



SIERRA CLUB
LONE STAR CHAPTER

PUBLIC CITIZEN 50
YEARS



November 10, 2022

Official Position on the TCEQ Sunset Decision Document from the Sierra Club, Public Citizen, and Air Alliance Houston

The Lone Star Chapter of the Sierra Club, Public Citizen’s Texas Office, and Air Alliance Houston appreciate the efforts of the Sunset staff and Commissioners to improve the responsiveness, efficacy, and purpose of the Texas Commission on Environmental Quality (TCEQ), Texas’s main environmental regulatory agency. There is tremendous mistrust of the TCEQ due to poor transparency, a lack of meaningful public input, and a spotty environmental enforcement record. We believe that the Sunset Staff and Commissioners missed an opportunity to make bold recommendations and changes that would regain public trust and improve community protection. While we support most of the relatively *modest* recommendations found in the final Decision Document, these changes will not go far enough to protect Texans from environmental harms and undue decades of disregard for how pollution disproportionately impacts communities in Texas. In fact, we are deeply concerned about some specific recommendations in the document, which will prevent certain communities from having full access to permitting information and public meetings.

Please find below our official positions on the Decision Document that was released on November 9th at 5 PM. The Sunset Commission will meet today to approve or disapprove these recommendations and proposed modifications.

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Issue #	Description	Source	Our Position	Comment
1	TCEQ’s Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.	Staff	None	"Distrust and confusion" minimizes the public's role. Public dissatisfaction is not due to confusion. Commenters have consistently asked the TCEQ to

				prioritize public health over industry permits and profits.
1.1	Clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit.	Staff	Support	We agree with holding public meetings before and after the draft air permit is issued; final permits should include meaningful consideration of comments.
	Replace Recommendation 1.1 with the following: Require the public comment period for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with a consolidated notice of receipt of application and intent to obtain permit (NORI) and notice of application and preliminary decision (NAPD), if a public meeting is held.	Perry	Support, but not as replacement	We support this as a standalone issue. An extra 36 hours is helpful but does not actually address the recommendation for an additional public meeting. Also this is limited to air permits alone. We oppose replacing the public meeting recommendation with this modification.
	Replace Recommendation 1.1 with the following: Require the public comment period for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with a consolidated notice of receipt of application and intent to obtain permit (NORI) and notice of application and preliminary decision (NAPD), if a public meeting is held.	Schwertner	Support but not as a replacement	See above.
1.2	Direct the commission to vote in a public meeting on key foundational policy decisions that establish how staff approach permitting and other regulatory actions.	Staff	Neutral	This promotes the flawed premise of "public confusion;" the opportunity for public input should include written response to comments from TCEQ.
	Replace Recommendation 1.2 with the following: Direct the commission to vote in a public meeting on the acceptable level of health-based risk	Perry	Support	We support having the Commission clarify its position on permit levels, but this recommendation does not

	used in the development of toxicity factors for permitting and other regulatory actions.			address the policy issues highlighted in 1.2.
1.3	Direct TCEQ to develop a guidance document to explain how it uses the factors in rule to make affected person determinations.	Staff	Insufficient	Does not address the underlying critique that state standing doesn't satisfy federal minimums
	Replace Recommendation 1.3 with the following: Direct TCEQ to develop a guidance document that explains what information the commission needs to evaluate whether a person is potentially affected by a permit application and states that each request is reviewed on a case-by-case basis, considering all the factors in its rule, including — but not limited to — distance.	Holland	Support	While we prefer that TCEQ be directed to follow federal guidelines, this modification is a slight improvement. Still we worry that TCEQ is violating state and federal rules by imposing arbitrary distance requirements and not allowing for full exhaustion of legal remedies.
1.4	Direct TCEQ to adopt a policy guiding its rule review process to ensure that identified deficiencies in the rules are addressed.	Staff	Neutral	Sunshine via sunset, doesn't address root cause
1.5	Direct TCEQ to review and update its website to improve accessibility and functionality.	Staff	support	agree with public meetings calendar, downloadable data, permits and permit applications online suggest adding language justice and translation
	Modify Recommendation 1.5 by adding a statutory change to require TCEQ to post all permit applications and associated materials on TCEQ's website once the agency determines the application to be administratively complete and include the website's address in any public notice issued for the permit. For water right permit applications, the posting would also include maps and supporting material.	Schwertner	Support	We support this in general, but do not believe it is good public policy to remove the requirement to have required documents placed in a public building.

	Posting online may be in lieu of placing the required documents in a public building. Under this recommendation, TCEQ would be required to consider and accommodate if there are affected persons in areas of the state lacking internet availability that might need assistance with access to the documents, particularly if there is heightened interest or in response to comment or request.			
	Modify Recommendation 1.5 to direct TCEQ, when updating their website, to make easily accessible to the public, and provide to regional water planning groups, the webpage link to the database of GCDs, MUDs, SUDs, river authorities, water systems, WCIDs, etc. with contact information and separated by county.	Schwertner	Support	
1.6	Direct TCEQ to evaluate its current use of advisory committees to provide more public involvement in rulemaking and other decision-making processes, and continue advisory committees by rule, as appropriate.	Staff	Support	Useful only if the right diversity of opinions is represented and good advice is followed
	TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable		insufficient	accurate critique but the proposed solution is inadequate
2.1	Require TCEQ's compliance history rating formula to consider all evidence of noncompliance while decreasing the current emphasis on site complexity, and direct the agency to regularly update compliance history ratings.		Support	emphasis should be not on complexity, but on the size of the offender, with fines that create economic disincentive to pollute

	<p>Replace Recommendation 2.1 with the following: Direct TCEQ to review and update the agency’s compliance history rating formula to ensure it accurately reflects a regulated entity’s record of violations, including considerations of site complexity and cumulative violations or multiple violations of the same type. TCEQ should specifically consider major, moderate, and repeat occurrences of the same minor violations when calculating compliance history ratings. Finally, TCEQ should regularly update an entity’s compliance history rating throughout the year as the agency receives additional information that could alter the rating. (Management action - nonstatutory)</p>	Schwertner	Support	<p>While we are not sure if this recommendation will lead to any change in the use of compliance history, we appreciate paying attention to repeat violations and updating compliance history more frequently.</p>
	<p>Modify Recommendation 2.1 to also direct TCEQ to re-evaluate its compliance history rating formula to ensure a facility’s compliance rating does not improve if the facility reports an unauthorized air pollution emission and seeks an affirmative defense. (Management action - nonstatutory)</p>	Holland	Support	<p>This has been a major issue with certain facilities and we support this recommendation.</p>
2.2	<p>Require TCEQ to consider all violations when classifying an entity as a repeat violator.</p>	Staff	Support	<p>should include local and federal enforcement actions, complaints, investigations, etc.</p>
2.3	<p>Require TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operational status.</p>	Staff	Neutral	<p>minimally useful</p>
2.4	<p>Direct TCEQ to reclassify recordkeeping violations based on the potential risk and severity of the violation.</p>	Staff	Support	
2.5	<p>Direct TCEQ to develop and implement clear guidance to evaluate affirmative defense requests for air emissions.</p>	Staff	oppose	<p>recommend ending the affirmative defense altogether</p>

	Direct TCEQ to establish a centralized committee of agency staff authorized to review and approve all applications for affirmative defense related to unauthorized air pollution emissions	Holland	Support	While we recommend ending affirmative defense altogether, this is a reasonable compromise.
2.6	Direct TCEQ to modify its approach to nuisance complaints to make better use of the agency's investigative resources.	Staff	Neutral	recommend guidance for routing nuisance complaints to appropriate local authorities
	TCEQ's Oversight of Water Could Better Protect the State's Scarce Resources			
3.1	Remove the abolishment clause for the E-Flows Advisory Group and E-Flows Science Advisory Committee, and require the advisory group to adopt a biennial statewide work plan for adaptive management updates of environmental flow standards.	Staff	Support with modification	committee has not met for several years
	Rather than disband and re-establish Bay and Basin Stakeholder Committees and Expert Science Teams every ten years for adaptive management, continue those groups in effect with renewable five-year terms for members that continue in effect until a replacement member is named or a vacancy occurs through resignation or inability to continue to serve.	Johnson	Support	We believe this would be a positive modification.
3.2	Require TCEQ to hold its annual meeting regarding priority groundwater management area studies in a public setting.	Staff	Support	
3.3	Direct TCEQ to conduct a comprehensive study of its water usage data and initiate cancellation proceedings for water right permits with nonuse over 10 years.		Support but with modification	We support having TCEQ review water usage data and water rights and work in a voluntary capacity with owners to place water rights in the Texas Water Trust.

	Replace 3.3 with Direct TCEQ to publish a report on status of WAMs as they are updated, including development and structure of WAMs, information on WAM updates, prioritization for other WAM dataset updates and estimated cost for the prioritized update. As part of the recommendation, TCEQ should post info on the website.	Perry	Support but.	While we support this recommendation as a standalone, we would prefer that TCEQ also be directed to review water rights permits and water usage data and identify opportunities for environmental flows.
	TCEQ and OPIC Lack Certain Transparent and Efficient Processes for OPIC to More Effectively Represent the Public's Interest			
4.1	Direct OPIC to consider developing and using umbrella contracts to procure expert assistance.	Staff	Support	
4.2	Direct TCEQ commissioners to take formal action on OPIC's rulemaking recommendations.	Staff	Support	
	Continue the Texas Commission on Environmental Quality			
5.1	continue the TCEQ for 12 years	Staff	Oppose	We would support a six year extension, with the Legislature coming back for a mid-course correction review
5.2	update board member training standard	Staff	Support	
5.3	update separation of duties standard	Staff	Support	
	Continue the Texas Low-Level Radioactive Waste Disposal Compact Commission			
6.1	continue the LLRWCC for 12 years		Support	LLRWC should continue and be a standalone entity
	New Recommendations by Commissioners			

1	Require TCEQ, when posting or sending out notices on all permit applications and permit amendments, to include, at a minimum, the name of the applicant, type of permit and address of the proposed or existing site.	Schwertner	Support (but strengthen)	We support, but also including location descriptions and a link to permit materials would be useful
2	Create in statute a new permit for the operation of a temporary concrete batch plant that supports a public works project. This new public works permit will operate under the existing environmental regulations required by the standard concrete batch plant permit. This new permit can only be used in conjunction with a specific public works project.	Holland	neutral	
3	Require TCEQ to provide notice when it receives an application to create a new district, such as municipal utility districts (MUDs), to state representatives and senators that represent any portion of the proposed district's boundaries.	Holland	Support	
4	Authorize TCEQ to review and potentially suspend a facility's compliance history rating in the event of exigent circumstances, such as an emergency event causing death or injury.	Holland	Support	
5	Create in statute the Compliance Training and Safety Program within TCEQ's Small Business and Local Government Assistance program. As part of this recommendation, authorize TCEQ to divert qualifying facilities to receive additional training and on-site follow-up by TCEQ staff in response to minor or moderate violations that do not present an imminent threat to public health or safety, rather than	Holland	Neutral	

	formal enforcement action. Establish that facilities would be eligible for participation in the program once in a 24- month period.			
6	Increase statutory limits on administrative penalties for all violations with a current cap of \$25,000 per day to \$50,000 per day.	Johnson	Support	We last updated our maximum penalties in 2011 and with inflation, \$50,000 provides a greater deterrence. Note that EPA fines are currently well above \$50,000 now.
7	Expand TCEQ statutory authority to include both newspaper and electronic publication notice for pending permit applications. The electronic publication should include posting on a website as well as an option to receive notifications through email. Federal requirements for newspaper or public location notification would be in addition to electronic publication. Under this recommendation, TCEQ would be required to consider and accommodate if there are affected persons in areas of the state lacking internal availability that might need assistance with access to the notices, particularly if there is heightened interest or in response to comment or requests.	Johnson	Support	We believe this modification is a good approach to increase public input, notice and participation in permitting decisions.
8	Amend statute to expressly authorize TCEQ the discretion to hold virtual public meetings in lieu of in-person public meetings. The commission will consider and accommodate if there are affected persons in areas of the state lacking internet availability that might need assistance with access to the meetings, particularly if there is heightened interest or in response to comments or requests.	Perry	Oppose	A hybrid meeting option would be an improvement. We do not support a virtual only option, especially because TCEQ's virtual meetings are audio-only with no video option. In other words, expand access, don't take it away for those who want to be at a meeting in person. Also it is important for TCEQ staff to see

				the area where facilities are to be located for context.
9	Direct TCEQ, upon receiving public comments that are not under jurisdiction of the agency, to answer the comments with information on the agency or organization with relevant jurisdiction (non-statutory)	Perry	Support	This is a good change and we support it.
10	Direct TCEQ to prepare and deliver by Sep 2023 to the leg on its efforts to enhance public participation and language access as part of its November 2, 2020 informal resolution agreement with EPA	Canales	Support	Our groups were involved in bringing the complaint to EPA and appreciate this recommendation.
11	Direct TCEQ to consider developing Spanish language versions of its online form through which individuals may submit a complaint	Canales	Support	