

Date: March 29, 2023

To: Chairman Birdwell and the Members of the Senate Committee on Natural Resources & Economic Development

CC: Sen. Judith Zaffirini, Sen. Carol Alvarado, Sen. César Blanco, Sen. Kelly Hancock, Sen. Bryan Hughes, Sen. Lois W. Kolkhorst, Sen. Borris L. Miles, Sen. Kevin Sparks  
*Via hand delivery and by email.*

**From: Adrian Shelley, Public Citizen, [ashelley@citizen.org](mailto:ashelley@citizen.org), 512-477-1155**

**Re: SB 1397 Supporting Testimony by Public Citizen**

Dear Chairman Birdwell and Members of the Committee:

Public Citizen appreciates the opportunity to testify in support of SB 1397 by Senator Schwertner, relating to the continuation and functions of the Texas Commission on Environmental Quality. Although we believe that the Texas Commission on Environmental Quality (TCEQ) is a fundamentally broken agency in need of major reform, we are supportive of the modest reform proposed in this bill. We are especially supportive of the following provisions:

- Maximum daily fine increased from \$25,000 to \$40,000 (P.13,L.11).
- Public comment period extended to 36 hours after public meeting (P.5,L.16). We recommend this provision be expanded to include the deadline to request a contested case hearing (Section I.A below).
- Permit applications posted online (P.8,L.14). We suggest draft permits also be posted (Section I.C).
- Public notice of permit applications posted online (P.10,L.12). We suggest this not replace other posting methods (Section II.A).
- Compliance history review/suspension due to exigent circumstances (P.12,L.22-24). We also recommend further changes to compliance history (Section II.C).
- Periodic review of environmental flow recommendations (P.14,L.18).
- Biennial report on environmental flow standards (P.16,L.23).

**I. Some clarifications are needed.**

There are several sections in the bill that we believe need slight clarifications or modifications. We think these are faithful to the intent of the Sunset Advisory Commission and the bill's authors.

**A. Align the contested case hearing request deadline with the public comment deadline.**

First, in Section 5 of the bill (P.5, L.16-20), the deadline to comment on a permit application is extended to at least 36 hours after the end of the public meeting. This extended deadline should also apply to the opportunity to request a contested case hearing. In our experience, members of the public often learn about a proposed facility for the first time during a public meeting. Allowing more time after that meeting to comment and request a contested case hearing will give these individuals time to fully participate in the process.

**B. Clarify that the virtual option supplements—not replaces—the in-person option for public meetings.**

Second, in Section 13 of the bill (P.11, L.3-14), we recommend clarifying that virtual public meetings are in addition to, not instead of, in person public meetings. As we understand it through conversations with offices of members of the Sunset Advisory Commission, the intent of this section is to facilitate, not limit, public access to meetings. The example we have heard is a constituent from a remote district who would be unable to participate in a TCEQ public meeting held in Austin on, for example, a proposed rule. In that scenario, a virtual option would facilitate public participation.

There is another scenario we are concerned about: the public meeting on a permit application that takes place in a location near the proposed facility. In this case, an in-person meeting is essential. In my years of experience attending public meetings on permit applications, the main benefit they provide is the establishment of a working relationship between a permit holder and their future neighbors in the community. This relationship is best formed in person, over a handshake. Establishing these working relationships will ease the administrative burden on TCEQ in dealing with complaints, as neighbors are more likely to address concerns first to the facility owner. We know that this works, as we have seen it in action.

For the virtual option, we recommend the meeting platform used offer video sharing and chat. Throughout the COVID pandemic, TCEQ held public meetings on a virtual platform with video sharing disabled. This limits interaction during the meeting. Also, there was only one-way chat provided, with participants only able to chat the meeting organizer directly. Fully enabled chat would allow participants to ask questions in an open forum, and would allow the permit applicant to share contact information with the public.

**C. Include the draft permit in the permit applications materials posted online.**

Section 11 of the bill provides for electronic posting of “the permit application and any associated materials.” (P.8, L.17-18.) This section should be clarified to ensure that the entire draft permit is posted. This will also ease the administrative burden on the agency, as it will not have to print complete application drafts and mail or deliver them to a public reading room near the proposed facility.

**II. Modifications we recommend.**

We also recommend several modifications to the bill. These are substantive changes to the current version of the bill, but do not reach the level of what we consider “major reform.”

**A. Maintain physical posting of notices in a public place and publication of notices.**

First, we recommend eliminating the provision that allows electronic notice to replace physical posting of notice in a public place (strike P.9, L.6-8). Similarly, we recommend electronic notice be in addition to, not instead of, printed publication (on P.10, L.14-15, strike “instead of by printed means”). The objective of this legislation should be to expand—not restrict—public access to the process. There will be people for whom physical notice in a public place or publication is the preferred means of communication. We should not leave them out of the process. We do not think the requirement to post a physical copy of notice in a public place and to public notice in a newspaper is a significant burden on the agency or the permit applicant.

**B. Eliminate the affirmative defense.**

The Texas Clean Air Act provides an affirmative defense for air pollution violations under certain circumstance. The affirmative defense is inconsistent with federal law. EPA recently re-proposed a rule directing states to end their affirmative defenses.<sup>1</sup> Texas needs to eliminate its affirmative defense in order to stay in compliance with the federal Clean Air Act.

The affirmative defense can be repealed by striking Health & Safety Code § 382.0216(f), (g), (h), and the second sentence of (i). In their place a new subsection (f) should be added reading: “(f) The commission shall repeal the affirmative defense to a commission enforcement for emissions events currently codified at 30 Texas Administrative Code § 101.222(b), (c), (e), (h), (i), and references to the existing affirmative defense at 30 Texas Administrative Code §§ 101.222(f), 101.223(c).”

**C. Further changes to the compliance history system.**

The Sunset Report explained well why the current compliance history rating system is biased in favor of the largest is biased in favor of the largest facilities. The Sunset Report recommended that site size and complexity be accounted for in revisions to the compliance history system. This was not done in the bill. We recommend changes that (1) account for site size and complexity and (2) consider the potential and scale of public health risks associated with a facility.

**III. Real reform of the TCEQ is possible.**

There is still time and opportunity for major reform of the Texas Commission on Environmental Quality. We have consistently recommended the following reforms and are backed by the people throughout Texas we engaged in our public participation process (see Section IV below).

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<sup>1</sup> For the March 2022 re-proposal of the EPA rule from 2016, see <https://www.epa.gov/system/files/documents/2022-03/fact-sheet-affirmative-defense.pdf>.

### **A. Establish an office of environmental justice.**

It is critical to public health that the TCEQ begin considering environmental justice in its decision making. Environmental justice is the tendency of pollution sources to concentrate in low-income communities of color. This has its roots in redlining, segregation, and systemic racism.

Bizarrely, the TCEQ avoids even using the words “environmental justice,” preferring for some reason the term “environmental equity.” This circumlocution cannot hide the true root of the issue: racism.

Whether the agency admits it or not, the effect of its policies is to perpetuate racism. We are regularly told that the agency “doesn’t do siting” as if this absolves them of responsibility for racist policies. It does not. The agency is actually under investigation right now by the U.S. Environmental Protection Agency for civil rights violations in the citing of concrete batch plants in Harris County.<sup>2</sup> Only by confronting this issue head-on can the TCEQ hope to get under control the racist impact of its decisions.

Among 92 commenters we heard from during our public process (see Section IV below), 33 of them—more than a third—cited environmental justice as a concern. It was the leading issue among people we spoke to.

We recommend establishment of an Office of Environmental Justice through a mechanism such as HB 642 by Representative Ron Reynolds. The outcomes of this office should include empowering the agency to prioritize enforcement in EJ communities, reject permit applications in overburdened communities, and direct investment in remediation programs such as supplemental environmental projects (SEPs) to EJ communities.

### **B. Consider cumulative impacts in permitting.**

Cumulative impacts occur when multiple polluting facilities contribute to pollution exposure in a single community or population. It is caused in part by the clustering of related members of a given industry. We see, for example, a high concentration of oil refineries and chemical plants on the Houston Ship Channel. We see clusters of concrete batch plants in certain Houston communities including Third and Fifth Ward. Quarries cluster in Central Texas (granted, near mine sites). Concrete kilns cluster north of Dallas.

Again, the agency ignores this problem by indicating that it “doesn’t do siting.” This means that the agency reviews a new permit application only for administrative and technical completeness. The agency does not consider—and in fact maintains the position that it has no authority to consider—the proposed site of a facility with respect to other polluting facilities or vulnerable and overburdened communities.

This could be remedied through a mechanism such as SB 179 by Senator Borris Miles.

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<sup>2</sup> See, e.g., <https://www.houstonchronicle.com/news/houston-texas/environment/article/EPA-TCEQ-investigation-concrete-batch-plants-17361507.php>.

**C. Allow Commissioners to deny a permit based on considerations of equity and justice.**

The Texas Commission on Environmental Quality interprets the Texas Clean Air Act as not granting the agency authority to deny a permit application that is administratively complete. *See* Texas Health and Safety Code Sec. 382.0518(b). This interpretation of state law prevents TCEQ from denying a permit application when considerations of equity or justice suggest that a permit should not be granted. We believe that TCEQ should have the authority to deny permits based on holistic considerations of equity, environmental justice, and its mission to protect public health and the environment. We recommend an amendment to the Texas Clean Air Act to clearly grant this authority.

**D. Eliminate economic interest from the TCEQ’s mission.**

The mission statement of the agency is:

The Texas Commission on Environmental Quality strives to protect our state's public health and natural resources *consistent with sustainable economic development*. Our goal is clean air, clean water, and the safe management of waste.

Emphasis added. The TCEQ is the only state environmental agency with economic development in its mission statement. This fact surely contributes to the oft-repeated characterization of the agency as a “reluctant regulator.” We think it is evidenced in, for example, the extremely low enforcement rate for industry self-reported violations of air pollution laws.<sup>3</sup>

Among 92 public comments we took on the agency, 15 commenters suggested changing the mission to remove “economic development.” We agree.

**IV. Our position is informed by significant public engagement.**

Public Citizen convened a working group on TCEQ Sunset that meet weekly or biweekly from June 2021 through October 2022.<sup>4</sup> The working group had two purposes: (1) facilitate public participation in the Sunset process and (2) submit technical comments.

To the first purpose, we held a series of people’s hearings around the state:

- June 8, 2022 – Statewide (virtual)
- April 30, 2022 – Houston
- March 29, 2022 – Dallas (virtual)

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<sup>3</sup> *See* Environmental Integrity Project and Environment Texas, “Illegal Air Pollution in Texas, 2020” (14 Oct. 2021) available at <https://publicinterestnetwork.org/wp-content/uploads/2021/10/Illegal-Air-Pollution-in-Texas-2020-EMBARGOED-for-10-14-21.pdf> (“Looking back over the last nine years, the total number of enforcement orders filed by TCEQ for air pollution events is less than 3 percent of the total number of unauthorized air pollution events recorded by the agency in that time.”).

<sup>4</sup> At this point the Sunset working group was dissolved and many participants transitioned to meeting through the Alliance for a Clean Texas, a longstanding energy and environmental advocacy lobby coalition that meets weekly throughout the Legislative session.

- March 21, 2022 – San Antonio ([watch](#))

These hearings were translated into Spanish in real time and were recorded and transcribed. We submitted the complete transcripts—consisting of comments from 92 people—to the Sunset Advisory Commission. They are available [here](#). A summary of the comments we received follows:

<b># Speakers</b>	<b>Topic</b>
33	Environmental Justice
28	Aggregate Production Operations
28	Community health, personal health
26	Permits (16 speakers specifically mentioned TCEQ “rubber stamping” permits)
25	Air pollution
24	Enforcement
20	Public information access and public communications
17	Public participation (including public meetings and contested case hearings)
16	Water pollution
15	Agency Mission statement
15	Pollution on land, including Superfund
10	Oil & gas, including fracking and methane emissions
10	Climate change
10	Compliance history
9	Cumulative impacts
7	Affected party status
6	Bad science
5	Permit denial authority
3	Hurricane Harvey recovery
3	Radioactive waste
4	Language justice
15	Other miscellaneous subjects

The distribution of these comments informed our recommendations for major agency reform.

We also facilitated attendance at the June 22, 2022 Sunset Advisory Commission hearing by dozens of Texans.

To the second purpose, we submitted comments throughout the process:

- November 10, 2022 - Response to SAC decision ([link](#))
- June 22, 2022 - Comments on SAC report ([link](#))
- December 20, 2021 - letter by 41 orgs ([link](#))
- August 3, 2021 - General comments ([link](#))