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The Honorable Craig Estes, Chair
Members of the Senate Committee on Natural Resources

February 1, 2018

Re: Testimony of Adrian Shelley, Director, Public Citizen's Texas Office and Dr. Stephanie Thomas, Houston area Researcher and Community Organizer, Public Citizen's Texas Office to Senate Committee on Natural Resources

Public Citizen appreciates the opportunity to provide this testimony for the February 1, 2018 hearing of the Senate Committee on Natural Resources on the interim charge related to Regulatory Barriers. We would welcome the opportunity to discuss our testimony further.

Expedited Permitting

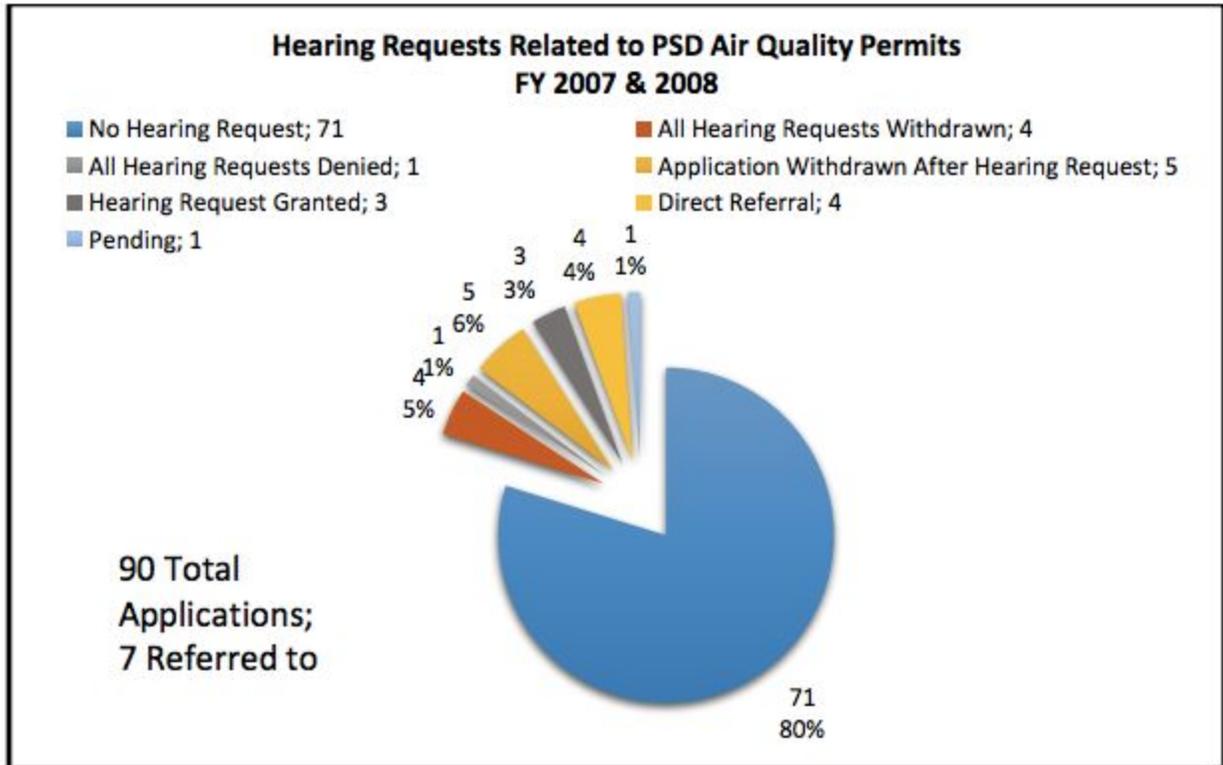
The perceived need for expedited permitting in Texas is a symptom of a larger problem: inadequate funding for our regulatory agencies, including the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission. These agencies are currently unable to effectively regulate the industries they oversee. The backlog of permit applications is the result of inadequately staffing the TCEQ.

Rather than trying to speed up the permitting process, the legislature should increase funding to the TCEQ. Permit fees could be increased to provide additional revenue to fund the Commission. This would allow for a more thorough review of each individual permit application, which would lead to better permits.

Speeding up the process further impedes public participation in the permitting process which is already difficult, due to the quick timelines involved, the technical nature of permit applications, and the need for expert assistance (including, potentially, engineers and attorneys). Most citizens are unable to meaningfully participate in this process, as we have seen in our work in communities across Texas over the years.

Furthermore, industrial facilities are often located in low-income communities of color—environmental justice communities—that lack the resources to protect themselves and their community by participating in the permitting process. The result is an inequitable process that often prioritizes economic interest over the wellbeing of people and communities. Great care should be taken to engage communities throughout the permitting process. Expedited permit processes frustrate this aim.

It is also important to note that the vast majority of permit applications are not part of certain public processes such as Contested Case Hearings. This analysis from Fiscal Year 2007 & 2008 shows that such hearings are rare:



Public Citizen believes that a robust permitting process, and adequate opportunities for public participation, lead to better permits and cleaner, safer operation of permitted entities, and more buy in from surrounding communities to the industry’s presence. We encourage the legislature to adequately fund the TCEQ to conduct thorough permit reviews, rather than seeking additional means of expediting the permitting process.

Exceptional Events

The purpose of the Clean Air Act is, “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population[.]” *42 U.S.C. § 7401(b)(1) (2017)*. Essential to the operation of the Clean Air Act—and the protection of public health—is proper designation of areas as in attainment or nonattainment of National Ambient Air Quality Standards (NAAQS).

The Clean Air Act and its enabling regulations permit the use of “exceptional events” to remove certain anomalous data points from the data used to determine NAAQS attainment. However, we believe that systematically claiming exceptional events in an attempt to present data that shows an area in attainment of a NAAQS frustrates the intent of the Clean Air Act and was not intended by its authors.

The Texas Commission on Environmental Quality has done precisely this, for example in 2013 when it presented data from the Houston-area for 2010-2012 for compliance with the 2012 fine particulate matter



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(PM2.5) NAAQS. Indeed, the TCEQ explicitly stated in presentations to the Houston-Galveston Area Council's Regional Air Quality Planning Advisory Committee (on which our director Adrian Shelley served) that it was claiming exceptional events in an effort to avoid a nonattainment designation for Houston area.

We have two recommendations about this practice:

1. TCEQ should not use exceptional events to artificially place an area in attainment of a NAAQS.

The practice described above should be ended. People have to breathe air pollution regardless of its source. Allowing an area that is in practice not attaining a NAAQS to avoid a nonattainment designation subjects the people living in that area to unhealthy levels of air pollution. This will result in poorer health and increased mortality in these areas. This frustrates the intent of the Clean Air Act and, in our analysis, is not an acceptable use of exceptional events.

For this reason, we recommend that the state legislature do not allocate additional funding to the TCEQ for the purpose of identifying and claiming more exceptional events. Funding for air quality compliance should be used on programs that reduce air pollution and accurately assess whether an area is meeting a National Ambient Air Quality Standard.

2. New EPA rules clarify that TCEQ will not be able to claim agricultural fires as exceptional events in three sequential years in an Air Quality Control Region.

The definition of "exceptional event" in the Clean Air Act includes a requirement that the event, "is an event caused by human activity that is unlikely to recur at a particular location or a natural event." *See* 42 U.S.C. §7619(b)(1). This statutory language is embodied in regulation at 40 C.F.R. §50(c)(3)(iv)(E).

The TCEQ regularly flags as exceptional events particulate matter (PM) events caused by agricultural fires in Mexico and Central America. These fires do not meet the Clean Air Act's definition of "exceptional event." They are set every year by agricultural workers as a land management strategy. The associated PM pollution events are caused by human activity (setting fires) and recur annually at a predictable time (April to June) and place (agricultural lands in eastern Mexico and Central America). For this reason, these events cannot be claimed by TCEQ as exceptional events.

In a recent rulemaking on exceptional events, the clarified the meaning of 42 U.S.C. §7619(b)(1). EPA stated that:

[I]f there have been two prior events of a similar type within a 3-year period in an [Air Quality Control Region], that would generally indicate the third event, for which the demonstration is being prepared (or would be prepared), does not satisfy the "human activity that is unlikely to recur at a particular location" criterion and, thus, would not qualify as an exceptional event.

81 Fed. Reg. 68216, 68232 (2016).



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In this same rulemaking, EPA also clarified that “prescribed fires” are indeed “events caused by human activity”:

We proposed regulatory language stating that prescribed fires are events caused by human activity and, therefore, to be considered an exceptional event, every prescribed fire demonstration must address the “human activity unlikely to recur at a particular location” criterion.

81 Fed. Reg. 68216, 68250 (2016).

In its designation recommendation of the Houston area under the 2012 fine particulate matter (PM_{2.5}) standard, the Texas Commission on Environmental Quality excluded exceptional events caused by agricultural fires in Mexico and Central America in 2010 and 2011.¹ Under current EPA rules, TCEQ would not have been allowed to claim an exceptional event related to agricultural fires in 2012. (In fact, TCEQ did not claim such an event, claiming only events related to Saharan dust.)

TCEQ should endeavor to follow 42 U.S.C. §7619(b)(1) and 40 C.F.R. §50(c)(3)(iv)(E), as clarified in EPA’s rulemaking announced at 81 Fed. Reg. 68216, 68250 (2016). The commission must not claim exceptional events related to wildfires in each of three years in a single Air Quality Control Region.

Again, we appreciate the opportunity to provide this testimony. If you wish to discuss these issue further, we can be reached by phone at 512-477-1515 and by email at ashelley@citizen.org and sthomas@citizen.org.

Respectfully,

Adrian Shelley

Director, Public Citizen’s Texas Office

¹ See “Houston 2010 PM_{2.5} Exceptional Events Demonstration” Texas Commission on Environmental Quality (22 May 2013) *available at* <https://www.tceq.texas.gov/assets/public/compliance/monops/air/pm25-event-2010-houston.pdf>; “Houston 2011 PM_{2.5} Exceptional Event Demonstration” Texas Commission on Environmental Quality (30 August 2013) *available at* <https://www.tceq.texas.gov/assets/public/compliance/monops/air/pm25-event-2011-houston.pdf>; “Houston 2012 PM_{2.5} Exceptional Events Demonstration” Texas Commission on Environmental Quality (30 August 2013) *available at* <https://www.tceq.texas.gov/assets/public/compliance/monops/air/pm25-event-2012-houston.pdf>.