

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Consideration of Resolution

AGENDA REQUESTED: May 10, 2023

DATE OF REQUEST: April 21, 2023

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Candice Slater, Texas Register/Agenda Coordinator, (512) 239-6087

CAPTION: **Docket No. 2023-0246-RES.** Consideration of a resolution regarding the reinstatement and indefinite continuation of the Small Business Compliance Advisory Panel (CAP), and a request to appoint a new member to represent the commission on the CAP. The CAP is required by Federal Clean Air Act, Section 507, and Texas Water Code, Section 5.135. (Shelley Naik, Terry Salem; Project No. 2023-122-RES-NR)



Director

Andy Gardner

Division Deputy Director

Candice Slater

Agenda Coordinator

Copy to CCC Secretary? NO YES

TCEQ Interoffice Memorandum

To: Commissioners

Thru: Laurie Gharis, Chief Clerk
Executive Office

Erin E. Chancellor, Interim Executive Director
Executive Office

CP Craig Pritzlaff, Director
3/9/23 Office of Compliance and Enforcement

From: *AHG* Andy Gardner, Deputy Director
3/2/23 Program Support and Environmental Assistance Division (PSEAD)

Date: April 21, 2023

Subject: Consideration of the Reinstatement and Continuance of the Small Business Compliance Advisory Panel (Docket No.: **2023-0246-RES**)

Requested Commission Action:

Staff requests Commission approval to reinstate and indefinitely continue the Small Business Compliance Advisory Panel (CAP) until it is no longer required by the Federal Clean Air Act (FCAA) or Texas Water Code (TWC); clarifying the applicability of Texas Government Code (Tex. Gov't Code), Chapter 2110 and 30 Texas Administrative Code (TAC) Chapter 5 to the CAP. Staff also request approval of the appointment of the suggested TCEQ nominee.

CAP Background:

Federal Clean Air Act Mandate & Texas Air Control Board Compliance

The FCAA, §507, requires states to establish a small business stationary source technical and environmental compliance assistance program and submit that program to the United States Environmental Protection Agency (EPA) as part of its state implementation plan (SIP). FCAA, §507(e) also requires states to create a CAP with specific requirements for the composition of the panel as well as responsibilities outlined in the statute.

To comply with this requirement, the Texas Air Control Board (TACB) adopted the required SIP revision on November 6, 1992, creating all required elements of the program, including a CAP. EPA approved the SIP revision, effective October 18, 1994, as published August 19, 1994 (59 Federal Register 42759). The statutory authority for the program and the CAP originally resided in the Texas Clean Air Act, Tex. Health & Safety Code, §382.0365; but was moved to the TWC, §5.135 in 2003.

Currently, Advisory Committees are governed by Chapter 2110 of the Texas Gov't Code, which specifies requirements for the establishment, composition, presiding officers, reimbursement of expenses, duration, etc. Section 2110.0011 of the Tex. Gov't Code specifically notes that the chapter "applies unless and to the extent:

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(2) a federal law or regulation:

(A) imposes an unconditional requirement that irreconcilably conflicts with this chapter; or

(B) imposes a condition on the state's eligibility to receive money from the federal government that irreconcilably conflicts with this chapter."

Tex. Gov't Code Section 2110.008 allows a state agency to designate the date an advisory committee is abolished, but it must do so by rule. The FCAA, §507(e) explicitly requires states to create a CAP and does not provide for the expiration of this requirement. Tex. Gov't Code Chapter 2110, by its terms, does not apply to the CAP to the extent that it is irreconcilable. To the extent that the TCEQ rules in 30 TAC Chapter 5 implement Tex. Gov't Code, Chapter 2110, the rules should not currently apply to the CAP to the extent that they conflict with federal law, since Chapter 2110 contains an express exemption for certain advisory committees.

The commission and its predecessor agencies adopted resolutions to govern the continuation of the CAP and other advisory committees periodically; however, the last resolution relating to the CAP was Docket No. 2009-1096-RES. A new resolution is recommended to reinstate and continue the CAP in perpetuity or until it is no longer required by the FCAA and the TWC.

CAP Composition:

The CAP is a seven-member panel. Two members are appointed by the governor to represent the public; two members each are appointed by the lieutenant governor and speaker of the Texas House of Representatives to represent small businesses; and one member is appointed by the TCEQ Chairman.

The current TCEQ member, Brian Christian, is no longer with the agency. Staff request that this position be filled by Andy Gardner, Deputy Director of the Program Support and Environmental Assistance Division.

The TCEQ Chairman appointee will coordinate with the CAP Chair and offices of the Governor, Lieutenant Governor, and Speaker of the House to request appointments for other vacant positions as needed. This has historically been done via email or interoffice memo.

Agency Contacts:

Shelley Naik, Manager, Small Business & Local Government Assistance Section, (512) 239-1536
Terry Salem, Staff Attorney, Environmental Law Division, (512) 239-0469
Candice Slater, Texas Register Coordinator, (512) 239-6087

cc: Chief Clerk, 7 copies

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



Docket No. 2023-0246-RES
Non-Rule Project No. 2023-122-RES-NR

A RESOLUTION to reinstate and indefinitely continue the Small Business Compliance Advisory Panel (CAP) as long as it is required under state and federal law, clarify the applicability of Texas Government Code (Tex. Gov't Code) Chapter 2110 and 30 Texas Administrative Code (TAC) Chapter 5, and request a new member be appointed.

WHEREAS, Federal Clean Air Act (FCAA), §507 (42 United States Code (U.S.C.), §7661(f)) required states to establish a small business stationary source technical and environmental compliance assistance program as part of their responsibility to have a fully approved and implemented state implementation plan (SIP); and

WHEREAS, the small business stationary source technical and environmental compliance assistance program consists of three parts: (1) the Small Business Ombudsman, (2) the Small Business Assistance Program, and (3) the Compliance Advisory Panel (CAP); and

WHEREAS, states were required to comply with the requirements of FCAA, §507 by the effective date of the state's federal operating permit program, required by FCAA, §§501-506 (42 U.S.C. §§7661a-7661e) i.e., not later than November 15, 1994; and

WHEREAS, FCAA, §507(e) creates a requirement for states to create such a CAP with specific requirements for the composition of the panel as well as responsibilities outlined in the statute; and

WHEREAS, the Texas Commission on Environmental Quality (TCEQ or commission) and its predecessor agencies fulfilled the requirements of FCAA, §507 through its adoption of the required SIP revision on November 6, 1992, creating all required elements of the program, including a CAP; and

WHEREAS, the U.S. Environmental Protection Agency (EPA) approved the November 6, 1992, SIP revision, effective October 18, 1994, as published August 19, 1994 (59 *Federal Register* 42759); and

WHEREAS, the TCEQ and its predecessor agencies adopted multiple resolutions

concerning the initiation and continuation of the CAP as follows:

- Texas Air Control Board Order 92-22, adopted November 6, 1992; approved January 15, 1993;
- Texas Natural Resource Conservation Commission (TNRCC) Order (no docket number) adopted October 13, 1993, signed October 14, 1993;
- TNRCC Order (no docket number) adopted September 21, 1994, signed September 23, 1994;
- TNRCC Order, Docket No. 97-0870-RES, adopted October 1, 1997, signed October 6, 1997;
- TNRCC Order, (no docket number) adopted October 12, 2001, signed October 17, 2001;
- TCEQ Order, Docket No. 2005-1619-RES, adopted October 12, 2005, signed October 14, 2005; and
- TCEQ Order, Docket No. 2009-1096-RES, adopted October 7, 2009, signed October 9, 2009;

WHEREAS, the October 9, 2009 TCEQ Order (Docket No. 2009-1096-RES) continued the CAP for four years after the date of the resolution and no further resolutions concerning the continuation of the CAP have been located; the commission is required to reinstate the CAP to comply with the requirements of the FCAA, §507 and the EPA-approved SIP; and

WHEREAS, Texas Water Code, §5.107 provides the Texas Commission on Environmental Quality and the Executive director with the authority to create and consult with advisory committees; and

WHEREAS, Texas Water Code, §5.135(c) specifically provides for the creation of the Small Business Compliance Assistance Advisory Panel and membership composition; and

WHEREAS, Texas Water Code, §5.135(d) specifically provides for the duties of the Small Business Compliance Assistance Advisory Panel; and

WHEREAS, Tex. Gov't Code, §2110.0011 states that where a federal law or regulation imposes an unconditional requirement that irreconcilably conflicts with provisions of Tex. Gov't Code, Chapter 2110, the federal law or regulation prevails; and

WHEREAS, the requirement found in 30 TAC §5.2 that an advisory committee created by the commission shall be abolished in accordance with Tex. Gov't Code, Chapter 2110 would be superseded by the requirement of FCAA, §507 and the EPA-approved SIP; and

WHEREAS, FCAA, §507(e) explicitly requires states to create a CAP, does not provide for the expiration of such requirement, and sanctions provided in FCAA, §110(m) or §179 (42 U.S.C. §7410(m) or §7509) may apply to states who do not comply, based on Tex. Gov't Code §2110.002, Tex. Gov't Code §2110.008(b) does not apply to the CAP; and

WHEREAS, the Commission rule, 30 TAC §5.3, states that an advisory committee created by the commission shall be created by commission resolution;

NOW, THEREFORE BE IT RESOLVED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that the Commission, pursuant to 30 TAC §5.3, hereby reinstates and indefinitely continues the Small Business Compliance Advisory Panel, in compliance with the requirements of FCAA §507 and the EPA-approved state implementation plan.

Be it further resolved, that the Chairman of the Commission shall select one member to represent the commission for the Small Business Compliance Advisory Panel in compliance with Texas Water Code §5.135(c)(4).

It is so **RESOLVED**.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Jon Niermann, Chairman

Date Signed