



TEXAS CHEMICAL COUNCIL

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June 21, 2022

The Honorable Charles Schwertner
Chairman, Sunset Advisory Commission
P.O. Box 12068 – Capitol Station
Austin, Texas 78711

The Honorable Justin Holland
Vice Chairman, Sunset Advisory Commission
P.O. Box 2910
Austin, Texas 78768-2910

RE: Texas Chemical Council Comments on TCEQ Sunset Advisory Commission Staff Report

Dear Chairman Schwertner and Vice Chairman Holland:

The Texas Chemical Council (TCC) appreciates the opportunity to comment on the Sunset Advisory Commission Staff Report for the Texas Commission on Environmental Quality (TCEQ).

TCC is a statewide trade association of chemical manufacturers. TCC represents 70 member companies who own and operate over 200 manufacturing and research facilities across the state. The business of chemistry has called Texas home for nearly 100 years and manufactures vital products that sustain our quality of life and provide employment for approximately 500,000 Texans. The products of chemistry are the state's top non-energy export with over \$40 Billion in state exports annually to customers around the world.

TCC supports the continuation of the TCEQ. TCEQ is the principal agency that regulates the chemical industry in Texas. The Texas Legislature and TCEQ have fostered a science-based regulatory approach that is protective of public health and the environment while recognizing the state's economic growth.

We applaud the Sunset Advisory Commission in conducting a thorough review of the TCEQ and its programs. TCC supports many of the recommendations in the Report, but has significant concern regarding several of the recommendations in the Report. Our comments are enclosed.

Thank you for your consideration.

Sincerely,

Hector L. Rivero
President & CEO

CC: Texas Sunset Advisory Commission Members

TCC Comments on Sunset Advisory Commission Staff Report for TCEQ

Issue 1: TCEQ's Policies and Processes Lack Transparency and Opportunities for Meaningful Public Participation, Generating Distrust and Confusion Among the Public.

1.1: Clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit.

TCC Response – OPPOSE:

- Current Texas law adequately affords the public with multiple opportunities to participate in the permitting process and request a public meeting. **Texas already has a very robust public participation process.**
- Under current state law, TCEQ has a dual notice and comment period that exceeds EPA permitting requirements. The first public notice and 30-day comment period is posted in multiple languages once a permit application has been received and reviewed by TCEQ. The public can provide and submit comments as well as request a public meeting during this first notice and comment period. A second notice and 30-day comment period is posted once TCEQ has completed its technical review of a permit application. Again, this posting is done in multiple languages and provides the public with any opportunity to submit comments.
- Additionally, Texas provides for a Contested Case Hearing (CCH) process that few, if any, states offer to the public. Under the Contested Case process, a person who is affected by a permit may request an independent hearing by the State Office of Administrative Hearings (SOAH) which, at a minimum, adds 180 days to the state's permitting process.
- Under current state law, the TCEQ must provide a public meeting if requested by a state legislator or if there is significant public interest as determined by the Executive Director.
- Mandating public meetings for all proposed permits that have a public participation element is excessive as most permit applications are uncontested.
- Requiring a public meeting during or in advance of a technically complete draft permit would be premature because a proposed permit, at this stage, would lack much of the engineering data and scientific modeling that is developed and validated during the technical review process for inclusion in the draft permit.
- Requiring a public meeting prior to the existence of a draft permit would further delay the permitting process and give other states a time advantage for attracting new economic investments. A mandatory public meeting would likely require at least a 30-day notice in advance of the meeting. Further, TCEQ would need additional time to review and consider comments received during the public meeting before proceeding with filing a draft permit, which in practice could result in up to an additional 90 days to the permitting process.
- The U.S. shale economy starting in 2010 enabled significant economic investment opportunities and job growth in Texas. As a result, permit applications were getting backlogged due to resource demand at TCEQ. Competition for these investments was fierce across the country and Texas' lengthy permitting process was forcing market sensitive projects to consider other states. In response, the Texas Legislature took action in 2013 to establish an expedited permitting program to streamline the administrative process for air quality permits without impacting the public participation process or removing any regulatory requirements. Under the expedited permitting program, applicants can cover the cost of overtime or contract work hours in hopes of securing a permit in no less than 180 days.
- Lastly, mandating public meetings for every permit would be costly and require significant additional resources for TCEQ to conduct these meetings across the state.

1.2: Direct the commission to vote in a public meeting on key foundational policy choices that establish how staff approach permitting decisions and other regulatory actions.

TCC Response - OPPOSE:

- Permitting decisions should be driven by laws and administrative rules.
- It is important that the Commission adhere to the permitting process as defined by statute and the administrative process. Texas statute and TCEQ rules clearly define the scientific requirements and data that must be submitted to determine whether a permit meets all the requirements of law.
- It would be unfortunate if a business is able to meet every requirement of law and is denied the ability to operate because of a bureaucratic precedent that politicizes the permitting process.
- We feel the current rulemaking process provides full transparency as to the permitting process through the multiple public comment periods and agency response to comment which is published before the Commission makes any final determination on a permit.
- TCC further believes that TCEQ should maintain its ability to delegate authority to the Executive Director to implement agency policy and evaluate scientific data to support agency decisions.

1.3: Direct TCEQ to develop guidance documents to explain how it uses the factors in rule to make affected person determinations

TCC Response – OPPOSE:

- The TCEQ contested case process provides an additional public participation appeals process that far exceeds the requirements of federal law and is not found in any other state with major industrial manufacturing investment.
- The TCEQ contested case process significantly extends the regular permitting process by no less than 180 days as defined by statute.
- The Texas Legislature took action in 2015 to reform the TCEQ Contested Case process and established clear definitions for the Commission to determine standing for an “affected person”.
- The statutory definition clearly specifies that an affected person must have a “personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.”
- These reforms were made to address abuses to the process that used the contested case process to solely delay the permitting process.
- Prior to legislative reforms, the contested case process was regularly abused for the sole purpose of delaying permits, in some cases, delaying permits as much as two years.

1.5: Direct TCEQ to review and update its website to improve accessibility and functionality.

TCC Response – SUPPORT:

- TCC supports the posting of all permit documents on the TCEQ website and supports all public notices to be posted in multiple language, as deemed appropriate.
- TCEQ has created a very robust and accessible website and recently adopted a rule requiring multilingual public notices.
- TCC supports increased funding for TCEQ to continue to further enhance their website.

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.

TCC Response – NEUTRAL:

- TCEQ advisory committees currently works very well, are publicly accessible and have strong participation by stakeholders.

Issue 2: TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable

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.

TCC Response – OPPOSE:

- **TCEQ recently adopted revisions to its Compliance History rules on June 1, 2022.** TCEQ revisions authorize the Executive Director to redesignate a site's compliance history classification to "Under Review" which triggers further investigation of a permitted facility. If, after the investigation, the agency determines that "exigent circumstances" exist due to a number of conditions and factors, the Executive Director may reclassify the facility as "Suspended."
- The Sunset Commission Report makes an incorrect assumption that complexity is too heavily weighted in the calculation and that more complex facilities are unfairly granted a "free pass" based on the number of permits held. The Report fails to recognize that a permitted facility's complexity considers far more than the number of permits, but rather depicts the sophistication of a facility based on the integration of many permits combined to operate a complex manufacturing facility. A highly complex facility, in most cases, is required to maintain an EPA Title V permit required of large stationary sources. A Title V permit consolidates all of a facility's air permits into one document so that regulators and the public can more easily identify all of the air quality requirements that apply to the facility. These facilities have far more extensive compliance and reporting requirements than other permitted facilities.
- Every site regulated under 30 TAC § 60 receives a compliance history site rating, called the "RN rating," that reflects the site's compliance with environmental regulations during the five-year compliance history period. TCEQ calculates compliance history rating using a formula that factors in the number of violations, investigations, permit exceedances, as well as a sites level of complexity.

- The following formula is used to calculate the RN rating for a regulated entity:

$$\left[\frac{(\text{Violation Points}) + (\text{Chronic Excessive Emission Event Points}) + (\text{Repeat Violator Points}) - (\text{Self Audit Points})}{(\text{No. of investigations} \times 0.1) + (\text{Complexity Points})} \right] \times (\text{Voluntary Program Points}) \text{ (if applicable)}$$

- Complex facilities have more extensive compliance reporting requirements to both the TCEQ and EPA that include semiannual monitoring reports, an annual compliance certification requirement, and an annual emissions inventory. Title V reports require active air monitoring demonstrations, submission of any permit deviations and corrective actions that are taken during the reporting period. The annual Title V compliance certification requires a thorough regulatory review of all permit terms and conditions and document compliance for the previous calendar year. Therefore, the current definition of complexity and its formulaic application to determine a site's compliance history rating should remain unchanged.

- Conservatively, a complex facility may have between 500,000 and 2,000,000 points of compliance. Comparing complex industrial facilities to an autobody repair shop or residential construction site as stated in the Report ignores the vast differences in sophistication and regulatory requirements for differing operators and is fundamentally incomparable. The complexity factor takes into consideration the sophisticated environmental compliance management systems in place at large stationary source facilities that are required to have active monitoring and additional reporting requirements that are not required of smaller unsophisticated regulated facilities like an autobody repair shop or residential construction site.

2.2: Require TCEQ to consider all violations when classifying an entity as a repeat violator.

TCC Position – OPPOSE:

- TCEQ already classifies a regulated entity as a repeat violator if they have two or more major violations. Major violations include emissions events or discharges that may cause “adverse effects for human health, safety or the environment, violations of a Commission enforcement order, falsification of documents, or a violation that is found to be a criminal act.” This is and should be the primary focus of the agency’s resources.
- Minor and Moderate violations do not rise to the same level of concern as major violations. They do not include emissions events or discharges that have any impact on human health or the environment and therefore should not be treated as major violations and should not be considered in classifying repeat violators for purposes of compliance history. Paperwork errors that are classified as minor that may have been issued as a result of a simple omission or misplacement of a name or date, should not be treated the same as a major violation.
- **This recommendation would treat all violations equally and would not prioritize enforcement for serious violations that have the potential to impact public health and the environment, and would not be an effective use of the agency’s resources.**

2.4: Direct TCEQ to reclassify recordkeeping violations based on potential risk and severity of the violation.

TCC Position – OPPOSE:

- TCEQ already distinguishes between minor paperwork violations that have no measurable impact on public health and the environment and major recordkeeping violations that are deliberate omissions or intended to deceive.
- **TCEQ’s Enforcement Initiation Criteria (EIC) already takes severity of recordkeeping violations into account. It elevates violations that “results in substantial interference with the TCEQ’s ability to perform regulatory oversight and/or determine compliance”. [see EIC Section A9.c]**

2.5: Direct TCEQ to develop and implement clear guidance to evaluate affirmative defense requests for air emissions.

TCC Position – OPPOSE:

- TCEQ’s Affirmative Defense program is a federally approved program that has been upheld in Federal Court. (See *Luminant Generation Co. LLC v. USEPA*, 714 F.3d 841 (5th Cir. 2013))
- The Sunset Commission Report inaccurately asserts that an affirmative defense is easy to obtain and includes a chart that reflects that TCEQ grants affirmative defense 86% of the time. Once again, the report makes an incorrect assumption based on misleading information.

- As discussed previously when discerning between sophisticated large complex facilities and smaller less sophisticated permitted facilities, consideration of affirmative defense varies dramatically based on size and complexity of a facility.
- We urge the Sunset Advisory Commission to analyze the number of affirmative defense requests granted by the size and complexity of facilities. **If the Commission were to look at affirmative defense requests in TCEQ Region 12 (Greater Houston Area) where most of the facilities are large and complex industrial sites that are likely to also have a Title V permit, affirmative defense requests are granted closer to 25% of the time.** The reason for this is that affirmative defense is actually very difficult to obtain.
- **There are 11 specific criteria that must be met before a facility may qualify for affirmative defense:**
 - 1) *The owner or operator must comply with all emissions event Reporting and Recordkeeping requirements as specified in §101.201;*
 - 2) *The unauthorized emissions must have been caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;*
 - 3) *The unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;*
 - 4) *The air pollution control equipment or processes must be maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;*
 - 5) *The owner or operator must have taken prompt action to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;*
 - 6) *The amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;*
 - 7) *All emission monitoring systems were kept in operation;*
 - 8) *The owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;*
 - 9) *The unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;*
 - 10) *The percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and*
 - 11) *The unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.*
- If all the affirmative defense criteria are met, a facility must then submit a detailed STEERS report, provide a written response to TCEQ information requests, which then initiates a thorough TCEQ investigation as required by statute. After the completion of its investigation, TCEQ may deny the affirmative defense request if it determines that any conditions have not been sufficiently met.

2.6: Direct TCEQ to modify its approach to nuisance complaints to make better use of the agency's investigative resources

TCC Position – SUPPORT:

- TCC supports adequate resources for TCEQ to effectively manage enforcement efforts.

Thank you for the opportunity to comment on the Sunset Advisory Commission Staff Report for TCEQ. If you have any questions or would like additional information, please do not hesitate to contact us.