisory Commission will address these issues and make appropriate or necessary changes and/ or recommendations relating to them, many of the issues and problems that Texas citizens face regularly when dealing with TCEQ in permitting, enforcement and public health matters can be reasonably and meaningfully addressed.

Enforcement

This section presents a number of issues, unaddressed by the Sunset staff, along with recommendations to address those issues, that are intended to provide TCEQ more authority where needed, more flexibility where appropriate, and more clarity in its roles and responsibilities for enforcement and compliance. Collectively, the recommendations presented herein would result in important improvements to TCEQ's enforcement program. Several recommendations would make the enforcement program stronger by making the process more timely, more predictable and clearer. Some recommendations would more firmly tie violations to appropriate consequences. All are intended to help supplement or enhance TCEQ's well-established, and often successful, enforcement programs. Depending upon the specific issue and recommendation, implementation may require anything from an operational or policy change within TCEQ up to a statutory change followed by a rule-making process and resulting appropriate policy and operational changes.

The recommendations presented in this section are summarized as follows:

- Require automatic initiation of enforcement for all permit violations
- Expand the Field Citation Program
- Enhance TCEQ's authority to suspend or revoke a permit
- Expedite the handling of enforcement cases
- Re-define "repeat violator"
- Adopt media-specific penalty policies
- Adopt standard penalties for most common programmatic violations
- Increase penalties to accurately reflect harm and to deter future noncompliance
- Recover the economic benefit of noncompliance
- Adopt better methodology for determining the number of penalty events
- Enhance collection of delinquent fees and penalties

ACT firmly believes that addressing these issues with the recommendations offered would help facilitate addressing all the enforcement issues raised in the December 2003 State Auditor's

[1] TCEQ Air Permitting and Enforcement, 2010

Office (SAO) audit report relating, in part, to TCEQ's enforcement functions, as well as address the as yet unaddressed items developed through the 2004 TCEQ Internal Review of its Enforcement Programs.

General enforcement:

Issue: TCEQ's current Enforcement Initiation Criteria (EIC) do not require initiation of enforcement action for all violations.
One of the recommendations adopted/implemented as a result of the agency's enforcement review in 2004 was to develop a risk-based investigation strategy that focuses resources on those facilities that pose a significant risk to human health and the environment. To focus investigations, monitoring, enforcement, and compliance assistance under such a strategy approach, the agency's EIC was revised, effective July 1, 2008.

In order to promote consistency in handling air, water and waste violations, the criteria specified in the EIC are used for initiating formal enforcement actions. The EIC divides violations into three categories, with different criteria associated with each: Category A violations require automatic initiation of formal enforcement action when documented during an investigation; Category B violations require a NOV at the first occurrence, then require initiation of formal enforcement action if the violation is not corrected by an established NOV deadline or if the violation is documented at two consecutive investigations within the most recent 5-year period; and Category C violations may require initiation of formal enforcement action if the entity receives a notice of violation for the same violation 3 times within the most recent 5-year period, including the notification for the current violation. It is important to note that some criteria have specific exclusions written into them which change the required enforcement action for the excluded violation(s), and that variances to the violation categories and handling are authorized in particular situations.

The EIC is to be reviewed and updated, as appropriate, on an annual basis, and the Commission has the opportunity to review any proposed revisions before final approval by the ED.

ACT Recommendation: TCEQ should revise the EIC to require automatic initiation of enforcement for:

- all permit violations, unless it finds the violations are de minimis, or are a result of force majeure, an act of God, war, strike, riot or other catastrophe; or
- all permit violations that have the potential to harm the environment or public health.

Issue: The scope of the current Field Citation Program should be expanded to cover other programs or other violations to help promote quick on-site resolution of clear-cut violations and corrective actions with a specified, reduced penalty.
Another recommendation adopted as a result of TCEQ's enforcement process review was the implementation of a field citation pilot program statewide on March 13, 2006, covering nine specific violations. Since April 27, 2007, TCEQ's Field Citation Program has shifted from a pilot to a permanent program. The Field Citation Program currently covers violations in the

following programs: Petroleum Storage Tanks (PST); (PST) Stage I and II vapor recovery; Storm water (industrial and construction); Occupational Licenses; Dry Cleaners; On-site Sewage Facilities; and Water Rights.
The field citation process is different from the traditional enforcement process in that when TCEQ conducts an investigation, the investigator may cite certain clear-cut violations and hand a penalty assessment to the respondent on the spot. The field citation is intended to promote a quick resolution for any of the field citation-eligible violations documented during an investigation, while offering a reduced penalty as compared to a penalty calculated through the traditional enforcement process. A respondent has the right to appeal the field citation to the Regional Director within the 30 days from the investigation date, but after the 30th day, the respondent will be subject to higher penalties for the unsettled field citation.
When a field citation is issued, the respondent has two options: (1) settle the field citation by paying the total assessed field citation penalty within 30 days from the investigation date, and correcting the violation(s) and documenting/certifying completion of any required corrective actions within 45 days from the investigation date; or (2) choose not to accept the field citation, in which case the field citation will be referred to the Enforcement Division for a standard administrative enforcement order, either agreed or contested. In this process, the reduced penalty opportunity is removed.

ACT Recommendation: The scope of TCEQ's current Field Citation Program should be expanded to include additional programs and/or to add additional violations in the current programs subject to field citations.

Issue: Despite clear statutory authority otherwise, TCEQ does not revoke or suspend permits, licenses, certificates, registrations even when warranted in enforcement actions.
Water Code Sections 7.302 and 7.303 provide that after notice and hearing, the commission may revoke or suspend a permit on any of the following grounds:
(1) **violating** any term or condition of the permit, and revocation, suspension, or revocation and reissuance is necessary in order to maintain the quality of water or the quality of air in the state, or to otherwise protect human health and the environment consistent with the objectives of the statutes or rules within the commission's jurisdiction;
(2) having a **record of environmental violations** in the preceding five years at the permitted or exempted site;
(3) causing a discharge, release, or emission **contravening a pollution control standard** set by the commission or contravening the intent of a statute or rule;
(4) including a **material mistake** in a federal operating permit issued under Chapter 382, Health and Safety Code, or **making an inaccurate statement** in establishing an emissions standard or other term or condition of a federal operating permit;
(5) **misrepresenting or failing to disclose** fully all relevant facts in obtaining the permit or misrepresenting to the commission any relevant fact at any time;
(6) a permit holder **failing to ensure that the management** of the permitted facility conforms or will conform to the statutes and rules within the commission's jurisdiction.

However, currently it is **not** the policy/practice of TCEQ to revoke or suspend permits, licenses,

certificates, registrations in enforcement actions.

There are two approximations of this enforcement measure: one currently utilized by TCEQ in one specific instance, and another recently authorized by the Legislature but not presently implemented. First, if a respondent defaults in a Petroleum Storage Tank (PST) enforcement case by failing to file an answer or failing to participate in either the preliminary or evidentiary hearing once a matter is referred to SOAH, the current Commission policy is to **revoke the respondent's delivery certificate**. [authorized by 30 TAC 334.8(c)(6)]. When a delivery certificate has been revoked, fuel suppliers are prohibited from delivering motor fuel into the PSTs. To implement this policy, the agency's enforcement petitions conspicuously inform the respondent that failure to answer or participate in any hearing will result in revocation of the delivery certificate. Where a delivery certificate is held by a party that is not otherwise a part of an enforcement case, petitions will be served on both the owner and the operator of the PST, since both are affected by the revocation. Note: The Commission has directed staff to look into other opportunities to revoke other certificates, such as certificates for dry cleaning facilities and dry cleaner drop stations [authorized by 30 TAC 337.11(f)], but to date, no additional certificate revocations have been pursued.

Second, House Bill No. 3547, enacted by the 81st Legislature in 2009, authorizes TCEQ to order a dry cleaning facility or dry cleaning drop station to cease operation if the violation is not corrected within 30 days after the receipt of the NOV. If the owner or operator does not correct the violation within the prescribed time, the commission may order the dry cleaning facility or dry cleaning drop station to cease operation. This authority became effective September 1, 2009 for violations occurring on or after that date.

ACT Recommendation: Direct TCEQ to adopt/implement a specific policy that a permit shall be revoked or suspended when deemed appropriate in enforcement actions, pursuant to Water Code Sections 7.302 and 7.303, especially if the respondent is a repeat violator or if TCEQ finds the violations to be willful or grossly negligent. Under any circumstances, TCEQ should suspend a permit until the respondent comes into compliance.

Issue: Additional or enhanced policies/procedures could be implemented to help expedite the handling of enforcement cases.

The December 2003 State Auditor's Office (SAO) audit report found "the lack of timely enforcement orders and settlement of enforcement cases could allow violations to continue and slows penalty collections." The audit specifically found that TCEQ does not consistently settle enforcement cases, or does not refer unsettled cases to the Litigation Division and/or issue enforcement orders to alleged violators, within timeframes established in its policies. Noting that TCEQ's philosophy is to promote voluntary compliance and to work with entities to correct violations prior to finalizing enforcement orders and collecting penalties, the audit stated that delays in the enforcement process could result in violators' continuing to pollute and cause the State to lose the use of penalty funds.

In the agency's 2004 enforcement review process, significant focus was placed on how long the enforcement process takes. In response, TCEQ streamlined the enforcement process timeline

from approximately 250 days to 185 days (with settlement achieved); implemented a Field Citation Program to cite certain clear-cut violations on-site regarding certain specific programs; and, streamlined the financial inability to pay process by enforcing a 30-day deadline to submit supporting documentation.

The delay in enforcement can also have an impact on permitting decisions. When enforcement actions are subject to delays such as one-year postponement in a Contested Case Hearing, permitting actions can proceed as if no violations are at issue.

ACT Recommendations:

- TCEQ should be directed to set/enforce firm deadlines for processing enforcement cases to settlement; e.g. enforce the 185-day timeline currently in place; and
- TCEQ should be directed to expand the scope of the current Field Citation Program, as discussed above, to allow more minor enforcement cases to be resolved in the Field Offices more quickly.

Issue: TCEQ's current repeat-violator definition is overly complex and confusing.

Although primarily a compliance history component [Water Code Sec. 7.754(c)(2), 30 TAC Sec. 3], the repeat violator definition can/should be used in other enforcement considerations. Water Code Sec. 7.053 requires TCEQ to consider the history and extent of previous violations [i.e. repeat violations] in determining the amount of an administrative penalty.

TCEQ Rule 60.3(a)(3) provides, in part:

> (D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a **repeat violator**.
>
> (E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a **recurring pattern of conduct** that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

Rule 60.3(c) provides:

> (c) Enforcement. For enforcement decisions, the commission may address compliance history and **repeat violator** issues through both penalty assessment and technical requirements.
>
> > (1) Poor performers are subject to any additional oversight necessary to improve environmental compliance.
> >
> > (2) The commission shall consider compliance history classification when assessing an administrative penalty.
> >
> > (3) The commission shall enhance an administrative penalty assessed on a **repeat violator**.

Accordingly, the current Penalty Policy provides that when a respondent is designated as a repeat violator at the site which is under enforcement, then the recommended administrative penalty for the case will be enhanced by 25 percent, with the repeat violator designation determined according to Rule 60.2(d).

ACT Recommendations:

- Direct TCEQ to make targeted, meaningful changes to the present definition/formula of repeat violator by modifying the definition of major violation found in Rule 60.2(c)(1) to ground it to impact-related violations.
- Direct TCEQ to amend the current definition found in Rule 60.2(d)(1) to include systemic violations of the terms and conditions of TCEQ authorization(s). Violations should not be limited to the same violation; rather a pattern of behavior should dictate the use of the term repeat violator. TCEQ should also have the ability to classify a person as a poor performer if the agency can demonstrate performance issues impacting human health and/or the environment as well as systemic inability, either through lack of resources or disregard for rules and regulations, to comply with the terms and provisions of a TCEQ authorization. The EIC's definitions of certain A, B and C violations and a specific frequency based on an entities size and complexity should be incorporated in order to capture some measure of systemic violations.

Penalty Policy

Issue: Separate media-specific penalty policies should be adopted.
The regulated community subject to TCEQ's jurisdiction is significantly diverse, both as to size and complexity of facilities and types of violations that occur. Also, the type and nature of discharges or emissions that occur and the actual or potential environmental or human health effects vary across the regulated community, depending on the media involved [i.e. air, water, waste].

However, TCEQ's current penalty policy applies a standard, common approach to all violations, no matter the media involved. Applying the same penalty policies to vastly different facilities and sectors of the state's regulated community in different media can be problematic. A "one-policy-fits-all" approach does not always work fairly and sometimes results in unreasonable outcomes. Air regulations are more complex and have greater opportunities for violations. Wastewater discharge permit levels are generally set at levels that do not expect 100% compliance with the limits on a continuous basis [e.g. 30-day averages]. The severity and significance of violations in different media rarely have any relation to compliance in other media.

ACT Recommendation: Given the significant differences in the regulatory expectations and requirements between different media, separate media-specific penalty policies should be developed/adopted.

Issue: Incorporating standard penalties into the Penalty Policy could help expedite the handling of enforcement cases.
By eliminating individual assessments for minor violations, the use of standard penalties could shorten timelines and allow a shift of agency enforcement resources to more serious violations. The use of standard penalties would also make outcomes more predictable, thus enhancing

deterrence.
The Field Citation Program already specifies fixed, standard penalties for the specific violations encompassed in the Program's scope. At the March 29, 2006 Agenda, the Commission directed staff to develop standard base penalties for programmatic violations; i.e. those that do not involve actual discharges or emissions and/or documented environmental or human health effects. Pursuant to this directive, staff developed a proposed standard penalty table for some specific, common programmatic violations. However, since standard penalties would be part of the Penalty Policy, further development and implementation of the proposed standard penalty table was effectively placed on hold since the proposed Penalty Policy rulemaking package has never been scheduled for Commission deliberation, and no date for any future consideration by the Commission has been established.
ACT Recommendation: TCEQ should adopt standard penalties for the most common programmatic violations. Common violations for major program areas should be researched and the violations divided into common categories, which are then assigned a standard penalty amount for each category as a percentage of the statutory limit for major and minor sources. Any documented violation falling within a proposed category would be assessed the penalty amount associated with that category. The standard penalties should be periodically reviewed and adjusted as necessary to account for inflation and other relevant circumstances.

Issue: Penalties calculated pursuant to the Penalty Policy are not high enough to accurately reflect the environmental harm or human health effects from a violation, and are not effective to deter future noncompliance.

Deterrence of future violations is a long-recognized goal of penalty assessment. Water Code Sec. 7.053(3)(E) expressly provides that in considering the amount of a penalty the commission shall consider the amount necessary to deter future violations. TCEQ historical data indicates that the assessed penalty did not deter future violations by the same entity in a significant percentage of time.

ACT Recommendation: Revise the Environmental/Property and Human Health Penalty Matrix to increase the penalties assessed. Example:

Harm Level:	Major	Moderate	Minor
Respondent:	Major/Minor	Major/Minor	Major/Minor
Actual Release	100% / 75%	75% / 50%	50% / 20%

[Percentages reflect the percentage of the statutory maximum penalty that will be utilized to calculate the base penalty.]

Issue: Under the current penalty policy, consideration of the economic benefit resulting from noncompliance and any resulting adjustment of a penalty does not adequately account for the economic benefit received by the violator and/or provide an appropriate deterrent effect.

Water Code Sec. 7.053(3)(D) requires TCEQ to "consider" the economic benefit of noncompliance (EBN) in setting penalties. TCEQ currently defines economic benefit as monetary gain derived from a failure to comply with any TCEQ regulation or State statute. Economic benefit may include, but is not limited to, any or all of the following: (1) the return a respondent may earn by delaying the capital costs of purchasing and installing pollution control equipment; (2) the return a respondent may earn by delaying a one-time expenditure; and (3) the return a respondent may earn by avoiding the costs of compliance.

To determine whether a respondent has gained an economic benefit (during the alleged violation period), TCEQ evaluates the following issues for each violation:
1. Did the respondent avoid or delay capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
2. Did the respondent gain any interest by avoiding or delaying capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
3. Did the respondent gain an economic advantage over its competitors?
4. Did the respondent avoid or delay disposal, maintenance, and/or operating costs?
5. Did the respondent receive increased revenue due to noncompliance?
6. Did the respondent avoid the purchase of financial assurance for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?

If the answer is "yes" to any of the above questions, then the overall economic benefit gained will be estimated. Only capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained are evaluated in the calculation of economic benefit. Capital expenditures include all depreciable investment outlays necessary to achieve compliance with the environmental regulation or permit. Depreciable capital investments are usually made for things that wear out, such as buildings, equipment, or other long-lived assets. Typical environmental capital investments include groundwater monitoring wells, stack scrubbers, and wastewater treatment systems. One-time non-depreciable expenditures include delayed costs the respondent should have made earlier (to prevent the violations) which need only be made once and are not depreciable (i.e., do not wear out). Such an expenditure could be purchasing land, setting up a record-keeping system, removing illegal discharges of dredged and fill material, disposing of soil from a hazardous waste site, or providing initial training to employees. Periodic costs are recurring costs associated with operating and maintaining the required pollution control equipment.

Once the economic benefit has been estimated and totaled for all violations included in the enforcement actions, it is currently handled in two different manners by TCEQ:

One hundred percent of the **avoided costs of compliance** (i.e. economic benefit) are recovered through an adjustment under "other factors that justice may require," to the extent allowed under the statutory penalty caps. The only exception to this is that TCEQ does not attempt to recover avoided costs of compliance from governmental and non-profit entities.

TCEQ also seeks to recover *some* of the **delayed costs of compliance** when the delayed costs exceed $15,000. In these cases, the base penalty for the violation(s) is increased by 50%, as set

forth in the matrix below. The economic adjustment factor is capped so the adjustment amount does not exceed the economic benefit gained.

Economic Benefit Matrix:

% Adjustment to Base Penalty	Dollar Range of Economic Benefit
None	Less than $15,000
50%	Equal to or greater than $15,000

Inclusion of economic benefit cannot result in a final assessed administrative penalty that exceeds statutorily mandated penalty caps.
At the September 7, 2007 Work Session, two Commissioners directed staff to lower the threshold for applying EBN relating to delayed costs of compliance to $7,500, and include that change in the proposed penalty policy rule. However, since no proposed penalty policy rule has ever been considered by the Commissioners, that threshold change has never been implemented.

The December 2003 SAO audit, noting that the 2002 penalty policy revisions subject all entities that receive more than $15,000 in economic benefits from noncompliance to a penalty enhancement of only 50 percent of the base penalty, found that entities that are subject to the enhancement often have economic benefits that exceed their penalties, which could reduce their incentive to comply. Also, in a December 2003 report on TCEQ's TPDES enforcement program, EPA recommended that TCEQ change its penalty policy to "collect at least the economic benefit of noncompliance and the gravity portion for the actual time period of noncompliance. This practice would serve to 'level the playing field' and make it economically impractical to violate the permit requirements."

In FY 2007, only 6% of the total EBN accrued by violators was recovered through the EBN component of assessed penalties. TCEQ enforcement data indicates that economic benefit is actually applied in less than 10% of all cases because the economic benefit is either negotiated out of agreed orders or the amount does not exceed the $15,000 threshold. In cases where economic benefit does exceed the $15,000 threshold, the recovery is usually very small after deducting the $15,000 threshold.

ACT Recommendations:

- Direct TCEQ to recover all of the economic benefit, whether from avoided or delayed costs, as an add-on to the base penalty, up to the statutory cap allowed for the penalty.
- Allow the total deferral of economic benefit for local governments, non-profit organizations (such as churches and charitable organizations), and public service entities (such as school districts and hospital districts), provided that compliance is achieved in accordance with the schedule and terms of the enforcement order. Also, allow the deferral of up to $5,000 of economic benefit for small businesses, provided that compliance is achieved in accordance with the schedule and terms of the enforcement order.

Issue: A better methodology for determining the number of penalty events than the one currently expressed in TCEQ's Penalty Policy is needed.

The current TCEQ Penalty Policy provides that the number of violation events that will be assessed a penalty depends on the number of times the violation is observed, the specific requirement violated, the duration of the violation, and other case information.

Certain violations will typically be considered **discrete** events. Discrete violations are situations that are observed and documented during an investigation - a discrete interval in time. These violations involve practices or actions that do not occur continuously. If they recur, they do so in individual instances that are separate in time. For these violations, one penalty event will be assessed for every documented observation. Examples of violations that would be discrete events are the failure to submit annual reports, the failure to collect or report monitoring data, the failure to perform a hazardous waste determination where required, and the failure to show a certificate of self-certification prior to accepting a fuel drop. For discretely occurring violations, one penalty event will be assessed for every documented observation of the noncompliance (e.g. for each sample analysis documenting a violation).

Other violations are considered to be **continuing**, and not constrained by documented observations of the noncompliance. Examples of violations that would be considered to be continuing are the exceeding of permitted discharge or emission limits, groundwater contamination, unauthorized discharges/releases, endangerment, the commingling of good and bad water in a public water supply, operating without a required permit, and other such violations. For continuing violations, the number of events will be linked to the level of impact of the violation by considering the violation as if it recurred with the frequency shown in the chart below.

Continuing Violations

	Harm or Severity	**Number of Events**
Actual Releases	Major	Up to daily
	Moderate	Up to monthly
	Minor	Up to quarterly
Potential Releases	Major	Up to monthly
	Moderate	Up to quarterly
	Minor	Single event
Programmatic	Major	Up to daily
	Moderate	Up to quarterly
	Minor	Single event

The duration of events concerning continuous violations, for the purposes of preparing an enforcement action, may begin with the initial date of noncompliance with a requirement, rule, or permit and extend up to the time that the enforcement documents are prepared. In practice, continuous violations will be assessed beginning with the documented date of noncompliance (i.e., sample results, record review) or the date that the respondent "should have known," whichever is appropriate, as the beginning point. The respondent is always considered knowledgeable of permit conditions.

The date the respondent returned to compliance or the enforcement screening date, whichever is appropriate, will be the end-point for the assessed events. Utilizing this date will assure that no one will be impacted by the order in which cases are prioritized within the agency.

The duration of events will be revised, as appropriate, to reflect extended noncompliance when cases fail to settle expeditiously and/or prior to referral to the SOAH. Discrete violations are not revised because they are considered single events.

The number of events is determined by dividing the appropriate time frame into the duration of the violation. For this determination, any part of a day equals a "day;" any part of a month equals a "month;" any part of a quarter equals a "quarter." For example an actual minor that is assessed as a quarterly event will have 5 quarters for a violation that continued for 13 months. A penalty is then calculated by multiplying the base penalty amount by the number of penalty events determined for the violation being considered. This step is done for each violation included in the enforcement action.

During TCEQ's 2004 Enforcement Review Process, significant comment focused on the component of the Penalty Policy as it related to determining the number of violation events when calculating appropriate penalties. There was general consensus among all stakeholders regarding a need for a better definition for determining the number of penalty events, but there were different viewpoints as to how to accomplish that and to what end.

Environmental groups primarily focused their comments on the calculation of the number of events for continuous major programmatic violations. Noting that programmatic violations are classified as major if more than 70% of any rule or permit requirement is not met, they stated that the level of severity of violations classified into this category varied widely depending on the significance of the rule. In addition to addressing this through standard penalties, they recommended that the Penalty Policy be revised to explicitly state that a violation should be considered continuous only when there is no possible way to count it as a series of discrete events. For example, a company that is out of compliance for record-keeping over several years could be cited for each occasion that it was required to certify compliance with rules, rather than citing a single event.

In the same context as determining the number of violation events, environmental groups also commented that the Penalty Policy does not presently handle well the scale of a violation. For example, the policy does not presently distinguish between situations where a facility fails to properly monitor two pumps for leaks and where a facility fails to properly monitor an entire unit. They also commented that the current policy fails to define the scale of a violation involving multiple units; i.e. should a violation covering several units at the same facility be counted as separate violations for each distinct operating unit or simply one violation for the entire facility. They recommended that each operating unit be cited as a violation because this approach would more accurately reflect the total scale of the offense.

The regulated community primarily commented that the violation count used for penalty

calculations under the current Penalty Policy is not applied consistently, and can be manipulated to calculate a significantly large penalty for an event or series of events with little or no environmental impact. They claimed that application of the current policy has been used to generate nonsensical results, such as multi-million dollar penalty calculations for fugitive emissions monitoring or leak detection and repair (LDAR) violations that had little or no impact on the environment, based on counting each component that was not monitored as a separate violation. The number of events for a given violation should be consistent with the violation, and TCEQ should not arbitrarily decide whether the events should be categorized as monthly, quarterly, or annual. For example, if the violation is for failing to report under a permit, it should be tied to the reporting frequency or the permit term. TCEQ should continue to focus its efforts and penalties on those situations where there is an actual discharge or release and an actual harm. In deciding the number of events and the severity of same, this should be the focus of the enforcement process. They also stated that use of a violation count should not penalize a company for attempting to repair a recurring noncompliance or result in a higher penalty for an intermittent event that a company is working to resolve than for a longer, on-going problem, simply based on violation count.

In the context of Title V deviations, they commented that current TCEQ guidance provides little in the way of clarity or meaningful instructions on counting deviations. For example, they claimed it makes no sense to count a deviation that is attributable to the same root cause and may occur for several hours as an alleged repeat violation of an hourly permit limit; or to penalize those companies that implement the most comprehensive compliance reporting systems. The number of deviations included in a deviation report, in and of itself, should not be viewed as a measure of a Title V permit holder's compliance efforts, since all deviations are not automatically violations.

As a result of the Enforcement Review and all the various discussions and comments received, the ED recommended that the methodology for determining the number of violation events be revised. However, since this revision would be part of the Penalty Policy, it has not proceeded since the proposed Penalty Policy rulemaking package has never been scheduled for Commission consideration, and no date for any future consideration by the Commission has been established.

ACT Recommendations:

- The Penalty Policy should be revised to explicitly state that a violation should be considered continuous only when there is no way to count it as a series of discrete events.
- A violation covering several units at the same facility should be counted as separate violations for each distinct operating unit, not one violation for the entire facility; i.e. each operating unit should be cited as a violation to more accurately reflect the total scale of the offense.
- If the violation is for failing to report under a permit, registration or order, it should be tied to the reporting frequency or the permit, registration or order term.

Issue: TCEQ does not hold regulated entities to terms of a reduced penalty.

When a facility claims a certain set of facts in order to qualify for a reduction in a penalty, TCEQ should reinstate the higher fine with an additional penalty if the facility takes action which renders the facts inaccurate. For example, if a Municipal Solid Waste facility asserts that because

it is closing in the near future and will never emit enough air pollution to be classified as a major polluter and is eligible for a lower fine. If however, the facility then is granted an expansion extends the life of the facility and will become a major polluter, the facility should be penalized at the higher fine

Issue: TCEQ has no statutory authority to assess interest on delinquent penalties or penalty payment plans.

Interest is defined as compensation for the use, forbearance or detention of money (Finance Code Chapter 301, Sec 301.002 (4), Definitions). TCEQ is authorized by the Water Code to impose interest on delinquent fees, and the agency currently assesses interest on delinquent fees at a rate of Prime plus 1 percent. There is **no** statutory authority to assess interest on delinquent penalties or payment plans.

While any interest assessed will increase the amount of money owed to the state, it will be an incentive for respondents to pay or pay timely.

ACT Recommendation: Give TCEQ express statutory authority to assess interest charges on delinquent penalties or for late payment of administrative penalties.

Permitting

Again, since the Sunset staff has regrettably declined to identify and analyze policy-related issues which significantly affect the manner and effectiveness of TCEQ in carrying out its permitting duties and responsibilities, and has failed to make any recommendations as to how any policy-related deficiencies in the permitting programs can be addressed or improvements made, ACT presents a number of such issues in the sections below. All of these unaddressed issues and recommendations were presented to the Sunset staff for their review and recommendations.[13]

This section presents a number of issues, unaddressed by the Sunset staff, along with recommendations to address those issues, that are intended to provide TCEQ more authority where needed, more flexibility where appropriate, and more clarity in its roles and responsibilities in air permitting. Collectively, the recommendations presented herein would result in important improvements to TCEQ's air permitting program, and help address the SIP-related issues. Several recommendations would make the permitting program stronger by making the process more predictable, more effective and clearer. Some recommendations would more specifically tie permitting requirements to emission sources, and afford greater protection to the environment and public health. All are intended to help supplement or enhance TCEQ's well-established air permitting program. Depending upon the specific issue

[1] TCEQ Air Permitting and Enforcement --- Improving Texas' Air Quality Through the Sunset Review Process"; June 2010

and recommendation, implementation may require anything from an operational or policy change within TCEQ up to a statutory change followed by a rule-making process and resulting appropriate policy and operational changes.

The recommendations presented in this section are summarized as follows:

- Restrict or clarify the applicability of Standard Permits (SPs) and Permits by Rule (PBRs), and implement appropriate measures to promote public notice and opportunity to comment on a facility's use of SPs and/or PBRs
- Authorize the imposition of additional monitoring requirements in permits under appropriate circumstances
- Authorize the imposition of different and/or more stringent conditions upon renewal or amendment of an air permit under certain appropriate circumstances
- Authorize a hearing on an air permit amendment, modification or renewal for any good cause determined
- Authorize the denial of an air permit renewal under certain appropriate circumstances
- Repeal the statutory provision allowing a qualified facility to make physical and operational changes without obtaining a permit or other approval from the TCEQ
- Implement appropriate measures to promote public notice and opportunity to comment on all permit alterations and modifications
- Require flexible permit program to be limited to minor NSR permits; be as stringent as any applicable federal permitting requirements
- Require the evaluation and consideration of the cumulative effects on ambient air quality, public health and property from new or expanded pollution emissions under certain appropriate circumstances
- Revise the current Air Pollutant Watch List (APWL) and Effects Screening Levels (ESL) processes and require that they be adopted as enforceable standards in rules
- Implement appropriate measures to ensure that all parameters, provisions and conditions in air permits be clear, understandable, measurable, and easily capable of determining compliance
- Include all activities intended to effectuate a specific development/building plan or prepare the site for a specific facility when determining "start of construction" for air permitting purposes

ACT strongly believes that if the Sunset Advisory Commission will address these issues and make appropriate or necessary changes and/or recommendations relating to them, many of the issues and problems that Texas citizens face regularly when dealing with TCEQ in permitting matters can be reasonably and meaningfully addressed.

Issue: The applicability and use of Standard Permits (SPs) and Permits by Rule (PBRs) are too broad, and appropriate measures to promote public notice and opportunity to comment on a facility's use of SPs and PBRs are lacking.

Sec. 382.05195 of the Health & Safety Code specifically authorizes TCEQ to issue a Standard

Permit (SP) for new or existing similar facilities if the commission finds that: (1) the SP is enforceable; (2) the commission can adequately monitor compliance with the terms of the SP; and (3) the facilities will use control technology at least as effective as that described in Health & Safety Code Section 382.0518.
If a facility meets all of the conditions of a SP, it can qualify to use the SP to authorize its emissions. There is no case-by-case review for SPs. A SP cannot be used to authorize emissions that must undergo PSD or NA review. The public can participate in the SP adoption process only through the opportunity to comment on the published proposed SP, but there is no public participation at the time a facility claims a PBR.

The commission by rule is required to establish procedures for the amendment of a SP and for an application for, the issuance of, the renewal of, and the revocation of an authorization to use a SP. The adoption or amendment of a SP or the issuance, renewal, or revocation of an authorization to use a SP is not subject to Chapter 2001, Government Code [the Administrative Procedure Act]. A facility authorized to emit air contaminants under a SP shall comply with an amendment to the SP beginning on the date the facility's authorization to use the SP is renewed or the date the commission otherwise provides. Before the date the facility is required to comply with the amendment, the SP, as it read before the amendment, applies to the facility. The commission may delegate to the executive director the authority to issue, amend, renew, or revoke an authorization to use a SP.

Pursuant to Chapter 116, Subchapter F of TCEQ rules, currently, TCEQ has adopted SPs for: Air Quality Pollution Control Projects; Animal Carcass Incinerators; Boilers; Concrete Batch Plants with Enhanced Controls; Electric Generating Units; Municipal Solid Waste Landfills; Oil and Gas Facilities; Permanent Hot Mix Asphalt Plants; Permanent Rock and Concrete Crushers; Sawmills; Temporary Hot Mix Asphalt Plants; Temporary Rock Crushers; and Concrete Batch Plants. As of December, 2009, TCEQ requested public comments on seven proposed standard permits that could be used to authorize a variety of agricultural operations and proposed new standard permits for Temporary Rock Crushers and Permanent Rock and Concrete Crushers. An owner or operator who chooses to use a SP is required to register to use a SP. The registration to use a SP is valid for a term not to exceed ten years. Registration to use a SP is required to be sent by certified mail, return receipt requested, or hand delivered, to the ED, the appropriate TCEQ regional office, and any local air pollution program with jurisdiction, before a SP can be used. The registration must be submitted on a required form and must document compliance with the requirements of TCEQ rules. Construction may begin any time after receipt of written notification from the ED that there are no objections or 45 days after receipt by the ED of the registration, whichever occurs first, except where a different time period is specified for a particular SP. A copy of the SP along with information and data sufficient to demonstrate applicability of and compliance with the SP shall be maintained in a file at the facility site and made available at the request of representatives of the ED, the EPA, or any air pollution control agency having jurisdiction.
Permits by rule (PBRs) are similar to SPs, but are adopted through the rulemaking process rather than through the permitting process. Health and Safety Code Sec. 382.05196 states that TCEQ may adopt permits by rule "for certain types of facilities" that "will not make a significant contribution of air contaminants to the atmosphere." The PBR must "specifically

define the terms and conditions" of the permit. Sec. 382.05196(a) specifically prohibits TCEQ from adopting any PBR "authorizing any facility defined as 'major' under any applicable preconstruction permitting requirements of the federal Clean Air Act (42 U.S.C. Section 7401 et seq.) or regulations adopted under that Act."

Pursuant to TCEQ rules, some PBRs require registration. To qualify for a PBR, the following general requirements must be met: total actual emissions authorized under PBR from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO_2) or inhalable particulate matter (PM_{10}); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. There is no case- by-case review for PBRs. A PBR cannot be used to authorize emissions that must undergo PSD or NA review. The public can participate in PBR development and adoption only through the rule-making processes, but there is no public participation at the time a facility claims a PBR.

Chapter 106 of the TCEQ rules identifies certain types of facilities or changes within facilities which are eligible for coverage by air PBRs. PBRs for similar activities are grouped in a subchapter, as follows: Subchapter C: domestic and comfort heating and cooling; Subchapter D: analysis and testing; Subchapter E: aggregate and pavement; Subchapter F: animal confinement; Subchapter G: combustion; Subchapter I: manufacturing; Subchapter J: food preparation and processing; Subchapter K: General; Subchapter L: feed, fiber, and fertilizer; Subchapter M: metallurgy; Subchapter N: mixers, blenders, and packaging; Subchapter O: oil and gas; Subchapter P: plant operations; Subchapter Q: plastics and rubber; Subchapter R: service industries; Subchapter S: surface coating; Subchapter T: surface preparation; Subchapter U: tanks, storage, and loading; Subchapter V: thermal control devices; Subchapter W: turbines and engines; Subchapter X: waste processes and remediation.

Certain PBRs, including many in Subchapter K, are not source-category specific and are used by major sources to authorize emissions at units covered by major NSR or PSD permits. Facilities use these PBRs to authorize increases in emissions that would otherwise violate the terms of their individual permits. Facilities are not limited in the number of PBRs that can be used to authorize increases in emissions. The air quality impacts of the cumulative PBR authorizations are not evaluated.

An owner or operator may certify and register the maximum emission rates from facilities permitted by rule in order to establish federally-enforceable allowable emission rates which are below the emission limitations in TCEQ rules relating to PBRs. The registration must be submitted on a required form. All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration become conditions upon which the facility permitted by rule shall be constructed and operated. It is unlawful for any person to vary from such representation if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in an increase in the discharge of the various emissions, unless the certified registration is first revised. Certified registrations must be submitted no later than the date of operation. All certified registrations shall be maintained on-site and be provided immediately upon request by representatives of TCEQ or any local air pollution control agency having jurisdiction over the site. Upon request, TCEQ shall make any such records available to the public in a timely manner.

ACT Recommendations:

- To clarify the applicability of SPs and PBRs, consistent with federal requirements, SPs and PBRs should: (1) be applicable only to narrowly-defined source categories; (2) include the specific emission limits applicable to all sources that may seek coverage under the SP or PBR; and (3) include specific monitoring and reporting requirements sufficient to demonstrate compliance with the SP or PBR. In addition, at the time of adoption, TCEQ should be required to demonstrate that the emissions that may be authorized pursuant to the SP or PBR will not cause or contribute to a violation of air quality standards.
- To promote public notice, a facility's registration to use a SP or be permitted by rule should be required to be posted on a publicly accessible internet Web site, and TCEQ should be provided with the Web address link for the registration materials. TCEQ shall post on its Web site the identity of all owners and operators filing such registration and the Web address link required.
- To promote public opportunity to comment, the public should be given at least 30 days to file written comments on a facility's registration to be permitted by rule, or before a facility's registration to use a SP is considered accepted by the ED. Upon a showing of good cause, the ED may grant an additional 30 days to file comments.
- Notice of the ED's acceptance of a registration to use a SP should be posted on TCEQ Web site, given that a SP is effective any time after receipt of written notification from the ED that there are no objections or 45 days after receipt by the ED of the registration, whichever occurs first, except where a different time period is specified for a particular SP.
- The ED's acceptance of a registration to use a SP and a facility's registration to be permitted by rule should be subject to TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of TCEQ rules. Under current TCEQ rules [Section 50.131], air quality SPs and PBRs are excluded from MTO coverage.
- SPs and PBRs should not be available to facilities with a bad compliance history and/or repeat violators, or to facilities that are part of a major emissions source.
- All SPs covering a facility should be consolidated into the facility's site-specific [individual] permit at the first available opportunity [i.e. when the permit is amended or renewed], but no later than 5 years after the registration to use a SP or to be permitted by rule.
    - Note: Health & Safety Code Section 382.0511 provides that the commission may consolidate into a single permit any permits, special permits, standard permits, permits by rule, or exemptions for a facility or federal source. Current TCEQ rules allow permitted facilities and processes to be modified if the changes will meet a PBR under Chapter 106 or a SP under Subchapter F, Chapter 116. The rules also require that these claims be consolidated into the permit when the permit is next amended or renewed.
    - There are two different scenarios that determine when and how a PBR or SP is consolidated in the permit for that facility when the permit is amended or renewed: consolidation by reference and consolidation by incorporation. Consolidation of certain PBRs and SPs by reference is mandatory. All SPs and PBRs that directly affect the emissions of permitted facilities must, at a minimum, be referenced when a NSR permit is amended. If SPs and PBRs occur at the permitted site, but do not directly affect permitted facilities, consolidation

is not required, but at the request of the permit holder may be consolidated by reference. Referencing will not require a BACT review but may require an impacts review based on TCEQ guidance. Consolidation of all other PBRs and SPs by incorporation is voluntary. If the permit holder requests incorporation (i.e. reauthorization under the permit), PBRs and SPs may be incorporated but will undergo BACT and impacts review based on TCEQ guidance. When incorporated into the permit, the original authorization becomes void. The incorporation of PBRs and SPs requires an amendment.

- All SPs and PBRs covering a facility should be incorporated into the facility's site-specific [individual] permit, rather than be referenced.
- When SPs and PBRs covering a facility are consolidated into the facility's site-specific [individual] permit, they should undergo BACT and impacts review.
- A facility's site-specific [individual] permit should not be allowed to be voided when the facility meets the requirements for a PBR and/or SP.
    - Note: Current law allows facilities to obtain any authorization for which they qualify. In some cases, facilities hold an individual, site-specific permit, but the owner/operator subsequently determines that those facilities meet the conditions of a PBR or SP. TCEQ allows individual, site-specific permits to be voided and authorization changed to a PBR/SP under certain circumstances. If all facilities which are related to a production line or operation meet the conditions of a PBR/SP, the permit may be voided. When the PBR/SP requires registration, this action must be completed prior to the permit being voided. In no case can a facility which is part of, or related to, a particular process be claimed under a PBR/SP and deleted from a permit unless the entire process and related facilities can meet PBR/SP requirements.

Issue: TCEQ policy not to impose additional monitoring requirements in permits unless requested or agreed to by the applicant/permittee has inhibited the ability to accurately monitor all emissions at a site, thus resulting in an inaccurate and incomplete emissions inventory.

Health & Safety Code Section 382.016 provides that TCEQ may prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants subject to TCEQ's jurisdiction. Section 382.021 authorizes TCEQ to prescribe the sampling methods and procedures to be used in determining violations of and compliance with the commission's rules, variances, and orders, including: ambient air sampling; stack-sampling; visual observation; or any other sampling method or procedure generally recognized in the field of air pollution control.

It has been the general practice/policy of TCEQ to not impose additional monitoring requirements in permits unless requested or agreed to by the applicant/permittee. This practice has effectively inhibited the ability to accurately monitor all emissions at a site, whether authorized or not. It has also resulted in a less than accurate and complete emissions inventory.

ACT Recommendation: It should be expressly clarified that TCEQ is authorized to impose additional monitoring requirements in permits in the following circumstances: (1) across-the-

board; (2) if the facility is in a non-attainment area or subject to any TCEQ program which identifies areas of air quality concerns, such as APWLs, etc.; (3) if the facility is a major facility; (4) if the facility emits any pollutant of concern [e.g. ozone, APWL]; and/or (5) additional monitoring is necessary/appropriate as a matter of enforcement against the facility.

Issue: TCEQ policy not to impose new and/or more stringent conditions in permit amendment and renewal requests unless agreed to by the applicant/permittee has allowed the continued operation of facilities without consideration of technology developments or changed circumstances.

Section 382.055 of the Health & Safety Code provides that in reviewing permit renewals, TCEQ may not impose conditions more stringent than the existing permit unless TCEQ determines more stringent conditions are necessary to avoid a condition of air pollution or to ensure compliance with other state and federal air quality control requirements. It further states that TCEQ can impose as a condition for renewal only those requirements TCEQ determines to be economically reasonable and technically practicable considering the age of the facility and the effect of its emissions on the surrounding area. In practice, these thresholds are almost never reached and permits are routinely renewed without any emissions reductions unless the applicant volunteers to do so.

Health & Safety Code Section 382.0511(b) provides that "consistent with the rules adopted under Subsection (d) and the limitations of this chapter, including limitations that apply to the modification of an existing facility, the commission may amend, revise, or modify a permit." Section 382.0541(a)(7) authorizes the commission to "reopen and revise an affected federal operating permit if:

(A) the permit has a term of three years or more remaining in order to incorporate requirements under the federal Clean Air Act (42 U.S.C. Section 7401 et seq.) adopted after the permit is issued;
(B) additional requirements become applicable to an affected source under the acid rain program;
(C) the federal operating permit contains a material mistake;
(D) inaccurate statements were made in establishing the emissions standards or other terms or conditions of the federal operating permit; or
(E) a determination is made that the permit must be reopened and revised to assure compliance with applicable requirements."

Section 305.62(d) of TCEQ rules provides that "if good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, modification, or minor modification to a permit and the executive director may request an updated application if necessary. Good cause includes, but is not limited to:
(1) there are material and substantial changes to the permitted facility or activity which justify permit conditions that are different or absent in the existing permit;
(2) information, not available at the time of permit issuance, is received by the executive director, justifying amendment of existing permit conditions;
(3) the standards or regulations on which the permit or a permit condition was based have been

changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued;
(4) an act of God, strike, flood, material shortage, or other event over which the permittee has no control and for which there is no reasonably available alternative may be determined to constitute good cause for amendment of a compliance schedule;

Notwithstanding these provisions, under current TCEQ policy, as well as historical policies and practices, new and/or more stringent conditions are not be imposed when addressing permit amendment and renewal requests unless agreed to by the applicant/permittee. The result of this is continued operation of facilities without consideration of technology developments that, if required as a condition of permit renewal, could significantly reduce air emissions from the source.

ACT Recommendations: Authorize TCEQ to impose different and/or more stringent emission requirements when amending or renewing air permits if: (1) the facility is located within an area included within the Air Pollutant Watch List and the facility emits an air contaminant on the Air Pollutant Watch List; (2) the facility is located in an area designated as nonattainment of a National Ambient Air Quality Standard and TCEQ has adopted a State Implementation Plan to demonstrate attainment; or (3) new or revised state or federal air quality standards are applicable to the facility for which an amendment or renewal is sought.

Issue: More statutory flexibility allowing TCEQ to hold a hearing on an air permit amendment, modification or renewal for good cause is needed.
Section 382.0561 of the Health & Safety Code provides that TCEQ shall not hold a hearing on a permit amendment, modification, or renewal if the basis of a request by a person who may be affected is determined to be **unreasonable**. Reasons for which a request for a hearing on a permit amendment, modification, or renewal shall be considered to be unreasonable include, but are not limited to, an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Section 382.056(g) specifies that TCEQ may not seek public comment and may not hold a public hearing in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted, and the applicant's compliance history is other than the lowest classification.

ACT Recommendations:

- Amend the statute to allow TCEQ to hold a hearing on an air permit amendment, modification, or renewal for any good cause determined by the Commission, even if the amendment, modification or renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.
- Repeal/revise statutes that restrict hearings on air permit amendments, modifications, or renewals:
    A. Health & Safety Code Section 382.058 which specifies that for a concrete plant that performs wet batching, dry batching, or central mixing only those

persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.

B. Health & Safety Code Section 382.056(g) which specifies that the commission may not seek public comment and may not hold a public hearing in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

Issue: The lack of clear authority to deny renewal of an air permit for good cause is problematic.

Section 382.055 of the Health & Safety Code generally provides that air permits issued on or after December 1, 1991 are subject for review every ten years after the date of issuance. It also expressly provides that if the applicant meets the commission's requirements in accordance with the renewal schedule, the commission shall renew the permit.

TCEQ rule 116.314 requires the ED to renew an air permit if it is determined that the facility meets the requirements of the rules. An air permit renewal cannot be denied unless TCEQ follows a very exact procedure. Prior to denial, the ED must provide notice to the permit holder with a report which describes the basis for denial. If denial is based on failure to meet the requirements of the renewal rules, the report shall establish a schedule for compliance with the renewal requirements. The report must be forwarded to the permit holder no later than 180 days after TCEQ receives a completed application. The permit must be renewed if the requirements are met according to the schedule specified in the report. If denial is based on failure to maintain substantial compliance with the TCAA or the terms of the existing permit, the renewal denial shall be final. After failure to satisfy TCEQ requirements for corrective action by the deadline specified in the ED's report, the applicant shall show cause in a contested case proceeding why the permit should not expire.

ACT Recommendations:

- TCEQ should be authorized to deny renewal of an air permit for good cause, including failure to maintain compliance with the TCAA or the terms of the existing permit; inability to meet all applicable state and federal air quality standards and regulations; etc.
- TCEQ should be expressly authorized to deny a permit renewal if it finds: (a) construction of the facility has never been completed; (b) the facility has never been commercially operated; or (c) the facility has ceased operation for the preceding 5 years or more.

Issue: Current statutory authority allowing a qualified facility to make physical and operational changes without obtaining a permit or other approval from TCEQ inhibits, if not eliminates, public notice and opportunity to comment on the requested changes.

The 74th Texas Legislature [1995] passed SB 1126 [See Attachment 1] which gave qualified facilities the flexibility to make physical and operational changes through an expedited process, without a permit or permit amendment.

The bill analysis for SB 1126 stated:

> *Currently, facilities that are required to obtain an air permit must complete a process that includes modeling for the potential health effect, a review to determine if the facility is using the best available control technology, and a contested case hearing offered to the affected persons. Facilities are also required to apply for a permit amendment and again complete the program whenever the facility intends to change its processes or equipment. The permitting process has become longer since facilities have become larger and more complex, which has resulted in increasing costs to the Texas Natural Resource Conservation Commission.*
>
> *As proposed, C.S.S.B. 1126 redefines "modification of existing facility"; requires the Texas Natural Resource Conservation Commission to consider specific factors in determining whether a proposed change at a facility will allow an increase in allowable air pollution.*

Under SB 1126's qualified facility flexibility, an existing facility [SB 1126 cannot be used to authorize new facilities] that satisfies certain criteria will be classified as a "qualified facility." These criteria require that the existing facility either (1) was issued a permit or permit amendment or was exempted from pre-construction permit requirements no earlier than 120 months before the change will occur, or (2) uses air pollution control methods that are at least as effective as the BACT that was required or would have been required for the same class or type of facility by a permit issued 120 months before the change will occur. A qualified facility may make physical and operational changes without obtaining a permit or other approval from TCEQ if the change will not result in a net increase in allowable emissions of any air contaminant or the emission of any new air contaminant (i.e., one not previously emitted or allowed to be emitted). To achieve no net increase in allowable emissions and no emissions of any new air contaminant, TCEQ will consider the facility's addition of air pollution control methods to reduce emissions. TCEQ also will consider emission decreases from other qualified facilities at the same air account number to offset emission increases from the change. These emission decreases (trades) will be reductions in either allowable emissions or actual emissions depending on whether the other facility is a qualified facility due to a permit, exemption, or the use of BACT. Although no TCEQ approval is required to make a change under the qualified facility flexibility, rules require that TCEQ be notified of the change, with the type of notification dependent on the relative significance of the change:

- Pre-change notification. If intra-plant trading exceeds reportable limits stated in the SB 1126 guidance document, TCEQ must be notified before the change occurs.
- Post-change notification. For changes that fall within the reportable limits stated in the SB 1126 guidance document, the change may be implemented and then TCEQ notified.
- Annual report. If emission trades from other qualified facilities are not involved, the change may be reported through an annual report.

For all changes made under the qualified facility flexibility, the owner/operator is responsible to ensure that changes conform to applicable requirements, and must maintain records that demonstrate the change is allowed under the qualified facility flexibility.

Only a "qualified facility" will be able to use the additional flexibility provided by SB 1126. Facilities that do not satisfy the criteria to be a qualified facility will continue to be subject to the definition of "modification," which is based on whether a change at a facility will result in an increase in actual emissions or in the emission of a new air contaminant.

The scope of the qualified facility flexibility under SB 1126 is limited. SB 1126 only revised the Texas "minor new source review" program to allow some changes to be made without a requirement to obtain a permit or other "approval" from TCEQ. SB 1126 does not supersede federal requirements such as Nonattainment (NA) Review and Prevention of Significant Deterioration (PSD) review of new major sources and major modifications to existing sources. SB 1126 also does not supersede other TCEQ regulations controlling emissions, such as those for VOC or NO, nor does SB 1126 supersede TCEQ's general powers and duties to control the quality of the state's air and to take action to control a condition of air pollution if it finds that a condition of air pollution exists.

If the original permit for a facility was issued more than 120 months before the change will occur, it is still possible for the facility to be a qualified facility on the basis of a permit. If the facility has undergone a subsequent permit action, such as amendment, within the past 120 months, and as part of that action TCEQ had the opportunity to review and revise the air pollution control requirements for the facility, then the facility will be a qualified facility on the basis of the permit. It is not necessary that TCEQ require any revision to the control requirements as a result of that review. For facilities that have undergone permit renewal within 120 months of a change, qualification is not automatic unless the facility underwent a permit amendment at time of permit renewal.

A facility's status as a qualified facility is not perpetual. A facility can be a qualified facility at one point in time, but later lose its status as a qualified facility if its permit, exemption, or control methods fall outside the 120-month period. Therefore, the owner/operator of a facility must continually review the qualified status of the facility.

Permits generally contain Special Conditions that may limit operational flexibility (e.g., limits on the throughput, production levels, or fuel usage). If a change made under the qualified facility flexibility would result in the violation of a permit special condition, the permit holder must revise the permit special condition to stay in compliance with the permit. This revision can be made through the permit alteration process or under the notification process set forth in TCEQ rules.

ACT Recommendations:

- Repeal the statutory provision that allows a qualified facility to make physical and operational changes without obtaining a permit or other approval from TCEQ.
- To promote public notice, notice of all changes by a qualified facility without obtaining a permit or other approval from TCEQ should be required to be posted on a publicly accessible internet Web site, and TCEQ should be provided with the Web address link for the notice. TCEQ shall post on its Web site the identity of the qualified facility making such changes and the Web address link required.
- To promote public opportunity to comment, the public should be given at least 30 days to file written comments on all changes by a qualified facility without obtaining a permit or other approval from TCEQ. To promote public opportunity to comment, the public should be given at least 30 days to file written comments on all changes by a qualified facility if "pre-change" notice to TCEQ is required; the public should be given at least

15 days to file written comments on all other changes by a qualified facility without obtaining a permit or other approval from TCEQ.
- The notice of the change(s) required to be given to TCEQ by a qualified facility should be posted on TCEQ Web site.
- Changes by a qualified facility without obtaining a permit or other approval from TCEQ should be subject to TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of TCEQ rules.

Issue: Current processes relating to permit alterations do not include appropriate measures to promote public notice and opportunity to comment on all permit alterations and modifications.

Health & Safety Code Section 116.116(c) defines a permit alteration as: (A) a decrease in allowable emissions; or (B) any change from a representation in an application, general condition, or special condition in a permit that does not cause: (i) a change in the method of control of emissions; (ii) a change in the character of emissions; or (iii) an increase in the emission rate of any air contaminant. Requests for permit alterations that must receive prior approval by the executive director are those that: (A) result in an increase in off-property concentrations of air contaminants; (B) involve a change in permit conditions; or (C) affect facility or control equipment performance. The executive director shall be notified in writing of all other permit alterations not specified above. A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of rules relating to BACT. Permit alterations are not subject to the requirements of the rules requiring a BACT demonstration. No public notice is required.

ACT Recommendations:

- To promote public notice, notice of all permit alterations should be required to be posted on a publicly accessible internet Web site, and TCEQ should be provided with the Web address link for the notice. TCEQ shall post on its Web site the identity of the facility making such alterations and the Web address link required.
- To promote public notice and opportunity to comment, TCEQ should specify by rule which permit alterations should be required to be subject to public notice/comment. All such permit alterations should be required to be posted on a publicly accessible internet Web site, and TCEQ should be provided with the Web address link for the notice. TCEQ shall post on its Web site the identity of the facility making such alterations and the Web address link required.
- To promote public opportunity to comment, the public should be given at least 30 days to file written comments on all permit alterations before ED approval.
- The notice of the ED's approval of permit alteration(s) should be posted on TCEQ Web site.
- Alterations to a permit should be subject to TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of TCEQ rules.

Issue: Failure to analyze the cumulative impacts, or potential impacts, of new or expanded

pollution emissions on the overall air quality, public health and property within an airshed does not afford the required demonstration that any new major source of air pollution will not cause or contribute to a violation of any NAAQS.

Applicable federal and state regulations make it clear that it must be demonstrated that any new major source of air pollution will not cause or contribute to a violation of any NAAQS in any air quality region. [40 CFR 52.21(k); 30 TAC 116.161]. While an individual point source's emissions might have only an insignificant impact on air quality levels in an airshed, the resulting cumulative impact of the new or expanded emissions and emissions from other facilities in the airshed could be significant. Only when a cumulative effects analysis is done can it reasonably be demonstrated that new or expanded emissions will not cause or contribute to a violation of any NAAQS in an airshed.

Currently, TCEQ does cumulative effects analyses for criteria pollutants [e.g. NOx, Lead, SO2], using EPA guidance. It does not do cumulative effects analyses for ozone or PM2.5. For certain criteria pollutants, EPA has developed "de minimis" (also known as "significant") concentration levels. If emission of a criteria pollutant is not at or below the established de minimis level, it must be demonstrated that the emission satisfies both applicable "increment" analysis and the appropriate air quality standard (e.g. for SO2, CO). Also, even if the concentration is below the "increment," it cannot be above the de minimis level in a non attainment area. Every county has an increment value developed by EPA (a nationwide value) for certain pollutants (SO2, PM, NOx). An emission can't exceed the increment amount for that area.

If an emission is below a de minimis/significance level, that implies that it doesn't "cause or contribute" to air pollution in non-attainment area. If an emission is above the de minimis level, no permit can be issued at the requested emissions level; the applicant must lower the requested emissions level.

No de minimis/significance levels or increment levels have been established for ozone in Texas, but have been established for one of the ozone precursors, NOx. To do a cumulative effects review for ozone, a de minimis/significance level for ozone would have to be established by rule; otherwise any source would "contribute" to ozone formation for any amount of precursor emissions within the non-attainment area. The de minimis/significance level could be the minimum detection level of an ozone monitor. To determine ozone precursor allowables (i.e. de minimis/significance levels), a meaningful emissions database is needed. Such a database does not currently exist in Texas, but TCEQ was appropriated funds by the 2009 Legislature to establish an air permits allowable emissions database. However, photochemical ozone models are already available in non-attainment areas from TCEQ or local Councils of Government (COGs). The cost to an air permit applicant to do cumulative effects modeling may be approximately $100,000. Since cumulative effects modeling does not have the same "rigor" as SIP ozone attainment analysis, there will not be much benefit gained from cumulative effects analysis of major sources located within non-attainment areas. Here, an appropriate comparable analysis is already being done through NSR non-attainment permitting (LAER, offsets) and also through the SIP process.

ACT Recommendations:

- Require TCEQ to evaluate and consider the cumulative effects on ambient air quality, public health and property from **all expected air contaminant emissions** from any facility or proposed facility and from other facilities located within a prescribed distance [e.g. 100 miles] from the facility or proposed facility, alternatively, within a distance

specified by TCEQ rule.

- Require TCEQ to evaluate and consider the **formation of ozone** due to the cumulative effects of the facility's expected emissions, authorized emissions from issued permits for a new major source or a major modification to an existing major source, and actual authorized emissions from all permitted facilities located within a prescribed distance [e.g. 100 miles] from the facility or proposed facility, or within a distance specified by TCEQ rule.
- Require TCEQ to formalize cumulative effects analysis in rule, thus allowing all interested stakeholders an opportunity to participate in the development of that process, and making it clear to all what will be required in the future.

Issue: The Air Pollutant Watch List has not been adopted as enforceable standards in rules.

The Air Pollutant Watch List (APWL) is a list of areas in Texas where specific pollutants were measured at levels of concern. It is maintained by TCEQ Toxicology Division (TD) and is intended to alert TCEQ technical personnel and the public to cities and counties within the state that have areas with elevated concentrations of special-interest air pollutants.

The APWL is composed of the following information: area of concern listed by county, city and TCEQ Region; APWL site number; year added; pollutant of interest; and area boundaries. An area of concern is defined as an area in which one or more particular pollutants has been measured at a level that can potentially cause adverse short-term or long-term health effects (or both) or odor.

The purpose of the APWL is to: heighten awareness in areas of concern for interested parties; encourage efforts to reduce emissions; help TCEQ focus resources to conduct facility inspections and field investigations, pursue enforcement activities, increase pollution prevention efforts, and prioritize mobile monitoring efforts; and, help in review of air permits. In the past, APWLs were mainly directed to TCEQ staff and industry. However in June 2009, due to increased legislative interest, the TD began notifying legislators whose districts include an APWL area two weeks prior to any proposed or final changes to the APWL area.

In 2009 and January 2010, six APWL areas and nine pollutants were removed from the APWL, and 7 more pollutants in 5 counties are proposed to be removed in 2010. As of March 1, 2010, there are 11 APWLs in 10 Texas counties.

An area or pollutant (or both) are added to the APWL when persistent elevations of measured concentrations of the pollutant of interest are determined by the TD to be of concern for potential to cause adverse short- or long-term health effects (or both) or odor. Once the affected legislative officials are notified of this determination, a 30-day public comment period is opened. Notification of this comment period is put on the APWL Web site and individuals signed up for the TD listserv are sent notifications via email. After the close of the comment period, all comments and any additional monitoring information are re-evaluated. Following a final notification to legislative officials, the pollutant and/or area is placed on the APWL.

The process of removing a pollutant and/or area from the APWL is similar to the addition process. In order to be eligible for removal from the APWL, long-term monitoring in these areas must show a decreasing trend and/or mobile monitoring must show that levels of pollutants are

no longer at a level of potential concern. In addition, the TD takes into account industry efforts to control or reduce emissions of the pollutant of concern that could have contributed to the monitored decrease in ambient concentrations. Legislators whose districts are in these areas are notified of the proposal to remove these pollutants from the APWL and the public is given a 30-day comment period. The public comment period consists of posting relevant data on the APWL Web site along with the public comment form. Those signed up for the TD listserve are notified of the update via email. After all comments and any additional monitoring data are reassessed, a final notification is provided to legislative officials prior to the final removal of the chemical and/or area.

ACT Recommendations:

- Require TCEQ to adopt the air pollutant and/or toxics watch list as enforceable standards in rules.
- Require TCEQ to: (1) establish and maintain an air pollutant and/or toxics watch list for each air contaminant that TCEQ determines exceeds federal or state ambient air quality standards or health effects screening levels; (2) designate areas of the state where modeled or monitored ambient air concentrations of one or more air contaminants exceed any ambient air quality standards or health effects screening levels adopted by TCEQ; and (3) ensure that the emission requirements in any permit issued in a designated area are consistent with any ambient air quality standards or health effects screening levels adopted by TCEQ.

Issue: The Effects Screening Levels have not been adopted as enforceable standards in rules.

Effects Screening Levels (ESLs) are used to evaluate the potential for effects to occur as a result of exposure to concentrations of constituents in the air. ESLs are based on data concerning health effects, the potential for odors to be a nuisance, effects on vegetation, and corrosive effects. They are not ambient air standards. It is TCEQ's policy that if predicted or measured airborne levels of a constituent do not exceed the screening level, adverse health or welfare effects are not expected; if ambient levels of constituents in air exceed the screening levels, it does not necessarily indicate a problem but rather triggers a review in more depth. Both short- and long-term ESLs are listed. "Short-term" generally indicates a one-hour averaging period. "Long-term" indicates an annual averaging period.

ACT Recommendations:

- Require TCEQ to adopt ESLs list as enforceable standards in rules.
- Require TCEQ to: (1) adopt effects screening levels for all air contaminants that evaluate the potential for adverse health effects to occur as a result of exposure to concentrations of the air contaminants; (2) to adopt ESLs at least as stringent as those adopted by the EPA; and (3) require emission sources to comply with any adopted ESLs.

Municipal Solid Waste and Recycling Permitting Issues

Issue: TCEQ staff has never imposed a set time limit, renewal requirements or reasonable fees for municipal solid waste permits.

Industrial hazardous waste facilities, major air and water facilities all have permits, which usually last for ten years. Permits go through a review process and can be renewed. Although the Solid Waste Disposal Act provides for permit terms, TCEQ now issues permits that are good for the life of the facility TCEQ has never set time limits on MSW permits. For landfills, the permits are valid until the capacity of the permitted height and design is reached. According to the 2010 TCEQ annual report of the MSW Permits Section[14], 67 of the 197 active landfills in Texas have at least 50 years of capacity left:

- 32 landfills have more than 100 years of capacity left; and
- 35 additional landfills have at least 50 years of remaining capacity.

If landfill operators do not propose major changes that would require the review of the permit amendment process, these permits might not ever be thoroughly reviewed even though these facilities do receive materials such as heavy metals that could be dangerous for centuries and they are not required to show that their containment systems won't degrade over long periods of time. Processing facilities, such as trash transfer stations, never permanently fill up, but their permits have no time limit either. Thorough periodic review of permits is essential in order to consider the safety of the operations and the implementation of better pollution controls as technology advances. The regulated community maintains that they would be unable to obtain financing for their facilities with a set time limit. However, this argument seems hollow given that other major facilities that obtain water, wastewater and air permits with 10 year time limits or less are able to obtain bonds and other long-term financing.

As a result of the last Sunset process, TCEQ initiated a review process for MSW permits. But as the Sunset Staff Report recapped, it is currently not very comprehensive as implemented by staff as only facilities with a poor compliance history are subject to the reviews and the waste permitting staff has not even consulted with the enforcement personnel or reviewed the complaint history in these reviews, let alone allowed for public comment.

ACT Recommendations:

- MSW facility permits should be brought into line with other facilities by instituting a 10-year term limit.
- At the very least, require the permittees of municipal solid waste facilities to undergo a Good Neighbor Reviews of their facility's performance. The facilities would be required to publish notices with detailed information on their tonnages recycled, composted, landfilled, or processed, plans for updates in technology, site operating plans, planned expansions. The facilities would report details on complaints, violations, penalties assessed and provide for written comments and a public meeting. The information from the facilities and the public would be compiled by the facility and be made available on the facilities' website that would be linked to TCEQ's website, alongs with their permits and pending amendments and modifications.

[1]Waste in Texas: A Year in Review FY 2009 Data Summary and Analysis. Waste Permits Division. AS-187-10.

Issue: The current $100 fee to apply for a new permit, amendment or modification does not reflect the cost to the state of processing applications.

ACT Recommendation:

- Significantly increase the fee to apply for permits, amendments and modifications from the current $100 to reflect TCEQ's real costs in reviewing applications, at least for major waste facilities.

Issue: MSW Permits Do Not Have a "Use it or Lose it" Provision

Once an MSW permit is issued, there is no time limit on when it must be used. The land use patterns may change dramatically and people and businesses that move into an area after a permit has been issued may have no idea that a dormant MSW permit has been granted.

The only provision to address this is a requirement that permit-holders erect a sign on the site if the permit is not used within 5 years. However, a permit can still be used at any time with no subsequent reviews as to the suitability of the facility given the present land use patterns, compliance history or other new information related to the site, the permittee or technology changes.

ACT Recommendation:

- MSW permits should expire within 3 years of issuance if the facility is not built.

Issue: TCEQ processes for handling the existing county authority for siting, the requirement for a land use compatibility analysis, and public notice provisions are not sufficient to meet local needs for input into the siting of MSW facilities.

Early public notice of potential waste facilities provides communities with time to evaluate the possibilities for appropriate citing. Potential applicants must do soil borings and submit those documents to TCEQ, but not to local officials or potentially affected neighbors. Several other types of facilities must perform soil borings and submit that information to TCEQ months before submitting a permit. While the information is technically public information, communities are generally unaware that these borings are taking place and an application is being prepared.

Usually local officials and the potential neighbors of a trash facility find out about the facility after a permit or registration application is submitted and declared administratively complete. Currently, county governments have the power to designate certain areas of the county as unsuitable for trash facilities, as long as some area of the county is designated as appropriate. But, a county citing ordinance cannot be retroactive, so a new application is not subject to a citing ordinance.

The county siting powers are hampered in that in order for a county to designate areas as "unsuitable" for a landfill, it must also designate other areas that are suitable for a landfill. That provision makes them politically difficult to pass which is somewhat lessened if there is already a landfill in the county. However, the days of every county having a landfill are long gone already. As standards have been put in place many small, especially local government run MSW facilities, have closed and now 126 counties do not have landfills within their borders. Requiring counties to designate suitable sites is no longer necessary given the regional nature of most landfills and the abundance of permitted landfill space in Texas. TCEQ's October 2010 MSW report showed that once again, the remaining years of landfill capacity has climbed to its highest ever of 49 years and that every COG region has at least 12 years of capacity.[15]

MSW permits are one of the few kinds of permits in which TCEQ is supposed to consider the compatibility with surrounding land uses. Currently, TCEQ staff is not required to (and does not) conduct a land use compatibility analysis. The express language of the rules does not require the applicant to include a land use compatibility analysis. The rules require only that certain information be included in the application to facilitate such an analysis, but no qualified individual (on behalf of the applicant or the Executive Director) is required to actually conduct a land use compatibility analysis.

If a landfill is proposed to be constructed over an aquifer, the Commission must consider the potential impacts on groundwater availability. For instance, if dewatering is proposed, the Commission must consider how this might impact groundwater users, *i.e.*, whether it will diminish the water supply in the area. If there are a significant number of water wells in the area or public water supply wells, then, the Commission must consider how leak from the landfill will affect those wells, and whether alternate sources of water are available. These issues should be part of the land use compatibility analysis.

In addition, the local Council of Governments (COGs) must submit a declaration as to whether the proposed facility is compatible with the Regional Solid Waste Management Plan. However, the deference given to the COG determination has decreased since rules changes to Health and Safety Code were completed in 2006.

During the 2001 Sunset process, the State Legislature passed a provision requiring automatic public hearings whenever a new industrial hazardous waste facility, landfill or other municipal solid waste facility is proposed. However, very late in the 2005 legislative session an amendment was added to a bill that made these public meetings optional and the number of them has since decreased dramatically. These public meetings are often the first time that many people find out about the proposed facility. They are an important opportunity for the public to learn the details of a proposed waste facility – and public awareness is a critical factor in the outcome of permits.

TCEQ requires notice by mail to local landowners, residents and mineral rights holders, however, those lists are not required to be kept current. The permitting process may take in

[1]Municipal Solid Waste in Texas: A Year in Review FY 2009 Data Summary and Analysis. Waste Permits Division. AS-187-10. October 2010.

excess of three years, but residents and businesses new to the area may be completely unaware of an application.

ACT Recommendations:

- Counties and communities should receive notice that soil boring test results are being done and that a waste facility may be proposed.
- County siting powers should be altered so that counties can designate areas that include aquifers as off-limits for landfills without having to identify areas that are suitable for landfills. Counties should be allowed to designate MSW facilities outside their borders. Counties should be able to require additional protection for aquifers, such as double synthetic lining with leak detection systems between the two liners.
- Applicants should be required to determine the source of water of every neighbor within a mile or so, by whatever means are required. If the water well databases are inadequate, the applicant should have to keep investigating beyond consulting published and open sources of information, which may not contain complete information about wells and springs..
- Counties should be allowed to conduct a land use compatibility analysis and include that analysis with the permit application, which should be given substantial weight in the process. TCEQ could also develop capability to evaluate the land use compatibility perhaps based on an independent land use analysis. If only COGs make land use compatibility determinations, deference should also be given to their decision.
- Automatic public meetings for new solid waste facilities should be restored. However, in order to relieve TCEQ of the expense, applicants should be required to hold an early public meeting when an application for a new industrial hazardous waste and municipal solid waste facility is submitted. TCEQ would only have to provide written and online materials, as the onus would be on the applicant to hold and publicize the public meeting.
- Applicants should be required to update their mailing lists if the old list is more than a year old.

Issue: TCEQ rules have not done enough to thwart sham recycling operations.

A number of facilities that were supposedly engaged in recycling or other beneficial uses of materials have created environmental problems. Current practice does not have enough safeguards against sham recycling operations from taking advantage of reduced permitting requirements for recycling.

Under current rules, if an MSW facility, such as a grease trap processor, promises to recycle 10% of what they take in, the facility can apply for a registration rather than a permit. TCEQ does not require specific information on the end markets for the recycled materials. Given the low level of public input for a registration compared to a permit, this has led to new waste processing facilities being approved with very little or no public input. Applicants who have had serious violations of state environmental laws are not prohibited from applying under these provisions.

On Christmas Day 2006 a fire broke out at a massive sham mulching operation in Bexar County

that caused massive air and water pollution problems. The Legislature responded with HB 2541 which prescribed time limits for processing and removing materials from a facility; limited the amount of combustible material that may be stored at a recycling facility; limited the size of a pile of combustible recyclable or recycled materials, including composting materials or mulch, at a recycling facility; and imposed different standards for a recycling facility appropriate to the size and number of piles of combustible materials to be stored.

Another dimension of the problem in Helotes and at other waste facilities is low financial assurance standards. Local governments often must pay for cleaning up these sites when they are abandoned.

ACT Recommendations:

- TCEQ should require higher levels of recycling and verify specific end markets for materials before allowing applicants to apply for an MSW registration instead of a permit.
- If applicants have violated environmental laws in the past, permits should be required.
- Extend the safeguards of HB 2541 to other municipal solid waste facilities and other counties.
- Increase financial assurance requirements for MSW facilities.

Issue: Basic Standards for Home Dumping and Burning

Under current law, Texas residents in unincorporated that do not have trash pick-up services provided by a local government, are legally allowed to burn their trash or bury up to a ton on their property annually – even in a floodplain. A Lower Colorado River Authority (LCRA) survey found 324 significant dumpsites near the river, many of which were in 100-year flood plain.

The Chapter 330 rules rewrite completed in 2006 eliminated the requirement to have a deed restriction if when a landowners has engaged in on-site dumping. An increasing portion of a household's waste stream is composed of product and packaging waste. Often the product and packaging contain plastics and other materials that can be hazardous went burned or when washed downstream if placed in a floodplain. Chemically sensitive neighbors can be especially at risk when neighbors burn their wastes.

Alternatives do exist. Current rules [1]authorize low volume transfer stations in unincorporated areas if county approvals are in place and adjacent landowners are notified. The maximum storage capacity is 40 cubic yards and waste must be transferred at least weekly. Given the high demands on surface water and the costs for clean-up efforts, this dumping, especially in floodplains, should be curtailed. TCEQ should be exercising its water pollution enforcement powers to stop this pollution of the waterways of Texas.

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[1]Health and Safety Code 330.1205(g)

ACT Recommendations:

- Prohibit burying or depositing trash in a floodplain
- TCEQ should enforce the requirement for water quality permits against dumpsites near surface waters
- Expand the list of materials that should not be burned.
- Restore the requirement for deed restrictions for on-site dumping so that future owners are aware of past dumping on the property.

Issue: TCEQ has never requested an adjustment in the Solid Waste Disposal Fee to keep pace with inflation and does not appear to be adequately funding permitting, enforcement, statewide or local recycling efforts.

TCEQ has never requested an increase in $1.25 per ton Solid Waste Fee (Health and Safety Code § 361.013) since it was instituted in 1991. Half of the funds are supposed to be used by TCEQ for MSW related functions including permitting, enforcement and recycling promotion and the other half is supposed to be distributed by the COGs for MSW and recycling related projects. (Health and Safety Code§ 361.014) However, it is unknown whether the Solid Waste Fee is being used for the purposes outlined in state law, or if a significant portion is being diverted for a disproportionate amount of general TCEQ expenses. It is unclear whether all landfills and other MSW facilities are subject to annual inspections and whether there are sufficient resources being dedicated towards inspectors in the field offices that focus on MSW facilities.

It appears that TCEQ at the statewide level is doing very little to promote recycling or clean up municipal solid waste abandoned dumps which are specified programs to be funded by these fees.

Other nearby states, including Arkansas, New Mexico and Florida track recycling rates annually. Florida has very detailed county-by-county data for various commonly recycled materials and has set a statewide goal of 75% diversion from landfills. Compared to landfilling, recycling can create more robust economic development and increase the state's tax base.

Local governments and COGs have noted that the level of funds available for local waste and recycling grants is less than half of what should be available to them. It is unclear whether COGs were supposed to have requested that these designated funds were desired for disbursement or not.

There are provisions in existing law for recycling pilot projects and research, but these recycling promotion activities have not been active. Aside from Tx DOT's "Don't Mess with Texas" anti-litter efforts, there are no broad public education efforts to promote positive messages on trash and recycling. Some states have mascots and other public relations efforts to unify recycling messages in the state.

TCEQ was mandated to provide public education on the Computer TakeBack Law (HB 2714)

passed in 2007. As of September 1, 2008, all companies selling desktops, laptops and monitors had to have free and convenient recycling for their products in order to keep selling those items in Texas. TCEQ set up www.texasrecyclescomputers.org which provides links to each company's takeback program. However, a 2009 survey of 200 local government websites and recycling information personnel found that less than 20% of those websites and personnel referenced TCEQ website or any other producer takeback program.

ACT Recommendations:

- Raise the existing $1.25 per ton Solid Waste Disposal fee on landfilling and adjust it every five years to account for inflation. This would allow TCEQ to perform its responsibilities to evaluate MSW applications, enforce the MSW laws, disburse funds to the COGs for local grants, track recycling rates across the state and provide for more robust statewide recycling efforts, which will create economic development, jobs and improve the state's tax base.
- TCEQ should dedicate resources from the Solid Waste Disposal surcharges towards fulfilling the public education responsibilities of the Computer TakeBack Law passed in 2007.