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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 30, 2020

Via U.S. Mail and E-Mail

The Honorable Sean O'Donnell
Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2410T)
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Re: EPA Office of Inspector General Report No. 20-P-0062

Dear Mr. O'Donnell:

I write to provide additional, perhaps final, comments to the initial observations I shared with your predecessor, Mr. Sheehan, about OIG report ([No. 20-P-0062](#)), concerning air quality monitoring during Hurricane Harvey. As I [wrote](#) to Mr. Sheehan, the report demonstrates numerous misunderstandings about TCEQ's response to this historic disaster. These include misunderstandings material to OIG's audit objectives—and which would likely have been avoided if our staffs had met to discuss the response or OIG's staff had consulted publicly available information, including information linked to [TCEQ's Hurricane Harvey website](#).

While TCEQ has decided not to publish a comprehensive set of corrections, I am compelled to address two key shortcomings of the report: (1) errors in its findings and conclusions about the operational status and scope of the air monitor network and (2) its mischaracterization of Texas' affirmative defense for maintenance, startup and shutdown (MSS) emissions.

Operational Status and Scope of Houston-Area Air Monitoring Network

In the report's discussion of the state and local air monitoring system (SLAMS) network, it states: "By September 13, 2017, most of the air monitoring network in the Houston area was once again operational." In fact, most of the network was operational *eleven days* earlier, on September 2.

That is true whether you count only those air pollution samplers that were designated as SLAMS samplers (of which there were 69 in the Houston area) or the more than 140 samplers (SLAMS and non-SLAMS) that measured air quality there. Indeed, most monitoring sites in the Houston area were *fully* operational by September 2, meaning every sampler at the site was operational.¹

This information was readily available to OIG staff. Data demonstrating the operational status of the Houston-area samplers was posted to the [Texas Air Monitoring Information System \(TAMIS\)](#)

¹ Most sites have multiple samplers, and the samplers at a given site were often returned to service on different days.

[web interface](#), where it has remained.² The TAMIS web interface was and remains linked both to TCEQ's Air Monitoring webpage and its Hurricane Harvey webpage. It is not difficult to find. For your convenience, I have attached a summary of the published TAMIS data showing the operational status of these samplers ([Attachment A](#)).³

That most of the network was operational by September 2 is evident not only in the data published to TCEQ's website, but also in contemporaneous reporting. On September 16, 2017, the [Houston Chronicle reported](#)⁴ of the Houston-area monitors that “[m]ost were back online by Sept. 2.” Given all of that, it is unclear how OIG's report could have missed the date by more than a week and a half—especially since the network's operational status is central to the stated purpose of OIG's report.



TCEQ staff redeploys air monitoring station in Hurricane Harvey floodwaters.

Unfortunately, OIG's implication that most of the network was not operational until September 13 plays into revisionist history about TCEQ's response to the event. For example, months later, the [Houston Chronicle's Editorial Board asserted](#),⁵ absurdly: “The Texas agency whose job it is to protect the public from environmental harm largely failed to monitor that pollution. We only have the information the polluters themselves reported—in some cases weeks or months after the storm.” Of course, there is abundant publicly available evidence to discredit such irresponsible

² Data from the network's continuous monitors was posted in near real time. Data from the network's non-continuous monitors was posted at normal intervals—well before OIG initiated its audit.

³ In addition to data from the 145 Houston-area samplers that are part of TAMIS, TCEQ also evaluated data from 12 privately owned samplers that do not share data to TAMIS—eight of which remained operational for the duration of the hurricane. These 12 samplers are also included in [Attachment A](#) for reference.

⁴ Jordan Blum, *Private air quality monitoring detects high levels of pollution following Harvey*, Houston Chronicle, Sept. 16, 2017.

⁵ Editorial Board, *Harvey's dirty secret: Texas didn't track pollution during the 2017 hurricane season. It may be too late for 2018* [Editorial], Houston Chronicle, May 25, 2018.

claims, including information available at TCEQ’s Hurricane Harvey website *and the reporting by the Houston Chronicle’s own newsroom*.

That might sound like a local squabble, but as it relates OIG’s report, I think we can agree that conclusions about air quality monitoring during Hurricane Harvey should be grounded in an adequate command of the facts. And whether air monitors were operational within a week of Harvey’s landfall—even before the storm finally dissipated—or 19 days after landfall is material.

Further, OIG appears to have misunderstood the scope of Texas’ air monitoring network. Of the more than 140 samplers in the Houston area, OIG’s report emphasizes a tiny subset. Specifically, the report focuses on just five of the SLAMS samplers that are capable of detecting air toxics.⁶ Setting aside the wisdom of focusing solely on air toxics, there is no reason to limit the analysis to SLAMS samplers, as the responding agencies and the public had access to available data from all samplers that report to TAMIS—whether or not they were designated as SLAMS samplers.⁷ This includes EPA staff, with whom TCEQ worked closely in evaluating air quality and in issuing press releases and other guidance to affected communities.

Indeed, TAMIS shows 27 samplers in the Houston area that are capable of detecting air toxics: 12 automated gas chromatographs (autoGCs), 11 volatile organic compound (VOC) canisters, 2 semi-volatile organic compound (SVOC) samplers, and 2 carbonyls samplers. Of the dozen autoGCs, which are continuous monitors posting data in near real time, the first was returned to operation on August 30, with three more the following day. On September 1, seven were in operation, where OIG reports just one. See OIG report, Figure 6 on page 17. The point is that information readily available to OIG staff shows a very different picture than the report portrays.

Table 1 – Number of Houston-Area Stationary Air Monitoring Samplers

	Air Toxics Samplers	Other Samplers	Total
SLAMS Samplers*	9 ⁶	60	69
Non-SLAMs TAMIS Samplers	18	58	76
TAMIS Sampler Subtotal	27	118	145
Non-TAMIS Samplers	6	6	12
Total	33	124	157

* All SLAMS samplers are part of TAMIS.

But even beyond the data posted to TAMIS, TCEQ also evaluated data from an additional six autoGCs in the Houston area.⁸ Four of these remained operational for the duration of Hurricane Harvey, a fact that invalidates the report’s findings and analysis about the absence of air monitoring during the final days of August 2017. By presenting just a small fraction of the air monitoring activities during and after Hurricane Harvey, OIG’s report fails to adequately address the very subject of its audit objectives.

So it is all the more unfortunate, as I expressed to Mr. Sheehan, that our staffs did not meet to discuss these issues. Respectfully, in this case, OIG staff proved to be their own impediment to

⁶ The report identifies five Houston-area samplers capable of detecting air toxics. In fact, 33 Houston-area samplers are capable of detecting air toxics, including nine that are designated as SLAMS samplers: three autoGCs, two VOC canisters, two SVOC samplers and two carbonyls samplers.

⁷ Perhaps OIG staff mistook SLAMS samplers for the universe of samplers.

⁸ These six additional autoGCs, which are included in [Attachment A](#), are privately owned and do not share data to TAMIS.

obtaining information central to the audit objectives: OIG staff was impatient with scheduling challenges (their own as well as TCEQ's) and then abandoned the idea of meetings that everyone had agreed would take place. In addition, as noted above, OIG staff failed to avail themselves of information readily available to the public.

It is entirely appropriate to review and critique the state and federal agencies' response to Hurricane Harvey. TCEQ welcomes that and has worked to improve its response to disasters. But, again, that critique should be grounded in an adequate command of the facts.

Looking to more recent history, you may be interested to know that of the 42 air monitoring sites that TCEQ secured in advance of last month's Hurricane Laura, 20 were returned to full operation the same day as landfall (August 27th) and 31 (74%) were fully operational the day after landfall. By September 1, all but five sites were fully operational. These five remaining sites were brought back online as soon as power was restored and repairs to the monitoring equipment were completed.

TCEQ has been able to redeploy its assets faster following Hurricane Laura than it did following Harvey because the damage was less widespread and less severe. While widespread power outages were a considerable aggravating factor with Laura, unprecedented flooding following Hurricane Harvey prohibited access to many monitoring sites long after the storm dissipated. In addition to stationary air quality monitoring, TCEQ's response to Hurricane Laura included the deployment of new van-based mobile monitors and, as during Hurricane Harvey, teams of responders with handheld air monitors.

Texas' Enforcement of MSS Emission Violations

I now turn from a topic central to the report's purpose to one that is beyond tangential. In its examination of air monitoring conducted after Hurricane Harvey, the report embarks on a discussion of Texas' enforcement regime for violations stemming from maintenance, startup and shutdown (MSS) emissions, including pieces of its procedural history.

More than irrelevant to OIG's stated purpose, the discussion also errs in its description of Texas' rules by claiming that Texas provides "automatic exemptions from enforcement for facilities whose SSM emissions violate the Clean Air Act standards." There is no such exemption.

Texas offers an affirmative defense against penalties, but not injunctive relief, for unplanned MSS emissions *if* TCEQ's executive director determines that the emissions are not excessive, *and* the violator proves all of the following:

- (1) the violator met the applicable reporting and recordkeeping requirements;
- (2) the emissions could not have been prevented through planning or design;
- (3) the emissions were not recurring in a manner indicating inadequate design, operation or maintenance;
- (4) if the emissions were from a bypass of pollution control equipment, the bypass was unavoidable to prevent death, injury or severe property damage;
- (5) the facility and pollution control equipment were operated consistent with good practices for minimizing emissions;
- (6) the frequency and duration of operation in an unplanned MSS mode were minimized and all possible steps were taken to minimize the impact of the emissions on ambient air quality;
- (7) all emissions monitoring systems were kept in operation if possible;
- (8) the violator's actions during the period of emissions were documented; *and*

(9) the emissions did not cause or contribute to an exceedance of the national ambient air quality standard (NAAQS), PSD increments, or a condition of air pollution.
See 30 Tex. Admin. Code § 101.222(c).

Quite different from an automatic exemption, Texas' affirmative defense requires the violator to prove proper conduct before, during and after the emissions. This conduct includes appropriate investment, engineering, management, and work practices to minimize emissions, to avoid their impact to human health and the environment, to document the events, and to timely comply with Texas' uniquely rigorous reporting requirements. You can appreciate, then, that Texas' affirmative defense creates a different set of incentives for a regulated entity than an automatic exemption.

In addition to TCEQ's rules, the Federal Register notice that the OIG report cites in its discussion of the procedural history of Texas' enforcement policy includes well over a dozen references to Texas' "affirmative defense"—but nothing to suggest that Texas has an automatic exemption. *See* 80 Fed. Reg. 33840 (June 12, 2015). Again, it is unclear to me how, given the information available, the report could contain such an error or why the report would address this topic in the first instance.

But much like the report's misstatement regarding the status of the monitoring network, this error also plays into a false narrative. Some detractors of Texas' rules for unplanned MSS emissions will not engage the actual rules and their substance, but instead the fiction that Texas simply exempts these emissions from enforcement. A [Texas Tribune article](#),⁹ for example, refers to Texas' so-called exemption more than half dozen times, never mentioning, much less describing, Texas' affirmative defense or the 9-prong showing it demands. I welcome critiques of TCEQ's enforcement policy, if they are grounded in the facts. Ideally, that policy discussion would not include incorrect commentary from an OIG report on air monitoring during a hurricane.

Again, I regret that our staffs' efforts to meet and exchange information stalled, and that OIG forged ahead without the benefit of TCEQ's perspectives. But the errors I cite above were also largely avoidable with information readily available to the public. I regret too that OIG's report could lend weight to arguments that degrade the conversation about environmental policy in Texas with misinformation.

The quality of work on this report is an outlier. Our staffs share a history of working together cooperatively and constructively on other OIG projects. I am confident that will be the case in our future work together.

Thank you for hearing my concerns and thank you for your leadership.

Sincerely,



Jon Niermann, Chairman
Texas Commission on Environmental Quality

Enclosure

⁹ Neena Satija, *EPA's Proposed Emissions Limits Drawing Debate*, Aug. 6, 2014.