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November 30, 2010

Senator Glenn Hegar, Jr.
Chair
Texas Sunset Commission
Robert E. Johnson Building
P.O. Box 13066
Austin, TX 78701

Representative Dennis Bonnen
Vice Chair
Texas Sunset Commission
Robert E. Johnson Building
P.O. Box 13066
Austin, TX 78701

Dear Chairman Hegar and Vice Chairman Bonnen:

For more than 30 years, the Texas Sunset Advisory Commission (Sunset Commission) has provided critical oversight of the government agencies that keep Texas the greatest state in the nation, balancing the need for important government services with the understanding that freedom comes when government does its core duties well and minimizes its interference in people's lives beyond its authorized responsibilities.

With the exponential growth in development of the Barnett Shale's resources, the Sunset Commission's review of both the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas (RRC) could not have come at a better time. With both agencies encountering challenges dealing with the increased exploration and drilling activity throughout Texas, a review of both entities together is important. Oversight and regulation of oil and gas development within the state has traditionally been divided among several different state agencies.

Increasingly, however, modern development has shown that a more streamlined process would appear to be warranted. Many of my constituents, as well as my own office, have found deciphering which agency to approach for any given aspect of natural gas drilling oversight to be a Sisyphean task. Passing the buck, at times, appeared to be the norm at both the TCEQ and the RRC. Should a resident have concerns over whether hydraulic fracturing has tainted his private well, where should he turn? Both agencies would seem to have some role in protecting the integrity of well and drinking water, yet each points the finger to the other, and residents are left wondering whether they can trust the water coming from their taps.

Trust has become a recurring theme surrounding the interaction between the state agencies, the companies involved in exploration and drilling in the Barnett Shale region, and the public. The

issue of trust has been paramount since the spring of 2010, when the *Texas Observer* reported that an internal audit of TCEQ, begun after a whistleblower complaint, showed TCEQ briefed Ft. Worth officials with inaccurate test results of air quality monitoring in the region. The audit found, after learning of the inaccurate figures, TCEQ updated its testing results but failed to update the local officials it had previously briefed.

I myself had been briefed by TCEQ on the test quality results in Ft. Worth. I specifically asked TCEQ whether there were any red flags present in the results. I was told unequivocally there were not. This response does not appear to square with the audit results showing TCEQ did have concerns over the equipment used to test certain areas in Ft. Worth – concerns significant enough to warrant retesting with newer equipment. As legislators, you know as well as I that we must have 100 percent confidence and trust in the information given to us by state and federal agencies. I will not stand for half-truths and inaccurate reporting to shield unflattering results and the people of Texas will not stand for it either. The question remains, do we have that confidence in the information given out by TCEQ.

I spoke with officials at TCEQ about this incident shortly after the audit was released. While I believe, after many discussions with the commissioners and top officials at the agency, that no malice or ill-intentions were present when the decisions were made to proceed the way they did with these updated air quality test results, the perception that TCEQ had in any way attempted to distort or conceal air monitoring results has hurt its credibility immensely. Indeed, repeatedly at town halls and in private meetings with my constituents, the overwhelming recurring question is ‘who can we trust?’ The state agencies monitoring air and water quality affected by the increased activity in the Barnett Shale must regain 100 percent of the public’s trust. They are far from attaining that goal. I remain convinced, however, that it is the state, not the federal government, which is in the best position to protect the health and economic interests of the people of Texas. To that end, I hope the reports published by the Sunset Commission, as well as the subsequent public hearings and comments, will assist the Texas Legislature to make the necessary changes to restore full public confidence in the agencies whose primary job must be to protect the people they serve.

TCEQ has garnered a perception throughout the state that its actions are slanted toward protecting industry rather than the citizens. TCEQ must do a better job showing that it is an impartial regulator, and not simply an industry friend. One way the Texas Legislature can assist in this perception would be a thorough review of TCEQ’s fee structure. At a time when state and federal budgets are straining at the seams, and hard choices inevitably must be made regarding budget cuts, I urge the legislature to resist aggressive cuts to the agency charged with protecting citizens’ health and safety. An overhaul of the fee structure employed when industry bad actors abuse their position would go far toward both boosting TCEQ’s standing as an independent regulator and assist in preventing budget cuts that may hamper TCEQ’s oversight role of the expanding presence of the oil and gas industry. The same concern persists with the RRC, another regulator poised with protecting public health. Underfunding either agency could have

dire effects on both Texas' environment and the health of people living mere feet from some drilling operations.

Indeed, TCEQ has made marked improvements in its outreach to the residents in North Texas. It has made real-time air quality monitoring data from several permanent on-site monitors, including monitors in the DISH and Flower Mound communities, available for review on its website, allowing citizens and experts to see the actual readings being taken in their communities. Further, TCEQ officials have made themselves available around the clock for officials in DISH and other localities. Should residents notice substantial changes in odor in the air, or experience sudden changes in their own health, such as nosebleeds or extreme headaches, TCEQ officials have come out within hours of such notifications, taking air samples and making in-person assessments of the situation.

More outreach must be done within the communities where hydraulic fracturing has taken off at exponential rates. With drilling moving from the mostly rural areas a decade or more ago to the suburban and even urban areas of today, local residents must be given the opportunity, on a regular basis, to meet with and talk to the officials who are charged with protecting their health. Regularly scheduled town hall meetings and forums, by both elected officials and regulators, would enhance transparency and provide the public with information that will ease their concerns over new drilling rules and regulations. Informational public meetings, including explanations of permitting and monitoring procedures, will also alleviate much of the concern which follows a simple lack of information surrounding the activity being performed, in many cases, in residents' own yards.

TCEQ's use of third-party quality assurance testing should also be made available to the public in a user-friendly manner. Beyond posting the raw data test results -- which remains critical for open and transparent government -- residents would benefit from clear, plain-language analyses of the data posted on its website. When test results show higher-than-normal readings, explanations of why this could occur, the dangers posed, and what could be done to prevent higher readings in the future would be beneficial. What is the risk? TCEQ must spell out every side of the data it presents, and explain whether further agency or industry action is necessary. TCEQ must not simply explain away abnormalities in its air quality readings, but must give straightforward analyses of what is happening, and what these readings could mean for human health.

The interconnectedness and often overlapping roles of both the TCEQ and the RRC surrounding regulating and overseeing the exploration and development of natural gas production has led to much frustration within the communities of North Texas. While I agree with the Sunset Commission's Staff Report recommending the RRC change its current anachronistic name to the more accurate "Texas Oil and Gas Commission," I am gravely concerned over the Commission's recommendation that the agency's makeup be altered from its current three-member elected board to a five-member appointed board. In order to achieve the highest accountability possible in the agencies charged with protecting the health and welfare of the

citizens, it is imperative the RRC remain an elected board. As we have seen at the federal level, executive appointees are granted insulation between their decisions and public opinion. While this can allow for more efficient decision-making, it can also lead to officials making decisions without consideration of public sentiment and concerns. Elected officials remain, inherently, more connected to the people they represent, and maintaining the elected status of RRC's commissioners would ensure residents' voices continue to be heard on important decisions being made in their backyards. Good government is accountable government.

Further, my experience with both the TCEQ and the RRC leads me to believe the Sunset Commission's assessment that both agencies work well together in deciding which regulatory body is responsible for specific issues in the community is misguided. Too often, both agencies employed a 'pass-the-buck' mentality, pointing a finger toward the other, and referring constituents to another agency to resolve individual issues. For instance, residents with concerns that their well water has been contaminated by errant hydraulic fracturing have been passed back and forth between the TCEQ and the RRC, both claiming that different aspects of hydraulic fracturing could be the cause of such problems, and then subsequently claiming that those aspects are regulated by the other agency.

My own office has been frustrated, despite both agencies' notable outreach efforts to keep elected officials informed of regulatory activities, with officials referring cases back and forth between the agencies, taking days if not weeks to determine which office has proper jurisdiction over any given constituent issue. If an elected official's office experiences these kinds of frustrations, the average citizen is only completely discouraged when confronted with the same daunting task of determining which agency to even approach with a concern.

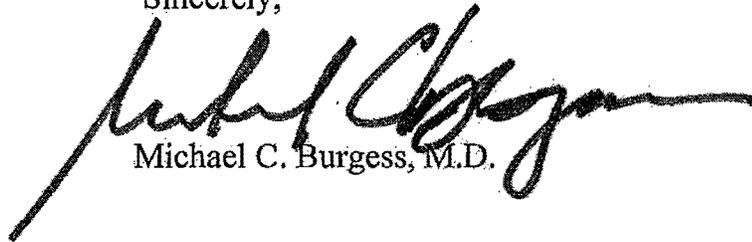
My recommendation to alleviate this frustration would be to establish an intermediary, ombudsman office between the two agencies. A single, available representative to assist citizens in traversing the complicated division of responsibilities between the two agencies would give residents a clear starting point to address their concerns. This ombudsman would have a comprehensive understanding of the role of each agency, and could immediately direct citizens to the proper office in either agency to assist with their specific cases. Too often residents are referred to various offices, leaving multiple messages, only to never receive a response, as agency staff dismisses the concern knowing their individual office is not responsible for the issue being raised in the message. A single, accountable ombudsman office will give Texans the confidence in knowing their government is readily responsive to their questions and concerns.

With the increased activity of oil and gas drilling in urban, residential areas, the role of the TCEQ and the RRC has never been more critical. Ensuring the success of both of these agencies must be the priority of every elected official in this state. While I strongly believe both agencies have made great strides in improving public outreach – including TCEQ's Barnett Shale website with real-time air quality monitoring results – much more must be done to regain the public trust lost in the spring of 2010. Texans must have 100 percent confidence in the

agencies tasked with protecting their health and wellbeing. Any changes to the structure of these agencies must be made with that single most important concern in mind.

Thank you for the opportunity to address my concerns with these two agencies with you. The Sunset Commission's role in improving the status of Texas' state agencies cannot be understated. I look forward to working with both of you, as well as the entire state legislature, to ensure the continued success of every agency serving the people of this great state.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Burgess", written in a cursive style.

Michael C. Burgess, M.D.

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Congress of the United States
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December 17, 2010

Senator Glenn Hegar, Jr.
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Representative Dennis Bonnen
Vice Chair
Texas Sunset Commission
Robert E. Johnson Building
P.O. Box 13066
Austin, TX 78701

Dear Chairman Hegar and Vice Chairman Bonnen:

Due to the last-minute announcement in the House of Representatives that a vote on major tax legislation would be before the House on Wednesday December 15, and Thursday, December 16, I was unable to travel to Austin to attend the Sunset Commission's hearing regarding the Commission's review of both the Texas Commission on Environmental Quality (TCEQ) and the Texas Railroad Commission. Unfortunately, due to the unavailability of video- or teleconferencing technology at the Texas State House, I was further unable to submit testimony live during your hearing.

I have followed the Commission's review of both agencies closely, and regret I have been detained in D.C. due to the Lame Duck session currently being held. I have included my written testimony and respectfully request that it be included in the Commission's record, along with my previous letters to the Commission regarding both agencies.

Improving both TCEQ and the Railroad Commission must be a priority for the state legislature. I look forward to working with the Commission and the full legislature to ensure positive changes are made at both agencies so that the health and well being of all Texans continue to be a top priority.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Burgess".

Michael C. Burgess, M.D.

Congressman Michael C. Burgess, M.D.
Statement before the Texas Sunset Commission
Testimony Regarding Review of Texas Commission on Environmental Quality and
Texas Railroad Commission
December 15, 2010

Thank you, Mr. Chairman, and members of the Sunset Commission.

The Sunset Commission has a long history of reviewing state agencies with the purpose of improving their operations, and keeping them accountable to the people they represent. If the federal government had such a system, we might not experience some of the problems we are seeing with runaway bureaucrats exercising unchecked powers. The federal Environmental Protection Agency's actions are the first that come to mind – and if we have to keep the EPA in check we are required to have functioning and vigilant state agencies.

In plain language, I will say to both agencies what my constituents have been trying to impress upon them for the past several years: Do Your Job! Both the TCEQ and the Railroad Commission need to step it up. If they can't or won't do their authorized jobs of protecting the people, then it's only too clear the federal government is ready to step in and take over. The bottom line is, someone must do this oversight, and if our state agencies won't, federal agencies will.

I am here today with the hope that this Commission will provide the necessary guidance and suggest the proper changes to prevent federal agencies from overstepping their authority and preempting state actions. Too many times over the past few years we have seen overly ambitious federal bureaucrats attempt to step on the toes of state agencies, knowing full well

those state agencies are in a better position to assist the residents of this state than any federal bureaucrat ever could be. But the continued inattention of the TCEQ and the Railroad Commission seem to be driving this. If the state regulators are slow to act – or worse, totally dismissive of citizen concerns – where else can they turn but the federal agency?

The burgeoning natural gas industry in the Barnett Shale region is the perfect example of this. There is no doubt; the TCEQ and the Railroad Commission have experienced growing pains in dealing with the exponentially expanding business of drilling for natural gas, specifically in North Texas. It would be hard to find a resident in North Texas who is unaware of the issues local residents and elected officials have had with TCEQ and the Railroad Commission.

In April of last spring, media reports that TCEQ had failed to brief elected officials on certain air quality test results updates left me especially disturbed. I was one of the elected officials originally briefed on the results from the Fort Worth area. I specifically asked TCEQ staff at that time whether there were any “red flags” with the data and was told there were none.

Subsequent to the reports of TCEQ’s internal audit, I spoke with Commissioner Shaw and other officials at TCEQ. I believe TCEQ has since made a concerted effort to make better outreach to officials and the public on their testing results, but there is no doubt that more must be done.

There is no doubt that their credibility suffered significantly in this process.

In the wake of the increased monitoring of air quality in the Barnett Region, TCEQ instituted a page on their official website to relay up-to-the-minute monitoring results. However, the

information is provided in raw-data form, precluding many residents from understanding the full impacts of the data. Providing explanations of what the data means, and in terms average citizens can understand, would go a long way in addressing residents' fears. People want to be told the truth – good or bad – as to what chemicals are in and around their daily lives. TCEQ and the Railroad Commission owe it to the public to give them all the information, and let them decide what is best for them and their families.

As I stated in my written recommendations, TCEQ should hold regular town hall and informational meetings in neighborhoods across North Texas where drilling activity has increased. Having TCEQ officials in regular contact with the residents they are charged with protecting will provide a perspective not always attainable in government offices where most regulations are enforced. Here's the deal: TCEQ must show that it is accountable to the citizens of the state – not an apologist for the industry it is purported to regulate.

Moreover, my office, and I know many of my constituents, have been discouraged in trying to discern exactly which agency - the TCEQ or the Railroad Commission - is the proper regulator for certain issues. Historically, there were sound reasons to divide up oversight of the oil and gas industry into two separate regulatory bodies. I support the continued existence of both agencies. However, more must be done to assist residents and local officials in discerning which office in which agency can help with their problem. I recommend creating a liaison or ombudsman office where citizens can go and be directed to the proper regulator who can help with their individual issue – and to provide thorough follow-up until the situation is resolved.

Further, we are all aware of looming budget concerns in the upcoming state legislative session. I strongly urge the Legislature to use caution before reducing the budgets of either the TCEQ or the Railroad Commission, given the oil and gas industry's increased activity throughout the state. This activity comes closer and closer to neighborhoods and schools every day. These agencies are tasked with protecting the health and well-being of every person, and we cannot constrain their efforts by failing to provide sufficient resources.

I would recommend, before any significant cuts are made, that legislators look to restructure the fee schedule for operators in the Barnett Shale region and elsewhere – increasing the cost of penalties and citations. Increasing fees paid by bad actors in the community will not only provide greater funding for the agency, but will also deter behavior that is putting our neighbors at risk for serious health conditions.

In reviewing the Commission's staff reports of both the TCEQ and Railroad Commission, I am concerned that, as the report stated in the case of the Railroad Commission: "While the estimated \$186 billion oil and gas industry makes a significant contribution to the State, the Commission relies on General Revenue to fund almost half of its more than \$50 million budget for this industry's oversight." Funding streams for both agencies must be updated to reflect the industry's increased presence in the state. New funding should not be taken from the General Revenue Fund, and the industry should fund, through fees and penalties imposed, the proper oversight necessary for this activity to continue.

Stories in the media are becoming all too common of the federal government coming into Texas and preempting state agencies on a number of issues. Just recently, the federal EPA announced it would be taking over the case of two houses in Parker County where natural gas is suspected to be in the residents' water supply. The federal government will never know better than our own state government how best to protect our communities. And yet it seems as if the dismissive attitude of the Railroad Commission necessitated this intervention. We must give the TCEQ and the Railroad Commission every tool they need to do their jobs so that federal bureaucrats cannot overstep their authority and usurp our state agencies' role.

I hope this testimony will underscore just how serious a matter proper regulatory involvement and oversight has become in my District in North Texas. Residents are rightly concerned about the air they are breathing and the water they are drinking and ensuring both are safe. We must get this right – we are talking about people's lives. I have submitted a separate letter to the Commission, which I have also posted on my congressional website, explaining my concerns in further detail. I look forward to working with the Commission and the entire State Legislature to make sure this gets done right.

Thank you, Mr. Chairman and members of the Commission.