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November 30, 2010

Senator Glenn Hegar, Jr.
Chair
Texas Sunset Commission
Robert E. Johnson Building
P.O. Box 13066
Austin, TX 78701

Representative Dennis Bonnen
Vice Chair
Texas Sunset Commission
Robert E. Johnson Building
P.O. Box 13066
Austin, TX 78701

Dear Chairman Hegar and Vice Chairman Bonnen:

For more than 30 years, the Texas Sunset Advisory Commission (Sunset Commission) has provided critical oversight of the government agencies that keep Texas the greatest state in the nation, balancing the need for important government services with the understanding that freedom comes when government does its core duties well and minimizes its interference in people's lives beyond its authorized responsibilities.

With the exponential growth in development of the Barnett Shale's resources, the Sunset Commission's review of both the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas (RRC) could not have come at a better time. With both agencies encountering challenges dealing with the increased exploration and drilling activity throughout Texas, a review of both entities together is important. Oversight and regulation of oil and gas development within the state has traditionally been divided among several different state agencies.

Increasingly, however, modern development has shown that a more streamlined process would appear to be warranted. Many of my constituents, as well as my own office, have found deciphering which agency to approach for any given aspect of natural gas drilling oversight to be a Sisyphean task. Passing the buck, at times, appeared to be the norm at both the TCEQ and the RRC. Should a resident have concerns over whether hydraulic fracturing has tainted his private well, where should he turn? Both agencies would seem to have some role in protecting the integrity of well and drinking water, yet each points the finger to the other, and residents are left wondering whether they can trust the water coming from their taps.

Trust has become a recurring theme surrounding the interaction between the state agencies, the companies involved in exploration and drilling in the Barnett Shale region, and the public. The

issue of trust has been paramount since the spring of 2010, when the *Texas Observer* reported that an internal audit of TCEQ, begun after a whistleblower complaint, showed TCEQ briefed Ft. Worth officials with inaccurate test results of air quality monitoring in the region. The audit found, after learning of the inaccurate figures, TCEQ updated its testing results but failed to update the local officials it had previously briefed.

I myself had been briefed by TCEQ on the test quality results in Ft. Worth. I specifically asked TCEQ whether there were any red flags present in the results. I was told unequivocally there were not. This response does not appear to square with the audit results showing TCEQ did have concerns over the equipment used to test certain areas in Ft. Worth – concerns significant enough to warrant retesting with newer equipment. As legislators, you know as well as I that we must have 100 percent confidence and trust in the information given to us by state and federal agencies. I will not stand for half-truths and inaccurate reporting to shield unflattering results and the people of Texas will not stand for it either. The question remains, do we have that confidence in the information given out by TCEQ.

I spoke with officials at TCEQ about this incident shortly after the audit was released. While I believe, after many discussions with the commissioners and top officials at the agency, that no malice or ill-intentions were present when the decisions were made to proceed the way they did with these updated air quality test results, the perception that TCEQ had in any way attempted to distort or conceal air monitoring results has hurt its credibility immensely. Indeed, repeatedly at town halls and in private meetings with my constituents, the overwhelming recurring question is ‘who can we trust?’ The state agencies monitoring air and water quality affected by the increased activity in the Barnett Shale must regain 100 percent of the public’s trust. They are far from attaining that goal. I remain convinced, however, that it is the state, not the federal government, which is in the best position to protect the health and economic interests of the people of Texas. To that end, I hope the reports published by the Sunset Commission, as well as the subsequent public hearings and comments, will assist the Texas Legislature to make the necessary changes to restore full public confidence in the agencies whose primary job must be to protect the people they serve.

TCEQ has garnered a perception throughout the state that its actions are slated toward protecting industry rather than the citizens. TCEQ must do a better job showing that it is an impartial regulator, and not simply an industry friend. One way the Texas Legislature can assist in this perception would be a thorough review of TCEQ’s fee structure. At a time when state and federal budgets are straining at the seams, and hard choices inevitably must be made regarding budget cuts, I urge the legislature to resist aggressive cuts to the agency charged with protecting citizens’ health and safety. An overhaul of the fee structure employed when industry bad actors abuse their position would go far toward both boosting TCEQ’s standing as an independent regulator and assist in preventing budget cuts that may hamper TCEQ’s oversight role of the expanding presence of the oil and gas industry. The same concern persists with the RRC, another regulator poised with protecting public health. Underfunding either agency could have

dire effects on both Texas' environment and the health of people living mere feet from some drilling operations.

Indeed, TCEQ has made marked improvements in its outreach to the residents in North Texas. It has made real-time air quality monitoring data from several permanent on-site monitors, including monitors in the DISH and Flower Mound communities, available for review on its website, allowing citizens and experts to see the actual readings being taken in their communities. Further, TCEQ officials have made themselves available around the clock for officials in DISH and other localities. Should residents notice substantial changes in odor in the air, or experience sudden changes in their own health, such as nosebleeds or extreme headaches, TCEQ officials have come out within hours of such notifications, taking air samples and making in-person assessments of the situation.

More outreach must be done within the communities where hydraulic fracturing has taken off at exponential rates. With drilling moving from the mostly rural areas a decade or more ago to the suburban and even urban areas of today, local residents must be given the opportunity, on a regular basis, to meet with and talk to the officials who are charged with protecting their health. Regularly scheduled town hall meetings and forums, by both elected officials and regulators, would enhance transparency and provide the public with information that will ease their concerns over new drilling rules and regulations. Informational public meetings, including explanations of permitting and monitoring procedures, will also alleviate much of the concern which follows a simple lack of information surrounding the activity being performed, in many cases, in residents' own yards.

TCEQ's use of third-party quality assurance testing should also be made available to the public in a user-friendly manner. Beyond posting the raw data test results – which remains critical for open and transparent government – residents would benefit from clear, plain-language analyses of the data posted on its website. When test results show higher-than-normal readings, explanations of why this could occur, the dangers posed, and what could be done to prevent higher readings in the future would be beneficial. What is the risk? TCEQ must spell out every side of the data it presents, and explain whether further agency or industry action is necessary. TCEQ must not simply explain away abnormalities in its air quality readings, but must give straightforward analyses of what is happening, and what these readings could mean for human health.

The interconnectedness and often overlapping roles of both the TCEQ and the RRC surrounding regulating and overseeing the exploration and development of natural gas production has led to much frustration within the communities of North Texas. While I agree with the Sunset Commission's Staff Report recommending the RRC change its current anachronistic name to the more accurate "Texas Oil and Gas Commission," I am gravely concerned over the Commission's recommendation that the agency's makeup be altered from its current three-member elected board to a five-member appointed board. In order to achieve the highest accountability possible in the agencies charged with protecting the health and welfare of the

citizens, it is imperative the RRC remain an elected board. As we have seen at the federal level, executive appointees are granted insulation between their decisions and public opinion. While this can allow for more efficient decision-making, it can also lead to officials making decisions without consideration of public sentiment and concerns. Elected officials remain, inherently, more connected to the people they represent, and maintaining the elected status of RRC's commissioners would ensure residents' voices continue to be heard on important decisions being made in their backyards. Good government is accountable government.

Further, my experience with both the TCEQ and the RRC leads me to believe the Sunset Commission's assessment that both agencies work well together in deciding which regulatory body is responsible for specific issues in the community is misguided. Too often, both agencies employed a 'pass-the-buck' mentality, pointing a finger toward the other, and referring constituents to another agency to resolve individual issues. For instance, residents with concerns that their well water has been contaminated by errant hydraulic fracturing have been passed back and forth between the TCEQ and the RRC, both claiming that different aspects of hydraulic fracturing could be the cause of such problems, and then subsequently claiming that those aspects are regulated by the other agency.

My own office has been frustrated, despite both agencies' notable outreach efforts to keep elected officials informed of regulatory activities, with officials referring cases back and forth between the agencies, taking days if not weeks to determine which office has proper jurisdiction over any given constituent issue. If an elected official's office experiences these kinds of frustrations, the average citizen is only completely discouraged when confronted with the same daunting task of determining which agency to even approach with a concern.

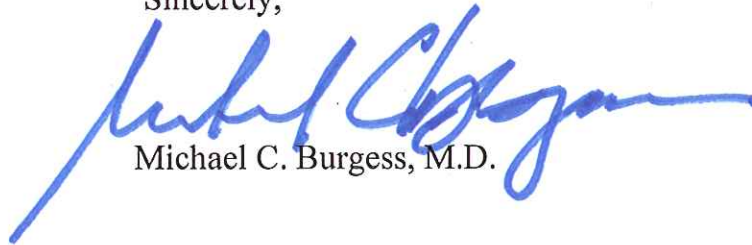
My recommendation to alleviate this frustration would be to establish an intermediary, ombudsman office between the two agencies. A single, available representative to assist citizens in traversing the complicated division of responsibilities between the two agencies would give residents a clear starting point to address their concerns. This ombudsman would have a comprehensive understanding of the role of each agency, and could immediately direct citizens to the proper office in either agency to assist with their specific cases. Too often residents are referred to various offices, leaving multiple messages, only to never receive a response, as agency staff dismisses the concern knowing their individual office is not responsible for the issue being raised in the message. A single, accountable ombudsman office will give Texans the confidence in knowing their government is readily responsive to their questions and concerns.

With the increased activity of oil and gas drilling in urban, residential areas, the role of the TCEQ and the RRC has never been more critical. Ensuring the success of both of these agencies must be the priority of every elected official in this state. While I strongly believe both agencies have made great strides in improving public outreach – including TCEQ's Barnett Shale website with real-time air quality monitoring results – much more must be done to regain the public trust lost in the spring of 2010. Texans must have 100 percent confidence in the

agencies tasked with protecting their health and wellbeing. Any changes to the structure of these agencies must be made with that single most important concern in mind.

Thank you for the opportunity to address my concerns with these two agencies with you. The Sunset Commission's role in improving the status of Texas' state agencies cannot be understated. I look forward to working with both of you, as well as the entire state legislature, to ensure the continued success of every agency serving the people of this great state.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael C. Burgess", written in a cursive style.

Michael C. Burgess, M.D.