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December 15, 2010

The Honorable Glenn Hegar  
Chairman  
Sunset Advisory Commission  
P. O. Box 13066  
Austin, Texas 78711

RE: Sunset Advisory Commission Staff Report on the Texas Commission on Environmental Quality

Dear Chairman Hegar:

The Texas Association of Business (TAB) would like to offer the following comments in regards to the Sunset Commission staff report on the Texas Commission on Environmental Quality (TCEQ) and supplemental report on the Public Utility Commission (PUC) as you prepare for public input and action by the Commission on the staff's recommendations.

Founded in 1922, the Texas Association of Business is a broad-based, bipartisan organization representing more than 3,000 small and large Texas employers and 200 local chambers of commerce. Given the scope of authority and responsibility of the TCEQ and its relationship with thousands of Texas business entities, our membership has a vital interest in the continuation of the agency in a way that ensures its operation is efficient, cost-effective and capable of meeting its mission of protecting public health while also supporting the ability of this state to maintain essential economic progress.

TAB applauds the Sunset staff's focus on issues that we believe are consistent with the mission and goals of the Sunset process. While acknowledging that the TCEQ is engaged in many policy issues of considerable public interest and debate, it is entirely appropriate to recognize the limitations in the scope of the Sunset review and defer consideration of these policy issues to the Legislature and the legislative committee process.

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

TAB is in complete agreement with Recommendation 1.1 that the TCEQ be continued as an agency of the state for twelve years. There is little argument that effective, reasonable regulatory programs are essential for both protection of the public health and natural resources as well as the opportunity to maintain an economy that makes such protections achievable. While clearly the consolidation of a significant number of often complex environmental regulatory functions in one large agency has presented challenges, there has been no compelling case that major restructuring of agency functions or programs will better serve the needs of the state.

The staff report makes a case that objective indicators of TCEQ's performance are difficult to find and suggests that this difficulty perhaps drives much of the public debate and controversy surrounding the agency. TAB suggests that there is ample evidence of the very real and significant progress that has been made in environmental quality and resource protection in Texas in recent years by both businesses and Texas citizens. We do not disagree with staff's assessment that improvements in air quality, for example, cannot be attributed to any one cause. We do not agree, however, that the attribution is vague or uncertain. There is no question that businesses in Texas have used the tools provided by the Texas Legislature and TCEQ to make unprecedented reductions in air emissions. Of course, reductions from mobile sources not regulated by the state have also contributed, but much of this contribution has come through the Texas Emission Reduction Plan, bought and paid for by Texas businesses and individual citizens. Other mobile source reductions, such as those generated through federal vehicle regulations have had an impact and will become increasingly important in the future, however we do not believe that these initiatives merit the significance some would attribute to them currently, nor should they confuse or obscure the results achieved through Texas' own efforts.

Under Recommendation 1.2 the function of providing recommendations to the Railroad Commission (RRC) concerning depth to usable groundwater for the purpose of establishing casing requirements for oil and gas wells would be transferred from TCEQ to the RRC. TAB has no reason to believe that RRC would not effectively and diligently administer the program. Despite the suggestion that TCEQ's authority in this area is dubious, it should be recognized, however, that the TCEQ has certain expertise and authority related to groundwater resources and the protection of groundwater quality. To the extent that the current program is working, and could even be improved with the same changes to revenue authority suggested in the report, these examples of productive interagency cooperation should be encouraged rather than discouraged unless there is a compelling case that the change will provide clear improvements. If the recommendation is approved we would suggest that the transfer be reviewed very carefully to ensure that no function or responsibility of either agency is adversely affected.

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

TAB is certainly in agreement with Sunset staff recognition that the breadth of responsibility and complexity of TCEQ's operations and programs results in a high level of public interest and desire for helpful information. Generally we are supportive of any measures under Recommendation 2.1 that can provide more useful information to the public. Improving the public's understanding of what the agency does and why can hopefully address some of the considerable confusion and lack of appreciation of the agency's specific statutory responsibilities and its limitations in meeting expectations that may fall outside of that authority. It must be recognized, however, that the very complexity and often highly technical nature of the agency's functions will always present difficult challenges in attempting to provide information in plain language that is meaningful to the general public.

While improving the efforts of the Executive Director in providing general public information is a laudable goal, we are concerned that such consolidation or reorganization of public assistance efforts could have significant unintended consequences. The staff report suggests that public

assistance efforts are not coordinated or well-defined. This assessment, however, may depend on just how “public assistance” is defined. The report appears to focus on public assistance in the general sense of communication with the public, much in the way an ombudsman or similar function would operate. TAB takes no position that such efforts could not or should not be improved at TCEQ. It is necessary, however, to differentiate between this type of general information exchange and the public assistance that results from the normal conduct of the agency business, whether it be permitting, enforcement, emergency spill response, or grant management. The agency has an enormous clientele and many members of the public that have questions about specific matters pending before the agency. It is TAB’s position that this assistance is better coordinated and more effective than the staff report may suggest. More importantly, this type of assistance should not be de-emphasized in any effort to improve general public awareness or appreciation of the agency’s operations.

One aspect of the recommendation TAB is particularly concerned with is the potential effects of any restructuring of public assistance efforts on the permitting process. This concern is largely based on the fact that staff’s listing of the functions of the Office of Public Assistance (OPA) makes no mention of what is, by far, the most significant responsibility of that office. One of the most important interactions of agency staff with the public is in the permitting process. OPA functions as the central point of coordination with the public, applicants, permitting staff, legal staff, government relations staff and executive management on public notice, public meetings and the many complex procedural steps in the permitting process. This function is critical to the agency effectively processing the thousands of authorizations that must be considered by the TCEQ while ensuring that the rights and public participation opportunities afforded members of the public are preserved.

The Sunset staff report recognizes that OPA has other, more general, public assistance responsibilities and the very title of the office may belie the more critical core permitting function the office is charged with. TAB is currently taking no position on where organizationally this essential permitting coordination function of OPA should be placed. The significance of ensuring that this function not be compromised or overlooked in the process of attempting to improve the public’s access to information, however, cannot be overstated.

Regarding Recommendation 2.5 related to the management action of improving the agency’s website, TAB is supportive of any efforts the agency is able to pursue to improve the organization and utility of the site. It is important to recognize that the website is not just a resource to guide the public or any party to information about TCEQ, but equally a portal for conducting business with the agency by the many thousands of entities the agency regulates. While many TAB member companies and local chambers of commerce experience the same issues in effectively navigating the agency website that Sunset staff are aware of, it is particularly important to recognize the limitations of the website in meeting the expectations of its many users. No matter how well organized or cleverly programmed, the website for an agency as large, complex and technical as TCEQ will always present challenges, particularly to casual users who may simply lack the time, resources and opportunity to learn how best to utilize the site.

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

Generally TAB is in agreement with Recommendations 3.1 – 3.4 related to compliance history and the recognition that the criteria for a uniform measure of compliance status promulgated as a result of the last Sunset review of TCEQ (then TNRCC) has not proven to be effective or productive. Clearly the extreme range of circumstances and the diversity of TCEQ’s large regulated universe require much more flexibility. While TAB envisions that these recommendations can be incorporated in rule and guidance by TCEQ consistent with Sunset staff recommendations and the objectives of our membership, it is essential from our perspective that any future implementing regulation continue to recognize the diversity of circumstances that a revised compliance history program must meaningfully address and retain an adequate degree of flexibility and discretion on the part of the Executive Director and Commissioners to apply reasoned judgement on a case-by-case basis.

Also, while TAB does not suggest that cost implications should represent an obstacle to implementing the recommendations under Issue 3, it must be acknowledged that a complete revision of the compliance history rules may have more than minor cost implications. Hopefully many of the lessons learned in implementing the previous Sunset compliance history measures will inform any subsequent efforts and minimize cost. It may be unrealistic, however, based on the significant effort the agency put forward previously, to assume that this recommendation will have no significant fiscal implications.

**Issue 4 – TCEQ’s Enforcement Process Lacks Public Visibility and Statutory Authority**

As a matter of principle, TAB is supportive of any reasonable attempts to make TCEQ’s enforcement policies and procedures more clear and understandable, not only to the public but also to our members whose activities may be subject to agency enforcement jurisdiction. Generally we are in accord with Recommendation 4.1 that TCEQ adopt its general enforcement policy in rule while deferring the promulgation of specific policies and penalty methodology to guidance documents. It is important to recognize, however, that no matter how detailed and well thought-out, any effective enforcement policy must retain an adequate degree of flexibility to ensure that the Commissioners are not unreasonably constrained in their ability to deal with individual cases on their merits and reach decisions that are fair, equitable and protective of the environment and the public’s interest.

It is neither reasonable nor desirable to adopt a policy that is prescriptive to the point that the outcome of an enforcement case or its ordering provisions becomes a rote process of following some formula. The Commissioners at TCEQ are appointed to serve in a judicial capacity and that responsibility should not be mitigated in an effort to ensure complete predictability of an outcome, either by the public or a respondent in an enforcement matter. While it may be challenging, TAB is confident that TCEQ can develop policies and guidance that explain the rationale and range of outcomes of enforcement matters in a way that is meaningful to the public and regulated entities and we are hopeful that any revision to the agency’s authority is consistent with that approach.

Regarding Recommendation 4.2, relating to increases in administrative penalties, TAB is opposed to the recommendation and must take issue with many of the assumptions expressed by the staff. The proposal to increase administrative penalties appears to mirror many recent suggestions that the current penalty authority represents some significant obstacle to effective enforcement. Unfortunately, as far as we are aware, there is no analysis of enforcement cases or characterization of any representative sample of enforcement orders that suggests exactly how the enforcement process or the beneficial outcomes of enforcement actions will be improved, particularly in terms of environmental benefit. There is only the vague representation that somehow establishing higher penalties will be “better” without any clear expression of how these higher penalties would result in fewer enforcement cases, fewer violations or more protective environmental outcomes.

It must be recognized that any increase in administrative penalties has the potential to affect a great many regulated entities with a significant increase in financial liability through enforcement. Not all of those potentially affected are large corporations. In fact, many could be small businesses or even more likely – local governments. The number of enforcement cases cited in the staff report as examples of instances in which TCEQ had to reduce penalties to fit within statutory caps represents a very small percentage of the total number of enforcement cases processed in one year. The effects of a 250 percent increase in the maximum penalty across the full spectrum of potential respondents and enforcement cases must be far better understood before such an increase to address a perceived inequity for a relative handful of cases each year can be supported.

TAB must also take issue with the recommendation to increase administrative penalties to be equivalent to civil penalties. This proposal ignores the very specific and intentional design of the penalty statutory authority which is intended to attach a greater significance and potential cost to a respondent that does not settle with the agency and forces a case to be elevated to the Attorney General’s jurisdiction. As the Sunset report identifies, there are examples of where administrative and civil penalties are set in statute to be equivalent. These infrequent examples of inconsistent statutory construction, however, cannot and should not be presumed to represent a precedent for eliminating an essential and important distinction between the TCEQ’s administrative authority and the Attorney General’s authority when pursuing a case through the courts.

The higher penalty authority cited in the Sunset staff report for other agencies also should not be interpreted to suggest that TCEQ’s authority is in any way outdated or inconsistent with current legislative policy. No one suggests that significant harm to the environment or endangerment of public health does not demand an effective enforcement response and deterrent. It should be readily apparent, however, that the scope of actions sanctioned by the Texas Department of Insurance or the Public Utility Commission may involve abuses of authority on the part of regulated entities that affect literally millions of consumers and entire segments of the state’s economy – instances where a higher penalty may be justified, although presumably levied far less frequently than the number of enforcement cases addressed by TCEQ.

TAB is supportive of Recommendation 4.4, relating to supplemental environmental projects, although we do have concerns about the justification for the proposal. The recommendation would remove statutory impediments to local governments' use of penalties to address compliance issues or take corrective actions for environmental harm. This policy appropriately recognizes the desirable outcome of an enforcement action – compliance on the part of a regulated entity and remediation of environmental damage or risk to public health. Depositing a penalty into the general revenue fund while leaving a regulated activity out of compliance and without the financial resources to take corrective action to eliminate threats to the public is shortsighted and counterproductive. Sunset staff's recommendation would effectively address this issue.

On the other hand, limiting this flexibility on the part of TCEQ to only units of local government is not consistent with the primary goal and justification – protection of the environment and public health. The limited application of the recommendation to local governments is based on the recognition by the staff that local governments may not have the money to both pay a penalty and clean up environmental damage at the same time without increasing taxes or rates for services. If environmental protection is the ultimate goal, the reservation of this flexibility to only local governments is difficult to justify. It is illogical to assume that all private entities that may find themselves in similar situations are any less limited in their ability to both pay a penalty and correct damages.

A small business that is forced to close because of the inability to pay a penalty and which leaves behind unresolved public health risks is an outcome that should be avoided with the same effort that is afforded a local government. Obviously, the agency cannot and should not ignore the essential differences between public and private entities. TAB would anticipate that using a more flexible SEP policy for businesses or other non-governmental parties would be an infrequent practice and subject to stringent requirements for evaluating a company's ability to pay its financial obligations and monitoring its cleanup activities. If the goal of the Sunset recommendation is to ensure that respondents in enforcement cases bear the burden of correcting errors, however, some limited ability on the part of the TCEQ Commissioners to address private sector respondents would appear to be justified.

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

TAB appreciates the issues identified by Sunset staff under Recommendation 5.1 related to the allocation of surface water resources during times of limited availability and agrees that measures are needed to improve the allocations to ensure that water is available for the highest public priorities and that no legal rights are interrupted unnecessarily. We would urge the Sunset Commission in consideration of additional requirements to maintain monthly water use records under Recommendation 5.2 to carefully evaluate the potential costs of such requirements and the number of water rights holders that would be subject to the requirements, particularly smaller businesses or units of local government.

TAB has some concerns with possible implementation of Recommendation 5.4 relating to a requirement that TCEQ continually evaluate the need for additional watermaster programs. We are not opposed in principle to the agency routinely evaluating circumstances within the river basins and advising the Commission on pertinent issues of water availability, potential allocation problems during drought or other information that will better prepare the Commission for actions the TCEQ may be required to undertake during periods of limited water availability.

There is some question whether a more comprehensive or extensive requirement for the Executive Director to routinely evaluate or recommend additional watermaster programs is necessary. Historically, predecessor agencies to the TCEQ have more actively engaged in review of potential new watermaster programs. These efforts have shown that some river basins may not benefit from a watermaster program, either because the majority of water rights are held by a small number of large right holders, or that conditions have not arisen that have resulted in sufficient political or stakeholder support for day-to-day state management and control of water withdrawals. Ultimately, a watermaster program is only feasible where the majority of water rights holders are prepared to support the additional cost and administrative burden to protect their rights. TCEQ's efforts may be more effectively applied in identifying basins where the water rights holders are supportive of self-regulation and assisting those parties in describing how a watermaster program would function and determining whether the program is appropriate for that basin.

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

TAB is in agreement that stable funding for both petroleum storage tank (PST) remediation and regulation is necessary and appropriate for the long term protection of our groundwater resources. We do have some concerns regarding the specific recommendations and the timing of certain events. Generally, we support the concept in Recommendation 6.1 that previous tank owners share responsibility, as appropriate, for contamination from leaking PST's. The key issue is that such liability to a previous owner must only attach in specific and limited circumstances. The liability of a former owner should arise only when the owner failed to disclose the presence of tanks or some material fact concerning their condition. Extending liability to a former owner should never relieve a subsequent owner from liability assumed as a result of a willing buyer – willing seller arrangement, nor should it interfere with private causes of action that are available to owners who dispute whether a real estate transaction was proper as far as disclosure.

We further disagree that the burden of proof of whether a release occurred during the period of a former owner's control should uniformly rest with the former owner. If a subsequent purchaser or successor assumed ownership with full knowledge of the existence of tanks and failed to exercise due diligence, the burden of proof should be on the subsequent owner. The burden should remain with the former owner only in those circumstances where the owner specifically acted to avoid or shift liability inappropriately.

Regarding Recommendation 6.3, relating to the PST remediation fee, we can support the proposal to reauthorize the fee. It is the position of TAB, however, that any reauthorization

should have a delayed effective date and that new revenues from the fee not be collected until the TCEQ has fully utilized the fund balance that is currently available to meet program requirements. It is also appropriate that the TCEQ's authority to raise or lower the fee under the caps be explicit to ensure that revenues closely track legislative appropriations.

The staff recommendation (6.4) related to the use of PST remediation funds for removal of non-compliant, out-of-service PSTs when owners are financially unable to do so is based on a premise that protections will be put in place to ensure that owners of tanks do not abuse this authority and avoid liability by shifting responsibility to the state. TAB can support this recommendation, but only if very stringent protections to avoid fraud and abuse are in place. It is appropriate to use state funds to avoid or mitigate obvious risks to groundwater quality, however, every measure should be taken to ensure that owners do not escape responsibility and create an unfair competitive advantage over other business owners who have fully discharged their obligations to remove PSTs when required.

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

TAB is opposed to staff's Recommendation 8.1 related to increasing the statutory cap on emission fees to fund the federal Title V air permitting program. We do not disagree that TCEQ has an obligation to set the fees in an amount sufficient to fund the Title V program. We also strongly believe that before any fee increase is contemplated that the agency look critically at the costs of the Title V program to ensure that only those activities that truly are a necessary and essential part of the program are being recovered. In addition, it is appropriate that a thorough review of the program be conducted to determine if costs cannot be reduced, a process that many companies who will be paying increased operating permit fees have been required to do. Increases in the fees should be a last alternative rather than the first if companies are going to be asked to pay more while they are struggling during difficult economic circumstances.

The recommendation to increase the fee cap is based on an inaccurate characterization of its purpose and the criteria for setting the fee. The operating permit fee for the Title V program is intended to recover the costs of a regulatory program. The fee is not a penalty and should not be used in any way to extract some cost from companies based on any negative connotations of greater emissions. Since regulatory costs do not vary proportionally with emissions, there is no justification for increasing the cap in order to force larger sources to pay more. The proposal assumes to provide a more "equitable" funding formula without any analysis or demonstration of how the current cap fails to reasonably relate fees paid to regulatory costs recovered. There may certainly be fee methodologies that would more fairly and equitably apportion the costs of the Title V program among the affected permit holders, but the Clean Air Act does not provide such a mechanism and increasing the cap would shift more of the financial burden to the largest emitters without any demonstration that the increase is proportional to their share of the program costs.

**Supplement to the Sunset Staff Report on the Public Utility Commission**

TAB supports the recommendation to continue the Public Utility Commission for twelve years and takes no position on the proposals under Recommendation S 1.2 through S 1.4 related to the transfer of utility regulatory authority from the RRC and TCEQ to PUC. We do have some concerns with the recommendations and would urge that any decisions to transfer utility regulatory authority be carefully evaluated to ensure that the benefits and expertise that exist within RRC and TCEQ related to the activities they regulate are not lost.

We have some concerns about Recommendation S 1.5 related to the transfer of funding to support new water utility activities within PUC. Rather than allocate revenues from the Water Resource Management Account between TCEQ and PUC, it may be less confusing and more efficient to deposit revenues to an account solely controlled by PUC. We also see no justification for increasing the water utility regulatory assessment. The original distinction between the rates paid by different classes of utilities was based on a valid observation that the regulatory burden imposed by all utilities on TCEQ was not equal. There has also been no case made that the additional revenue is required in order to effectively operate these programs. If there is new information to support a uniform rate of assessment for all regulated water utilities, then that rate should be set to be revenue-neutral, or at the level only required to support the current program.

TAB also urges the Sunset Commission to carefully evaluate the water utility programs proposed to be transferred and the shift in appropriations to ensure that there are no unintended consequences, particularly possible effects on the many aspects of TCEQ's water utility programs that are not primarily associated with water or wastewater utility rates.

Thank you for the opportunity to comment on the Sunset Commission staff report. We look forward to the public hearing on the recommendations and your decisions. If you have any questions or need additional information, please do not hesitate to contact me.



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