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Via email to Robert.Romig@sunset.texas.gov.

CC: Erick Fajardo, Chris Keslar, Katherina Wierschke, Sen. Charles Schwertner, Rep. Justin Holland, Chairman Jon Niermann.

Re: Recommendations for Texas Commission on Environmental Quality Sunset

Dear Mr. Romig,

The undersigned people and organizations appreciate this opportunity to comment to Sunset Advisory Commission staff on the Texas Commission on Environmental Quality (TCEQ). Many of these organizations and individuals have worked alongside the TCEQ for years or decades; some of us participated in the last TCEQ Sunset review in 2011. Our comments are drawn from personal and professional experience, as well as those of our members and networks. We understand that communications to Sunset staff are confidential, but we are choosing to release this letter to other stakeholders and the public.

Next year, we are planning a series of People's Hearings to gather public input on the TCEQ. The Sunset Advisory Commission is only able to hold two hearings on each agency, both of them in Austin. Our intention is to hold additional hearings across the state in order to provide more opportunities for public input and model the behavior we would like to see from government. Our hearings will be inclusive to capture the voices of the most impacted, translated into Spanish in real time, transcribed in English, and audio and video recorded. We will also solicit written comments through a website that will launch soon. We will submit these additional public comments to the Commissioners before the public comment deadline. Our goal is to increase the public's capacity to raise their concerns and share a vision for a new Texas Commission on Environmental Quality.

In that spirit, we offer the following recommendations.

I. Mission and Justice

A. Remove economic development from the TCEQ's mission.

The TCEQ's mission is "to protect our state's public health and natural resources consistent with sustainable economic development." The TCEQ is the only state environmental agency that has economic development in its mission. We recommend this mission be changed, as the goal of the agency should only be protection of public health and natural resources. We also

believe this approach to regulation—ensuring a business-friendly climate first—is a source of many of the TCEQ’s problems.

B. Grant Commissioners the authority to deny permits based on considerations of equity and justice.

The inherent conflict in TCEQ’s mission has consequences for public health, equity, and justice. The TCEQ takes the position that the Texas Clean Air Act compels the agency to approve any permit that is technically and administratively complete. We recommend that TCEQ Commissioners be given explicit authority to deny a permit in the interest of justice or equity. Right now, each permit application is considered individually, with no consideration of external factors such as neighboring facilities. This is known as the problem of “cumulative impacts,” in which each permitted facility, considered singly, is not violating the law, but in aggregate the facilities subject a community to illegal levels of air pollution. Data from nearby ambient air monitors is considered in permit applications and is supposed to address this issue. But in many cases the nearest air monitor is tens of miles away, with dozens of polluting facilities between the monitor and the newly proposed facility.

Giving the Commissioners explicitly authority to consider cumulative impacts in the interest of equity and justice would help with this problem. Commissioners would be empowered to look “outside the bounds” of a permit application that is technically and administratively complete and consider whether denial is in the public interest. If Commissioners needed assistance in evaluating the context of a permit application, an Office of Environmental Justice could be established at the agency to conduct this analysis. The EJ Office could issue a recommendation on a permit similar to that issued today by the Office of the Public Interest Counsel (OPIC). In fact, it might make sense to locate an EJ office within OPIC.

An EJ office could also work with community members, non-profit organizations, and TCEQ leadership on decision making in permitting, compliance and enforcement, community engagement and other substantive areas. We note that the TCEQ’s recent language justice rulemaking is a positive step toward equity and inclusion, but that more work is needed. TCEQ must translate its website into languages that reflect the impacted communities or at the very least provide its reporting websites and forms in other languages.

C. Stop using state resources to challenge settled science and the federal government.

The TCEQ should not use state resources, including those that come from Texans in the form of taxes and fees, to undermine science and the U.S. Environmental Protection Agency (EPA). We understand that this is part of a larger trend of antagonism between Texas and the federal government. But this is not something the Texas Commission on Environmental Quality should encourage or support. We recommend the agency rely on settled science and not spend state resources to undermine the EPA or the federal government.

The agency spent [\\$2.6 million](#) on consultants to undermine the 2015 review of the ozone National Ambient Air Quality Standard (NAAQS). This effort included the agency's Chief Toxicologies famously stating that ozone pollution was not a concern because most people spend ["90% of their life indoors."](#) This effort culminated in a [hearing](#) before the U.S. House Committee on Science, Space, and Technology.

The TCEQ has also systematically weakened guidelines it uses to assess the impact of toxic air pollutants on communities. The Center for Public Integrity [analyzed](#) the TCEQ's reviews of air pollution guidelines from 2007 to 2014. During those seven years, forty-five chemicals were reviewed. Two-thirds of the chemical standards reviewed were weakened. This means that, two times out of three, the public had less protection from toxic chemicals after the TCEQ's work.

Some in Texas leadership engage in climate denialism, a position that the TCEQ has at least tacitly accepted over the years. When the agency is clear about its position on the climate crisis, it is one of inaction. In a recent review of state agency policies on climate, [WFAA](#) received a statement from TCEQ that concluded, "the agency does not use climate change projections to evaluate future impact on air quality."

II. Permitting

A. Overhaul the permitting program to ensure that permits are protective of human health and the environment.

The TCEQ's approach to environmental permitting is flawed. Permits issued by the TCEQ often establish unenforceable requirements that are not technically justified. The process used to issue these permits improperly short-circuits public participation, implements policies that undermine the effectiveness of environmental permits, and is too deferential to industry requests to weaken regulatory requirements.

The TCEQ has failed to effectively adopt and implement water quality standards, including a proper anti-degradation policy for permits authorizing industrial releases of water pollution. Similarly, the TCEQ relies on unenforceable and practically meaningless screening procedures to determine whether impacts from toxic air pollution are acceptable.

The TCEQ often fails to scrutinize industry's attempts to circumvent stringent permitting requirements that apply to the largest sources of air pollution by allowing applicants to artificially break large projects into separate smaller projects for permitting purposes, by imposing emission limits just below major source thresholds without establishing monitoring necessary to make those emission limits enforceable, and by allowing the largest sources of pollution to use streamlined permitting mechanisms intended for much smaller sources to authorize cumulatively significant increases in the amount of pollution they emit.

Much of the application material explaining how limits are set and how compliance with these limits is to be demonstrated is improperly marked confidential, preventing members of the public from accessing it during public comment periods or referring to it when evaluating a source's

compliance with applicable limits. Even though these materials constitute public information as a matter of federal law, the TCEQ's permitting procedures do not include a process for ensuring that claims of confidentiality included in a permit application are proper.

The TCEQ must overhaul its environmental permitting programs to ensure that every permit it issues establishes requirements that are technically achievable, sufficiently stringent, practically enforceable, and protective of public health and environmental quality. The TCEQ must improve the scope and quality of its permit reviews to take into account real-world factors that affect environmental quality, like cumulative impacts from other facilities, significant emission spikes during plant upsets, and accurate information about existing environmental impairments. Finally, the TCEQ must revise its program rules to guarantee public access to public information and to provide robust public participation opportunities consistent with federal law.

B. Align the criteria to establish standing to challenge a permit with federal standing requirements.

The TCEQ's contested case hearing process presently operates as an impermissible and undue burden on members of the public who wish to protect their legally protected interests as part of the environmental permitting process. The TCEQ's use of this process to deprive Texans of their right to challenge the commission's permitting decisions in court is, to put it bluntly, illegal and diminishes the integrity of the Texas agency responsible for protecting the public from well-established dangers presented by industrial pollution.

To remedy this situation, the TCEQ must take two steps. First, it must conform its narrow criteria for determining affected persons to the broader threshold for standing established by Article III of the United States Constitution. Second, the TCEQ must submit its contested case hearing rules to EPA for review and approval. Until these steps are completed, the TCEQ's use of the contested case hearing process to shield its permitting decisions from state court scrutiny is an exercise of authority that the TCEQ does not actually possess. If the TCEQ is unwilling or unable to take these steps, the agency must establish a policy—consistent with the federal laws it implements—clarifying that members of the public who satisfy Article III standing requirements may challenge permitting decisions in state court, even if they have not requested a contested case hearing or their hearing request was denied by the TCEQ.

C. “No Means No” Provision for Permits with Significant Notices of Deficiency

TCEQ staff often spend significant time and resources fixing deficient permit applications. Neither in the permit procedures and guidelines nor in statute are there specific provisions about when a permit application that does not meet the requirements for TCEQ to be considered administratively and technically complete for possible approval is the permit considered “dead” or withdrawn. Indeed, often applicants continually come back to the TCEQ with changes and proposals, leading to a constant barrage of back and forth and which is a burden both on TCEQ staff but also on the public which is put in the position of not knowing whether a permit application is about to be approved for public input. We believe that either through statute or

management directives, TCEQ should have a policy that applicants should only be given two rounds of opportunities to fix deficient applications after which the application would be declared null and void and the applicant would be required to begin the permit application process anew - with required payment of a new application fee. This has been an issue in all program areas, but particularly in the air program.

D. Permit applicants should be required to post permit applications online.

At the start of the COVID pandemic, TCEQ began requiring permit applicants to post permit applications online. Previously, permit applications were only accessible in hard copy in the regional TCEQ office, a public library, or the Central Filing Room in Austin. We recommend the TCEQ require all permit applications to be posted online. During the 87th legislative session, in conversation about HB 2990, representatives from TCEQ stated that the agency would be able to post permit applications online at its own expense. Documents should be posted in text-searchable file formats.

E. TCEQ's surface water quality standards should be fully brought up to date.

Texas's Surface Water Quality Standards (SWQS) have long been piecemeal of different years' standards. During the EPA's review of the 2018 Standards, TCEQ was still using portions of standards from 1997, 2000, 2010, and 2014 for the Texas Pollutant Discharge Elimination System (TPDES) program. By TCEQ's own admission on its website, TCEQ regularly fails to implement and gain EPA approval of the most current water quality standards, resulting in a situation where water quality standards are unpredictable and cobbled together across multiple revision years. TCEQ is presently undergoing its 2022 revision of the SWQS, and will once again be submitting the standards to EPA for review and approval. It's imperative that TCEQ be required to adopt current SWQS for both permit and standards predictability as well as potential impacts to public health and the environment.

III. Enforcement

A. Significant changes to the TCEQ enforcement program, including raising the maximum level of fines to \$50,000 plus adjustment for inflation, or more for violations that have led to injuries or deaths, and full recovery of the economic benefit of non-compliance.

During the last sunset process, the Legislature expanded the levels of fines that can be assessed by the TCEQ against violators from a maximum of \$10,000 per day per violation to \$25,000 per day per violation, which was an important deterrent to violators. However, \$25,000 today is worth much less in 2021 than in 2011 and federal penalties were raised in 2016 and are more than twice what TCEQ penalties are, and are adjusted yearly by inflation.

Maximum fines should be raised to at least \$50,000 per violation per day, with an annual adjustment for inflation, and additional fines or maximums should be established for any violations that lead to major injuries or fatalities.

In addition, currently, TCEQ does not fully require that the economic benefit of non-compliance be captured in any total penalty assessed, but only bumps up a fine by 50% if there was more than a certain amount of economic benefit from the entity violating the law. Instead, TCEQ should recover the full economic benefit of non-compliance (up to the maximum penalty) where there was an economic benefit gained by the company.

Act	EPA Maximum Daily Fine (2016)
Clean Air Act	\$93,750
Clean Water Act	\$51,570
Federal Insecticide Fungicide and Rodenticide Act	\$18,750
Safe Drinking Water Act; Emergency Planning and Community Right-to-Know Act; Comprehensive Environmental Response, Compensation, and Liability Act	\$53,907

B. Change the metrics for success of the Office of Compliance and Enforcement to place more value on outcomes beyond simply closing enforcement cases.

The TCEQ likes to tout the efficiency of its environmental permitting and enforcement processes, focusing on the number of reviews it is able to conduct and the short duration involved in such reviews. But this kind of “efficiency” is counter-productive if it results in outcomes the process is supposed to prevent. A process that churns out a lot of permits that fail to require effective pollution controls and that establish unenforceable pollution control requirements while minimizing opportunities for the public to intervene in the process to ensure that facilities built where they live won’t explode or pollute the air and water is not actually efficient. It is counter-productive.

The same goes for the enforcement process. The fact that the TCEQ is able to complete an impressive-seeming number of paper compliance reviews each year or investigate a large number of unauthorized pollution releases is not efficient if the enforcement process doesn’t actually prevent environmental harm or provide a meaningful incentive for industry to invest the resources necessary to make industrial facilities safe to operate and to build and maintain controls that actually protect public health.

And we know that the TCEQ is failing on both these fronts. This much is clear from the many terrible industrial disasters that have occurred in recent years and the regularity of unpunished malfunction events that result in massive quantities of pollution being released into Texas communities. As the TCEQ’s Executive Director admitted in 2020, these are hallmarks of an

agency that has “been lagging around the idea of accountability.” This “lagging” is unacceptable, as it results in ruined lives, needless suffering, injury, and death.

Despite acknowledging the deficiency of its process, the TCEQ has failed to take steps necessary to fulfill its mission to protect the people of Texas. This is unacceptable. The TCEQ must take a hard look at its priorities and recast its metrics for success in a way that emphasizes public safety and polluter accountability over economic development and corporate profit. To this end, the TCEQ must develop metrics for tracking the effectiveness of its enforcement interventions in terms of the health and well-being of affected communities, in terms of process improvements that measurably increase plant safety and reduce the risk of environmental harm. The TCEQ must also develop enforcement criteria that more effectively prevent environmental disasters, rather than punishing polluters with token fines after they occur.

C. End the affirmative defense for air pollution “upsets.”

Every year, according to documents the companies file with the TCEQ, facilities release millions of pounds of pollution in violation of their permits through “upsets” or “emissions events.” These unauthorized air pollution events emit known toxins such as butadiene, benzene, particulate matter, and hydrogen sulfide, and they often do so in close proximity to residential neighborhoods, schools, and other populated areas, putting Texans at risk of harmful health impacts.

Executive Director Toby Baker admitted last year that enforcement efforts in Texas have “been lagging.” He described the rash of high profile chemical disasters in 2019 as “incompatible with TCEQ’s mission.”

According to the Texas Administrative Code, “Upset events that are determined not to be excessive emissions events are subject to an affirmative defense to all claims and enforcement actions brought for these events other than claims for administrative technical orders and actions for injunctive relief.” According to TCEQ data, companies claimed the affirmative ? serves as a barrier to effective oversight of polluting industries. In a memorandum, the agency directed Texas and 35 other states to eliminate affirmative defense provisions from air quality enforcement plans. While most states, including neighboring Louisiana, did so, the TCEQ ignored EPA’s directive and retained the affirmative defense criteria.

This directive was overturned in 2020 by EPA, but reinstated on September 30, 2021. We recommend that TCEQ follow EPA orders and end the use of the affirmative defense.

IV. Equity and Sufficiency in Fee Policy

TCEQ runs a number of programs in waste, air and water, and more than 80 percent of TCEQ’s revenues are paid for through annual program fees, application and permit fees. However, within individual fees and programs, there are wide discrepancies on the sufficiency of fees to support the program needs (rule development, permit writers, inspection, enforcement, etc), and

there are often equity issues where large users or polluters are paying less on a per-volume basis than smaller entities or polluters. Some of these fee amounts are set statutorily and others are set by TCEQ. There is a need to look broadly at TCEQ' s annual and permit fees in all programs and make changes to assure that revenues are sufficient and that the fees are equitable. We would note for example that within the air program, currently major air permit fees are capped at \$75,000 and the main annual fee for major sources – based on emissions of criteria pollutants - is capped at a maximum of 4,000 tons per pollutant, meaning large polluters are paying significantly less in annual fees compared to small polluters. While some cap might be reasonable, we would suggest raising the maximum permit fee and the maximum tons that can be assessed the air emissions fee, while also looking at the levels of the annual inspection fee.

The issue in the water program is perhaps even more egregious. While the legislature and TCEQ have made some small steps to increase fees and revenues in the water program, given the vast number of lakes, stream miles, coast lines, and groundwater resources of Texas, overall water rights, wastewater discharge permit fees, and annual fees are too low to support the need of the agency. In addition, the three main annual fees – the Public Health Service Fee, the Consolidated Water Quality Fee and the Water Use Assessment Fee – are not equitable, as large public utilities, water rights users and wastewater discharge permit holders pay a proportionally low amount of total revenues. The agency should be directed to raise fees overall by at least 100 percent and directed to arrive at a more equitable distribution of those fees between large and small public utilities, water rights and wastewater discharge permit holders. In addition there are large categories of water rights holders that are exempt from paying fees, and those entities should be providing at least some revenues to help our state agency manage water quantity and water quality.

Conclusion

Thank you for the opportunity to provide these comments on the Sunset review of the Texas Commission on Environmental Quality. We appreciate the other opportunities for input that you have given us. If you wish to discuss our recommendations further, please contact any of the signers of this letter, including Adrian Shelley at ashelley@citizen.org, 512-477-1155.

Respectfully,

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