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December 15, 2010

The Honorable Glenn Hegar, Chair  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, TX 78711

Dear Senator Hegar:

The Water Environment Association of Texas (WEAT) appreciates the opportunity to comment on the Sunset Advisory Commission's staff report on the Texas Commission on Environmental Quality (TCEQ). WEAT is a non-profit technical and educational organization whose members include scientists, engineers, utility managers, operators, and regulators. Collectively, our members are responsible for the design, operation and maintenance of wastewater collection and treatment and systems all across Texas. We are a state member association of the Water Environment Federation.

We commend the Sunset staff on a well written and comprehensive review of a very complex agency. We would like to provide the following comments on Issues 1, 2, 3 and 4.

***Issue 1: Texas has a continuing need for the Texas Commission on Environmental Quality***

- 1.1 Continue the Texas Commission on Environmental quality for the standard 12 year period.

WEAT concurs with this recommendation.

With respect to the statement in the findings section that "Texas generally enjoys a positive working relationship with the United States Environmental Protection Agency", WEAT would like to offer the observation that while this has generally been true in the past, we believe that the landscape is changing. In addition to disagreements over air permitting, there have been serious differences of opinion on implementation of Whole Effluent Toxicity (WET) limits in wastewater discharge permits.

We believe there is potential for these disagreements to become more frequent and more heated as local governments in Texas struggle with budget limitations. It will be necessary for TCEQ, and its stakeholders, along with the State of Texas in general, to be able to negotiate reasonable implementation strategies with EPA and to prioritize environmental programs.

***Issue 2: TCEQ's public assistance efforts lack coordination and focus***

- 2.1 Charge the Executive Director with providing assistance and education to the public on environmental matters under the agency's jurisdiction.
- 2.2 Focus Office of Public Interest Council's (OPIC's) efforts on representing the public interest in matters before the Commission.
- 2.3 Require the Commission to generally define, by rule, factors OPIC will consider in representing the public interest and establish OPIC's priorities in case involvement.

WEAT concurs with these recommendations. We believe that it is particularly important that the OPIC focus on the true public interest, and not just alignment with a single protestant in contested case hearings. Many times, applications for water quality permits are submitted to benefit the public at large by promoting centralized collection and treatment of raw sewage. Without such collection and treatment facilities, many areas of the State would be subject to the propagation of septic tanks and other decentralized treatment that may have no public benefit, and indeed, no environmental benefit. The OPIC needs to understand and balance the interests of the public at large with individual interests in contested case matters as it seeks to serve the public interest.

***Issue 3: TCEQ's approach to compliance history fails to accurately measure entities' performance, negating its use as an effective regulatory tool.***

- 3.1 Remove the uniform standard from statute and require the Commission to develop a compliance history method to be applied consistently.
- 3.2 Remove the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information.
- 3.3 Expand the statutory components to allow TCEQ to consider other factors in evaluating compliance history.
- 3.4 Direct TCEQ to revise its rules on compliance history

WEAT supports the above recommendations. We would particularly like to note one continuing issue that we hope will be addressed in rulemaking. Currently, TCEQ rules allow for penalty enhancement using the compliance history classification. In some cases, this amounts to "double

counting” violations in that the same violations for which a penalty is being assessed are the same ones that are calculated in the compliance classification for purposes of enhancing the penalties. WEAT also supports eliminating self-reported violations from the classification scheme until, and unless, the self-reported violations have been cited in an enforcement action.

WEAT would submit that, when considering changes to the compliance history protocol, including other enforcement tools, TCEQ should develop policies for political subdivisions, which are not for profit, separate from for profit enterprises. There needs to be a better mechanism to address compliance history and enforcement that addresses the reality that many respondents are political subdivisions with limited revenue to maintain compliance and pay fines. Corrective Action Orders, and other no penalty enforcement tools should be developed, as recommended, to address the differences in respondents.

***Issue 4: TCEQ’s enforcement process lacks public visibility and statutory authority***

- 4.1 Require the Commission to structure its general enforcement policy in rule and publicly adopt its resulting enforcement policies.

WEAT generally concurs with this recommendation. However, we believe that the TCEQ should allow mechanisms for flexibility in application of the policy for extenuating circumstances. As noted in the staff report, it may be more appropriate for some aspects of the process, like the penalty methodology, to be in guidance documents that are publicly available and easily revised.

- 4.2 Increase TCEQ’s administrative penalty caps.

WEAT understands the logic for this recommendation but disagrees that an increase in penalty cap is necessary for publicly owned wastewater treatment plants in the water quality category. As noted in Recommendation 4.4, the limited resources of local governments are best used in correcting the problems rather than paying fines. We believe that it is appropriate to leave the cap for water quality violations for political subdivisions at \$10,000, and likely more appropriate to lower it to \$5,000. We note that the same local government will only be subject to a \$5,000 cap for violations associated with their public water system.

- 4.3 Authorize TCEQ to assess administrative penalties for dam safety violations.

WEAT takes no position on this recommendation, but does submit that, if penalties are to be assessed, the differences in respondents, as discussed herein, should be considered in formal enforcement proceedings.

- 4.4 Authorize TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.

WEAT supports a process which would allow local government to direct dollars that might go for penalties to correcting the problem which caused the violation rather than putting the funds into general revenue. However, we have concerns about using the SEP process to do this. We believe that the SEP process was designed to allow respondents to direct penalty dollars to projects that are above and beyond compliance.

We would point out that Section 7.034 of the Texas Water Code currently allows TCEQ to defer payment of all or part of an administrative penalty for public utilities on the condition that the utility complies with all provisions of a corrective action in a commission order to address the violation. It is our understanding that TCEQ has rarely implemented this portion of current statute due to the difficulty with the requirement for the commission to assess the financial ability of the utility to pay. This is in fact the same requirement that the staff report proposes to be in the new SEP policy and would likely cause the same difficulty for TCEQ. WEAT's suggestion is that rather than creating a new avenue for public utilities to handle penalty assessments, that the current statute be modified so that TCEQ is able to implement it fully.

Thank you for the opportunity to comment. If you have any questions or need any additional information, please feel free to contact me at [carol@weat.org](mailto:carol@weat.org) or 512-924-2102.

Sincerely,

A handwritten signature in cursive script that reads "Carol Batterton".

Carol Batterton  
Executive Director

cc: Chloe Lieberknecht, Sunset Advisory Commission