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NOV 30 2010

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 30, 2010

Mr. Ken Levine  
Director  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, Texas 78711-3066

Dear Mr. Levine:

On behalf of the Commissioners and myself, enclosed please find the agency's responses to the recommendations included in your Staff Report on the Texas Commission on Environmental Quality (TCEQ).

In reviewing the Staff Report, it is evident that the staff for the Sunset Advisory Commission (SSAC) conducted a comprehensive and valuable review of the TCEQ's functions and operations. We welcome the review's findings and are supportive of the intent and direction of the recommendations laid out in the report.

We are available to discuss any of the specific issues mentioned in our enclosed comments and welcome the opportunity to testify at the SSAC hearing scheduled for mid-December.

Again, we appreciate the exhaustive and professional efforts displayed by your staff over the review period, and we look forward to working with you and them during the remainder of the Sunset process, as well as the upcoming legislative session.

Please contact me at (512) 239-5105 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark R. Vickery", with a large, stylized flourish at the end.

Mark R. Vickery, P.G.  
Executive Director

Enclosure

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

## Responses to Issue 1

### **Texas Has a Continuing Need for the Texas Commission on Environmental Quality.**

#### **Change in Statute**

##### **1.1 Continue the Texas Commission on Environmental Quality for 12 years.**

- The agency agrees that there is a continuing need for the TCEQ and appreciates the vote of confidence in extending the agency for 12 years.

##### **1.2 Transfer the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Railroad Commission.**

- The TCEQ supports the recommendation to transfer the groundwater protection responsibilities associated with oil and gas activities to the Railroad Commission (RRC). The agency will work with the RRC to ensure an efficient transfer of duties. This recommendation also authorizes the RRC, rather than the TCEQ, to collect the current surface casing expedited fee. Revenue from this fee is used to support the program. With the program transfer, TCEQ believes this fee revenue should no longer be deposited to the Water Resource Management Account #153, and instead, those revenues should be deposited to an RRC account.

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

- The TCEQ supports this recommendation. The Agency's Alternative Dispute Resolution Program (ADR) is an active program within the TCEQ and has been functioning under general statutory authority and agency rule. However, the Agency agrees that there is benefit to more specifically memorialize and define the TCEQ's authority to continue employing and encouraging the use of ADR. We further

agree with the advantages provided in addressing, in a similar fashion, negotiated rulemaking at the agency.

## **Responses to Issue 2**

### **TCEQ's Public Assistance Efforts Lack Coordination and Focus.**

#### **Change in Statute**

##### **2.1 Charge the Executive Director with providing assistance and education to the public on environmental matters under the agency's jurisdiction.**

- The agency agrees that there is a need to continually reassess and evaluate our operations to improve our assistance and educational services to the public. The agency is committed to expanding and refining our existing wheelhouse in the area of public service to determine needed changes to improve responsiveness to the public. The TCEQ believes that the current and on-going active response to questions and issues concerning activities associated with oil & gas exploration in the Barnett Shale area demonstrates our ability to coordinate and utilize agency resources to provide the public information on complex and technical issues in an ever changing situation.

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

- The TCEQ agrees with this recommendation. The transfer of OPIC's general public assistance function will allow for better use of that office's legal resources. The Counsel would be able to more effectively focus on permitting, rules, and enforcement matters that raise public interest issues involving human health, environmental quality and resource conservation concerns.

##### **2.3 Require the Commission to generally define, by rule, factors OPIC will consider in representing the public interest and establish OPIC's priorities in case involvement.**

- The TCEQ agrees with this recommendation. A general definition or a rule establishing guiding principles for representation of the public

interest would provide transparency for the work conducted by the office, ensure that resources are used effectively and to afford the public with a realistic understanding of OPIC's role. Any factors developed, however, should ensure that the office maintains a measure of flexibility to respond to unanticipated issues and not unduly limit the Counsel's ability to bring the office's public interest perspective to the Commission's decision making process.

**2.4 Require OPIC to annually report to the Commission on the Office's performance, budget needs, and legislative and regulatory recommendations.**

- The TCEQ agrees with this recommendation. An annual report would foster accountability, ensure that state funds are spent effectively, and would provide transparency in how the office operates.

***Management Action***

**2.5 Direct TCEQ, in pursuing changes to its website, to provide easy access to information on agency policy and environmental regulatory efforts in plain language.**

- The TCEQ supports this recommendation and is in the process of taking steps to improve our web page. We acknowledge the need for the web page to provide agency policy and environmental regulation using plain and understandable language. Since environmental information of interest to the public is often complex, scientific and technical, it is imperative that the agency ensure that this information is accessible and useful. The agency is committed to utilizing advances in technologies to improve the public's ability to retrieve the wealth of information available on the agency's web page. In recognition of the need to improve our web page, the agency has included this item in the Information Strategic Plans. These efforts will take time, as well as significant resources, to fully implement.

## **Responses to Issue 3**

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

#### **Change in Statute**

##### **3.1 Remove the uniform standard from statute and require the Commission to develop a compliance history method to be applied consistently.**

- The TCEQ agrees with the recommendation to remove the term "uniform standard" from the statute. TCEQ's interpretation of the term has resulted in a compliance history rule that is too rigid to accurately reflect individual performance over the broad range of TCEQ regulated entities. Removal of the term will allow TCEQ to revise the current compliance history rule in a manner that will more meaningfully reflect the compliance history of the regulated community.

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

- The TCEQ supports the recommendation to remove the requirement to assess compliance history with no compliance information to evaluate. This change will eliminate the need to classify facilities as average by default.

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

- The TCEQ agrees with the recommendation allowing TCEQ to include additional factors in evaluating compliance history. This recommendation will allow TCEQ to revise the current compliance history equation to include positive compliance factors, complexity factors, and to exclude enforcement orders without punitive sanctions. These data elements are currently being compiled and maintained in existing TCEQ data systems and therefore readily accessible.

## ***Management Action***

### **3.4 Direct TCEQ to revise its rules on compliance history.**

- The TCEQ agrees with the recommendation to revise the compliance history rule. TCEQ will consider its experience with the current rule, as well as the many comments received from Legislators, the public, and the regulated community to develop a rule that is useful, cost-efficient, consistent and unbiased.

## **Responses to Issue 4**

### **TCEQ's Enforcement Process Lacks Public Visibility and Statutory Authority.**

#### **Change in Statute**

#### **4.1 Require the Commission to structure its general enforcement policy in rule and publicly adopt its resulting enforcement policies.**

- The TCEQ supports the recommendation that the Commission's approach to enforcement be established in rule and that enforcement policies should be publicly adopted. TCEQ recognizes that improving transparency of the agency's enforcement process will benefit the public, the regulated community, and the agency.

#### **4.2 Increase TCEQ's administrative penalty caps.**

- The TCEQ agrees with the intent to provide a range of options that encourage compliance. Increased penalty caps will offer flexibility in determining appropriate penalty amounts. The agency will continue to calculate penalties commensurate to the violation in accordance with Commission's enforcement policies.

#### **4.3 Authorize TCEQ to assess administrative penalties for dam safety violations.**

- The TCEQ supports the recommendation to authorize the agency to assess administrative penalties for dam safety violations. Since current statute only allows for civil penalties with regard to dam safety violations, TCEQ must refer the violations to the Office of the Attorney General for processing. Allowing the TCEQ to manage

enforcement actions through its administrative process is an efficient use of the State's enforcement resources.

#### **4.4 Authorize TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.**

- The TCEQ supports this recommendation. This change will allow the Commission additional alternatives in its consideration of eligible Supplemental Environmental Projects (SEPs) proposed by local governments. This recommendation allows the Commission to direct the administrative penalty (i.e., local tax dollars) to the issue that poses the greatest potential risk to the local environment.

### **Responses to Issue 5**

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

#### **Change in Statute**

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

- The TCEQ supports clarifying the Executive Director's authority to curtail water use in water shortages and times of drought as an additional tool to ensure fairness in determining the best use of state water. The TCEQ will outline how it will use this authority to curtail water usage during a water shortage, including criteria that would trigger curtailment.

##### **5.2 Require water rights holders to maintain monthly water-use information and allow the Commission to access that information upon request.**

- The TCEQ agrees with the recommendation to require water right holders to maintain monthly water-use information. Requiring this up to date information will provide TCEQ timely access, thereby allowing the agency to more readily and resourcefully address unauthorized and/or excess water usage.

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

- The TCEQ agrees with the recommendation authorizing the agency to require implementation of Drought Contingency Plans (DCPs). With this authority the agency will be in a better position to ensure that water conservation efforts are being implemented consistently across the state.

### **5.4 Require TCEQ to evaluate the need for additional watermaster programs.**

- The TCEQ agrees that the need for additional watermaster programs should be evaluated on a regular basis. Conducting this evaluation on a regular basis will allow the agency to properly respond to any changing needs or conditions across the state. Since watermaster programs are self-supporting, creation of any new program would include the agency's assessment of a fee on the affected water right holders.

## **Responses to Issue 6**

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

#### **Change in Statute**

#### **6.1 Require previous tank owners or operators to share responsibility, as appropriate, for contamination from leaking PSTs.**

- Though leaking PSTs have been a source of soil and groundwater contamination over the years, activities by owners, operators and the state have done much to remedy this issue. Through commitments by the state and responsible parties, over 23,000 contaminated sites have been cleaned up. These clean ups, as well as regulatory requirements governing underground tanks, have mitigated the effects of releases. In addition, privately-funded cleanups and financial assurance requirements have vastly reduced the state's liability.



- TCEQ agrees with the recommendation addressing previous tank owner and operator liability, with a modification. It would be helpful to include statutory language creating express liability for current landowners so that they are treated in a consistent manner as previous tank owners and operators. Without express landowner liability, TCEQ may be required to perform a cleanup utilizing state funds, if a viable current or prior tank owner and/or current or prior operator cannot be found.

## **6.2 Prohibit delivery of certain petroleum products to uncertified tanks and provide for administrative penalties.**

- The TCEQ agrees with the recommendation. This statutory change is necessary to remain compliant with federal requirements and ensures that federal funds will continue to be available for the state program.

## **6.3 Reauthorize the PST remediation fee, change the current fee levels to caps, and authorize the Commission to set fees in rule.**

- The TCEQ agrees with providing the agency with the latitude to continue this fee and to assess it in rule. The agency's assessment of the fee will allow for sufficient revenues to support the Legislature's appropriation for the PST program.

## **6.4 Expand use of the remediation fee to allow TCEQ to remove non-compliant PSTs that pose a contamination risk.**

- The TCEQ agrees with the recommendation to allow the use of the PST remediation fund, when an owner is financially unable to do so, to remove non-compliant underground tanks that pose a risk. The TCEQ has encountered numerous cases through field investigations and subsequent enforcement actions where the owners are financially unable to either upgrade or remove the out-of-compliance underground tanks. This recommendation would explicitly allow the TCEQ to undertake this activity.

## **Responses to Issue 7**

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

#### **Change in Statute**

##### **7.1 Clarify the Compact Commission's funding mechanism.**

- The TCEQ agrees that the Compact Commission's funding mechanism should be clarified and that a separate General Revenue Dedicated Account should be established to financially support Compact Commission activities. The agency also expects that revenues to support the regulatory activities at the TCEQ should be deposited to the existing TCEQ Low Level Waste Account #88.

## **Responses to Issue 8**

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

#### **Change in Statute**

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

- The TCEQ agrees with efforts to provide the agency with various options to secure the level of funds needed to support the federal Title V Air Permit program activities. The manner chosen by the agency to assess the fee will be to only collect revenue amounts sufficient to support the appropriations for this program by the Legislature, which includes adequate support to manage the federally delegated program.

# **Responses to Water and Wastewater 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.**

#### **Change in Statute**

##### **S 1.4 Transfer responsibility for regulating water and wastewater rates and services from TCEQ to PUC.**

- The TCEQ agrees with the recommendation to transfer responsibilities for regulating water and wastewater rates and services from the TCEQ to the Public Utility Commission (PUC). The recommendation provides for the transfer of regulatory authority for retail, wholesale, and submetering water and wastewater utility rates; Certificates of Convenience and Necessity; reporting requirements; consumer assistance; and financial aspects of emergency and temporary rates for nonfunctioning systems to the PUC. If this recommendation is adopted TCEQ will work with the PUC to assure an efficient and transparent transition, including the development of a Memoranda of Understanding.

##### **S 1.5 Eliminate the existing water and wastewater utility application fees and adjust the Water Utility Regulatory Assessment Fee to pay for utility regulation at PUC.**

- The TCEQ agrees with the Sunset staff recommendation to repeal the three filing fees for applications for rate changes, CCNs, and the sale, transfer, or merger of a CCN. Further, the agency agrees with the recommendation to equalize the 0.5 percent customer assessment for non-profit utilities and utility districts at 1.0 percent.
- The TCEQ suggests modifying the recommendation to transfer a portion of the Utility Regulatory Assessment Fee to PUC from the Water Resource Management Account. The TCEQ proposes that the fee payers remit to each agency a percentage of the Utility

Regulatory Assessment Fee in proportion to the amounts appropriated to each agency by the Legislature.

- Without the suggested modification, the agency could experience cash flow issues for this account since the Utility Regulatory Assessment Fee is not collected until January of each year. Also sharing fee revenues in one account by more than one agency is inefficient and unnecessarily time consuming.
- This suggested modification eliminates the inefficiencies inherent in shared cash. Additionally, both agencies would share proportionally, as the fee rises and falls due to economic and weather-related conditions.

**S 1.6 Require OPUC to represent residential and small commercial interests relating to water and wastewater utilities, contingent on the transfer to PUC.**

- The agency supports the transfer to OPUC responsibilities related to representation of residential and small commercial consumers in water and wastewater utility matters. The agency believes it is appropriate for OPUC to assume this role if PUC is given regulatory oversight of water & wastewater utility activities.

## **On-site Wastewater Treatment Research Council**

### **Responses to Issue 1**

#### **Texas Does Not Need a Separate, Stand-Alone Council to Fund On-site Sewage Research.**

#### **Change in Statute**

**1.1 Abolish the On-site Wastewater Treatment Research Council and transfer authority to award grants for on-site sewage research to the Texas Commission on Environmental Quality.**

- The agency agrees that it is in a position to assume the On-site Wastewater Treatment Research Council grant-making responsibilities. The agency understands that it would administer and award grants for the same purposes currently allowed under the council. Further, the agency will consider whether the on-site

sewage conference should continue as a stand-alone or in association with other agency conferences.

### ***Management Action***

#### **1.2 Direct TCEQ to evaluate the benefits of on-site sewage research and clearly communicate them to the public.**

- The agency agrees there is always a need to reassess and evaluate the benefits of the research grants. A periodic evaluation will assist the agency in determining whether the research grants awarded are valuable and the best use of state funds.

#### **1.3 Direct TCEQ to form a working group to consider stakeholder input when issuing grants.**

- The agency supports the formation of a working group that would provide input regarding on-site sewage facilities when performing its grant awarding duties. The agency will work with interested parties to ensure the stakeholder group is composed of diverse individuals representing different geographical areas and technical expertise.

### **Fiscal Implication Summary**

- The agency suggests a modification to the recommendation. Currently the fee revenue collected to support these activities are deposited to General Revenue Account #001 and then appropriated to the TCEQ. The TCEQ suggests that if the activities are transferred to the agency, the fee revenue be deposited to the TCEQ Water Resource Management Account #153 for appropriation to the TCEQ.