



Texas Pipeline Association

November 30, 2010

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

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

Dear Chairman Hegar:

On behalf of the Texas Pipeline Association (TPA), I am submitting the following comments on the Sunset Staff Report on the Texas Commission on Environmental Quality (TCEQ). TPA is an organization representing over 30 member companies who gather, process, treat and transport natural gas and hazardous liquids through intrastate pipelines in Texas.

The TPA appreciates the opportunity to submit these comments and is willing to discuss these comments further if desired, including the presentation of testimony at the Sunset Commission's public hearing. For the current comment period, TPA has limited its comments to those recommendations in the Sunset Staff's Report that are most essential from TPA's perspective. However, TPA is willing to discuss and state applicable positions on any of the other issues raised in the report.

Staff Issue/Recommendation 1: Texas Has a Continuing Need for the Texas Commission on Environmental Quality

TPA agrees that TCEQ should be continued. There is no reason to dissolve the agency or to undertake the massive task of transferring TCEQ's responsibilities to another agency. To do so, would waste resources and would create a significant disruption to agency activities and to the regulated community. TPA concurs with the Sunset Staff that any shortcomings in TCEQ's practices should be addressed by an improvement of agency procedures, rather than a wholesale restructure or transfer or elimination of agency's responsibilities. The body of environmental regulation that the TCEQ undertakes requires such specialized knowledge and is so highly technical in nature that much of the expertise and momentum in programs would be lost if such a restructuring were to occur.

The Texas Water Code sets out the Declaration of Policy for TCEQ, stating it is "the agency of the state given primary responsibility for implementing the

constitution and laws of this state relating to the conservation of natural resources and the protection of the environment." § 5.011, TEX. WATER CODE. Accordingly, TCEQ represents a consolidation of the major environmental regulatory functions for the State of Texas, except for the limited area of jurisdiction delegated to the Railroad Commission of Texas (RCT). Consolidation of the major environmental regulatory functions into a single state agency was accomplished in the early 1990's through the merger of the Texas Air Control Board and the Texas Water Commission, along with the transfer of certain major environmental programs from the Texas Department of Health. The stated purpose of the merger was to provide "one-stop shopping" for environmental regulation in Texas. The goal was to streamline and standardize environmental regulation by placing it jurisdictionally under one state agency. TPA believes that this goal has largely been achieved over the past two decades.

In addition, TPA does not believe that any significant changes need to be made to TCEQ's structure or organization. TCEQ is led by a three-member Commission appointed by the Governor. The Commissioners are the final decision-makers of the agency. The Executive Director is hired by the Commission. The Executive Director leads the staff of the agency and directs the programs implemented by the agency. This structure allows for a check and balance between the day-to-day implementation of the programs and final agency decisions which often implicate important state-wide policy decisions.

As the Sunset Staff Report notes, the more pertinent question regards the state's interest in performing the functions of environmental protection itself rather than having the federal government assume this responsibility. TPA believes that Texas is better off addressing its own environmental issues than to allow the federal government to take over this role. TCEQ historically coordinates well with other state, federal and local agencies. EPA's recent decision to disapprove aspects of Texas' air quality rules, which had been pending approval for more than a decade, has placed a severe burden on TCEQ and the regulated community in Texas. While it is unfortunate that EPA waited so long to take action on these programs, TCEQ has acted and continues to act in a manner that resolves EPA's concerns and protects the environment of Texas. This effort is ongoing but it is our observation that TCEQ is striving to reach a consensus position with EPA.

Staff Issue/Recommendation 1: Authority for Making Groundwater Protection Recommendations Should Be Transferred to RCT

RCT and TCEQ have a longstanding understanding of the division of their responsibilities and have, over time, developed a Memorandum of Understanding that sets out and delineates each agency's environmental jurisdiction. TPA believes that RCT is an effective agency and carries out its responsibilities efficiently. TPA supports Sunset Staff's recommendation to transfer groundwater protection recommendations regarding oil and gas drilling to the RCT as this transfer of responsibility will streamline the approvals necessary and place all functions into a single agency regarding oversight of oil and gas well drilling. As Sunset Staff notes, TCEQ's limited role in this regard is unnecessary, inasmuch as RCT maintains jurisdiction over oil and gas well drilling activities. Issuance of groundwater protection recommendations for oil and gas drilling falls much more naturally within

the RCT's jurisdiction and will streamline the process. Indeed, under the current arrangement, TCEQ serves largely in an advisory role, making recommendations while RCT retains enforcement authority regarding the drilling of the well. This awkward arrangement is unwieldy and inefficient.

Accordingly, TPA believes that Sunset Staff is correct to recommend that the authority for making groundwater protection recommendations regarding oil and gas activities be transferred from TCEQ to RCT.

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

TPA agrees that the current methodology for rating compliance histories is broken. A regulated entity's compliance history is an important factor in TCEQ's decision-making process. Compliance history can affect decisions such as whether a permit should be denied, whether special conditions should be placed in a permit, and whether administrative penalties should be enhanced. For this reason, it is crucial that TCEQ's approach to measuring compliance history be fair and accurate.

As Sunset Staff has noted, statutes require TCEQ to employ a "one size fits all" approach that fails to account for important differences between sites and sophistication of operators that, if considered, could better inform TCEQ's compliance history determinations. While the statute directs the TCEQ to take into account the complexity of the site and whether a person is a repeat violator, the methods that the TCEQ uses to carry out these functions are objective formulaic approaches that eliminate any subjectivity for these factors. In addition, the statute directs that a Notice of Violation ("NOV") must be included in a regulated entity's compliance history. If this NOV is ultimately included in an Agreed Order, a double counting of the violation occurs, once as an NOV and again as a violation in an Agreed Order. This cascading of violations is particularly significant if the violation is a major violation that causes the person to be considered a repeat violator. This and other issues, such as, the acquisition of the former owner's compliance history upon purchase of a site, should be addressed comprehensively in a re-structuring of this program.

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

TPA agrees that the TCEQ enforcement process lacks public visibility and participation. In particular, regulated entities and the public should be given notice of policies and guidelines that the TCEQ intends to enforce. Too often TPA members have been presented with an internal memorandum or been given an interpretation of an enforcement policy for the first time in an enforcement meeting with no notice of staff's interpretation in advance. This lack of due process affects the integrity of the agency's enforcement actions. Moreover, it would not be that burdensome for the TCEQ to publish its internal enforcement guidelines for the public to review and to comment on. Regulated entities should not be left to guess as to whether and to what extent enforcement activity will occur. It is not appropriate, and it undermines

public confidence in the regulatory process, if there is no advance notice of the types of conduct and activities that can be held as a basis for an enforcement action.

TPA is aware of the many Commission meetings held over the course of the last several years to address reforms to the agency's enforcement activities and applauds the Sunset Staff in its recommendation to compile the result of this work and make it available to the public in the form of a rule or policy documents so that it is accessible to all members of the public and the regulated community.

TPA very much appreciates the opportunity to share our views with the Sunset Commission on the Sunset Advisory Commission Staff Report and we look forward to continuing to work with the Commission on these and other related issues important to our State. Thank you for your honorable service to Texas.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thure Cannon', written over a horizontal line.

Thure Cannon

Director of Governmental Affairs

cc: Mr. Ken Levine, Interim Director, Sunset Advisory Commission