

June 12, 2000

The Honorable Fred Bosse
Chairman, Sunset Advisory Commission
P.O. Box 13066
Austin, TX 78711-3066

Dear Chairman Bosse:

Thank you for providing the opportunity to submit written comments on the report on the Texas Natural Resource Conservation Commission (TNRCC or Commission) issued by the staff of the Sunset Advisory Commission. We first would like to commend you and your staff on their hard work and analysis. The TNRCC is a large agency and its responsibilities very complex. Your staff has successfully identified most of the compelling issues facing the agency and has proposed useful approaches to dealing with those issues.

The Staff Report identifies thirteen major issues for your consideration. However, several issues share common themes, including regulatory innovation, compliance history, enforcement strategy and public participation. The comments below in some cases will be organized according to those major themes. However, the pertinent issue numbers or sections will also be identified for your convenience.

Innovative programs (Issues 1, 2 and 3)

The TNRCC agrees with the Sunset Commission staff that innovation both in the regulatory structure, and in the development of control technology, is essential to the success of the state's future environmental protection efforts. In fact, the TNRCC and the Legislature have been leaders nationally in developing innovative regulatory approaches, and the agency will continue to do so.¹ Participation in several of these programs is based on outstanding environmental performance (i.e., Senate Bill 1126, Clean Texas 2000, emissions banking, flexible permits). It needs to be clear that innovative programs must be balanced with the need for more traditional forms of regulation. While innovative approaches can lead to superior, results-oriented environmental outcomes, the need for inspections, permitting and prescriptive monitoring, reporting and technology requirements will continue.

We are reviewing the programs identified by the staff report as successful models, and we will be working with Sunset staff to identify specifics in those models which could be implemented at the TNRCC. It is, however, important to acknowledge that no state or federal regulatory program has "broken the code" in developing a multimedia, agency-wide program that will improve environmental performance, provide adequate incentives for participation, improve public participation, and meet the needs of the full spectrum of regulated entities. It is therefore unrealistic to anticipate that the Legislature, the Sunset Commission or the TNRCC will in the near future develop the definitive regulatory reform and innovation package. Rather, the goal should be a commitment to expand and integrate regulatory innovation efforts through all media and functions and coordinate across the agency.

¹Examples of Texas' innovative programs developed pursuant to statute include emissions banking and trading (Senate Bill 513, 73rd Legislature), regulatory flexibility orders (SB 1591, 74th Legislature), progressive voluntary cleanup provisions (House Bill 2296, 74th Legislature), environmental audit program (House Bill 2473, 74th Legislature), Clean Texas and associated pollution prevention programs (Senate Bill 1099, 72nd Legislature), drought planning (Senate Bill 1, 75th Legislature), operational flexibility for well-controlled facilities (Senate Bill 1126, 74th Legislature), and the cap and trade program for nitrogen oxide emissions from electric utilities (Senate Bill 7, 76th Legislature).

Examples of Commission-developed programs are multimedia compliance assistance for small business and local governments; flexible air permits; cap and trade rules proposed to make State Implementation Plan compliance efficient; the Environmental Council Of States (ECOS)-Environmental Protection Agency (EPA) flexibility agreement; colonias assistance under the Small Towns Environmental Program (STEP); the Texas Risk Reduction Program rules designed to make cleanups more efficient and consistent; use of strategic planning to target enforcement and compliance assistance efforts; use of Environmental Management Systems in enforcement planning; and the Consolidated Uniform Report for the Environment reporting program.

In developing innovative programs, it also is essential to recognize that federal statutory and regulatory barriers often limit state flexibility and innovation. If Texas wishes to develop consistent and wholesale innovative programs, federal approval, and in some cases, changes in federal statute will be required. In addition, changes in the philosophy of federal regulators may also be required. For instance, opportunities such as the environmental management systems being piloted by TNRCC to conserve resources may require federal approvals in some cases. As the EPA struggles with implementation of innovative and flexible programs, Texas may face challenges in obtaining federal approval of its own innovative programs. However, Texas currently is working through ECOS to obtain additional flexibility in federal programs that can make the state's programs more successful.

With respect to environmental management systems, the TNRCC agrees with Recommendation 1.5 that these systems offer great promise. For that reason, implementation of environmental management systems has been included as a requirement for participation in the successors to the Clean Texas program. In addition, consistency in the use of environmental management systems should be beneficial, and TNRCC will take action to adopt a consistent definition for these systems for all programs by the end of the year.

With respect to Recommendations 3.2 and 3.4, we believe that the Supplemental Environmental Project program (SEP) will benefit from many of the controls endorsed in the report. However, the Commission notes that if the requirement of a direct correlation between harm and benefit is construed to require that projects be in the same media, availability of SEP's in some cases will be limited, especially for smaller penalties where air violations are involved.

Funding flexibility (Issue 10)

As we discussed at the February hearing, because we are a predominantly fee-funded agency, this is the TNRCC's most significant long term issue, and we appreciate the staff's attention to it. We agree with staff's finding that our fee funding should be reevaluated to achieve a stable, equitable and flexible funding structure, and that that structure should be simplified wherever possible. We specifically support the following:

- ▶ Identification of a source of funding which would provide funds for multimedia activities and through a statutory change be flexible enough in its use to address changing priorities. Through such a broad-based fee, the agency could achieve some of the transferability available to other state agencies through Article IX of the Appropriations Act.
- ▶ Consolidation and simplification of the agency's fee structure and elimination of several smaller, redundant fees. This would lead to greater administrative efficiency and would allow the restructuring of certain media-based fees to achieve more equity among fee payers.
- ▶ A modest increase in water-related fees and modification of the rate structure to bring additional equity to fees paid by various sized entities.
- ▶ Evaluation of existing fee caps to assess the equity of resulting fees among the fee payers of various sizes.

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- ▶ As outlined in Recommendation 10.2, a continuation of the Petroleum Storage Tank fee at a level appropriate to the long-term enforcement of petroleum storage tanks regulations, participation in the State Lead program and the cleanup of abandoned sites.

We look forward to continuing our work with the Sunset Commission to craft a proposal which meets the objectives identified by the Sunset staff.

Compliance history (Issues 1, 2, 3 and 4)

The TNRCC believes that compliance history should be used consistently in both permitting and enforcement activities. Existing variations in statutory definitions of compliance history (see enclosure) will require resolution before we can achieve consistency. Present, conflicting statutes mean that, even assuming legislative direction for consistency, the most consistency that the Commission could achieve would be the adoption of the definition of applicant supplied in Chapter 361 of the Health and Safety Code for all media.

Contested case hearings (Issues 8 and 9)

In the Regular Session last year, in House Bill 801, the Legislature adopted sweeping changes to the agency's public participation process for individual permit actions. Changes made by HB 801 include the timing of notice, the opportunities to comment, the class of persons eligible to request a contested case hearing, and the subjects on which a case can be referred to the State Office of Administrative Hearings. Rules implementing HB 801 became effective in September and October of 1999. These changes are just now beginning to come into play. In view of the opportunity for corrections and revisions that the Sunset process affords, this limited experience with the new HB 801 process is unfortunate.

An example of the problem posed by the recent implementation of HB 801 is the issue of the role that the Executive Director of the TNRCC should play in the contested case process. In Recommendation 8.1 the staff of the Sunset Commission recommended that the Executive Director should not be a party to a case and should only be allowed to supplement the evidentiary record. The Commission is concerned about this possibility. We understand the concerns regarding the perception that the Executive Director seems always to support the issuance of permits. However, the Commission believes that, while perception is to a degree reality in the mind of the public, the issue is one of appearance. Moreover, HB 801's provision for early notice and opportunities for public involvement appear to be designed to address the perception that the staff always is aligned with applicants. Unfortunately, we have not yet had time to judge whether this will be the effect that HB 801 will have on the contested case process.

This is particularly unfortunate in light of the downside which may result from precluding the Executive Director from being a party in contested cases. The Commission is concerned about the possibility of incomplete records and the resulting prospects either of inefficiency due to remands or bad decisions due to incomplete records. In addition, the Commission notes that elimination of the Executive Director as a party would mean that the agency will not take legal positions to which

interested parties can respond. The Commission also notes that the recommendation would mean that Office of Public Interest Council (OPIC) will be the only agency party admitted, and other recommendations would seem to limit OPIC's role to assisting protestants. Thus, disinterested analysis would no longer be available from the agency. We recommend that the Sunset Commission consider other means to eliminate the perception that the agency functions as an advocate for applicants. We fear that removal of the Executive Director from party status will hinder, and not help, protection of the public.

Turning to Recommendation 8.2, relating to consolidation of notice provisions, the Commission welcomes the attention to notice, but believes that the notice provisions applicable to the TNRCC should be reviewed to eliminate conflicts and confusion. HB 801 promises to improve the hearings process by providing for a consistent notice, comment and hearing process, and by requiring hearings to focus on specific, significant issues on permits. However, the underbrush of varying statutory notice requirements means that HB 801's notice requirements often duplicate or contradict specific programmatic requirements with no public participation benefits. For example, even the requirements as to which newspaper applicants should publish notice in vary. Some require publication in a newspaper of general circulation published in the county in which the facility will be located and some in a newspaper of general circulation in the county. We therefore recommend going beyond the consolidation endorsed by Recommendation 8.2 to some level of consistency.

With respect to Recommendation 9.4, to allow for the use of evidence produced by non-agency persons, the Commission notes that the current policy of the TNRCC is that evidence from outside the agency can be used to provide additional support to an existing enforcement action, provided that it is sufficient and credible. We believe that the agency should continue to be allowed to use all relevant evidence in enforcement cases. The recommendation that we be able to call providers of evidence from outside the agency is very helpful in enabling us to use such evidence. We also would recommend that it be made clear that TNRCC staff should have the discretion to evaluate the value and credibility of evidence, and the merits of any particular enforcement case, because a failure to do so could result in an inefficient process of requiring an administrative law judge or the Commission to evaluate the evidence first. In addition, we believe that the agency should be authorized to develop criteria for credibility and use of external evidence because such guidance will protect the validity of the process while avoiding disappointment on the part of interested citizens. Such criteria should be similar to the requirements such as those for chain of custody procedures currently in use for TNRCC staff.

With respect to Recommendation 9.6, the Commission also notes that some types of additional notice may be costly either to the agency or the regulated entity. On the other hand, some relatively inexpensive means of additional notice, such as web publication, may allow for enhanced notice at minimal cost.

Other Public Participation Recommendations (Issue 7)

With respect to Recommendations 7.3 and 7.4, relating to advisory/working groups, the Commission notes that advisory groups are precisely that—advisory—and are not substitutes or covers for the decisions that should be made by the Commission or its employees. The Commission believes that a clear agency policy on the use of advisory/working groups is a good idea, and will be moving to articulate and implement such a policy by the end of the year. This policy should include the following: (1) opportunities for representation of views on all sides of the issues, (2) definition of the purpose and scope of the advisory group prior to creation, and (3) written documentation and management review of advisory group creation. The Commission also believes that listing of active advisory/working groups on the agency's web site is also a good idea, and we will move to do this by the end of the year. Finally, the Commission notes that the supply of public members/public interest groups is limited, particularly when the cost of participation is borne by individuals. For that reason the Commission agrees that opportunity rather than actual participation should be the standard.

With respect to Recommendation 7.5, the Commission believes that web broadcasting of board meetings and other hearings or meetings should be the future for all agencies. To that end, the agency will review costs and budgets to determine whether an appropriations request will need to be included in the agency's legislative appropriations request.

The Commission expresses no opinion on whether, as discussed in Recommendation 7.1, the Office of Public Interest Counsel should be a gubernatorial appointee, but notes that the Public Interest Counsel currently reports to three gubernatorial appointees. If the Legislature elects to elevate the Office of Public Interest Counsel to a gubernatorial appointment and be given the ability to appeal Commission decisions, the Commission suggests that this higher profile and ability to incur substantial, unpredictable expenses argues for the Office of Public Interest Council being made an independently funded and staffed agency.

Finally, the Commission notes that Recommendation 7.2 appears to be both broader and more narrow in scope than Sunset staff may have realized. The recommendation appears to be based on Section 5.053 of the Water Code, which limits the appointment to the Commission of persons having conflicts of interest. However, the larger universe of entities regulated under the air, water rights, drinking water, districts and municipal solid waste programs means that many individuals may be precluded from serving on the Commission. Thus, the expansion of the period to two years and to all media could mean that the candidate pool for the Commission would be largely limited to state and federal employees, employees of environmental or other public interest groups and the independently wealthy with few or no business interests.

Enforcement (Issues 4 and 9)

The Commission agrees that an after-hours program for responding to complaints should be established and is reviewing options for such a program.

With respect to upset and maintenance air emissions, the Commission agrees that chronic upsets that indicate that a regulated entity is not taking reasonable efforts to prevent those upsets should no longer be granted the exemption. To this extent, there is and should be a link between compliance history and upset emissions. It is also important to note that under current rules, each upset must be evaluated upon its individual merits to determine if the exemption applies. This scrutiny should be heightened under the rules and policies which the Commission currently is considering.

Radioactive waste (Issue 12)

We note that conflicts of interest are not necessarily resolved by making the TNRCC the permit applicant or holder for low-level radioactive waste disposal. A low-level radioactive waste disposal facility is likely to require permits for hazardous waste and water quality. Therefore, to wholly avoid conflicts of interest responsibility, an entity without permitting responsibilities should be selected.

Resources (Issues 2, 4, 5, 6, 7, 11 and 13)

Several of the recommendations such as additional research responsibilities, additional tracking of compliance history, expanded innovative programs, potentially increased numbers of enforcement contested case hearings and additional tracking of upsets and maintenance have all been assumed not to require any additional employees. These very likely will require additional employee hours that, together, could add up to a significant number.

With respect to lab certification, the Commission believes that a lab certification program and its use by the agency and regulated entities would improve the quality of data used by the Commission and other regulatory entities to evaluate environmental (and other) performance. However, the Commission does not believe that the TNRCC should be the first choice for such a certification program. As the report noted, additional employees would be required, and the five noted appear not to include administrative support for the program. It is the Commission's sense that one of the biggest concerns heard from the public and the legislature that the agency already is too big. At the same time, other agencies are available, including the Texas Department of Health, which already has a certification program, and the Texas Department of Licensing and Regulation, which is the state's multipurpose licensing agency. Regardless of which agency is assigned responsibility for such a program, the Commission supports clarifying which labs will be required to be certified, and that those labs not required to be certified must comply with the same standards and procedures.

Given the additional responsibilities assigned by the Legislature each session, we encourage the Sunset Commission to review seriously the programs identified in Recommendation 13. We believe that all of the programs identified serve a valuable purpose and that the employees working on those programs are doing a good job. However, in the last two sessions, the TNRCC has been asked to implement some 320 new legislative directives with the same number of employees. This means that each year we must determine which programs should be managed with fewer staff and which permits or enforcement actions take longer.

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Across the Board Recommendations

We have no comments on the substance of the Across the Board Recommendations. However, it should be noted that if the Legislature elects to leave the current occupational licensing responsibilities with the TNRCC, the governing statutes could be consolidated and streamlined while making the statutory changes. This would result in a more efficient statute, as well as more consistent and comprehensible procedures for occupational licensing.

Again, thank you for this opportunity to comment. We look forward to working with the Sunset Commission and your staff to make the TNRCC a better agency. If we may be of further assistance, please contact us at (512) 239-5500.

Sincerely,

Robert J. Huston
Chairman

R. B. "Ralph" Marquez
Commissioner

John M. Baker
Commissioner

Enclosure