August 3, 2021

Texas Commission on Environmental Quality
12100 Park 35 Cir
Austin, TX 78753
Via email to Elizabeth.SifuentezKoch@tceq.texas.gov and Steven.Schar@tceq.texas.gov.

Re: Comments on TCEQ Sunset Self Evaluation Report

The undersigned organizations appreciate the opportunity to provide these comments to Texas Commission on Environmental Quality (TCEQ) staff in advance of their sunset self-evaluation report. We would welcome the opportunity to discuss our recommendations further. Please contact Adrian Shelley at ashelley@citizen.org, 713-702-8063.

I. Permitting

A. Authority to Deny Permits

The Texas Commission on Environmental Quality interprets the Texas Clean Air Act as not granting the agency authority to deny a permit application that is administratively complete. *See* Texas Health and Safety Code Sec. 382.0518(b). This interpretation of state law prevents TCEQ from denying a permit application when considerations of equity or justice suggest that a permit should not be granted. We believe that TCEQ should have the authority to deny permits based on holistic considerations of equity, environmental justice, and its mission to protect public health and the environment. We recommend an amendment to the Texas Clean Air Act to clearly grant this authority.

B. Adequacy of Permit Fees and Deficiency Cycles

TCEQ must assure going forward that its annual registration fees and permit structure is equitable and raises sufficient revenues to assure adequate permit writers, inspectors, and enforcement and compliance staff. While improvements have been made, in particular, an inequitable framework for paying for drinking water, wastewater discharge and water quality programs has prevented the agency from more fully assuring public drinking water and surface water quality. TCEQ and the legislature should make changes to assure adequate funding for TCEQ in all programs. We have a particular concern about the lack of funding in Fund 153. Budget riders that limit maximum air and water permit fees, and statutory caps on certain fees have limited revenues needed by the agency to fulfill its mandate.

We recommend increasing permit application fees so that they are sufficient to cover the entire cost of permit review. Permit fees for certain media have not been increased in many years.

TCEQ staff often assert that they lack the resources for more thorough permit reviews. For example, many permits are processed without agency staff ever conducting a site visit of the proposed location for a facility. Permit fees should be sufficient to cover the entire administrative cost of a thorough permit review, including a site visit for all permit applications.

We oppose the practice of agency permit staff working with applicants through lengthy "deficiency cycles" in which staff essentially fill in missing information in permit applications. These deficiency cycles create a substantial administrative burden for the agency. If an applicant cannot submit a complete permit application, we believe it does not deserve a permit. A reasonable opportunity should be given to complete an application and fix minor errors. But incomplete or poor applications should not become a burden to the agency. They should be rejected and the applicant required to submit a new application with a new fee. If applicants take the agency through costly deficiency cycles, we believe they should pay additional fees to cover the additional administrative burden of completing their applications.

C. Notice Consolidation

We disagree with the consolidation of notice that is available to applicants under Health and Safety Code Sec. 382.056(g-1). In our experience with the public, it is already fairly difficult for communities near proposed facilities to actually receive timely notices of permit applications. The practice of consolidating notice limits opportunities for the public to actually receive notice. The practice of consolidated permit notice should be ended and the traditional two-notice system should be used in all cases.

D. Permit Access Online

TCEQ should promote public access by posting permit applications online. A single online location on the agency's website would be ideal. Or the agency could require the applicant to post permit administratively complete applications and associated materials online. It is our understanding that this has been the practice since the COVID pandemic began last year. Many of the signers to these comments supported HB 2370 (87R) by Rep. Morales Shaw, which provided for online posting of permit applications.

E. Concrete Batch Plant Permitting

The concrete batch plant standard permit and the concrete batch plant permit for enhanced controls should be consolidated into a single permit. The strongest controls from each permit should be retained, as should the right for a contested case hearing. The firm 440 yard setback for residences from rock crushers should be applied to all aggregate production operations including concrete batch plants.

F. Title V Permits

Both EPA and TCEQ are frequently behind on incorporating state permits into the larger Title V EPA permits. Some of our organizations have been involved in legal actions to require these permits to be issued in a timely manner and incorporate all permit requirements. TCEQ and EPA must fix this process, which leads to facilities operating without an overreaching enforceable Title V permit in place.

II. Enforcement

In the last TCEQ Sunset Review, the daily maximum fine was increased from $10,000 to $25,000. In the recent fifth revision of TCEQ's penalty policy, the agency changed the method by which it calculates penalties for ongoing violations. We appreciate these efforts to the extent that they provide for larger penalties. As a general policy matter, we believe penalties are too small and do not serve their purpose of giving companies an economic disincentive to pollute. We recommend that TCEQ further revise its penalty policy to include the following measures.

A. Mandatory Penalties

According to an analysis of pollution events and fines conducted annually by Environment Texas, fewer than 3 per cent of self-reported air emissions events are penalized by TCEQ. We recommend the establishment of mandatory penalties for certain pollution events—with their size and triggers to be determined by TCEQ with input from the public.

B. Speciation of Violations

Speciation would allow TCEQ to consider each violation of a permit term as a separate violation for the purpose of assessing a penalty. Many of the larger pollution events include dozens of pollutants and separate violations of as many permit terms. Each of these individual violations should be considered an event against which a penalty can be assessed.

C. Fines Exceeding the Economic Benefit of Noncompliance

This is another strategy to enact the principle that fines must serve as an economic deterrence to pollution. If a company can be showed to have profited from failing to install, e.g., pollution control equipment, and that company experiences a pollution event as a result of that failure, the fine should at least exceed the economic benefit. This proposal was filed by Rep. Erin Zwiener as HB 3035 during the 86th legislative session in 2019.

D. Compliance History

We have several concerns with the compliance history rating system. At times as many as 80 per cent of companies have been rated either satisfactory or unclassified. More often than not compliance history is used to lessen assessed penalties. We oppose the use of compliance history to reduce penalties that we already believe are inadequate.

TCEQ Executive Director Toby Baker has stated his concern that the compliance history system can sometimes lead to absurd results. As an example Mr. Baker has cited TPC Group, the company responsible for a fire in Port Neches that led to a mandatory evacuation within 4 miles on the day before Thanksgiving in 2019. Even a year after that incident, TPC Group still had a "satisfactory" compliance history rating. (Public Cittizen has written more extensively about this matter elsewhere.)

E. Upset Emissions, SSM Events, and the Affirmative Defense

We disagree with the U.S. Environmental Protection Agency's decision last year to withdraw the SSM SIP Call for Texas. The EPA's own explanation of this action concedes that Texas' program is inconsistent with national policy. We believe that Texas is not doing its job to reduce illegal pollution events and enforce against them when they occur. Of chief concern to us is the routine use of the affirmative defense against enforcement actions. Many companies apply the affirmative defense as a matter of policy without any regard for the actual circumstances and events that led to a pollution emission. We recommend Texas eliminate the affirmative defense and revise its enforcement policies with the goal of reducing emissions from SSM and upset events.

F. House Bill 1820 (87R)

Many of the signers to this letter supported HB 1820 by Rep. Erin Zwiener in the 87th legislative session. We agree with the approach Rep. Zwiener took to strengthening enforcement authority at TCEQ and encourage agency staff to consider this legislation in its self-evaluation report.

III. Affected Party Status for Contested Case Hearings

While partly due to statutory changes, TCEQ in recent years has limited public participation by effectively preventing those concerned about particular air, waste or water permits from being a named party in administrative contested case hearings. TCEQ has interpreted legislative direction to prevent Texans who are more than one mile from the particular location of a discharge point, air emissions or waste deposit from having standing, even though pollution and impacts can clearly and scientifically travel much further.

We believe that the agency has been too strict when determining "affected person" status for the purposes of challenging a permit. Clearly, an individual must be impacted by a proposed permit in a way that members of the general public are not. But TCEQ should liberally apply the concept of affected party in favor of allowing members of the public standing to bring administrative challenges. For example, a person who regularly drives by a facility on their way to work should be considered an affected person. Someone who enjoys outdoor recreation in a location that would be impacted by a proposed facility should have affected party status.

We don't believe there should be a bright line definition of affected person, such as a distance requirement for a residence. We do believe that the threshold for affected party status should be lesser than that applied in federal cases.

The FY 2017-2018 Biennial Report by the Office of Public Interest Council (OPIC) recommended changing the definition of "affected persons" for the purposes of requesting a contested case hearing to include, "schools, places of worship, licensed day-care facilities, hospitals, medical facilities, and persons[.]" This recommendation has been proposed in legislation by lawmakers in every session since this report. We recommend TCEQ change this definition as OPIC has recommended.

IV. Environmental Justice and Public Participation

The agency should establish an environmental justice office. The office should include staff to participate in public engagement, permit review, and enforcement. The office should make recommendations on permit issuance that commissioners consider when issuing permits. If commissioners disregard the recommendation of the environmental justice (EJ) office, they should clearly state their reason for doing so.

TCEQ should establish an office of public participation on the model of the new Federal Energy Regulatory Commission (FERC) Office of Public Participation. The office should include funding for communities to participate in TCEQ processes.

TCEQ should hold all virtual meetings on Zoom or a comparable videoconference platform. The platform should include a call-in only option. In person meetings should include an option for virtual participation.

TCEQ should end the current procedure of public meeting with a nonrecorded "Q&A" portion followed by a recorded comment portion. This model leads to confusion and difficulty among inexperienced members of the public.

V. The Texas Emissions Reduction Plan

The Texas Emissions Reduction Plan (TERP) will soon receive a much larger allocation each year, up from around $75 million to closer to $180 million. TCEQ should develop a plan as soon as possible to spend 100% of TERP funds each biennium. This will ensure that funding for clean air programs paid by Texans is used for its intended purpose.

TCEQ should also offer a more complete and transparent accounting of TERP spending to the legislature annually as now required, as well as a more robust accounting of TERP spending and cost-effectiveness each biennium.

TCEQ should consider the cost effectiveness in CMAQ programs at reducing air pollution when making future recommendations to the legislature.

VI. Oil and Gas

A. Air Emissions

We believe that the agency has taken too narrow of a focus on implementation of state and federal rules on emissions from sources related to the oil and gas production and transportation of fossil fuels. Thus, the agency has narrowly implemented provisions related to generic control technologies, volatile organic compounds and methane, and implemented differing requirements based on general, standard, permit-by-rule and individual permits for the oil and gas sector. These rules have been applied differently, with slightly more protective rules in the Houston and Dallas areas, despite the wide problems of pollution from oil and gas emissions throughout Texas, including from methane, which also impacts climate change. We strongly encourage the agency to instead implement broader state rules to reduce air pollution from the oil and gas sector, and a better working relationship and updated Memorandum of Understanding (MOU) with the Railroad Commission of Texas that assures that emissions from flaring are also reduced.

B. Communication with the Railroad Commission

We recommend better communication between the agency and the Railroad Commission. There are specific cases in which a seeming lack of communication between agencies has led to unfortunate outcomes. For example SB 367 (87R) by Sen. Miles is a response to an incident in his Houston-area district in which an oil and gas driller applied for a permit for a new well at a site adjacent to an active cleanup from a previous well blowout. The cleanup was undertaken by TCEQ, while the new permit was issued by the Railroad Commission. SB 367 would require operators to notify the Railroad Commission if they are applying for a drilling permit at a site adjacent to a blowout. We believe this information should already be shared directly between the agencies.

In the case of the Blackhorn Environmental Waste Facility, for example, TCEQ was actively investigating complaints against Blackhorn and had issued a violation a few days before the RRC decided to renew the facility's permit. Presumably TCEQ informed RRC about the violation, but RRC approved the renewal even though the original permit stipulates that the company must be in compliance with TCEQ rules. There has to be more the TCEQ can do to put a pause on facilities the RRC permits when there are human health issues at stake.

VII. State Implementation Plans

The agency has a poor and spotty record on the timely development and implementation of State Implementation Plans (SIPS) designed to meet clean air standards. First, the agency routinely ignores local solutions meant to help clean up the air to meet federal clean air standards for different locations. Second, the agency routinely fails to consider the impact of pollution sources outside the physical boundaries of non-attainment areas, refusing to consider controls that would have a regional and public health benefit by assuming that it does not have the authority to more adequately consider contributing sources. Third, the agency has often dragged its feet on developing more robust SIPs that would achieve real pollution reductions. The regional haze plan is a good example. TCEQ has failed to adopt plans to reduce particulate pollution from large electric generation units and other emitters of soot. As a result Class 1 areas in Texas and neighboring states do not meet visibility standards.

VIII. Timely Implementation of Environmental Flow Standards

The agency has through the years put time, money and effort into adopting environmental flow regimes in streams, but also in terms of inflows into bays and estuaries, especially since adoption of SB 3 (and HB 3) in 2007. Fifteen years after passage of important environmental flow legislation, TCEQ has not fully implemented the bill. While funding from the legislature to assure that all river basins are adequately studied is an obvious factor, the agency itself has at times ignored the recommendations of the scientific advisory committees in setting environmental flow standards. The TCEQ and the legislature must consider fundamental changes to assure that Texas' rivers, streams and bays have sufficient flows to meet environmental and economic needs.

As the time for implementation of the adaptive management provisions of S.B. 3 for environmental flow protection arises, some refinements are needed in the underlying statutes of S.B. 3 to help inform the path forward for TCEQ. First, input from the statewide Science Advisory Committee and the basin-specific stakeholder committees and science teams played an essential role in establishing initial flow standards and statutory clarification is needed to ensure that input will be available during the adaptive management phase. Second, refinements to the

language of Section 11.147 (e-1) of the Water Code are needed to ensure that TCEQ has the legislatively intended discretion to adjust water rights permits issued since the effective date of S.B. 3 to increase protections for freshwater inflows. That provision anticipated freshwater inflow protections would be included as specific permit conditions. In practice there are no such permit provisions, which largely eliminates the intended agency discretion.

IX. Water Quality Standards and Wastewater Discharge Standards

TCEQ has often failed to timely develop its triannual water quality standards, and over the last 10 years. A disturbing trend has emerged in which the agency seeks to downgrade the water quality standards for rivers, streams, reservoirs, bays and estuaries. This has been done both by downgrading individual streams and rivers by reclassifying their uses, but also through other regulatory actions, such as the creation of a secondary contact recreation standard, which has allowed higher levels of fecal coliform to be allowed in many water bodies. This creates a perverse circle in which streams and rivers and reservoirs are downgraded or reclassified, which then allows wastewater discharge permits with higher levels of pollutants to enter the water body, further degrading water quality and the types of uses the water body can support. TCEQ should be directed to reform its water quality program, and truly protect surface water quality and commit to anti-degradation measures. It must also consider much more robust development of new water quality standards, for new emerging threats like pesticides, plastic pollution and Harmful Algal Blooms (HABs).

X. Weakening Air Toxics Standards and Doubting Science

A. Effects Screening Levels

The Effects Screen Levels (ESLs) and Air Monitoring Comparison Values are underutilized by the agency. TCEQ should develop a clear methodology for using effects screening levels in permit reviews. This methodology should allow the agency to consider the cumulative impacts of toxic emissions from multiple facilities in an area.

TCEQ should also stop weakening ESLs. A review of changes to ESLs the agency undertook between 2007 and 2014 found that ⅔ of the chemicals reviewed had their standards weakened. This trend is counter to the larger trend in science and epidemiology, which tends toward strengthening health-based standards to be more protective. We recommend the agency not waste resources on toxicology reviews that result in weaker standards.

B. Air Monitoring Comparison Values and the Air Pollutant Watch List

Similarly, the Air Pollutant Watch List (APWL) has not been used effectively by the agency in some time. Areas have been hastily removed from the APWL, and independent analysis has shown that removed areas often experience problems with toxic pollution in the months and years after their removal. There is ample evidence that there are areas of the state that suffer from an excess of toxic pollution. For example, the Texas Department of State Health Services has identified several cancer clusters (in East Harris County and Houston's Fifth Ward) likely caused by toxic pollution.

C. Spending State Resources Doubting Settled Science

Perhaps most egregiously, the agency spent millions on attacks on federal health-based standards for ozone pollution. The health impacts of ozone are settled science. The agency should not waste state resources on science review that, from our perspective, seem politically motivated.

It is counter to the Commission's mission to actively oppose strengthening public health regulations. We are especially concerned with recent agency opposition to state and federal rules for ethylene oxide. Currently, one of our signatories, the Sierra Club, is involved in litigation to release documents generated by TCEQ staff related to ethylene oxide regulations. We fear they will show the agency trying to weaken regulations rather than seeking appropriate health-based standards.

XI. Texas Parks and Wildlife Department

We urge closer collaboration between TCEQ and Texas Parks and Wildlife Department (TPWD). This includes water quality testing and information on permits that impact parks and wildlife. We believe that TPWD should be able to contest TCEQ permits where they would impact the state's parks and wildlife.

XII. Language Access

We are encouraged by the language justice rulemaking currently underway at the agency. TCEQ should make every effort to provide materials and host meetings in languages spoken in impacted communities. There are tools such as the U.S. Environmental Protection Agency's environmental justice screening tool, EJ SCREEN, that can easily provide information about what languages are spoken in an impacted community. This recommendation extends to the sunset evaluation process itself.

XIII. Additional Stationary and Mobile Monitoring Resources

TCEQ lacks sufficient stationary and mobile monitoring to do its job. We are particularly concerned with the lack of monitors in industrial neighborhoods in the Gulf Area, El Paso, and the Permian Basin. We believe that Midland-Odessa in particular is suffering from high ozone (and sulfur dioxide) levels, and yet monitoring is virtually non-existent. More detailed comments on the stationary ambient air monitoring network have been submitted in the last two comment periods for the Annual Monitoring Network Plan by many of the organizations that have signed this letter. We reaffirm those comments here and encourage TCEQ staff to consider them when completing the self-evaluation report.

We appreciate the additional resources that have been dedicated to mobile monitoring in recent years. However, we strongly believe that some mobile monitoring vehicles and staff should be permanently located along the coast. TCEQ Executive Director Toby Baker has said before that he has a goal to place mobile monitoring vehicles in Houston, Beaumont/Port Arthur, and Corpus Christi. We support this goal.

Hours and even minutes count after a disaster occurs. Currently TCEQ houses its mobile monitoring vehicles in Austin. The agency has a day or two lag time when deploying these vehicles to areas along the coast. Emergency mobile monitoring is often needed on the coast due both to the high concentration of petrochemical facilities and the frequency of natural disasters such as hurricanes. We understand that staff and offices must be protected during disasters, but locating vehicles along the coast will cut down on response time once it is safe to enter an impacted community.

XIV. Conclusion

Again, we appreciate the opportunity to provide these comments. We would welcome the opportunity to discuss our recommendations further. Please contact any of the undersigned organizations, or Adrian Shelley at ashelley@citizen.org, 713-702-8063.

Respectfully,

John Beard Jr.
Founder and Director
Port Arthur Community Action Network

Rev. James Caldwell
Founder and Director
Coalition of Community Organizations

Environmental Defense Fund

David Foster
Texas Director
Clean Water Action

Iris Gonzalez
Coalition Director
Coalition for Environment, Equity & Resilience (CEER)

Luke Metzger
Executive Director
Environment Texas

Annalisa Peace
Executive Director
Greater Edwards Aquifer Alliance

Angelica Razo
State Director
Mi Familia Vota

Cyrus Reed
Interim Director & Conservation Director
Sierra Club Lone Star Chapter

Kristen Schlemmer
Legal Director
Bayou City Waterkeeper

Robin Schneider
Executive Director
Texas Campaign for the Environment

Adrian Shelley
Texas Office Director
Public Citizen

Michaelk Spano and Craig Wright
Co-Founders
Coalition for Responsible Aggregate Mining (CREAM)

Heiko Stang
Indivisible TX Lege

Corey Williams
Interim Executive Director
Air Alliance Houston