

# SUNSET ADVISORY COMMISSION

## FINAL REPORT

*Texas Commission on  
Environmental Quality*

*On-site Wastewater  
Treatment Research  
Council*

July 2011



# *Sunset Advisory Commission*



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In 1977, the Texas Legislature created the Sunset Advisory Commission to identify and eliminate waste, duplication, and inefficiency in government agencies. The 12-member Commission is a legislative body that reviews the policies and programs of more than 130 government agencies every 12 years. The Commission questions the need for each agency, looks for potential duplication of other public services or programs, and considers new and innovative changes to improve each agency’s operations and activities. The Commission seeks public input through hearings on every agency under Sunset review and recommends actions on each agency to the full Legislature. In most cases, agencies under Sunset review are automatically abolished unless legislation is enacted to continue them.

*Texas Commission on  
Environmental Quality*

*On-site Wastewater Treatment  
Research Council*

SUNSET FINAL REPORT

JULY 2011

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This document is intended to compile all recommendations and action taken by the Sunset Advisory Commission for an agency under Sunset review. The following explains how the document is expanded and reissued to include responses from agency staff and the public.

- *Sunset Staff Report, November 2010* – Contains all Sunset staff recommendations on an agency, including both statutory and management changes, developed after extensive evaluation of the agency.
  - *Hearing Material, December 2010* – Summarizes all responses from agency staff and the public to Sunset staff recommendations, as well as new policy issues raised for consideration by the Sunset Commission at its public hearing.
  - *Decision Material, January 2011* – Includes additional responses, testimony, or new policy issues raised during and after the public hearing for consideration by the Sunset Commission at its decision meeting.
  - *Commission Decisions, January 2011* – Contains the decisions of the Sunset Commission on staff recommendations and new policy issues. Statutory changes adopted by the Commission are presented to the Legislature in the agency's Sunset bill.
  - *Final Report, July 2011* – Summarizes action taken by the Legislature on Sunset Commission recommendations and new provisions added by the Legislature to the agency's Sunset bill.
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# Table of Contents

---

	PAGE
<b>SUMMARY</b>	
.....	1
<b>Staff Recommendations (page 3)</b>	
<b>Summary of Legislative Action (page 10a)</b>	
<b>TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>	
<b>AGENCY AT A GLANCE</b>	
.....	11
<b>ISSUES/RECOMMENDATIONS</b>	
1 Texas Has a Continuing Need for the Texas Commission on Environmental Quality .....	19
<b>Commission Decision (page 28c)</b>	
<b>Legislative Action (page 28c)</b>	
2 TCEQ’s Public Assistance Efforts Lack Coordination and Focus.....	29
<b>Commission Decision (page 36e)</b>	
<b>Legislative Action (page 36e)</b>	
3 TCEQ’s Approach to Compliance History Fails to Accurately Measure Entities’ Performance, Negating Its Use as an Effective Regulatory Tool .....	37
<b>Commission Decision (page 42f)</b>	
<b>Legislative Action (page 42f)</b>	
4 TCEQ’s Enforcement Process Lacks Public Visibility and Statutory Authority.....	43
<b>Commission Decision (page 52d)</b>	
<b>Legislative Action (page 52d)</b>	
5 TCEQ Does Not Have the Tools Necessary to Effectively Protect Surface Water Availability During Drought or Emergency Conditions.....	53
<b>Commission Decision (page 58c)</b>	
<b>Legislative Action (page 58c)</b>	

		<b>PAGE</b>
6	Gaps in Petroleum Storage Tank Regulation and Remediation Fee Expiration Threaten the State’s Ability to Clean Up Contaminated Sites .....	59
	<b>Commission Decision (page 64d)</b>	
	<b>Legislative Action (page 64d)</b>	
7	TCEQ Lacks Guidance on How to Fund the Texas Low-Level Radioactive Waste Disposal Compact Commission .....	65
	<b>Commission Decision (page 70b)</b>	
	<b>Legislative Action (page 70b)</b>	
8	The Statutory Cap on Emissions Limits TCEQ’s Ability to Adequately Fund the Title V Air Permit Program.....	71
	<b>Commission Decision (page 74b)</b>	
	<b>Legislative Action (page 74b)</b>	

**WATER AND WASTEWATER UTILITY REGULATION TRANSFER  
SUPPLEMENT TO THE SUNSET STAFF REPORT  
ON THE PUBLIC UTILITY COMMISSION**

	The State Could Benefit From Combining Regulatory Functions Related to Gas and Water Utilities in the Public Utility Commission.....	75
	<b>Commission Decision (page 86j)</b>	
	<b>Legislative Action (page 86j)</b>	

**ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL**

**COUNCIL AT A GLANCE**

	.....	87
--	-------	----

**ISSUE/RECOMMENDATIONS**

1	Texas Does Not Need a Separate, Stand-Alone Council to Fund On-site Sewage Research.....	89
	<b>Commission Decision (page 92c)</b>	
	<b>Legislative Action (page 92d)</b>	

**NEW ISSUES**

Texas Commission on Environmental Quality .....	93
<b>Commission Decision (page 120)</b>	
<b>Legislative Action (page 120)</b>	
Supplement to the PUC Report .....	123
On-site Wastewater Treatment Research Council .....	125

**PROVISIONS ADDED BY LEGISLATURE**

.....	127
-------	-----

**APPENDICES**

Appendix A — TCEQ Air Permitting and the EPA .....	129
Appendix B — TCEQ Areas and Regions .....	131
Appendix C — Major TCEQ Permits, Registrations, and Authorizations .....	133
Appendix D — Federally Delegated or Approved Environmental Program Reports .....	137
Appendix E — Compliance History Formula .....	141
Appendix F — Staff Review Activities .....	143





# *Summary*



# Summary

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## *Texas Commission on Environmental Quality*

### *On-site Wastewater Treatment Research Council*

The Texas Commission on Environmental Quality (TCEQ) is no stranger to controversy. As the state agency that oversees Texas' environment and ensures compliance with state and federal regulations, TCEQ has a large, complex, and difficult job. The challenges and criticisms the agency must face are an inevitable part of its job balancing the often competing interests of protecting the environment without unduly affecting the State's economy. These inherent challenges make reviewing TCEQ's performance a formidable task, especially considering that at the time the Sunset review of the agency occurred, TCEQ encountered specific trials in implementing its many programs.

TCEQ must implement state environmental law while satisfying federal requirements in all major program areas, including air, water, and waste. Concurrent with the Sunset staff review, TCEQ has been embroiled in several controversies that collide with the Environmental Protection Agency's (EPA) requirements for approval of federal programs, most noticeably TCEQ's air permitting program, including its flexible permit program. EPA has taken issue with some aspects of the program, as described in Appendix A, *TCEQ Air Permitting and the EPA*. EPA and TCEQ have been working together to come to agreement on how to proceed with EPA's objections to Texas' program. Separately, lawsuits have been filed challenging EPA's actions. Those negotiations and lawsuits are ongoing.

As this row plays out, TCEQ is facing separate tests in meeting federal requirements as EPA begins permitting greenhouse gases and revises its 8-hour ozone standard within the next year. The State has asserted that it will not implement EPA's proposed greenhouse gas permitting requirements by January 2, 2011. This decision leaves open how Texas' permitting program will work after the EPA deadline. Although these matters relating to the air permitting process create real problems and uncertainty for TCEQ and all stakeholder groups, they are ultimately high-level political and policy issues that do not easily lend themselves to objective staff-level analysis and solution. Of further complication, solutions to these issues would be moving targets that are almost impossible to hit through a review aimed at evaluating TCEQ's operations. Sunset staff simply could not insert itself into such complex negotiations and sensitive legal disputes related to TCEQ's air permitting program.

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*TCEQ has been embroiled in several controversies that complicate the assessment of its performance.*

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The Sunset review of TCEQ also occurred at the same time that the State Auditor's Office (SAO) was performing an in-depth audit of TCEQ's Texas Emissions Reduction Plan (TERP) grant program. More than one-third of TCEQ's entire budget is pass-through money for the TERP program, making its effectiveness vital to ensuring that it serves the agency's environmental mission and that state funds are well spent. Because of SAO's extensive work in this area, and to leverage legislative oversight resources, Sunset staff opted to scope out a detailed review of the TERP program from its broader review of TCEQ. As SAO concludes its work, the Sunset process could be a way to address any system or statutory problems identified with the TERP program.

Another undercurrent of the Sunset review of TCEQ is the changing landscape of the industries that affect the environment. This is perhaps best exemplified by technological advances that have led to increased natural gas drilling activity in the urban areas of North Central Texas in developing the Barnett Shale. Other formations are being similarly developed in South and East Texas. This increased activity has brought intense scrutiny to the jurisdictional split of environmental regulation between TCEQ, which oversees air emissions, and the Railroad Commission of Texas (RRC), which is responsible for all other environmental regulation of oil and gas drilling, and which is also under Sunset review.

The timeliness of these two reviews enabled an assessment of any potential gaps in the regulation of oil and gas drilling. Ultimately, Sunset staff determined that while the split can seem confusing and ungainly from the outside, the agencies have processes in place to make the situation work, and have applied lessons learned from the Barnett Shale to improve coordination as they move forward. Sunset staff determined that barring a wholesale merger of the economic regulation of the oil and gas industry with the broader environmental regulations at TCEQ, sufficient reason exists to retain the current split.

TCEQ's activities in the Barnett Shale also highlighted criticisms of its interaction and responsiveness to public concerns about its regulatory responsibilities. After its initial flat-footed response, TCEQ has made an effort to make its regulatory activities related to air emissions in that area accessible to the public, including creating an interactive air monitoring map on its website. Despite this seeming lesson learned, these criticisms did bring to light deficiencies in TCEQ's focus on public assistance, as discussed in this report.

In staff's analysis, the Legislature has largely given TCEQ the spectrum of statutory tools needed to successfully regulate the environment, although this report identifies needed changes in several areas. Criticisms of TCEQ's approach to regulation, including permitting and enforcement, often lie with the Commission's implementation of these tools, since in many cases the Commission has ample statutory leeway. While debates stemming from such criticism are important and will continue as the Sunset process proceeds, the assessment of TCEQ's use of these tools and the impact that TCEQ has on environmental quality is not only technically difficult, but also a hotly debated subject of studies and rhetoric. Ultimately, Sunset staff did not delve into the overarching issues relating to environmental *policy* of the Legislature, EPA, or the Governor-appointed Commission.

As a result, the recommendations in this report focus on the agency's operational functions. The goal is to put structures in place to ensure TCEQ has a more robust and focused public assistance function and can effectively identify and take action against regulated entities as appropriate to enforce State law and agency regulations. TCEQ also needs to be better able to address water quantity issues as they become increasingly critical to the State, and it needs proper funding mechanisms to meet its regulatory responsibilities and be compliant with federal law.

As guided by the Sunset Act, staff also analyzed TCEQ functions that may duplicate other state agency functions. Continuing work started in the review of the Public Utility Commission (PUC), staff looked at the placement of water and wastewater utility regulation, and found that while such utility regulation currently works at TCEQ, this kind of economic regulation is simply not within its wheelhouse. Recommendations to realign all utility regulation within PUC are included in the Supplement to the Sunset Staff Report on PUC, included in this report.

The report also includes recommendations regarding the On-site Wastewater Treatment Research Council, which was subject to a separate Sunset review. This Council, which receives administrative support from TCEQ, issues research grants for improving onsite wastewater treatment processes. While staff found that Texas can still benefit from the grants the Council gives, it did not find a continuing need for an independent structure to do so. The material on the following pages summarizes the recommendations from the TCEQ and On-site Wastewater Treatment Council reviews.

## Issues and Recommendations

### *Texas Commission on Environmental Quality*

#### Issue 1

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##### ***Texas Has a Continuing Need for the Texas Commission on Environmental Quality.***

The State needs regulation to protect Texas' environment. Texas' citizens and the economy benefit from having a state agency working to protect air and water quality, manage water quantity, ensure proper disposal of waste, and clean up contaminated sites. Moreover, although the federal government requires states to regulate the environment according to federal standards, Texas' state-specific approach to regulation – through TCEQ – allows it to tailor its efforts to the State's specific circumstances. The Sunset review offered the opportunity to examine whether structural changes could help focus TCEQ's work. One such change would transfer making groundwater protection recommendations regarding oil and gas drilling – a Railroad Commission responsibility for which TCEQ has dubious statutory authority – to its proper home at the Railroad Commission.

##### **Key Recommendations**

- Continue the Texas Commission on Environmental Quality for 12 years.
- Transfer the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Railroad Commission.

## Issue 2

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### ***TCEQ's Public Assistance Efforts Lack Coordination and Focus.***

TCEQ's public assistance functions occur among several different agency programs with overlapping duties and without specific statutory direction, contributing to a lack of focus and prioritization. In addition, having the Office of Public Interest Counsel (OPIC) involved in providing assistance to individual members of the public dilutes its primary duty to represent the public interest in proceedings before the Commission and can put it in potentially conflicting positions. OPIC also has little guidance in determining what the public interest is in deciding whether to participate in a contested or rulemaking matter.

The recommendations in this issue seek to focus and strengthen both the agency's public assistance function and OPIC's duties. Creating a centralized structure for public assistance would allow TCEQ to be more responsive to the public's questions and proactively identify environmental concerns. Focusing OPIC's work on representing the public interest in Commission proceedings, including contested permitting and enforcement cases and rulemaking matters, as well as requiring additional guidance on when to participate in a matter, would allow OPIC to more effectively use its resources to provide the public interest's perspective to the Commission when making decisions.

#### **Key Recommendations**

- Charge the Executive Director with providing assistance and education to the public on environmental matters under the agency's jurisdiction.
- Focus OPIC's efforts on representing the public interest in matters before the Commission.
- 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.

## Issue 3

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### ***TCEQ's Approach to Compliance History Fails to Accurately Measure Entities' Performance, Negating Its Use as an Effective Regulatory Tool.***

As part of the agency's last Sunset review, the Legislature created a structure for TCEQ to measure regulated entities' compliance history, to use in tailoring permitting and enforcement decisions and determining eligibility for voluntary incentive programs. As part of these provisions, statute requires TCEQ to develop a uniform standard to evaluate compliance history. Nine years later, the agency has implemented a system in which it uses an identical, objective formula in classifying all entities' compliance history performance.

However, this rigid, one-size-fits-all approach has resulted in a system that does not accurately measure performance, stripping compliance history classifications of meaning. Without a good, working standard that can truly identify good and bad actors, TCEQ cannot use compliance history to effectively target regulation. The recommendations in this issue attempt to remove some of the statutory roadblocks that have negated the practical use of this important regulatory tool, and allow TCEQ to revamp its approach to compliance history.

## Key Recommendations

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

## Issue 4

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### ***TCEQ's Enforcement Process Lacks Public Visibility and Statutory Authority.***

TCEQ takes enforcement actions against those who violate federal or state environmental laws and rules to sanction violators and deter future noncompliance. However, many of TCEQ's enforcement policies, including how it assesses penalties, are unclear, limiting the enforcement program's transparency, a key characteristic of an enforcement program that affects such diverse and important violations as those under TCEQ's jurisdiction. Moreover, statutory limits on the agency's administrative penalty amounts, silence regarding sanctions for dam safety violations, and restrictions on the use of Supplemental Environmental Projects prevent TCEQ from taking effective enforcement action, and appropriately sanctioning the most severe environmental violations.

## Key Recommendations

- Require the Commission to structure its general enforcement policy in rule and publically adopt its resulting enforcement policies.
- Increase TCEQ's administrative penalty caps.
- Authorize TCEQ to assess administrative penalties for dam safety violations.
- Authorize TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.

## Issue 5

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### ***TCEQ Does Not Have the Tools Necessary to Effectively Protect Surface Water Availability During Drought or Emergency Conditions.***

Texas' population is projected to more than double by 2060 and water demand is expected to increase by 27 percent – making TCEQ's responsibility to manage state surface water quantity a key duty in coming years. TCEQ issues and enforces water rights permits, which are generally allocated by the "first in time, first in right" doctrine, creating senior and junior rights. Although statute is clear about TCEQ's authority to manage water rights, the law is less clear about circumstances in which TCEQ can actively curtail the right to divert state water to protect senior rights and ensure adequate water supplies are available during water shortages and emergencies.

In addition, while statute provides TCEQ with other water management tools, such as requiring drought contingency plans and water use data recordkeeping by water rights holders, the law stops short of allowing TCEQ to meaningfully use these tools as intermediate steps before requiring more drastic and disruptive restrictions that come with severe droughts or other emergencies. The recommendations in this issue clarify TCEQ's regulatory tools to position it to more effectively manage surface water in severe situations, particularly important as water availability becomes more and more critical to the State.

### **Key Recommendations**

- Clarify the Executive Director's authority to curtail water use in water shortages and times of drought.
- Require water rights holders to maintain monthly water-use information and allow the Commission to access that information upon request.
- Authorize TCEQ to require implementation of drought contingency plans during times of a potential water shortage.
- Require TCEQ to evaluate the need for additional watermaster programs.

## **Issue 6**

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### ***Gaps in Petroleum Storage Tank Regulation and Remediation Fee Expiration Threaten the State's Ability to Clean Up Contaminated Sites.***

Leaking underground petroleum storage tanks (PSTs) are the biggest source of groundwater contamination in the state. TCEQ regulates and remediates PSTs, holding owners and operators responsible for proper installation and financial assurance, overseeing the cleanup of contaminated sites, and administering the PST remediation trust fund to clean up PST sites in situations in which the owner or operator cannot be found or is unwilling or unable to pay.

Statutory gaps result in TCEQ's inability to hold some parties responsible for groundwater contamination resulting from PSTs, shifting more remediation costs to the State and threatening TCEQ's federally delegated authority over PSTs. Compounding this problem, the fee that funds the State's remediation fund is set to expire in 2011, before TCEQ has completed its work in remediating sites statutorily eligible under the program. Finally, although statute provides a structure for TCEQ to remediate sites in which contamination has already occurred, TCEQ is limited in its ability to effectively act to prevent contamination from PST sites it identifies as non-compliant and potentially harmful.

### **Key Recommendations**

- Require previous tank owners or operators to share responsibility, as appropriate, for contamination from leaking PSTs.
- Prohibit delivery of certain petroleum products to uncertified tanks and provide for administrative penalties.
- Reauthorize the PST remediation fee, change the current fee levels to caps, and authorize the Commission to set fees in rule.



- Expand use of the remediation fee to allow TCEQ to remove non-compliant PSTs that pose a contamination risk.

## Issue 7

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### ***TCEQ Lacks Guidance on How to Fund the Texas Low-Level Radioactive Waste Disposal Compact Commission.***

TCEQ is involved in funding the Low-Level Radioactive Waste Disposal Compact Commission, which is a separate legal entity from the State. The Compact Commission is responsible for establishing the volume of compact waste to be disposed of in the low-level radioactive waste compact facility licensed by TCEQ to be built in Andrews County. Once this disposal facility is operating, as is expected within the next biennium, statute provides that the Compact Commission is funded by a portion of a disposal fee, to be adopted by TCEQ rule.

However, statute does not specify how this funding will flow to the Compact Commission. Since Texas ultimately holds the liability for compact waste brought into the state, the Compact Commission's decisions related to the volume of waste to be accepted into the compact site will be important to the State's long-term environmental and financial health. Given the ambiguity of TCEQ's and the Compact Commission's current funding arrangement and statute, time is ripe for the Legislature to consider how the funding mechanism between the State and the Compact Commission will be structured.

#### **Key Recommendation**

- Clarify the Compact Commission's funding mechanism.

## Issue 8

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### ***The Statutory Cap on Emissions Limits TCEQ's Ability to Adequately Fund the Title V Air Permit Program.***

To cover costs associated with administering the federal Title V air permit program, TCEQ requires facilities that emit air contaminants to pay \$25 per ton of regulated pollutants, up to 4,000 tons of emissions per year. Revenue from this Air Emissions Fee as currently configured in agency rule and statute is no longer adequate to support the Title V air permit program, endangering Texas' status as a federally approved state program. In fiscal year 2010, the fee returned \$30.6 million while program costs totaled \$34.6 million, a \$4 million shortfall. While TCEQ has authority to increase the fee rate above the current, inflation-adjusted \$25 per ton, applying the fee only to emissions below the statutory cap of 4,000 tons per year makes the fee more inequitable than it already is, and limits TCEQ's ability to adjust both the fee and tonnage cap in a way to fairly spread the costs of the program.

#### **Key Recommendation**

- Authorize TCEQ to administratively adjust the annual emissions tonnage cap for the Air Emissions Fee when necessary to adequately fund the Title V Operating Permit program.

# Water and Wastewater Utility Regulation Transfer

## Supplement to the Sunset Staff Report on PUC

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### ***The State Could Benefit From Combining Regulatory Functions Related to Gas and Water Utilities in the Public Utility Commission.***

In the reviews of the Railroad Commission and TCEQ, Sunset staff found that the agencies' respective utility responsibilities have worked within those organizations and have benefitted from these relationships. At the same time, however, Sunset Staff found that significant opportunities could be realized from realigning the regulation of gas utilities and water and wastewater utilities at PUC. Such a realignment would offer benefits from PUC's expertise in utility regulation, a structure for fair and independent decision making, and enhanced opportunities for each agency to focus on its core mission. Additional opportunities exist for improving consumer assistance and funding water and wastewater utility regulations at PUC. The realignment would also address needed transitional provisions to work out details for coordinating interrelated responsibilities between the agencies, including pipeline safety concerns at the Railroad Commission and drinking water and environmental regulatory issues at TCEQ.

### **Key Recommendations**

- Transfer responsibility for regulating water and wastewater rates and services from TCEQ to PUC.
- Eliminate the existing water and wastewater utility application fees and adjust the Water Utility Regulatory Assessment Fee to pay for utility regulation at PUC.
- Require OPUC to represent residential and small commercial interests relating to water and wastewater utilities, contingent on the transfer to PUC.

## ***On-site Wastewater Treatment Research Council***

### **Issue 1**

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#### ***Texas Does Not Need a Separate, Stand-Alone Council to Fund On-site Sewage Research.***

The On-site Wastewater Treatment Research Council is an independent entity, with a separate Sunset date of 2011, that provides grants for on-site sewage research in Texas. The State continues to benefit from this research and the Council has provided a valuable service to Texas in volunteering its time and expertise to guide the grant process.

However, the Council, without a staff of its own, already receives all of its administrative support from TCEQ through interagency contract. TCEQ administers other, similar, grant programs, with structures in place to assume this grant program with appropriate stakeholder input. Given this, the Sunset review of the Council did not find a continuing need to have an independent entity to administer this relatively small grant program.

### **Key Recommendation**

- Abolish the On-site Wastewater Treatment Research Council and transfer authority to award grants for on-site sewage research to the Texas Commission on Environmental Quality.

# Fiscal Implication Summary

## Texas Commission on Environmental Quality

These recommendations will result in a gain to general revenue of about \$560,000 per year and a gain to General Revenue Dedicated Account 153 – Water Resource Management Account – of about \$5.6 million per year. Other recommendations increase fee revenue or transfer funds, but will ultimately result in no net fiscal impact, based on expected appropriations to cover operational costs contemplated in the recommendations. The overall fiscal impact of these recommendation is summarized below.

- **Issue 1** – The recommendation to transfer responsibility for groundwater protection recommendations for oil and gas drilling from TCEQ to RRC would require the transfer of approximately \$765,000 to RRC to cover the costs of making these recommendations and to pay for the digital mapping project. In addition, nine full-time equivalent employees would need to transfer from TCEQ to RRC.
- **Issue 4** – The recommendations regarding TCEQ enforcement tools will likely result in a small revenue gain to the State, but a precise estimate cannot be determined. While the recommendation to increase administrative penalty caps could increase penalties assessed and deposited into general revenue, the amount would depend on specific violations and actual enforcement orders, which fluctuate from year to year and could not be estimated. Similarly, for the recommendation to authorize TCEQ to assess penalties against dam safety violations, the amount of actual penalties cannot be determined, since it depends on the type and severity of violations TCEQ discovers and enforces against in coming years. The recommendation to allow TCEQ to approve Supplemental Environmental Projects for local governments to correct or remediate environmental harm may result in fewer administrative penalties deposited into general revenue, but this reduction would be minimal.
- **Issue 6** – Overall, these recommendations pertaining to Petroleum Storage Tank regulations would have a positive fiscal impact to the State. Reinstating common carrier liability would add an estimated \$560,000 annually to General Revenue from administrative penalties for violating the law. Extending the PST remediation fee would add an estimated \$27 million to the PST Remediation Fund in fiscal year 2012, assuming the fees were charged at the statutory caps. However, the recommendation assumes that the fee revenue would be appropriated to the agency to fund the program, resulting in no net fiscal impact.
- **Issue 8** – This recommendation regarding the Air Emissions Fee would result in additional revenues to the General Revenue Dedicated Title V Operating Permit Fee Account to cover the Account’s shortfalls, but not result in an overall fiscal impact to the State.
- **PUC Issue** – The recommendation transferring regulation of water and wastewater utilities from TCEQ to PUC would require the transfer of about \$1.5 million and 20 employees from TCEQ to PUC to conduct rate and CCN regulation and to provide needed consumer assistance. To cover these costs at PUC without relying on general revenue funding, a separate recommendation provides for equalizing the utility regulatory assessment for water supply corporations and districts at 1 percent. Beyond covering the costs of utility regulation at both TCEQ and PUC, ensuring all water and wastewater utilities pay the same assessment rate would increase revenue by about \$5.6 million annually.

The recommendation to transfer responsibility for representing consumer interests in water and wastewater utility matters from OPIC to OPUC would require the transfer of one employee and approximately \$81,000.

**Texas Commission on Environmental Quality**

Fiscal Year	Gain to the General Revenue Fund	Gain to General Revenue Dedicated – Water Resource Management Account No. 153
2012	\$560,000	\$5.6 million
2013	\$560,000	\$5.6 million
2014	\$560,000	\$5.6 million
2015	\$560,000	\$5.6 million
2016	\$560,000	\$5.6 million

**On-site Wastewater Treatment Research Council**

This recommendation would have no fiscal impact to the State. The recommendation assumes that TCEQ would receive the current level of appropriations of \$330,000 annually for on-site sewage research, and would use a portion of appropriations for administrative costs as is current practice.

## ***Summary of Legislative Action***

### ***H.B. 2694 W. Smith (Huffman)***

The Legislature adopted most of the Sunset Commission's recommendations to put structures in place to help ensure appropriate action may be taken against regulated entities, to make TCEQ more transparent in the way it makes and communicates its decisions, and to provide proper funding mechanisms for TCEQ to meet its responsibilities. The Legislature also added several other statutory provisions to House Bill 2694. The list below summarizes the major provisions of H.B. 2694, and more detailed discussion is located in each issue.

#### **Sunset Provisions**

1. Continue the Texas Commission on Environmental Quality and transfer certain oil- and gas-related regulatory activities to the Railroad Commission.
2. Coordinate and focus TCEQ's public assistance efforts.
3. Revamp TCEQ's approach to compliance history to ensure it fairly and accurately measures entities' performance.
4. Improve TCEQ's ability to take appropriate enforcement actions, and bring predictability and transparency to TCEQ's enforcement process.
5. Provide TCEQ with tools to effectively protect surface water availability during drought or emergency conditions.
6. Provide TCEQ with tools to prevent and remediate groundwater contamination from leaking petroleum storage tanks.
7. Create a structure to fund the Texas Low-Level Radioactive Waste Disposal Compact Commission.
8. Eliminate three existing water and wastewater utility application fees, and make rate case information electronically available.
9. Focus TCEQ's dam safety program on high-hazard dams, and exempt certain low- and significant-hazard dams from regulation.
10. Require members of the TCEQ Commission to resign from office if running for elected office.
11. Abolish the On-site Wastewater Treatment Research Council, and transfer the authority to award grants for on-site sewage research to TCEQ.

#### **Provisions Added by Legislature**

1. Amend the process for contested case hearings for permits, including party status.
2. Create an expedited public hearing process for permit amendment applications for electric generating facilities to comply with Maximum Achievable Control Technology standards.
3. Create timelines for TCEQ to review and approve amendments to certain water management plans.

4. Expand the Water Code's definition of agriculture to include aquaculture.
5. Change the requirements for water district financial reporting to TCEQ.
6. Amend rate change notification requirements for certain utilities.

### **Fiscal Implication Summary**

House Bill 2694 will have an overall gain of about \$56.3 million to the State during the 2012–13 biennium.

Transferring the responsibility for groundwater protection recommendations for oil and gas drilling from TCEQ to the Railroad Commission will not have a net fiscal impact to the State, but will require the transfer of \$931,256 in annual costs from the Water Resource Management Account No. 153 to the General Revenue Fund. In addition, nine full-time equivalent employees will transfer from TCEQ to the Railroad Commission.

Prohibiting the delivery of certain petroleum products to uncertified petroleum storage tanks will lead to an estimated gain to the General Revenue Fund of \$560,000 annually resulting from administrative penalties. This estimate is based on TCEQ's past experience when the prohibition was in law before being repealed in 2005.

Extending the petroleum storage products delivery fee would have a positive fiscal impact to the Petroleum Storage Tank Remediation Account No. 655 of about \$28 million per fiscal year. The revenue amount shown in the table for fiscal year 2012 is only \$25,833,000 because it reflects the additional amount that would be collected above the \$2,469,000 already included in the Comptroller's Biennial Revenue Estimate for 2012–13. This estimate assumes that the fees will be charged at the maximum level, as happens currently, but revenues could be lower depending on actual fee reductions to reflect legislative appropriations. Also, since the fee is continued, the Comptroller will collect a 2-percent service charge that will be a gain to General Revenue ranging from \$500,000 in fiscal year 2012 to \$600,000 in fiscal year 2016.

Eliminating three existing water and wastewater utility application fees will result in an estimated loss of \$30,000 to the Water Resource Management Account No. 153.

Abolishing the On-site Wastewater Treatment Research Council and transferring its grantmaking authority to TCEQ will not have a fiscal impact to the State, but will transfer \$330,000 annually from the General Revenue Fund to the Water Resource Management Account No. 153.

<b>Fiscal Year</b>	<b>Net Gain to the General Revenue Fund</b>	<b>Net Loss to General Revenue Dedicated – Water Resource Management Account No. 153</b>	<b>Gain to General Revenue Dedicated – PST Remediation Fund No. 655</b>
2012	\$1,087,000	\$30,000	\$25,833,000
2013	\$1,043,000	\$30,000	\$28,396,000
2014	\$1,045,000	\$30,000	\$29,569,000
2015	\$1,049,000	\$30,000	\$29,724,000
2016	\$1,051,000	\$30,000	\$29,896,000

# *Texas Commission on Environmental Quality*





*Agency at a Glance*  
(November 2010)



# Agency at a Glance

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The Texas Commission on Environmental Quality (TCEQ) serves as the State's umbrella agency to regulate environmental quality. TCEQ's mission is to protect Texas' human and natural resources consistent with sustainable economic development, and its goals are clean air, clean water, and safe management of waste. TCEQ has regulatory oversight over air emissions, water use, wastewater discharges, and radioactive and solid waste disposal. To fulfill its mission, TCEQ:

- issues permits, registrations, licenses, and other authorizations to entities or individuals whose actions potentially affect Texas' environment or human health, including facilities that release contaminants into Texas' air, water, or land;
- monitors and assesses air and water in Texas, and develops plans to maintain and improve quality, in accordance with state and federal law;
- oversees the remediation of sites contaminated by toxic releases;
- ensures compliance with environmental laws and rules by inspecting regulated entities and taking enforcement action when necessary; and
- helps entities avoid polluting through technical assistance and grant programs, such as the Texas Emissions Reduction Plan.

## Key Facts

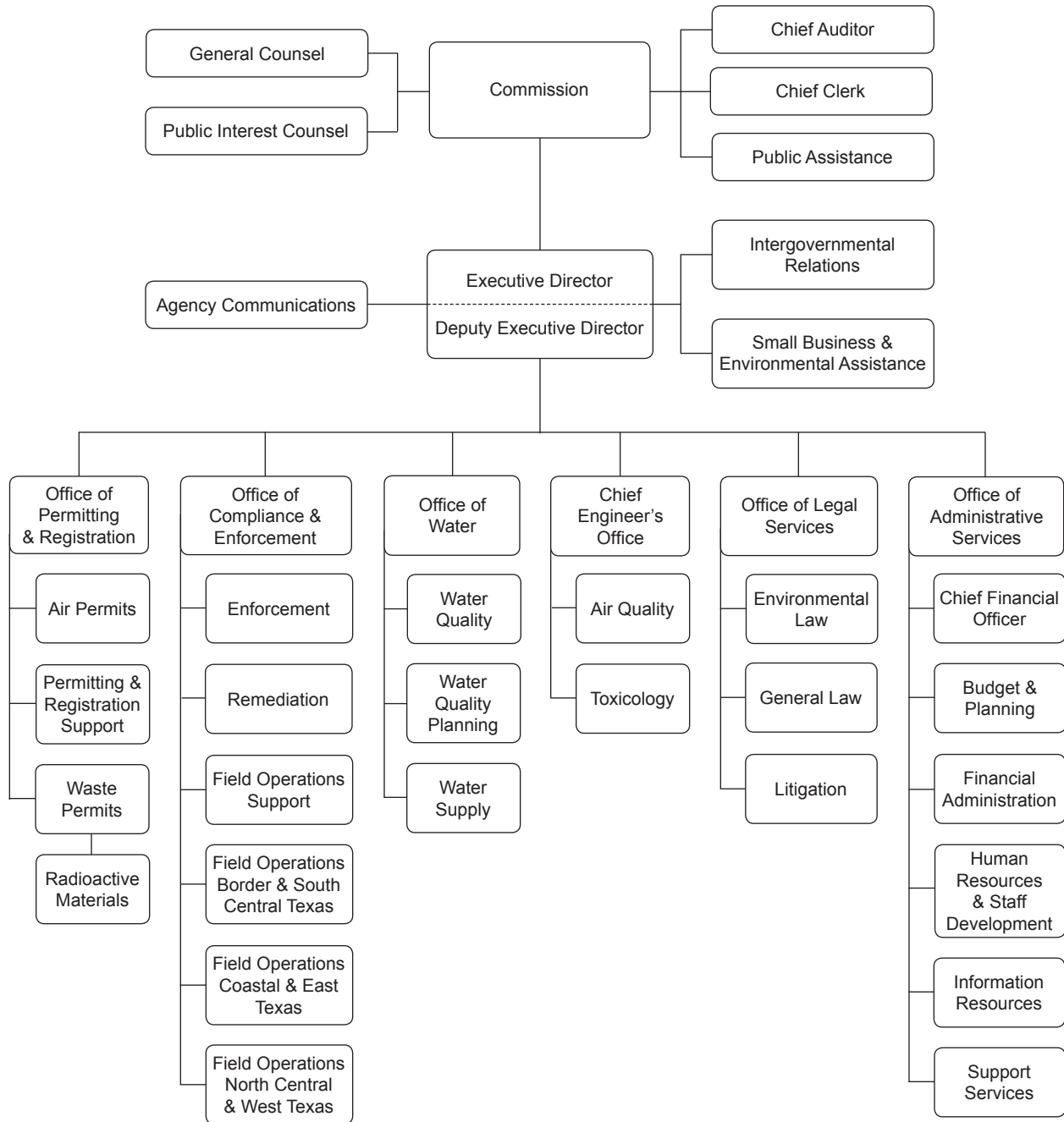
- **Commission.** TCEQ's Commission comprises three full-time Governor-appointed Commission members who serve staggered, six-year terms, as shown in the table, *TCEQ Commission*. The Commission sets policy and adopts rules for the agency; and makes final decisions on permitting, enforcement, and other regulatory matters. The Commission also appoints a Public Interest Counsel, who represents the public interest in matters before the Commission, participating in 192 cases in fiscal year 2009.

***TCEQ Commission***

<b>Member</b>	<b>Term Expiration</b>
Bryan W. Shaw, Ph.D., Chairman	2013
Buddy Garcia	2011
Carlos Rubinstein	2015

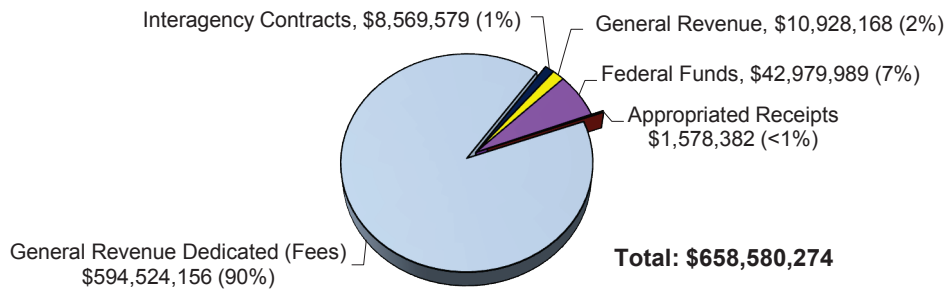
- **Staff.** TCEQ's Executive Director manages the agency's day-to-day operations and employed 2,935 staff in fiscal year 2009, 843 of whom were located in field offices around the state. Appendix B includes a map that shows the locations of TCEQ's 16 regional and two satellite offices, and one field lab. The chart on the following page, *Texas Commission on Environmental Quality Organizational Chart*, depicts the agency's organizational structure. The agency is organized in a mixture of functional and programmatic offices, and has restructured several times in the last decade.

## Texas Commission on Environmental Quality Organizational Chart

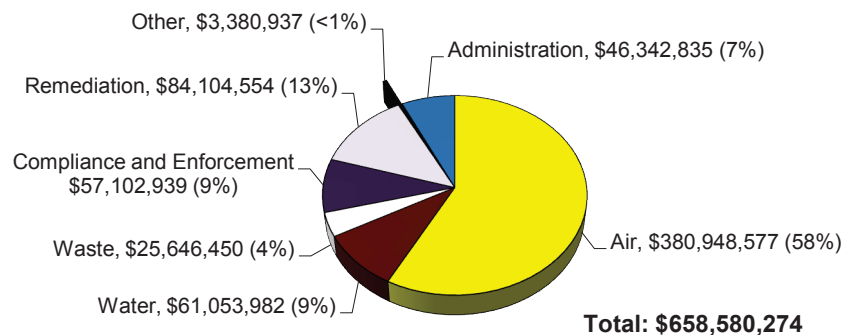


- Funding.** In fiscal year 2009, TCEQ spent about \$659 million. The majority of TCEQ's funding, 90 percent, was derived from revenue from 99 fees deposited into 14 General Revenue Dedicated accounts. The pie charts, *TCEQ Sources of Revenue* and *TCEQ Expenditures*, detail fiscal year 2009 funding streams and actual expenditures, grouped by major function. Of money appropriated to the agency in the last biennium, about 56 percent was pass-through funding, including grants to other agencies, entities, or the public.

**TCEQ Sources of Revenue**



**TCEQ Expenditures**



- Federal Delegation.** The federal government has delegated, approved, or assigned primacy to TCEQ to implement federal environmental regulation in Texas in several areas, including air, water, and waste. Major federal programs include: the Federal Resource Conservation and Recovery Act (Waste), Federal Clean Air Act, Federal Clean Water Act, Federal Safe Drinking Water Act, and Atomic Energy Act of 1954. The U.S. Environmental Protection Agency (EPA) delegates most federal programs to TCEQ, although TCEQ interacts with other federal regulatory agencies, such as the U.S. Nuclear Regulatory Commission.
- Permitting, Registration, Licensing, and other Authorizations.** To protect the environment and public health, TCEQ issues permits and other authorizations to entities that emit or discharge into Texas' air, water, or land, and for other activities that can potentially affect the environment. TCEQ has more than 100 general authorization categories and in fiscal year 2009 oversaw more than 400,000 entities and individuals, ranging from major petrochemical plants to used car lots. Appendix C gives more information about number and type of TCEQ's major permits and authorizations.

Each authorization category has different renewal, amendment, and public participation requirements. Many of TCEQ's major types of air, water quality, and waste permit applications must go through a public participation process that has two separate notice requirements and comment opportunities, and often allows for a contested case hearing on the permit applications for affected parties.

Generally, facilities must obtain authorization from TCEQ before emitting or discharging. Permitted facilities fall into three major categories – permitting by rule, for sources that emit or discharge insignificant levels of contaminants; general permits, which include standard activities, but can include large emitters; and individual permits, which include activities that require case-by-case review and issuance.

***Air.*** TCEQ permits entities that operate, construct, or modify facilities that emit contaminants into the air; examples of major sources include petroleum refineries, chemical manufacturing plants, and power plants. TCEQ issues two broad types of permits, New Source Review and Title V Federal Operating permits, to comply with both state and federal law. In fiscal year 2009, TCEQ issued almost 6,000 air authorizations.

***Water.*** TCEQ permits entities that affect the water quality or surface water quantity in Texas, overseeing more than 40,000 water-related permits in fiscal year 2009. To ensure water quality, TCEQ issues authorizations through Texas Land Application permits or the federally delegated Texas Pollutant Discharge Elimination System program to ensure that wastewater is treated properly when directly discharged to surface water or disposed of through evaporation, irrigation, or land application. Wastewater facilities can include domestic or industrial sources, agricultural operations that meet certain thresholds, and facilities like construction sites that contribute to storm water runoff.

In addition, under the Safe Drinking Water Act, TCEQ monitors the safety of public drinking water; and also regulates water utilities and districts, overseeing water utility rates and issuing Certificates of Convenience and Necessity. In the realm of water quantity, TCEQ issues water rights permits, to allocate and manage surface water quantity, which by law belongs to the State.

***Waste.*** TCEQ oversees the proper storage, treatment, and disposal of several major types of waste, overseeing more than 25,000 waste-related permits, registrations, and authorizations in fiscal year 2009. TCEQ's jurisdiction includes: industrial and hazardous waste, including underground injection control; municipal solid waste; recycling facilities; medical waste; used oil; sludge transporters; used tire facilities and transporters; and radioactive and low-level radioactive waste. TCEQ also oversees uranium mining through underground injection control and radioactive materials licensing programs.

***Other.*** TCEQ regulated more than 3,000 dry cleaning facilities and 27,000 petroleum storage tank sites. In addition, TCEQ issues licenses for 10 categories of people whose occupations affect the environment, such as public drinking water system operators and landscape irrigators. In fiscal year 2009, TCEQ regulated more than 51,000 occupational licensees and entities.

- **Assessment and Planning.** With a combination of science, monitoring, and development of management strategies, TCEQ assesses and plans for the State's natural resources.

***Air.*** To understand Texas' air quality, for both compliance and planning purposes, TCEQ has more than 1,200 stationary air monitors at more than 200 sites in Texas, and can deploy mobile monitoring

as needed. Using this and other modeling information, TCEQ assesses Texas' air and develops strategies to maintain and improve air quality. Primarily, TCEQ is responsible for developing and implementing the State Implementation Plan (SIP), which is Texas' federally required plan for ensuring air quality attains healthful standards. Texas only has one SIP, but revises it as necessary to account for changes in federal or state standards, or attainment designation of areas within the State. Since 1972, Texas has submitted more than 130 SIP revisions to EPA.

The SIP explains Texas' approach to complying with federal National Ambient Air Quality Standards (NAAQS) for six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, sulfur dioxide, lead, and particulate matter. The SIP assesses and measures Texas' attainment or nonattainment of federal requirements, and develops strategies to reduce emissions and come into compliance – how Texas monitors, what it monitors, and how it plans to improve air quality. Two areas in Texas, Dallas-Fort Worth and Houston-Galveston-Brazoria, exceed the 2008 federal ozone standards. In addition, a portion of Collin County is in nonattainment for lead, and El Paso is in nonattainment for PM<sub>10</sub>.

TCEQ also studies the adverse impact of chemicals, beyond EPA's criteria pollutants, on the environment and human health, and sets guidelines known as Effects Screening Levels (ESLs). TCEQ uses ESLs in its air permitting process, subjecting permit applications to further review if proposed emissions levels exceed ESL values. TCEQ also uses screening levels and air monitoring data to identify areas with elevated air contaminants that rate special attention from the agency. TCEQ includes these areas in the Air Pollutant Watch List. More than 5,000 chemicals have ESLs, and TCEQ has adopted 37 of those through its scientific review process.

**Water.** TCEQ establishes water quality standards, approved by EPA, once every three years. Through its permitting process, TCEQ has more regulatory control over point source water pollution than it does over most non-point source pollution, which is addressed through more of a voluntary approach. TCEQ pairs with local partners to monitor water quality throughout the state, including more than 1,700 active monitoring stations on major streams and rivers.

Using this information, TCEQ identifies water bodies that do not meet standards, and develops plans to restore water quality by adaptive management through its non-point source pollution program and its federal Total Maximum Daily Load (TMDL) program. The TMDL program addresses impaired water bodies and how much of a pollutant a water body can absorb and still meet standards, and develops implementation plans to address pollution. In fiscal year 2009, TCEQ adopted 41 TMDLs.

Texas also has a role in managing and planning for water quantity in Texas. Most actively, TCEQ issues water rights permits, and has watermaster programs in three areas of the State that actively manage state water. In determining the amount of surface water available for permits, TCEQ also has a role in the interdisciplinary development of environmental flows. Sharing both international and domestic borders, TCEQ also helps administer Texas' five River Compacts to ensure that Texas receives its equitable share of water. Although the State's preferred method of groundwater management is locally created Groundwater Conservation Districts (GCDs), TCEQ has a role in creating Priority Groundwater Management Areas, and creating and overseeing the compliance of GCDs.

- **Remediation.** TCEQ oversees the cleanup of harmful releases of toxic chemicals in air, land, or water through five major programs, as described in the chart, *TCEQ Major Remediation Programs*. Generally, the agency assesses the contamination and needed remediation, and may either assist and oversee the responsible party's cleanup of the site or assume operational and financial responsibility for sites.

### ***TCEQ Major Remediation Programs***

<b>Remediation Program</b>	<b>FY 2009 Activity</b>
<b>Superfund.</b> Remediates contaminated sites that pose an imminent threat to the public or environment. Both the state and federal governments take a hand in Superfund remediation.	Oversaw the continued cleanup of 57 federal and 52 state Superfund sites.
<b>Petroleum Storage Tank (PSTs).</b> Assesses and oversees cleanup of contaminated sites due to leaking PSTs. Cleanup efforts are funded either by the responsible party, the state PST remediation fund, or to a lesser degree, federal funds.	Had 2,622 pending sites, and completed 591.
<b>Dry Cleaner.</b> Evaluates and oversees cleanup at sites contaminated from dry cleaner activities.	Oversaw 172 sites, completing nine.
<b>Corrective Action.</b> Oversees cleanup at contaminated sites not within other remediation programs, including sites where TCEQ requires remediation due to enforcement action.	Oversaw 1,150 affected sites.
<b>Voluntary Programs.</b> Encourages cooperation from parties to clean up contaminated sites before formal enforcement or remediation action is required. The biggest program is the Voluntary Cleanup Program (VCP), in which the owner pays for cleanup and TCEQ certifies completion, releasing all future owners from liability. Other programs include Innocent Owner/Operator, Brownfields Site Assessment, and Municipal Setting Designation programs.	Issued 1,189 certificates of completion for Voluntary Cleanup.

- **Compliance and Enforcement.** TCEQ monitors compliance with environmental laws, rules, regulations, and agency-issued permits, and takes enforcement action when necessary to correct violations or deter future noncompliance. The agency has a risk-based approach to its investigations and performs both routine and complaint-based inspections. In fiscal year 2009, the agency performed 111,663 investigations, 4,875 of which were complaint-based. These investigations resulted in 11,407 notices of violations, 2,243 of which reached the threshold that required formal enforcement action. As a result, TCEQ issued 1,756 administrative orders against regulated entities, collected more than \$14.5 million in administrative penalties, and entered into 282 Supplemental Environmental Projects, an alternative to administrative penalties, worth \$6.4 million.
- **Assistance.** TCEQ has eight major grant programs for purposes such as solid waste reduction, air emissions research, and air and water monitoring. In fiscal year 2009, TCEQ awarded 19,333 grants through its various grant programs.<sup>1</sup> TCEQ's largest grant program is the Texas Emissions Reduction Plan (TERP), which has several subprograms and awards grants to reduce air pollutants, mainly nitrogen oxides, through the replacement of high-polluting vehicles and engines, and through research and development of new technologies. In fiscal year 2009, TCEQ awarded 1,534 TERP grants, totaling \$216.4 million.



The agency provides regulatory assistance through its Small Business and Environmental Assistance (SBEA) program, which coordinates voluntary compliance programs and manages TCEQ's pollution prevention and recycling programs. SBEA assisted 76,493 small businesses and local governments in fiscal year 2009. TCEQ also provides assistance to the public and conducted more than 40 public meetings around the state in fiscal year 2009.

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<sup>1</sup> This total includes 17,619 vouchers redeemed through the Low Income Repair, Assistance, Retrofit, and Accelerated Vehicle Program (LIRAP).



*Issues*



# Issue 1

## ***Texas Has a Continuing Need for the Texas Commission on Environmental Quality.***

### **Background**

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The Legislature created the umbrella structure for addressing environmental quality in 1993, consolidating regulatory programs for air, water, and waste disposal and cleanup in the Texas Natural Resource Conservation Commission. The Legislature renamed the agency as the Texas Commission on Environmental Quality (TCEQ) in 2001.

To pursue its complex job of protecting the environment, the agency has broad responsibilities encompassing regulation, assistance, and remediation. The agency issues permits or other authorizations for activities that have actual or potential environmental or human health impacts, such as air emissions, wastewater discharges, and waste disposal. It also has programs affecting water quantity and water rights. TCEQ conducts monitoring for air and water quality, inspects facilities, investigates complaints, and seeks to achieve compliance with laws and regulations voluntarily and through enforcement action. The agency also provides technical and financial assistance through grants, and administers remediation programs to correct environmental harm.

In fiscal year 2009, TCEQ had a staff of 2,935 and appropriations of \$515.4 million, of which 90 percent comes from fees. Only about 2 percent of its funding is from general revenue. About 46 percent of its budget is for grant programs to promote environmental quality through research and specific action to address the causes of pollution. The agency is headed by a Commission comprising three full-time members, appointed by the Governor.

### **Findings**

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#### **The State has a continuing interest in tailoring environmental regulation to Texas.**

The need for government regulation to protect the environment is not subject to serious debate. At a minimum, the federal government requires the State to do so for federally delegated or approved programs. Beyond this, the need to protect air and water quality, manage water quantity, ensure proper disposal of waste, and clean up contaminated sites is recognized for the impacts these activities have on the quality of life and health of Texas citizens and on the State's economic well-being.

The more pertinent question regards the State's interest in ensuring environmental quality as opposed to having the federal government assume this responsibility. With its sheer size and population, geographic diversity, wealth of natural resources, and concentration of industry, Texas presents a unique challenge for environmental regulation. Having a state-specific approach to these regulations enables a tailored effort by Texas regulators to develop and implement environmental programs to suit Texas' special circumstances. Texas has had a longstanding interest in addressing its own environmental issues with its own air, water, and waste programs.

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*Texas has had a longstanding interest in addressing its own environmental issues.*

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*Despite the recent attention to air permitting, Texas generally enjoys a positive relationship with the federal government.*

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Under federal oversight, Texas performs many of its environmental duties through a delegated or approved arrangement with federal agencies, mostly the U.S. Environmental Protection Agency (EPA). This delegation or approval of authority from the federal government to the states, to design and implement programs and innovative approaches to address their particular needs, is a common feature of environmental regulation nationwide. Other states' environmental agencies generally operate under their own delegation or approval agreements with the federal government.

Despite the recent attention given to certain air permitting processes in Texas, Texas generally enjoys a positive relationship with the federal government in the area of environmental regulation. Narrowly focusing on one program area for evaluating the large and multi-faceted effort required to ensure environmental quality misses the many other areas where the two work well together. The State administers federally delegated or approved programs in 10 areas subject to periodic reviews and reports to ensure the programs meet federal expectations. The accompanying textbox lists these delegated or approved programs and the responsible federal agency, and Appendix D summarizes key findings in each of the most recent compliance reports.

**Federally Delegated or Approved Environmental Program Reports**

TCEQ's Title V Air Permits Program – EPA

National Pollutant Discharge Elimination System (Texas Pollutant Discharge Elimination System) – EPA

Texas Nonpoint Source Program – EPA

TCEQ's Total Maximum Daily Load Program – EPA

TCEQ's Public Water Supply Supervision Program – EPA

National Estuary Program (Galveston Bay Estuary Program) – EPA

Resource Conservation and Recovery Act, State Hazardous Waste Program – EPA

TCEQ's Underground Injection Control Program – EPA

TCEQ's Underground Storage Tank/Leaking Underground Storage Tank Programs – EPA

Integrated Materials Performance Evaluation Program (Radioactive Waste) – U.S. Nuclear Regulatory Commission

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*If the State did not pursue a rigorous environmental program, Texas could jeopardize federal funds.*

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Some local governments have their own environmental quality programs, and the State has benefitted from these efforts. For example, through contractual arrangements with TCEQ, several municipalities conduct inspections to help enforce environmental regulations. River authorities and other entities conduct water sampling to help ensure clean rivers. Councils of Governments engage in activities to encourage recycling and to minimize waste. These local efforts, however important, lack the depth and breadth that the State can provide through TCEQ.

Finally, if the State did not pursue a rigorous environmental program, Texas could jeopardize federal funds. Without a State Implementation Plan to

address air pollution concerns such as ozone, Texas could suffer the loss or limits on the use of federal highway funds. Without TCEQ, the State would also lose about \$40 million in direct federal funding for environmental quality efforts.

**TCEQ is the most appropriate agency to perform the State's myriad environmental regulatory activities.**

The consolidation of most of the State's environmental control efforts under the TCEQ umbrella continues to make sense, given the nature of many pollution concerns involving air, water, and waste issues. In addition, common aspects related to TCEQ's overall mission highlight the need for this consolidated approach. Such aspects include the science of assessing human health impacts of various pollution sources; regulatory processes for permitting, monitoring, ensuring compliance, and taking enforcement action; and interactions with stakeholders on all sides of environmental issues. Other states have commonly taken this same approach in establishing comparable umbrella environmental agencies.

Questions regarding the structure of Texas' environmental agency more commonly relate to TCEQ's size and scope. Is it too big and complicated? Conversely, is it able to take on additional responsibilities related to environmental quality?

TCEQ is undeniably a large agency, with a large number of programs and regulated entities. Given the breadth of TCEQ's responsibilities and corresponding decentralized operational structure, it faces challenges in effectively targeting its efforts. Activities not related to these environmental responsibilities may distract or take time away from the agency as it works to achieve its core environmental goals. One opportunity for better focusing TCEQ's environmental mission is in transferring the regulation of water utilities to the Public Utility Commission (PUC), as is addressed in the supplemental issue to the PUC report, included in this report.

Despite its size, TCEQ enjoys a singularity of purpose regarding environmental quality. Adding environmental responsibilities that relate to TCEQ's regulatory mission would not necessarily add to the complexity of its job. Other natural resource agencies scheduled for Sunset reviews in the same review cycle as TCEQ provide the opportunity for considering further consolidation.

- **Railroad Commission of Texas (RRC).** The regulation of oil and gas extraction and other activities at RRC clearly relate to the environmental role of TCEQ, a point that has been brought into sharper focus in recent years with the development of the Barnett Shale natural gas field in the Fort Worth area. RRC regulates oil and gas activities from drilling, protecting water quality, and ensuring proper waste disposal, site remediation, and well plugging. RRC also regulates pipeline safety, surface mining, and exploratory drilling associated with

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*While an undeniably large agency, TCEQ enjoys a singularity of purpose.*

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*Effective oil and gas regulation depends on the ability to curtail production, which does not align with TCEQ's environmental mission.*

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in situ uranium mining. TCEQ provides recommendations to RRC regarding the depth and thickness of surface casings needed to protect groundwater for drilling and disposal wells under its purview. TCEQ is also responsible for air quality associated with oil and gas activities.

Opportunities for wholesale alignment of these regulatory activities at TCEQ currently exist. The environmental responsibilities related to oil and gas drilling and surface and uranium mining are within TCEQ's current expertise or could be readily assumed. However, effective regulation depends on the ability to take meaningful enforcement action that encourages respect for and compliance with the law. In the oil and gas arena, that means RRC's ability to curtail production. Activities to support oil and gas production, such as protecting correlative rights of mineral interests owners, are considerably less contentious than in the past and something TCEQ could take on in time. However, these activities do not fit well with TCEQ's overall environmental mission. Because of the interest in improving TCEQ's focus on its environmental mission, Sunset staff did not conclude that now is the appropriate time for such a change. Instead, as discussed below, an opportunity exists for moving from TCEQ what is essentially a RRC function of ensuring proper surface casing in oil and gas drilling.

- **Texas Water Development Board (Board).** The planning and financing of water projects by the Board to meet the needs of an increasingly populous state play a role with TCEQ's ultimate responsibility for ensuring both the quality and quantity of water to Texans. In fact, Board activities related to groundwater quantity expose the common ground between the Board and TCEQ regarding the need for science to support both planning and regulatory aspects of water, raising reasonable questions about the need for two agencies to guide water resource decisions.

The separate Sunset staff report on the Board contains a recommendation for unifying the process for petitioning groundwater conservation districts' desired future conditions of aquifers at TCEQ. This recommendation continues the Legislature's historical separation of water planning at the Board and regulation at TCEQ. For now, the State continues to need the Board's separate and non-regulatory approach to water development.

- **Texas State Soil and Water Conservation Board (State Board).** TCEQ and the State Board split the responsibility for controlling nonpoint source water pollution, with TCEQ assuming responsibility for municipal runoff and the State Board for agricultural and forestry runoff. The State Board also administers grant programs for the repair and maintenance of about 2,000 flood control dams and for water supply enhancement through brush control activities, which relate, to some extent, to TCEQ's activities. Despite the common goals of the two agencies, statute requires decidedly different approaches to achieving them. The State Board uses a cooperative, non-regulatory approach to get landowners to implement



best management practices to protect land and water, though TCEQ is ultimately responsible for taking enforcement action. Consolidating the State Board or its environmental programs with TCEQ could risk the effectiveness of the State's voluntary, non-regulatory approach to agriculture.

**TCEQ performs reasonably well, given the difficulty of its environmental responsibilities.**

Many factors affect the assessment of an agency's performance. Objective indicators of real performance are difficult to find. Events or circumstances that are beyond the agency's control may affect its results as much as anything the agency does. The intensity of opposing opinions on issues before an agency can make a dispassionate assessment of the agency complicated. These factors all affect the view of how well TCEQ is doing to ensure environmental quality in Texas, and whether the environment is cleaner because of its efforts. In many respects, the environment is, in fact, cleaner, but challenges remain, as discussed in the following material.

- **Air.** Emissions of air pollutants are generally decreasing, particularly pollutants that cause the formation of ozone and particularly in areas that do not meet federal air quality standards for ozone. In these areas, known as nonattainment areas, controls are more rigorously applied to meet the State's obligation under the State Implementation Plan with EPA for achieving air quality standards directly under TCEQ's purview. In addition, these areas have a number of facilities that have taken advantage of unique state permitting programs that may have contributed to emissions reductions, although the cause of such reductions is hotly debated. These areas also have a large number of motor vehicles, not regulated by TCEQ, that have lower ozone-forming emissions than in the past, likely contributing to air quality improvements as well. Attributing one cause, solely to the agency's actions, or drawing a definitive conclusion from this mix of factors to explain these emissions reductions is beyond the ken of the Sunset staff.

Further, despite the State's progress in meeting federal air quality standards for ozone, proposed tighter federal standards threaten to place far more Texas cities into nonattainment status. Federal initiatives to begin regulating greenhouse gas emissions in January 2011 add to TCEQ's regulatory challenges. TCEQ is also under pressure to ensure Texas' state air permits are in compliance with EPA requirements, and in appropriately regulating emerging air emissions sources, such as those related to oil and gas drilling in the Barnett Shale.

- **Water.** In its water programs, TCEQ has excelled in ensuring that 96 percent of Texans' drinking water meets federal standards. Regarding water quality, Texas has programs for identifying impaired water bodies and establishing programs for limiting pollutant loads and focusing efforts to protect watersheds from nonpoint source pollution. In 2010,

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*The intensity of opposing opinions on issues before an agency can make a dispassionate assessment complicated.*

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*Attributing one cause for air quality improvements is not technically feasible.*

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TCEQ removed 74 water bodies from the list of impaired water bodies, many because of additional collected data that led to reclassification. More work is needed, however, to remove water bodies because of actual water quality improvements. Related to surface water quantity regulation, TCEQ faces continuing challenges as Texas' population and need for water grows, as discussed in Issue 5 of this report.

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*Of 158 superfund sites, 105 have either been cleaned up or are under contract for remediation.*

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- **Waste.** Evidence also shows that municipal and industrial and hazardous waste generation is down and that reuse and recycling activities are up. Again, how much to attribute these phenomena to TCEQ's actions or to changes in human behavior and business practice is difficult to ascertain. As Texas' licensed low-level radioactive waste disposal facility is expected to become operational in the next biennium, TCEQ will also encounter new regulatory tests as it seeks to effectively monitor this new type of waste disposal in the state.
- **Remediation.** Perhaps one area where TCEQ actions have had a direct, measurable impact on the environment is in its remediation activities. Of 158 state and federal Superfund sites reported since 1982, 105 have either been cleaned up or are under contract for remediation. In TCEQ's Petroleum Storage Tank (PST) program, 94 percent of identified sites have at least begun cleanup activities, and 89 percent of sites are fully remediated. However, the agency's role in remediating leaks from PSTs is far from over, as indicated in Issue 6.
- **Compliance and Enforcement.** As an agency that oversees a large and diverse regulated population, TCEQ will always face inherent challenges in effectively targeting its compliance and enforcement efforts. The agency has implemented risk-based approaches to attempt to use its available resources wisely and on the most serious environmental concerns, but still has problems targeting regulation to performance, as discussed in Issue 3. In enforcement matters, the agency entered into 1,756 orders, assessing \$23.4 million in administrative penalties in fiscal year 2009. In addition, in recent years, the agency has made strides to reduce case backlog and increase the timeliness of enforcement actions. However, opportunities continue to exist for TCEQ to more effectively enforce against environmental violators, addressed in Issue 4.
- **Performance Measures.** Another way to view the agency is through its performance measures reported to the Legislature as part of the budget process. Of 56 key measures reported by TCEQ in 2009, it met or exceeded 39. The textbox on the following page, *TCEQ Key Performance Measures*, summarizes several of these measures, including TCEQ's explanation as to why it varied from its projected performance.

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*TCEQ met 39 of its 56 key performance measures in 2009.*

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**TCEQ Key Performance Measures**  
**Fiscal Year 2009**

**Measures Meeting or Exceeding Projected Performance Include:**

- Annual percentage reduction in pollution from permitted wastewater facility discharges by about 0.4 percent. TCEQ attributed its exceeding the projection to sizeable reductions by wastewater treatment plants in the Houston Ship Channel.
- Reduction in the amount of municipal solid waste per capita by 2.6 percent. TCEQ had, in fact, projected a small 0.02 percent increase because of population growth. The agency attributed this reduction to the economic downturn, but also to positive impacts of its waste reduction and recycling campaigns and the effect of ongoing public education efforts.
- Targets for point, area, and mobile source air quality assessments reviewed and entered into its database to meet EPA reporting requirements.
- Percentage of population meeting drinking water standards, and percentages and numbers of petroleum storage tank and Superfund sites cleaned up, as noted in the text above.

**Measures Not Meeting Projected Performance Include:**

- Stationary and mobile source pollution reductions in nonattainment areas. Emissions increased by about 7.3 percent in 2009 because of a significant increase in oil and gas activities and the addition of a new source category, largely for oil and gas exploration drilling rig engines in the Dallas-Fort Worth area. TCEQ reported that including these sources in the area source emissions inventory resulted in an increase of emissions that offset reductions from point, on-road mobile and non-road mobile sources. For 2010, a 9.5 percent reduction exceeded projections because of factors such as fleet turnover, rules implemented, and economic factors.
- Reductions in nitrogen oxide emissions through the Texas Emissions Reduction Plan. TCEQ attributed this deficiency to the time that larger, more complex projects have needed to complete purchases and begin using grant-funded vehicles and equipment. The agency further noted that the longer period for implementing projects will continue to help the program because the period for claiming reductions will extend further into the future to meet the new SIP emissions reduction targets for ozone.
- Percentage of non-compliant sites and facilities for which appropriate enforcement is taken. TCEQ said that performance was below projected levels because of efforts by the agency to reduce the case backlog. In 2010, the agency met this performance objective.

- **Stakeholder Perception.** Understanding how TCEQ is perceived by its stakeholders provides another way to assess the agency. This perception largely depends on one's orientation to the agency's mission statement to protect the State's human and natural resources consistent with sustainable economic development. This mission statement, which appears to be generally based on language regarding policy statements sprinkled throughout the agency's statutes, may contribute to concerns by some that the agency is biased in favor of industry, and not truly focused on environmental protection.<sup>1</sup> Critics suggest that the agency does not focus enough on the needs of the public. Sunset staff addresses this perception in Issue 2 of the report.

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*Critics suggest that TCEQ does not focus enough on the needs of the public.*

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*TCEQ generally appears to have the appropriate range of statutory tools to ensure environmental quality.*

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Some critics also claim that the agency balks at issuing restrictive permits, amendments, and renewals, unless agreed to by the permittee or applicant, suggesting that statutory or policy deficiencies prevent the Commission from doing what is needed to protect the public in its decisionmaking. With an opposite viewpoint, other critics hold that TCEQ's public participation processes are more involved than needed to comply with federal law, resulting in a cumbersome permitting process that allows obstructionist participation and removes incentives to amend permits. The agency, however, generally appears to have the appropriate range of statutory tools and authority to ensure environmental quality. The decision of how and when to use them is rightly in the hands of the Commission, appointed by the Governor, and responsible and accountable for setting policy direction and making decisions on regulatory cases that come before them. While room exists for visiting some issues confronting the Commission, as seen in several recommendations in this report, Sunset staff cannot substitute its judgment for the Commission's, or the Legislature's as a whole, in larger matters involving environmental policy.

**TCEQ's role in making groundwater protection recommendations for oil and gas drilling activities confuses the Railroad Commission's ultimate oversight responsibility.**

TCEQ issues letters for the total depth of surface casing needed to protect groundwater from drilling and disposal activities associated with oil and gas exploration, development, and production, as required by RRC rule. TCEQ has specific statutory authority for providing groundwater recommendations for injection wells used for disposal of oil and gas waste but lacks specific statutory authority to provide surface casing recommendations for oil and gas drilling. TCEQ also lacks the authority to collect a fee other than for the expedited letter for making surface casing recommendations for the drilling of wells associated with oil and gas exploration, development, and production. Fee revenues must cover the costs associated with processing expedited letters for well drilling and to pay for electronically mapping information about the geology and surface casing depths needed to protect the groundwater.

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*TCEQ's middleman role in making surface casing recommendations is unnecessary.*

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Under this arrangement, TCEQ provides recommendations to RRC that relate directly to the production of oil and gas and injection of oil and gas waste. Letters relating to surface casing recommendations for oil and gas drilling from TCEQ do not appear to have the force of law and are not enforceable by TCEQ. Moreover, responsibility for controlling groundwater pollution associated with oil and gas production and authority for enforcing surface casing requirements on producers rests with RRC, not TCEQ. In addition, TCEQ does not have the statutory authority to digitize well drilling maps. TCEQ's middleman role in these tasks is unnecessary, draining resources to provide a product for use by RRC and not TCEQ.

**The Commission's statute does not reflect standard language typically applied across the board during Sunset reviews.**

The Commission's governing statute does not include a standard provision relating to alternative rulemaking and dispute resolution that the Sunset Commission applies in across-the-board fashion to agencies under review. The agency has adopted an alternative dispute resolution (ADR) procedure in rule and has an active ADR program in place, but does not have rules regarding negotiated rulemaking, following instead the provisions for negotiated rulemaking in general law to guide its rulemaking process.<sup>2,3</sup> Including these provisions in TCEQ's statute will help ensure that agency rulemaking and dispute resolution continue to operate through open, inclusive, and conciliatory processes designed to solve problems by building consensus rather than through contested proceedings.

## **Recommendations**

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### ***Change in Statute***

#### **1.1 Continue the Texas Commission on Environmental Quality for 12 years.**

This recommendation would continue TCEQ for the standard 12-year period.

#### **1.2 Transfer the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Railroad Commission.**

This recommendation would remove the existing fee provision in TCEQ's statute regarding surface casing recommendations required for certain permits from RRC. Instead, it would add language to RRC's statute to provide clear authority to determine the depth of surface casing needed during the drilling of certain oil and gas wells to protect usable groundwater in the State. In addition to this basic authority, the provision should provide for the same expedited letter process at RRC as currently exists at TCEQ, subject to the same expedited letter fee not to exceed \$75. The recommendation would also give RRC the authority to set a fee in rule to recover the cost of processing non-expedited letters. As part of this recommendation, responsibility for digitizing drilling well maps would also transfer from TCEQ to RRC and clear authority added to RRC's statute for this activity.

#### **1.3 Apply the standard Sunset across-the-board requirement for the Commission to develop a policy regarding negotiated rulemaking and alternative dispute resolution.**

This recommendation would ensure that the Commission continues to have a policy to encourage alternative procedures for rulemaking and dispute resolution, conforming to the extent possible, to model guidelines by the State Office of Administrative Hearings. The agency would also coordinate implementation of the policy, provide training as needed, and collect data concerning the effectiveness of these procedures. Because the agency largely already has processes for this alternative approach to solving problems, this change would not require additional staffing or other expenses.

## Fiscal Implication Summary

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The recommendation to transfer responsibility for oil and gas surface casing recommendations from TCEQ to RRC would require the transfer of approximately \$765,000 currently deposited into TCEQ's Water Resources Management Account to RRC to cover the costs of making surface casing recommendations and to pay for the digital mapping project. Since the recommendations would give RRC the authority to charge the fees associated with this function, TCEQ would no longer be involved in the collection or disbursement of the fees. In addition, nine full-time equivalent employees would need to transfer from TCEQ to RRC. The authority for RRC to set and collect a fee for non-expedited letters would likely result in a revenue increase, but the specific amount could not be determined.

The recommendation to continue TCEQ for 12 years would require the continuing appropriations to fund the operations of the agency.

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<sup>1</sup> Texas Water Code, secs. 26.003 and 27.003; Texas Health and Safety Code, sec. 361.0231(a).

<sup>2</sup> Texas Administrative Code, Title 30, part 1, rule 40.1 to 40.9.

<sup>3</sup> Texas Government Code, ch. 2008.

# ***Responses to Issue 1***

## **Recommendation 1.1**

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*Continue the Texas Commission on Environmental Quality for 12 years.*

### **Agency Response to 1.1**

The agency agrees that there is a continuing need for TCEQ and appreciates the vote of confidence in extending the agency for 12 years. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 1.1**

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Thure Cannon, Director of Governmental Affairs and Celina Romero – Texas Pipeline Association, Austin

Tricia Davis, National Director – American Royalty Council, Dripping Springs

John W. Fainter, Jr., President and CEO – Association of Electric Companies of Texas, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

Barbara Roeling, P.G., Chairman – Texas Board of Professional Geoscientists, Austin

League of Women Voters of Texas

### **Against 1.1**

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Judy Landress – Clean Economy Coalition, Corpus Christi

### **Modifications**

1. Continue the Texas Commission on Environmental Quality for six years. (Representative Rafael Anchia, Member – Sunset Advisory Commission)
2. Continue the Texas Commission on Environmental Quality for six years. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

3. Combine TCEQ, the Railroad Commission, and Texas Parks and Wildlife Department into one agency. (Judy Landress – Clean Economy Coalition, Corpus Christi)
4. Require TCEQ to undergo Sunset review again in 2 or 4 years. (Brandt Mannchen, Houston)
5. Set TCEQ's Sunset date for less than 12 years. (Muriel Tipps, Cedar Lane)

## **Recommendation 1.2**

*Transfer the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Railroad Commission.*

### **Agency Response to 1.2**

TCEQ supports the recommendation to transfer the groundwater protection responsibilities associated with oil and gas activities to the Railroad Commission. The agency will work with RRC to ensure an efficient transfer of duties. With the program transfer, TCEQ believes the surface casing expedited fee revenue should no longer be deposited to the Water Resource Management Account #153, and instead, those revenues should be deposited to a RRC account. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**Staff Comment:** Recommendation 1.2 would transfer both the collection and disbursement of the fees related to groundwater protection recommendations relating to oil and gas activities to the Railroad Commission, and the fee revenue would no longer be deposited to the Water Resource Management Account #153.

### **For 1.2**

Thure Cannon, Director of Governmental Affairs and Celina Romero – Texas Pipeline Association, Austin

Teddy Carter, Director of Public Affairs – Texas Independent Producers and Royalty Owners Association, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

### **Against 1.2**

Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency

Ellen Hansen, Austin

Paula Jo Lemonds – Association of Environmental and Engineering Geologists

Mike Mahoney – Evergreen Underground Water Conservation District and the Texas Alliance of Groundwater Conservation Districts

Brandt Mannchen, Houston

Mike Massey, President – Upper Trinity Groundwater Conservation District, Springtown



**Against 1.2** (continued)

C. Victor McDonald, Denton

**Modification**

6. Transfer oil and gas water issues to a new Water Quality agency or a new Water Quality Division within TCEQ. (Ellen Hansen, Austin)

**Recommendation 1.3** \_\_\_\_\_

*Apply the standard Sunset across-the-board requirement for the Commission to develop a policy regarding negotiated rulemaking and alternative dispute resolution.*

**Agency Response to 1.3**

TCEQ supports this recommendation. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**For 1.3**

None received.

**Against 1.3**

None received.

## ***Commission Decision***

Adopted Recommendations 1.1 through 1.3.

## ***Legislative Action***

House Bill 2694 continues TCEQ for the standard 12-year period. (Recommendation 1.1) In addition, the bill applies the standard Sunset across-the-board requirement for the Commission to develop a policy regarding negotiated rulemaking and alternative dispute resolution. (Recommendation 1.3)

The bill transfers from TCEQ to the Railroad Commission the authority for making groundwater protection recommendations regarding oil and gas activities relating to three types of wells: oil and gas wells, injection wells for oil and gas waste, and injection wells for geologic storage of anthropogenic carbon dioxide. This provision adds language to the Railroad Commission's statute to provide clear authority to determine the depth of surface casing needed during the drilling of certain oil and gas wells to protect usable groundwater in the State. The bill requires the Railroad Commission to adopt rules to establish groundwater protection requirements for all operations within its jurisdiction.

The bill removes the existing fee provision in TCEQ's statute regarding surface casing recommendations and authorizes the Railroad Commission to charge a fee for groundwater

protection determinations for oil and gas wells. In addition to this basic authority, the bill provides for the same expedited letter process at the Railroad Commission as currently exists at TCEQ, subject to the same expedited letter fee not to exceed \$75. As part of this provision, responsibility for digitizing drilling well maps will transfer from TCEQ to the Railroad Commission with clear authority added to the Railroad Commission's statute for this activity. (Recommendation 1.2)

# Issue 2

## ***TCEQ's Public Assistance Efforts Lack Coordination and Focus.***

### **Background**

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The Texas Commission on Environmental Quality (TCEQ) provides public assistance and information in a number of ways. Much of the public's interaction with the agency happens on the local level, through the Commission's 16 regional offices across the state, which act as the Commission's eyes and ears on the ground.

In addition to this on-the-ground assistance, the Legislature and the Commission have recognized the need to help the public navigate complex environmental matters before the Commission by creating specific public assistance functions at TCEQ. The Legislature created the Office of Public Interest Counsel (OPIC) to ensure that the Commission promotes the public's interest and is responsive to environmental and citizen's concerns, including environmental quality and consumer protection.<sup>1</sup> Statute requires OPIC to represent the public interest and be a party to all proceedings before the Commission, and authorizes the Office to recommend needed legislative and regulatory changes.<sup>2</sup> By adopted resolution, the Commission has expanded OPIC's responsibilities to include public assistance, including assistance to citizens challenging agency actions and information about application processing and hearing request requirements.<sup>3,4</sup> OPIC is headed by a Public Interest Counsel appointed by the Commission, who is assisted by seven staff. The Office reports directly to the Commission and spent \$541,960 in fiscal year 2009.

The Commission, by resolution, has also created the Office of Public Assistance (OPA) to respond to questions by the general public concerning applications for permits or permitting processes; acknowledge in writing public comments filed concerning an application; hold public meetings concerning an application; and assist environmental justice communities accessing all programs and coordinate responses to federal Title VI discrimination complaints.<sup>5</sup> OPA reports directly to the Commission, has 13 staff, and spent \$855,064 in fiscal year 2009. The textbox on the following page, *OPIC and OPA Responsibilities*, shows how the two offices split the Commission's public assistance functions. Finally, TCEQ provides information to the public through its website, [www.tceq.state.tx.us](http://www.tceq.state.tx.us), which is coordinated through the Agency Communications Office, which reports to the Executive Director.

### **OPIC and OPA Responsibilities**

#### **The Office of Public Interest Counsel**

- Represents the public interest by participating in:
  - contested case hearings relating to air quality, water quality, water rights, water utilities, and applications for solid waste disposal permits;
  - proposed rulemakings;
  - enforcement matters; and
  - other matters set for consideration at the Commission’s public meetings.
- Provides general public assistance as needed, including providing information on public participation, contested hearing procedure, rules and regulations, and other general agency information.
- Assists unrepresented respondents in default enforcement order proceedings.

#### **The Office of Public Assistance**

- Answers questions regarding permitting process and opportunities for public participation.
- Conducts public meetings throughout the state on permit applications.
- Coordinates activities associated with the Compact with Texans and TCEQ’s Customer Satisfaction Survey and serves as the agency’s customer relations representative.
- Administers the Environmental Equity Program.

## **Findings**

### **The agency’s public assistance functions are not coordinated or well-defined.**

TCEQ’s public assistance functions, at both the Commission and agency level, happen among several different programs, resulting in an uncoordinated effort that can translate into a lack of focus and contribute to a perception of a lack of concern for the public. The Commission’s two centralized public assistance functions, OPIC and OPA, have overlapping duties. By Commission resolution, both programs have been charged with helping the public participate in proceedings before the Commission. While OPA helps the public participate early in permitting processes through public meetings and public comment, it has a limited role in overall public assistance for the agency as a whole. Other public assistance occurs on an ad hoc basis through the agency’s regional offices and specific program areas, such as by individual permit writers. Without a truly centralized effort to assist with public concerns about the environment, the agency may not be providing focused assistance for all regulatory matters under the agency’s jurisdiction, and may be missing an opportunity to identify broader public concerns about the environment.

In addition, while the Commission has charged both OPIC and OPA with public assistance, these offices exist within and report to the Commissioners’

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*TCEQ’s lack of focus on public assistance can contribute to a perception of a lack of concern for the public.*

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Office. OPIC focuses its work on matters immediately before the Commission. OPA focuses its work on assistance to the general public on any permitting or rulemaking matter. Despite the importance of providing help to those navigating the permitting and enforcement processes before the Commission, the agency at large does not have an office that coordinates public assistance on a day-to-day basis. This type of public assistance includes simply answering questions regardless of whether they become contested matters at the Commission.

TCEQ also lacks specific statutory direction that makes public assistance a priority within the agency. OPIC's charge to ensure that the Commission is responsive to concerns relating to environmental quality and consumer protection is the only general statutory charge to the Commission to provide public assistance. However, OPIC's main responsibility is to represent the public's interest in proceedings before the Commission, leaving little focus on its general assistance function.

In contrast, the Legislature recognized the need for assisting small businesses regulated by the agency, requiring the Commission to establish a small business compliance assistance program.<sup>6</sup> This charge is carried out by the Small Business and Environmental Assistance (SBEA) program, which assists regulated entities, including small businesses and local governments, and reports to the Executive Director. In fiscal year 2009, SBEA spent \$15.3 million and had 67 staff.<sup>7</sup>

Although different in that they interact with specific constituencies, such as insurance and telecommunications and electric consumers, the Texas Department of Insurance and the Public Utility Commission have specific statutory charges to educate and assist consumers and the public.<sup>8</sup> These statutory charges have translated into consumer protection programs at both agencies that report to the agency head and provide customer information and education, as well as complaint resolution. The broader nature of TCEQ's constituency of all Texans affected by its regulatory actions certainly makes its public assistance job difficult, but the agency still has a role to play in public assistance and education.

**OPIC's broad responsibilities prevent it from effectively focusing its efforts and can place it in potentially conflicting roles.**

- **OPIC Workload.** OPIC has party status in contested permitting and enforcement cases, to represent the public interest in the matter at hand. OPIC also represents the public interest in rulemaking and other proceedings before the Commission. Given that each Commission agenda has an average of 85 actionable items, which can almost all involve OPIC, its potential workload is substantial. However, OPIC has limited resources and must be able to focus its efforts. Although OPIC does not have formal procedures to guide its participation in cases, the Public Interest Counsel indicates that the consideration of a matter includes

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*TCEQ lacks specific statutory guidance that makes public assistance a priority.*

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*OPIC's potential workload is substantial, requiring it to focus its efforts.*

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the level of public interest, the environmental or consumer protection significance, the extent to which the parties adequately represent the public interest, and the likelihood of a contested case hearing.

- **Dilution of OPIC's Primary Duty.** OPIC's charge to generally assist the public and enforcement respondents dilutes the Office's ability to focus its efforts on its primary duty to represent the public interest in Commission proceedings. The responsibilities to provide public assistance and information about agency processes and procedures and to help regulated entities navigate the default enforcement order process take time away from representing the public interest. However, OPIC does not track its time spent on these other public assistance activities.
- **Potential Conflicts.** OPIC's dual role in providing individual assistance in matters before the Commission and representing the public interest in the same matter can put OPIC in potentially conflicting positions. For example, OPIC has implemented a program to address default enforcement orders resulting from unrepresented respondents failing to appear at hearings. OPIC contacts these regulated entities when default orders appear likely, to explain the process, consequences of a default, and to facilitate communication with TCEQ's enforcement attorneys. While this assistance is an important agency function, having OPIC provide assistance to an individual enforcement respondent may conflict with OPIC's role to represent the public's interest in that same enforcement case. In contrast, TCEQ's Small Business and Environmental Assistance program routinely assists regulated entities in achieving compliance with agency regulations.

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*Providing assistance to a party in a contested case can conflict with OPIC's duty to represent the public interest in the same case.*

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Potential conflict can also arise when OPIC assists individuals in navigating the contested permitting process, as it has been charged to do. For example, in a permitting case for a wastewater treatment plant or municipal landfill, the public interest could be the community's need for appropriate wastewater treatment or trash disposal; the community's need to limit the environmental harm that may result from such activities; or the community's need for jobs created by such facilities. The public interest may change from case to case, and may not always align with a particular member of the public protesting the Commission action. In these cases, OPIC may be put in the position of assisting individuals whose interests may not align with the public interest.

- **Lack of Guidance on the Public Interest.** OPIC's duty to represent the public interest in cases before the Commission is largely undefined. Neither TCEQ nor OPIC have developed any formal guidance on what the public interest is. OPIC indicates that informally the public interest involves getting the most protective permit possible and protecting the people's right to participate, stating that it can raise issues to State Office of Administrative Hearing judges and the Commissioners, and advocate

to get conditions added to a permit. However, without better defined goals of what representing the public interest might be, OPIC risks an unfocused and inconsistent approach to its work.

**OPIC’s unique accountability structure results in challenges in demonstrating its effectiveness.**

OPIC is an office within the agency, meant to provide the Commission with the public interest perspective in decision-making matters. Because of this, OPIC is solely accountable to the Commission, which appoints the Public Interest Counsel, evaluates the Office’s effectiveness, and approves the Office’s budget.

OPIC has no performance measures, whether external or internal, to show its effectiveness. For example, OPIC does not keep track of how its attorneys spend their time, other than which cases are assigned to each attorney, nor does it track the results of its participation in a particular case. In contrast, other public counsels that function as independent agencies, such as the Office of Public Insurance Counsel, the Office of Public Utility Counsel, and the Office of Injured Employee Counsel, must routinely evaluate and report their effectiveness through the legislative oversight and budgeting processes.

In addition, in 2001, the Legislature granted OPIC additional authority to strengthen its public interest role by giving it the authority to recommend legislative or regulatory changes and to contract for outside technical support to provide expertise on the cases it gets involved in. OPIC has never used either authority.

**TCEQ has an opportunity to provide better public information on environmental issues and its role in environmental protection and regulation.**

TCEQ is a large and complex agency that has broad responsibilities, resulting in a high level of public interest in TCEQ’s programs and decisions. TCEQ has a wealth of information about its functions and about the environment, but at times is not effective at communicating agency actions to the public. Customer service surveys of stakeholders suggest a high level of dissatisfaction with the usefulness of information on the website, and a recurring concern about making information easier to find on the website.<sup>9,10</sup> While the website has a considerable amount of information, it can be difficult to navigate and does not provide useful, plain language information for the public’s understanding.

In addition, state law requires TCEQ to make public all written statements of policy or interpretations formulated, adopted, or used to discharge its functions.<sup>11</sup> Despite this charge, information provided on the agency’s website does not clearly indicate policies the Commission uses to make its decisions. In addition, the agency’s website does not include a searchable

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*Unlike other public counsels, OPIC is solely accountable to its Commission.*

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*Information provided on TCEQ’s website does not clearly indicate policies it uses to make decisions.*

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docket system to track Commission decisions and other actions relating to agendas that guide agency decisions. Docket search results are not consistent. For example, results for searches using State Office of Administrative Hearings or TCEQ docket numbers can indicate “no results found” but can retrieve useful information when searching for the entity’s name in the same database. In other instances, the website fails to provide useful information on the outcome of agency cases other than docket numbers and dates.

Recognizing the opportunity to improve web access to its information, the Commission has recently revised its Information Strategic Plan, identifying 11 recommended action items, including improving overall communication to the public. Also included in the recommendations is a proposal to create an Enterprise Information Gateway/Information System that would increase the ability of agency staff and the public to search, query, and download information.

## Recommendations

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### *Change in Statute*

#### **2.1 Charge the Executive Director with providing assistance and education to the public on environmental matters under the agency’s jurisdiction.**

This recommendation would shift OPIC’s current statutory charge regarding responsiveness to environmental and citizen’s concerns, including environmental quality and consumer protection, to the Executive Director. Statutorily, these duties would be expanded to include a requirement that the Executive Director assist and educate the public on environmental matters under TCEQ’s jurisdiction.

Much like the legislative charge to assist small businesses regulated by the agency, this recommendation would give the agency the flexibility to determine how to structure this function. TCEQ should assess the public assistance functions that currently exist within OPA, OPIC, and other programs within the agency, and reorganize as appropriate. However, any coordinated effort should include initiatives related to all of the agency’s responsibilities, not just to matters before the Commission. The agency should, at a minimum, create a structure to provide the public a centralized access point to the agency, and to ensure that the agency is able to strategically assess the public’s concerns, and respond as necessary.

Any centralized assistance program would not prevent public assistance from continuing to occur throughout agency programs, such as regional offices or specific programs, as is currently the case. This centralized effort also would not include that agency’s process for investigating environmental complaints, which is appropriately centralized in the Office of Compliance and Enforcement. Providing a specific focus on public assistance will allow TCEQ to be more proactive in identifying and addressing the public’s concerns.

#### **2.2 Focus OPIC’s efforts on representing the public interest in matters before the Commission.**

In conjunction with Recommendation 2.1, this recommendation would focus OPIC on its primary duty to represent the public interest in matters before the Commission. OPIC would focus on the public interest in contested permitting matters, rulemakings, and enforcement proceedings as necessary.



To resolve any potential conflicts, OPIC's other assistance functions would transfer to the agency's new public assistance program. In addition, OPIC would no longer assist regulated respondents through the agency's enforcement proceedings. As the program within the agency charged with assisting small businesses and regulated entities with achieving compliance, the Small Business and Environmental Assistance program could serve as a resource for a regulated entity, of any size, that needs assistance in enforcement proceedings.

**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.**

Under this recommendation, the Commission would adopt rules to outline the factors OPIC should consider in determining whether it should participate as a party representing the public interest in proceedings before the Commission. The rules would include, but not be limited to, factors to be considered in determining the public interest in a case, as well as any other considerations OPIC must assess to prioritize its workload. Recognizing the need for flexibility and that the public interest may change depending on the facts of an individual case, this recommendation is not intended to specifically define the public interest, but rather to identify the factors OPIC must use in determining what the public interest is on a case-by-case basis. OPIC should make recommendations to the Commission in developing the rules. In addition, the rulemaking process will allow the public to provide input on what the factors should be.

**2.4 Require OPIC to annually report to the Commission on the Office's performance, budget needs, and legislative and regulatory recommendations.**

This recommendation would require OPIC to formally report to the Commission, as a public meeting agenda item, the Office's performance in representing the public interest, its budget needs, and any legislative and regulatory recommendations. This information should be included in the Commission's annual report. OPIC should work with the Commission to identify internal performance measures to best assess the Office's effectiveness. In addition, OPIC should assess its budget needs, including the need to contract for outside expertise, as currently authorized by statute, for the Commission's consideration in TCEQ's biennial Legislative Appropriations Request. Finally, this annual report should also include OPIC's legislative and regulatory recommendations, as it is currently statutorily authorized to make, which TCEQ would include in its statutorily required biennial report to the Legislature.<sup>12</sup>

***Management Action***

**2.5 Direct TCEQ, in pursuing changes to its website, to provide easy access to information on agency policy and environmental regulatory efforts in plain language.**

In pursuing changes to its website as part of implementing its Information Strategic Plan, TCEQ should incorporate comments and information received from public stakeholders, agency staff, and other state agency websites to develop an approach that quickly delivers current and useable information. The agency should also consider ways to better communicate the policies the Commission uses to make its decisions, including referencing its policies on its website and providing a searchable docket system. Recognizing that increasing the website's usability and creating a searchable docket system can take significant resources, this recommendation intends to minimize costs by encouraging TCEQ to continue to improve information access as it moves forward in upgrading its information technology in the future.

## Fiscal Implication Summary

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While these recommendations may result in the agency shifting resources among different programs, including OPIC, OPA, and SBEA, they should not require additional funding. In determining how to structure the agency's public assistance function and shifting duties from OPIC, TCEQ should assess current staff needs in each program and realign staff as necessary. The management recommendation to direct TCEQ to improve information on its website is intended to work in concert with TCEQ's Information Strategic Plan, and is not intended to require additional resources, more than what TCEQ would already request to implement its Information Strategic Plan on its own initiative.

- .....
- 1 Texas Water Code, sec. 5.271.
  - 2 Texas Water Code, sec. 5.273.
  - 3 Texas Natural Resource Conservation Commission (TNRCC), Resolution Concerning Public Participation, April 22, 1996.
  - 4 TNRCC, Resolution Concerning Dealing with the Public on Applications, Including Hearing Requests, 96-1513-RES, October 8, 1996.
  - 5 TNRCC, Resolution Concerning the Evaluation of Hearing Requests, 96-1508-RES, September 13, 1996 and TNRCC, Resolution Concerning Dealing with the Public on Applications, Including Hearing Requests, 96-1513-RES, October 8, 1996.
  - 6 Texas Water Code, sec. 5.135.
  - 7 Of the \$15.3 million SBEA spent in fiscal year 2009, \$9.3 million was dedicated to the Clean School Bus Grant program.
  - 8 Texas Insurance Code, ch. 521 and Texas Utility Code, ch. 17 and sec. 39.902.
  - 9 FY 2010 TCEQ Report on Customer Service, Tables A-2, and A-3.
  - 10 TCEQ-Quarterly Report on Customer Service, March 1, 2010 – May 31, 2010.
  - 11 Texas Water Code, sec. 5.121(a).
  - 12 Texas Water Code, sec. 5.178.

## ***Responses to Issue 2***

### **Recommendation 2.1**

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*Charge the Executive Director with providing assistance and education to the public on environmental matters under the agency's jurisdiction.*

#### **Agency Response to 2.1**

TCEQ agrees that there is a need to continually reassess and evaluate its operations to improve assistance and educational services to the public. The agency states that it is committed to expanding and refining its public service to determine needed changes to improve responsiveness to the public. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 2.1**

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

#### **Against 2.1**

Representative Lon Burnam, Member – Texas House of Representatives

Eric Allmon – Alliance for Clean Texas, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW), Montgomery

Wendi Hammond, Plano

### **Recommendation 2.2**

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*Focus OPIC's efforts on representing the public interest in matters before the Commission.*

#### **Agency Response to 2.2**

TCEQ agrees with this recommendation. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 2.2**

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Brandt Mannchen, Houston

**For 2.2** (continued)

League of Women Voters of Texas

**Against 2.2**

Eric Allmon – Alliance for Clean Texas, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

**Modifications**

1. Remove the Office of Public Interest Counsel from TCEQ and merge it with the Office of the Public Utility Counsel, with separate deputies for utility matters and environmental matters. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin; Eric Allmon – Alliance for Clean Texas, Austin; Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed – Lone Star Chapter, Sierra Club, Austin)
2. Increase the staff and budget for the Office of Public Interest Counsel. (Dr. Robert T. Fitzgerald, Vice President – Medina County Environmental Action Association, Inc., Hondo)
3. Make the Office of Public Interest Counsel an independent agency and the Public Interest Counsel a governor appointed position.
  - Public Interest Counsel must be licensed to practice law in Texas.
  - OPIC should represent the public interest in contested cases, rulemakings, appeal decisions by TCEQ to state district court, intervene in appeals brought by others to state district court, and recommend legislation on matters under TCEQ’s jurisdiction.
  - OPIC should have separate funding, and separate staff from TCEQ.(Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin)
4. Increase funding for the public interest and public assistance functions at TCEQ. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW), Montgomery)
5. Remove TCEQ’s responsibility for public assistance. (Ellen Hansen, Austin)
6. Strengthen the Public Interest Counsel with clear responsibility for representing the public interest in TCEQ and the ability to appeal. (Muriel Tipps, Cedar Lane)
7. Make the Office of Public Interest Counsel an independent agency. (League of Women Voters of Texas)

## **Recommendation 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.*

### **Agency Response to 2.3**

TCEQ agrees with this recommendation, but states that any factors developed should ensure that the Office maintains a measure of flexibility to respond to unanticipated issues and not unduly limit the Counsel's ability to bring the Office's public interest perspective to the Commission's decision making process. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 2.3**

Eric Allmon – Alliance for Clean Texas, Austin

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Brandt Mannchen, Houston

### **Against 2.3**

None received.

### **Modification**

8. Specify that the factors OPIC will consider in representing the public interest will include, at a minimum:

- the consistency of the proposed action with applicable law;
- the potential for a case to create precedent;
- amount of air emissions, waste water pollutants, waste disposal, or water right to be authorized;
- the level of public interest in a matter;
- whether all parties are represented;
- the ability of the parties involved to ensure a complete record; and
- cumulative impacts.

(Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and Eric Allmon – Alliance for Clean Texas, Austin)

## **Recommendation 2.4**

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*Require OPIC to annually report to the Commission on the Office's performance, budget needs, and legislative and regulatory recommendations.*

### **Agency Response to 2.4**

TCEQ agrees with this recommendation. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 2.4**

Eric Allmon – Alliance for Clean Texas, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

### **Against 2.4**

None received.

## **Recommendation 2.5**

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*Direct TCEQ, in pursuing changes to its website, to provide easy access to information on agency policy and environmental regulatory efforts in plain language.*

### **Agency Response to 2.5**

TCEQ supports this recommendation and states that it is in the process of taking steps to improve its web page. In recognition of the need to improve its web page, the agency states that it has included this item in the Information Strategic Plan. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 2.5**

Senator Wendy Davis, Member – Texas Senate

Eric Allmon – Alliance for Clean Texas, Austin

Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

League of Women Voters of Texas

### **Against 2.5**

None received.

## **Modifications**

9. Require TCEQ to post draft permits, fact sheets/statements of basis of information, and final permits for Texas Pollutant Discharge Elimination System permits on its website. (Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency)
10. Require TCEQ to make its general permit Notice of Intent database that is used for storm water general permits accessible to the public on-line with a search function. (Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency)
11. Direct TCEQ to consider providing the public with electronic access to information and documents associated with each permit action at individual facilities. (Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency)
12. Direct TCEQ to take full advantage of electronic forms of communication in providing information to the public, including subscription to an electronic mailing list for all notices related to a facility. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and Eric Allmon – Alliance for Clean Texas, Austin)
13. Require TCEQ to make the State Implementation Plan, supplements, board decisions, etc. available online. (Wendi Hammond, Plano)

## ***Commission Decision***

Adopted Recommendations 2.1 through 2.5.

## ***Legislative Action***

House Bill 2694 charges the Executive Director with providing assistance and education to the public on environmental matters under the agency's jurisdiction. As part of this provision, the bill specifies that the Office of Public Interest Counsel's (OPIC) primary duty is to represent the public interest in matters before the Commission. (Recommendation 2.2) The Office's current statutory charge to ensure responsiveness to environmental and citizens' concerns, including environmental quality and consumer protection, shifts to the Executive Director. TCEQ will assess the public assistance functions within the agency, and develop and implement a program to provide the public a centralized access point to the agency, and ensure that the agency is able to strategically assess the public's concerns and respond as necessary. (Recommendation 2.1)

House Bill 2694 requires the Commission, after considering recommendations from OPIC, to adopt rules that include factors to determine the nature and extent of the public's interest, and factors to consider in prioritizing OPIC's workload. (Recommendation 2.3) The bill also provides for OPIC to formally report to the Commission, in time for the Commission to include in its own reports, information about the Office's performance in representing the public interest, its

budget needs including the need to contract for outside expertise, and any legislative and regulatory recommendations. OPIC and the Commission must work cooperatively to identify internal performance measures to best assess the Office's effectiveness. (Recommendation 2.4)

As a management recommendation not needing statutory change, Recommendation 2.5 did not result in legislative action.



# Issue 3

## ***TCEQ's Approach to Compliance History Fails to Accurately Measure Entities' Performance, Negating Its Use as an Effective Regulatory Tool.***

### **Background**

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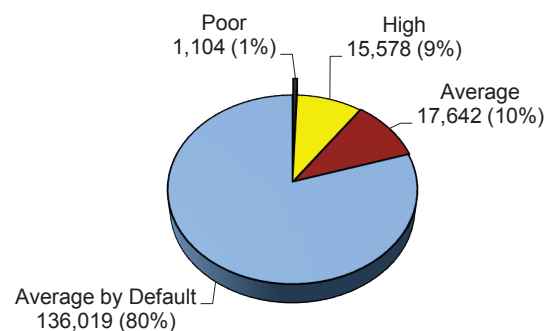
The Texas Commission on Environmental Quality (TCEQ) measures regulated entities' compliance history and uses it to tailor regulatory decisions, such as denying permits or adding permit conditions, and enhancing administrative penalties. In 2001, the Legislature required TCEQ to develop a uniform standard for compliance history and use it to implement a new performance-based regulatory structure. At the time, the process for measuring or comparing compliance history across TCEQ's programs for air, water, and waste was inconsistent. In addition to the traditional use of compliance history in permitting and enforcement decisions, this new performance-based regulation allowed TCEQ to use compliance history when determining eligibility for voluntary incentive programs. The idea is to use compliance history to provide incentives for regulated entities to do more to protect the environment than law requires, by making available benefits, such as regulatory flexibility and exemptions from some inspections.

In late 2001 and early 2002, TCEQ held stakeholder meetings to develop this new system of compliance history. TCEQ interpreted the uniform standard in law to mean using an identical objective formula for all entities. Although staff proposed a rule revision in 2006, the compliance history system has remained unchanged since implementation.

In calculating compliance history, TCEQ assigns points for different components that when computed in an equation produce a numerical score for each regulated entity. Generally, the lower the score is, the better the classification. For instance, bad behavior such as enforcement actions taken against a facility adds points, and good behavior such as participating in voluntary programs subtracts them. Appendix E provides more information on the compliance history formula.

TCEQ recalculates compliance history scores annually based on information from the previous five years, and classifies regulated facilities as poor, average, or high, as required by statute. For a breakdown, see the chart *Regulated Entities' Compliance History Classification*. Statute also requires TCEQ to assess the compliance history of entities for which it does not have compliance information. By rule, TCEQ has chosen to classify these entities as average by default. This category consistently includes the vast majority of regulated entities.

***Regulated Entities'  
Compliance History Classification  
FY 2009***



## Findings

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### **TCEQ's one-size-fits-all approach to compliance history does not accurately or fairly reflect regulated entities' environmental performance.**

As a regulatory agency, TCEQ oversees a very diverse population, ranging from small car lots with only one regulatory requirement to large complex chemical plants with untold regulatory requirements. This diversity makes evaluating compliance history using one uniform standard difficult. Consistently evaluating compliance history across regulated entities is important and allows TCEQ to compare actual performance, ensuring fairness and regulatory certainty. However, TCEQ's interpretation of a compliance history system based on a uniform standard has been problematic, leading to a rigid formula that ultimately distorts compliance history scores and strips classifications of practical meaning.

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*TCEQ's evaluation consistently produces the same classification percentages – achieving a predetermined outcome.*

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- **Point System Not Tied to Actual Performance.** In classifying regulated entities as poor, average, and high performers, TCEQ's compliance history formula arbitrarily assigns each classification a point limit. This point system was established so that 1 percent of entities will be poor performers and nine percent will be high performers, and these percentages have held almost constant over the last four years. In designing the point system this way, TCEQ's evaluation consistently produces the same classification percentages to achieve what is essentially a predetermined outcome. As such, the process negates consideration of the actual performance of individual entities, rendering the classifications meaningless as a practical tool. Also, the fixed point system hinders a regulated entity's ability to improve its classification if it improves performance.
- **Average by Default.** TCEQ classifies all regulated entities annually, whether or not the entity actually has a compliance history to evaluate. In fiscal year 2009, TCEQ classified 80 percent of regulated entities as average by default, because TCEQ had no information about those entities' performance. Without much of a working record with TCEQ, these entities are not suitable candidates for classification under this process. The average-by-default classification does not add meaning to the process, and the sheer size of the category skews the overall classification of the 20 percent of regulated entities that actually have performance records.
- **Complexity of Facilities.** Because it is a uniform standard, TCEQ's compliance history formula does not account for differing complexity among regulated facilities, producing scores and classifications that may be inaccurate and unfair. The vagaries of the existing formula can cause less complex facilities to be treated more harshly than more complex ones without a clear relation to their underlying performance. For example, a less-complex facility with one major violation can have a worse

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*Eighty percent of regulated entities are classified as average by default.*

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classification than a more-complex facility with two major violations and 83 other violations. Other aspects of the formula, however, give more complex facilities, with greater opportunities for things to go wrong, little chance of improving their performance classification.

**Without accurate classifications, TCEQ cannot use compliance history as an effective regulatory tool, making it harder for the agency to punish bad actors and reward good ones.**

Because the compliance history formula may result in dubious classifications, TCEQ cannot tailor regulatory decisions to reflect an entity's actual performance, preventing the agency from dealing with some entities through the compliance process in the way originally intended. By statute, TCEQ is required to consider compliance history when making permitting and enforcement decisions, giving it the flexibility to adjust regulations, such as adding greater restrictions and enhancing penalties for bad actors and repeat offenders. TCEQ pays special attention to compliance history when an entity is classified as poor. For instance, TCEQ reviews Municipal Solid Waste permits every five years for those facilities that have a poor performance classification. However, because the poor performer classification fails to measure performance accurately in some cases, it is an ineffective standard in TCEQ decisions.

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*Because of dubious classifications, TCEQ cannot tailor regulatory decisions to reflect actual performance.*

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Deficiencies in compliance history classifications also undercut the incentives offered through performance-based regulation. For instance, TCEQ's Clean Texas program offers incentives such as reduced inspection frequency, or extra assistance during the permitting process, in exchange for voluntary actions to protect the environment. Only regulated entities classified as average or above qualify for these programs. However, since classifications do not accurately reflect performance in all cases, some poor performers may potentially avoid some regulations and some good performers may not be able to take advantage of these incentives.

**Statute does not address other factors that can enhance TCEQ's evaluation of compliance history.**

Statute specifically defines the factors TCEQ must consider in evaluating compliance history, as seen in the textbox, *Compliance History Components*.<sup>1</sup> However, statute does not address other relevant factors that may be indicative of regulated entities' actual performance.

**Compliance History Components**

As required by statute, TCEQ must consider these factors when evaluating compliance history:

- enforcement orders;
- court judgments;
- consent decrees;
- state and federal criminal convictions;
- notices of violation;
- changes in ownership; and
- any information required by other law or requirement necessary to maintain federal program authorization.

- **Enforcement Orders Without Punitive Sanctions.** Statute requires TCEQ to consider all enforcement orders in calculating compliance history, without giving TCEQ the ability to differentiate between enforcement orders with or without punitive sanctions, which could

include penalties, shutdown orders, or other punitive emergency orders. Enforcement orders can differ in severity, and at times, TCEQ enters into formal orders without punitive sanctions, which can be enforced if necessary. Having TCEQ consider all of these types of enforcement orders as negative factors in its compliance history process discourages the use of some of these enforcement tools, which can affect overall enforcement efforts.

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*Considering non-punitive enforcement orders as negative factors discourages their use as enforcement tools.*

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For example, TCEQ can enter into enforceable orders without punitive sanction, called Corrective Action Orders (CAOs), which require corrective action for violations and allow TCEQ to achieve more compliance than would be possible under other enforcement actions. One way TCEQ could use these orders is in cases when it wants to develop a compliance plan with a municipality to make major improvements to the municipality's sewer system. However, since statute requires TCEQ to consider all enforcement actions in calculating compliance history, CAOs count as a negative component in the formula. As a result, TCEQ and respondents may be reluctant to use this valuable tool. In fact, TCEQ only issued one CAO in the last fiscal year.

- **Lack of Positive Factors.** Statute does not align with TCEQ rules allowing the use of positive factors in evaluating compliance history. Including positive factors gives TCEQ the ability to measure performance comprehensively, and to offer incentives to good actors.

## Recommendations

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### ***Change in Statute***

#### **3.1 Remove the uniform standard from statute and require the Commission to develop a compliance history method to be applied consistently.**

This recommendation would replace the uniform standard requirement in statute with authority for TCEQ to develop a method for evaluating compliance history. Under the recommendation, TCEQ would be required to apply this method consistently in its decisions on permitting, enforcement, and voluntary incentive programs. In implementing consistency, TCEQ would not be required to compare all entities using the same standard, but could tailor the method to differentiate by type of entity and make comparisons among similar type entities, as statute allows. Under this recommendation, TCEQ would maintain the existing compliance history system until the transition to the new method is complete.

#### **3.2 Remove the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information.**

This recommendation would remove the requirement to classify entities with no compliance information to evaluate. The agency would also eliminate the average-by-default classification, but as statute specifies now, could require a compliance inspection to determine eligibility for programs that require a high level of performance.

### **3.3 Expand the statutory components to allow TCEQ to consider other factors in evaluating compliance history.**

This recommendation would expand the factors TCEQ may use in determining compliance history to include, but not be limited to, positive compliance factors, complexity, and enforcement orders without punitive sanctions. In considering what other factors to consider in compliance history calculations, and how they will affect entities' overall scores, TCEQ would be required to adopt its approach in its compliance history rules.

The recommendation would specifically provide for the agency to consider positive indicators that affect compliance history, such as voluntary efforts to do more than the law requires. In conjunction with Recommendation 3.1, expanding the list of components to include complexity would allow TCEQ the flexibility to evaluate compliance history based on relative performance among similar type facilities, rather than on one standard formula for all entities. In determining how to account for complexity, TCEQ could consider entities' regulatory requirements and the severity of potential violations.

In addition, TCEQ would be authorized to differentiate between enforcement orders with punitive sanctions, and those without. Punitive sanctions would include penalties, shutdown orders, and other punitive emergency orders entered into by the Commission. By allowing TCEQ to differentiate among the type of enforcement orders, the agency would be able to use its current statutory authority to enter into enforcement orders requiring more meaningful corrective action than punitive sanctions, without having those enforcement orders penalize the respondents' compliance history score.

### ***Management Action***

#### **3.4 Direct TCEQ to revise its rules on compliance history.**

This recommendation would direct TCEQ to develop a new compliance history method by rule and make necessary changes to the current points system and formula. TCEQ would redefine the poor, average, and high classifications in such a way as to be responsive to changes in entities' actual performance. TCEQ would continue to assess compliance history annually. Also, TCEQ would be directed to reassess the effectiveness of the compliance history method on a regular basis, and within the parameters of statute, make changes to the rules as appropriate.

## **Fiscal Implication Summary**

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These recommendations would not have a fiscal impact to the State. Although TCEQ may choose to make changes to its current database system as a result of revising compliance history in rule, any changes are based on TCEQ implementation, and would not be significant.

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<sup>1</sup> Texas Water Code, sec. 5.753.



# Responses to Issue 3

## Recommendation 3.1

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*Remove the uniform standard from statute and require the Commission to develop a compliance history method to be applied consistently.*

### Agency Response to 3.1

TCEQ agrees with the recommendation to remove the term “uniform standard” from the statute and states that the removal of the term will allow TCEQ to revise the current compliance history rule in a manner that will more meaningfully reflect the compliance history of the regulated community. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### For 3.1

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Luke Bellsnyder, Executive Director – Texas Association of Manufacturers, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Thure Cannon, Director of Governmental Affairs and Celina Romero – Texas Pipeline Association, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

David Weinberg, Executive Director – Texas League of Conservation Voters

League of Women Voters of Texas

### Against 3.1

None received.

### Modifications

1. Provide clear guidance to TCEQ for developing a new compliance history method. (Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin)

2. Require TCEQ to evaluate the regulated community on a sector-by-sector approach, including requiring major sources to only be compared to other major sources. (Hector Rivero, President/CEO – Texas Chemical Council, Austin)

**Staff Comment:** Recommendation 3.1 states “TCEQ would not be required to compare all entities using the same standard, but could tailor the method to differentiate by type of entity and make comparisons among similar type entities, as statute allows.” Staff believes that this allows TCEQ the flexibility to accurately account for an entities complexity and number of regulations.

## **Recommendation 3.2**

*Remove the requirement to assess the compliance history of entities for which TCEQ does not have adequate compliance information.*

### **Agency Response to 3.2**

TCEQ supports the recommendation to remove the requirement to assess compliance history with no compliance information to evaluate. This change will eliminate the need to classify facilities as average by default. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 3.2**

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Luke Bellsnyder, Executive Director – Texas Association of Manufacturers, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Thure Cannon, Director of Governmental Affairs and Celina Romero – Texas Pipeline Association, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

League of Women Voters of Texas

### **Against 3.2**

None received.



### **Recommendation 3.3**

*Expand the statutory components to allow TCEQ to consider other factors in evaluating compliance history.*

#### **Agency Response to 3.3**

TCEQ agrees with the recommendation allowing TCEQ to include additional factors in evaluating compliance history. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 3.3**

Representative Lon Burnam, Member – Texas House of Representatives

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Luke Bellsnyder, Executive Director – Texas Association of Manufacturers, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Thure Cannon, Director of Governmental Affairs and Celina Romero – Texas Pipeline Association, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

League of Women Voters of Texas

#### **Against 3.3**

None received.

#### **Modifications**

3. Specify that corrective action orders, which are enforcement orders without punitive sanctions, should be included in compliance history, although perhaps they ought not carry the same weight as enforcement orders with administrative penalties. (Representative Lon Burnam, Member – Texas House of Representatives)
4. Require all enforcement orders to penalize a company's compliance history score. (Brandt Mannchen, Houston)

## **Recommendation 3.4**

*Direct TCEQ to revise its rules on compliance history.*

### **Agency Response to 3.4**

TCEQ agrees with the recommendation to revise the compliance history rule. TCEQ states that it will consider its experience with the current rule, as well as the many comments received from Legislators, the public, and the regulated community to develop a rule that is useful, cost-efficient, consistent and unbiased. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 3.4**

Representative Lon Burnam, Member – Texas House of Representatives

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Luke Bellsnyder, Executive Director – Texas Association of Manufacturers, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Thure Cannon, Director of Governmental Affairs and Celina Romero – Texas Pipeline Association, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Caroline Reynolds, P.E. – C.R. Solutions, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

Maitri Smithhisler, Chair – Neighborhood Protection Alliance of Richardson, Richardson

League of Women Voters of Texas

### **Against 3.4**

None received.

### **Modifications**

5. In revising compliance history, eliminate self-reported violations from compliance history classifications until, and unless, the self-reported violations have been cited in an enforcement action. (Carol Batterton, Executive Director – Water Environment Association of Texas, Austin)

6. Direct TCEQ to develop compliance history policies for political subdivisions separate from for-profit enterprises, including developing Corrective Action Orders and other non-penalty enforcement tools. (Carol Batterton, Executive Director – Water Environment Association of Texas, Austin)
7. Direct TCEQ, in revising compliance history, to address how it handles Notices of Violations and the acquisition of a former owner’s compliance history upon purchase of a site. (Thure Cannon, Director of Governmental Affairs – Texas Pipeline Association, Austin)
8. Require TCEQ to revise compliance history based on H.B. 2318 from the 80th legislative session:
  - Eliminate uniform standard.
  - Change the way TCEQ uses Notices of Violation (NOVs) to evaluate an entity’s compliance history.
    - Use NOVs to enhance penalties only when the agency takes subsequent enforcement action or the entity is a repeat violator.
    - Require that any NOVs listed in compliance history be accompanied by a clarification that an NOV is not a final enforcement action, nor is it proof that a violation has actually occurred.
    - Require that self-reported deviations or violations only be included in compliance history if TCEQ issues an actual written NOV.
  - Change compliance history classifications to “unsatisfactory” and “satisfactory”, and establish an “unclassified” category for those entities for which the Commission does not have enough information.
  - Continue using a formula-based approach that is balanced at using positive and negative factors related to size, operation and complexity of the site being evaluated.
  - Consider the following components in determining whether an entity is a repeat violator:
    - the size of the site where the violations occurred;
    - whether the violations are of the same nature and the same environmental media of other violations that have occurred in the last five years.
  - Components used to determine compliance history may not be used to determine penalty enhancements.
  - Allow an owner or operator of a site to have 30 days to evaluate its compliance history before it is posted on the internet.

- Allow regulated entities to use the Regulatory Flexibility program if they can prove that the alternative technology is as protective of the environment and public health as the agency's current method or standard.

(Hector Rivero, President/CEO – Texas Chemical Council, Austin)

## ***Commission Decision***

Adopted Recommendations 3.1 through 3.4.

## ***Legislative Action***

In House Bill 2694, the Legislature adopted the Sunset Commission provision to remove from statute the uniform standard requirement for evaluating compliance history, but slightly modified the provision to require TCEQ to develop standards, instead of a method, for evaluating and using compliance history consistently. TCEQ may also account for differences among regulated entities in developing the standards. (Recommendation 3.1) House Bill 2694 removes the requirement for TCEQ to assess the compliance history of entities for which it does not have adequate compliance information, essentially removing the average-by-default classification that skews the overall classification. (Recommendation 3.2)

The Legislature modified the Sunset Commission provision relating to the factors that TCEQ uses in compliance history and added several new provisions to the bill related to TCEQ's use of compliance history. House Bill 2694 removes the requirement for components of compliance history to include consent decrees and criminal convictions under federal law related to compliance with legal requirements of the Environmental Protection Agency (EPA), and instead provides for consent decrees and criminal convictions relating to violations of EPA rules to be included as components of compliance history to the extent they are readily available. In addition, the bill removes the requirement to include criminal convictions relating to violations of laws of other states. The bill requires TCEQ, in evaluating compliance history, to take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to federal Title V requirements.

The Legislature also modified the Sunset provision regarding factors to consider in determining compliance history to require TCEQ to include Notices of Violation, but for only one year after issuance. TCEQ may not include self-reported information received by TCEQ as required by Title V of the federal Clean Air Act, unless the Commission issues a written Notice of Violation. TCEQ may consider final enforcement orders or judgments resulting from self-reported Title V deviations or violations as components in determining compliance history. (Recommendation 3.3)

The Legislature added language requiring TCEQ to establish a set of standards for classification of compliance history in rule as a means of evaluating compliance history and authorizing TCEQ to consider the person's classification when using compliance history in regulatory actions. House Bill 2694 changes the classification category of "poor" performers to "unsatisfactory" performers, and defines "unsatisfactory" as performing below minimal acceptable performance

standards established by TCEQ. The bill also changes the classification of “average” performers to “satisfactory” performers, and defines “high” performers as regulated entities that have an above-satisfactory compliance record. In setting standards for the classification of compliance history, TCEQ may establish a category of unclassified performers or regulated entities for which it does not have adequate information. The bill removes language that prohibited the Commission from performing announced inspections for persons whose compliance history is classified as the lowest classification.

In classifying a person’s compliance history, TCEQ must establish criteria for classifying a repeat violator giving consideration to the size of the site at which the violations occurred, rather than the number of facilities owned or operated, and limiting consideration to violations of the same nature and the same environmental media that occurred in the preceding five years. TCEQ must also consider the size and complexity of the site generally, including whether the site is subject to federal Title V requirements, and consider the potential for a violation at the site that is attributable to the nature and complexity of the site.

The Legislature added language to specify that compliance history may be used for administrative penalty enhancement, but limits the amount of enhancement to 100 percent of the base penalty for an individual violation. The Legislature also added language to require TCEQ to evaluate compliance performance information through a quality assurance and control procedure, including a 30-day period for the owner or operator of the site to review and comment on the information, before the information may be placed on the Internet.

House Bill 2694 makes changes to the Regulatory Flexibility program, requiring TCEQ to exempt an applicant from a pollution control or abatement law or Commission rule if the applicant proposes a control or abatement by an alternative standard that is *as* protective of the environment, instead of *more* protective as currently required in law. The bill makes several additional changes related to the process by which an entity applies for regulatory flexibility and TCEQ approves the application. Finally, the bill applies TCEQ’s compliance history program to subsurface area drip dispersal systems; and programs for removing, collecting, and recovering convenience switches from end-of-life vehicles.

As a management recommendation not needing statutory change, Recommendation 3.4 did not result in legislative action.



# Issue 4

## ***TCEQ's Enforcement Process Lacks Public Visibility and Statutory Authority.***

### **Background**

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The Texas Commission on Environmental Quality (TCEQ) takes enforcement actions against those who violate federal or state environmental laws and rules to sanction violators and deter future noncompliance. Given TCEQ's broad jurisdiction, the agency takes enforcement action against many different types of regulated entities, which range widely in size and sophistication. TCEQ uses risk-based investigation and enforcement criteria that focus the agency's efforts and resources on violations that result in the most serious harm to the environment or human health. For these more serious violations, TCEQ will issue a Notice of Enforcement (NOE) and initiate formal enforcement proceedings. For less severe violations, TCEQ issues a Notice of Violation (NOV), which is a notification without an assessed penalty. In most cases, TCEQ requires NOV respondents to correct violations within up to 180 days. If the respondent does not correct the violation, or if the original violation was more serious as categorized by the policy, TCEQ will issue an NOE, which signals the beginning of a formal enforcement process.

Once a violation reaches the formal enforcement threshold, statute provides a range of sanctions including: administrative penalties; occupational license denial, suspension, or revocation; shutdown and emergency orders; Supplemental Environmental Projects (SEPs); corrective action orders, which are administrative orders with no penalty; civil penalties and injunctive relief pursued through the Office of the Attorney General (OAG); and criminal fines pursued through district attorneys' offices. The textbox, *TCEQ Enforcement-Related Actions*, gives information about TCEQ's enforcement activity in fiscal year 2009.

#### ***TCEQ Enforcement-Related Actions FY 2009***

Investigations (Routine and Complaints): 106,758  
Notices of Violations: 11,407  
Notices of Enforcement: 2,243  
Administrative Enforcement Orders: 1,756  
Administrative Penalties Assessed: \$23,426,525  
Supplemental Environmental Projects: 282 projects equaling \$6,375,212  
Referrals to the Office of Attorney General: 63  
Civil Penalties Pursued by OAG: 29 orders for \$11,293,345 in penalties, including \$1,125,000 in SEP orders  
Occupational License and Petroleum Storage Tank (PST) Revocations: 36  
Shutdown Orders for PSTs: 15  
Emergency Orders: 6

TCEQ relies heavily on administrative penalties to sanction violators. Statute requires TCEQ to consider specific factors in determining the penalty amount.<sup>1</sup> TCEQ's Commission-adopted penalty policy specifies these factors and how they interact in penalty calculations, as seen in the textbox on the following page, *Penalty Calculation Factors*. Penalties are typically a percentage of the statutory administrative penalty maximum.

### **Penalty Calculation Factors**

To calculate a base penalty, TCEQ considers the potential and actual harm to human health or the environment; size of the site; significance of pollution; and degree of noncompliance. TCEQ then considers the number, type, and duration of the violation events. TCEQ then can adjust the penalty up or down, based on the following factors:

- compliance history and classification;
- repeat violations;
- culpability;
- good faith effort to comply;
- economic benefit gained by noncompliance; and
- other factors justice may require.

## **Findings**

### **TCEQ's enforcement policies are unclear, limiting regulated entities' and the public's ability to understand TCEQ's enforcement decisions.**

No clear path exists for someone to understand and follow TCEQ's enforcement decision process. First, very little of TCEQ's general approach to enforcement is in rule, including when and how it applies enforcement sanctions. The Commission adopted TCEQ's penalty policy most recently in 2002. However, the adopted policy does not reflect how the agency actually applies it, since the Commission has further shaped the policy through Commission decisions. The Commission has had eight meetings since 2004 where it made significant decisions that affect application of the penalty policy, but TCEQ has no central resource for this information. Without a clear, updated penalty policy, people cannot know how the agency calculates penalties. In addition, without a clear penalty policy, TCEQ or the State Office of Administrative Hearings, which conducts hearings on TCEQ enforcement cases, risk inconsistently applying penalties in the future.

For example, the Commission-adopted penalty policy does not direct TCEQ to recover economic benefit associated with the avoided costs of compliance. In its May 9, 2008 work session, the Commission directed TCEQ staff to assess penalties to recover this economic benefit from regulated entities other than political subdivisions and nonprofit organizations; however, this approach has never been incorporated into the penalty policy. Without knowing that the Commission had that particular discussion more than two years ago, and how to access and cross-reference Commission decisions, the public would have little ability to know TCEQ's approach to economic benefit in calculating penalties.

Because of the significance of the types of violations under TCEQ's jurisdiction, its enforcement actions are subject to much public scrutiny, including stakeholder groups, regulated entities, and affected parties, such

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*The 2002 adopted penalty policy does not reflect how it is currently applied.*

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as counties and cities in which regulated facilities exist. Recognizing this, statute requires information regarding pending enforcement orders to be posted in the Texas Register for 30 days, allowing for public comment on proposed enforcement orders before the Commission may act, taking into consideration this public comment.<sup>2</sup> However, effective comments are difficult to make if penalty policies are unclear. In addition, statute generally requires TCEQ to make public all written statements of policy or interpretations formulated, adopted, or used to discharge its functions.<sup>3</sup> Since one of TCEQ's biggest functions is to ensure compliance with environmental regulations by enforcing against violators, the public should be able to clearly understand TCEQ's approach to enforcement, including how TCEQ calculates penalties.

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*Civil penalties are capped at higher levels than TCEQ's administrative penalties.*

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**Statutory limits on administrative penalties hinder TCEQ's ability to take effective enforcement action against some violators.**

State law has 24 separately authorized administrative and civil penalty ranges for violations of law under TCEQ's jurisdiction, depending on media or subject area, as seen in the chart, *Statutorily Authorized Penalties*. Generally, TCEQ has a cap of \$10,000 per day, per violation for the most serious violations. Civil penalties pursued through OAG are capped at higher levels, but generally track the severity of administrative penalty ranges. Both administrative and civil penalties are deposited into the State's General Revenue Fund.

***Statutorily Authorized Penalties***

<b>Program Violation</b>	<b>Administrative Penalties Per Violation, Per Day</b>	<b>Civil Penalties Per Violation, Per Day</b>
Air Quality	\$0 – 10,000	\$50 – 25,000
Edwards Aquifer	\$0 – 10,000	\$50 – 25,000
Industrial and Hazardous Waste	\$0 – 10,000	\$50 – 25,000
Land over Municipal Solid Waste Landfills	\$0 – 10,000	\$50 – 25,000
Medical Waste	\$0 – 10,000	\$50 – 25,000
Municipal Solid Waste	\$0 – 10,000	\$50 – 25,000
Petroleum Storage Tanks	\$0 – 10,000	\$50 – 25,000
Radioactive Substances	\$0 – 10,000	\$50 – 25,000
Subsurface Excavation	\$0 – 10,000	\$50 – 25,000
Toxic Chemical Release Reporting	\$0 – 10,000	\$50 – 25,000
Underground Injection Control	\$0 – 10,000	\$50 – 25,000
Underground Water	\$0 – 10,000	\$50 – 25,000
Waste Tires	\$0 – 10,000	\$50 – 25,000

**Statutorily Authorized Penalties (conitnued)**

<b>Program Violation</b>	<b>Administrative Penalties Per Violation, Per Day</b>	<b>Civil Penalties Per Violation, Per Day</b>
Water Quality	\$0 – 10,000	\$50 – 25,000
Occupational Licenses	\$0 – 2,500	\$50 – 5,000
On-site Sewage Disposal	\$0 – 2,500	\$50 – 5,000
Used Oil	\$0 – 2,500	\$50 – 5,000
Used Oil Filter	\$0 – 2,500	\$100 – 500
Water Saving Performance Standards	\$0 – 2,500	\$50 – 5,000
Water Rights	\$0 – 5,000	\$0 – 5,000
Dam Safety	No Authority	\$0 – 5,000
Public Water Utilities	\$0 – 500	\$100 – 5,000
Levees	\$0 – 1,000	\$0 – 1,000
Public Water Supply	\$50 – 1,000	\$50 – 1,000

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*In 2009, TCEQ reduced penalties for 50 cases because of statutory caps.*

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- **Penalty Reductions.** After calculating administrative penalties according to factors in the agency’s penalty policy, TCEQ is forced to lower some calculated penalties because of statutory caps. The factors evaluated in assessing a penalty can result in an enhancement to the base penalty, if, for example, the violator has a poor compliance history. However, if the calculated penalty exceeds the administrative penalty statutory cap, then the penalty is reduced to the cap level, and the violator is not sanctioned for poor compliance history.

In fiscal year 2009, TCEQ reduced assessed penalties for 50 enforcement cases based on statutory penalty limits, indicating that TCEQ’s current caps cannot adequately provide for the appropriate level of sanction. These 50 cases included multiple violations per case, and all of the penalty caps related to these violations were at the \$10,000 per violation, per day level. The overwhelming majority of the cases were air cases. All penalty enhancements in these cases were because of negative compliance history components. Under the \$10,000 cap, TCEQ assessed \$2.7 million in penalties for these cases. Had the administrative penalty cap for these violations been \$25,000 – the level of the civil penalty cap – TCEQ would have assessed an additional \$1.4 million in penalties.

- **Referral to the Office of the Attorney General.** TCEQ refers some enforcement cases to the Office of the Attorney General for civil enforcement since OAG has higher statutory civil penalty caps and has a penalty calculation methodology that results in higher penalties. In calculating recommended penalties, OAG interprets its per violation, per

day penalty authority to allow for speciating pollutants, which means it breaks down the number of violations in an emission or discharge event into its individual chemical components. An example would be to count the individual contaminants of an illegal emissions event separately rather than as a single event. Although both TCEQ and OAG are taking action against the same categories of violations, statute and agency interpretation result in different assessed penalties, depending on the respondent's venue.

TCEQ currently has 296 cases pending civil enforcement at OAG. Of those, TCEQ staff indicate that 28 have been referred for civil penalties and injunctive relief because of OAG's higher penalty authority, providing another indication that TCEQ does not have enough administrative penalty authority. In cases such as these, TCEQ is forced to take the more time-consuming and expensive route of civil enforcement through OAG to appropriately sanction violators. Administrative enforcement proceedings are aimed at taking swift, appropriate action against violators, and keeping agency enforcement cases out of the courts. But in these cases, TCEQ cannot avail itself of the administrative process, because the fines would be too low to adequately sanction or deter future noncompliance. No matter what TCEQ's administrative penalty caps are, it will likely always need to make some referrals to OAG for egregious cases. However, if TCEQ had matching penalty authority, it could refer fewer cases to OAG, taking fuller advantage of the administrative enforcement process.

- **Significant Impact.** An agency's administrative penalty authority should reflect the severity of the violation and serve as a deterrent to violations of law. The very nature and seriousness of some violations under TCEQ's jurisdiction can have significant impacts to Texas that warrant higher penalties than the agency is currently authorized to assess. For example, one air contaminant emission event can release significant levels of toxins into the air, affecting the environment and human health.
- **Other Agencies.** Other regulatory agencies have higher statutory administrative penalty caps. For example, both the Texas Department of Insurance and the Public Utility Commission (PUC) have the authority to assess administrative penalties of up to \$25,000, per violation, per day. PUC's statutory administrative penalty was increased during its 2005 Sunset review from \$5,000 to \$25,000, and recently the Sunset Commission voted to increase PUC's administrative penalty authority for electric reliability violations to \$100,000 per violation, per day.

**TCEQ has no authority to assess administrative penalties against dam safety violations.**

TCEQ's dam safety program monitors, inspects, and regulates 7,190 dams in Texas. Last session, the Legislature authorized an additional 24 employees and \$2.5 million to improve TCEQ's program for inspecting and identifying problem dams. In fiscal year 2009, TCEQ identified 992 high-hazard and

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*At times, TCEQ must pursue the more time-consuming route of civil enforcement because of OAG's higher penalty authority.*

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*TCEQ identified 992 high-hazard dams in 2009.*

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### ***Dam Safety Violations***

In fiscal year 2009, TCEQ performed 654 dam safety inspections and noted the following significant deficiencies:

- 492 maintenance issues;
- 122 instances of structural instability;
- 398 instances of failure to submit an operation and maintenance plan, as required; and
- 337 instances of failure to respond to TCEQ with a plan of action to address inspection findings, as required.

738 significant-hazard dams. When TCEQ identifies dam safety violations, which can have significant environmental and human health impacts, it cannot effectively enforce environmental regulations, since it has no administrative penalty authority over dam safety violations. TCEQ has found violations related to dam safety, as shown in the textbox, *Dam Safety Violations*.

As a result of these findings, TCEQ has identified three issues to be addressed with

Notices of Violations, including: dams with major structural or hydraulic issues and whose owners have failed to respond to deficiency letters; dams that have been constructed, modified, or repaired without approval and whose owners refuse to provide information to TCEQ; and instances in which access to the property has been denied. Although TCEQ has begun to formally cite these violations, the lack of administrative penalty authority limits TCEQ's ability to appropriately sanction violators that refuse to come into compliance. In contrast to TCEQ's lack of penalty authority, OAG has civil penalty authority of up to \$5,000 per violation, per day for these same violations. TCEQ has referred one dam safety case to OAG for civil enforcement.

### **Statutory restrictions on the use of Supplemental Environmental Projects prevent TCEQ from using this enforcement tool to improve the environment.**

While administrative penalties are a way to deter future noncompliance, statute also gives TCEQ the authority to use Supplemental Environmental Projects (SEPs) to offset some or all of the administrative penalties assessed, depending on the project and type of respondent. SEPs offer an opportunity to benefit the environment and prevent future risks to the health and safety of Texans by allowing violators to put penalty dollars to work. OAG may also enter into SEPs in civil enforcement cases.

By statute, SEPs must go beyond compliance with environmental laws and have an environmental benefit. Statute prohibits the Commission from approving a SEP that is necessary to bring a respondent into compliance with environmental laws; if it remediates environmental harm caused by the violation; or if the respondent has already agreed to perform the work under a pre-existing contract with another governmental agency.<sup>4</sup> These provisions prevent violators from abusing the SEP program by avoiding penalties by taking actions they must already otherwise take. However, these statutory prohibitions can also prevent TCEQ from using SEPs as an appropriate tool to ensure compliance and remediation of the violation, particularly if the violator is a governmental entity with limited resources to perform corrective action for the violation. For example, if a small municipality's public drinking

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*Governmental entities have limited resources to pay fines and correct violations without increasing taxes.*

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water supply facility has violations, TCEQ can require administrative penalties and action to fix the violation, but a municipality may not have money to pay both the penalty and fix the problem in a timely manner – without further taxing constituents or increasing rates.

## Recommendations

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### ***Change in Statute***

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

Under this recommendation, the Commission would lay out its approach to enforcement and adopt it in rule. TCEQ's enforcement program involves many different, detailed operational policies that interact together, ranging from its enforcement initiation criteria to its penalty policy. Recognizing these many facets, and TCEQ's need to be able to adjust policies as needed, this recommendation would require the Commission to adopt its enforcement policies in rule, but not the actual penalty methodology. Instead, the recommendation would require the Commission to regularly assess, update, and adopt its enforcement policies, including its penalty policy. In doing so, the Commission would make the updated policies public, including putting them on its website, so people can easily understand how the agency calculates assessed penalties.

In adopting these rules and policies, the Commission should consider and make clear its approach to and use of its statutory enforcement tools including, but not limited to, its approach to speciation and economic benefit in calculating penalties, as well as when it will use some of its other tools, such as emergency shut-down authority.

#### **4.2 Increase TCEQ's administrative penalty caps.**

This recommendation would increase 20 of TCEQ's administrative penalty caps to match the cap levels in statute for civil penalties for the individual programs. The table on the following page, *Recommended Penalty Cap Level*, shows what each of the new penalty caps would be under this recommendation. For the sake of consistency, this recommendation would increase the penalty for violations of the used oil filter program to the same level as violations of the used oil program, despite its lower statutory civil penalty cap.

The recommendation would not affect administrative penalty caps for water rights, levees, and public water supply violations, as these cap-levels are already the same as authorized civil penalty caps. Recommendation 4.3 addresses TCEQ's administrative penalty authority for dam safety violations separately.

This recommendation does not intend for TCEQ to automatically assess the maximum penalty for violations simply because the cap would be higher. Instead, the recommendation contemplates TCEQ revising its penalty policy to include the higher caps, but TCEQ would only assess penalties to the higher level if the calculation, according to the policy, warrants such an increase. Given that TCEQ has encountered problems with hitting the penalty cap only in the most severe violation categories, with the proposed penalty cap of \$25,000, under current policy TCEQ would only see a change with these most serious violations.

**Recommended Penalty Cap Level**

Program Violation	Recommended Cap
Air Quality	\$50 – 25,000
Edwards Aquifer	\$50 – 25,000
Industrial and Hazardous Waste	\$50 – 25,000
Land over Municipal Solid Waste Landfills	\$50 – 25,000
Medical Waste	\$50 – 25,000
Municipal Solid Waste	\$50 – 25,000
Petroleum Storage Tanks	\$50 – 25,000
Radioactive Substances	\$50 – 25,000
Subsurface Excavation	\$50 – 25,000
Toxic Chemical Release Reporting	\$50 – 25,000
Underground Injection Control	\$50 – 25,000
Underground Water	\$50 – 25,000
Waste Tires	\$50 – 25,000
Water Quality	\$50 – 25,000
Occupational Licenses	\$50 – 5,000
On-site Sewage Disposal	\$50 – 5,000
Used Oil	\$50 – 5,000
Used Oil Filter	\$50 – 5,000
Water Saving Performance Standards	\$50 – 5,000
Public Water Utilities	\$100 – 5,000

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

Under this recommendation, TCEQ would be authorized to assess administrative penalties, up to \$5,000, per violation, per day for dam safety violations. The recommended level tracks the civil penalty level already in statute. In implementing this recommendation, TCEQ should revise its enforcement initiation criteria, penalty policy, and operating procedures as necessary under the framework described in Recommendation 4.1, to describe how the agency will approach taking action against dam safety violations.

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

This recommendation would remove statutory provisions that prohibit TCEQ from approving SEPs that will bring a facility into compliance with law or remediate harm from violations. These statutory prohibitions would only be removed for local governments, which have limited resources and can put penalty dollars to better use in correcting the potential or actual environmental harm resulting from

violations. In implementing this change, TCEQ would formulate a policy to clearly define when it would allow the use of SEPs for this purpose, to prevent regulated entities from systematically avoiding compliance. This policy would include an assessment of the entity's financial ability to pay administrative penalties and the ability to come into compliance or remediate harm, and the need for corrective action.

## Fiscal Implication Summary

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These recommendations will likely result in a small revenue gain to the State, but a precise estimate cannot be determined. The recommendation to adopt in rule and update enforcement policies would not have a fiscal impact as it can be incorporated into TCEQ's normal course of business. While the recommendation to increase administrative penalty caps could increase penalties assessed and deposited into General Revenue, the amount would depend on specific violations and actual enforcement orders, which fluctuate from year to year and could not be estimated. Based on 2009 data, this amount would have been \$1.4 million. In addition, such an increase could be offset by fewer civil penalties collected because the agency would be able to assess administrative penalties without referral to OAG. While administrative and civil penalties may offset each other, TCEQ should be able to take more administrative action, resulting in fewer referrals to OAG, decreasing OAG's workload. Since OAG is funded by general revenue, this may result in a small cost savings to General Revenue, which could not be estimated.

Similarly, for the recommendation to authorize TCEQ to assess penalties against dam safety violations, the amount of actual penalties cannot be determined, since it depends on the type and severity of violations TCEQ discovers and enforces against in coming years. The recommendation to allow TCEQ to approve SEPs for local governments to correct or remediate environmental harm may result in fewer administrative penalties deposited into General Revenue, but this reduction would be minimal.

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1 Texas Water Code, secs. 7.0525, 7.053, 11.0842, 13.4151, and 16.237 and Texas Health and Safety Code, sec. 341.049.

2 Texas Water Code, sec. 7.075.

3 Texas Water Code, sec. 5.121(a).

4 Texas Water Code, sec. 7.076.





## ***Responses to Issue 4***

### **Recommendation 4.1**

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

#### **Agency Response to 4.1**

TCEQ supports the recommendation that the Commission's approach to enforcement be established in rule and that enforcement policies should be publicly adopted. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 4.1**

Representative Lon Burnam, Member – Texas House of Representatives

Carol Batterton, Executive Director – Water Environment Association of Texas, Austin

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Thure Cannon, Director of Governmental Affairs – Texas Pipeline Association, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Matthew Tejada, Executive Director – Air Alliance Houston, Houston

League of Women Voters of Texas

#### **Against 4.1**

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

### **Recommendation 4.2**

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*Increase TCEQ's administrative penalty caps.*

#### **Agency Response to 4.2**

TCEQ agrees with the intent to provide a range of options that encourage compliance and states that the agency will continue to calculate penalties commensurate to the violation in accordance with Commission's enforcement policies. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**For 4.2**

Senator Wendy Davis, Member – Texas Senate

Representative Lon Burnam, Member – Texas House of Representatives

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Dr. Robert T. Fitzgerald, Vice President – Medina County Environmental Action Association, Inc., Hondo

Mary Beth Maher, Austin

Brandt Mannchen, Houston

Charles E. Markham, President – Bosque River Association, Hico

Luke Metzger – Environment Texas, Austin

Allison Sliva, Bay City

Matthew Tejada, Executive Director – Air Alliance Houston, Houston

League of Women Voters of Texas

**Against 4.2**

Luke Bellsnyder, Executive Director – Texas Association of Manufacturers, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

**Modifications**

1. Leave the cap for water quality violations for political subdivisions at \$10,000 per violation per day, and consider lowering the cap to \$5,000. (Carol Batterton, Executive Director – Water Environment Association of Texas, Austin)
2. Recommend that the Legislature reevaluate statutory penalty caps and adjust as needed every five years to account for inflation. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and Matthew Tejada, Executive Director – Air Alliance Houston, Houston)
3. Specifically authorize TCEQ to calculate penalties for multiple violations in a single event based on the speciated components when violations result from significant/severe events that occur over a short duration with documented or potential significant harm to human health or the environment, with the statutory cap applying to each component, not the total event. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and Matthew Tejada, Executive Director – Air Alliance Houston, Houston)

4. Raise penalty caps to at least \$100,000 to \$1,000,000. (Brandt Mannchen, Houston)
5. Clarify in statute that TCEQ cannot use speciation in calculating penalties. (Hector Rivero, President/CEO – Texas Chemical Council, Austin)

### **Recommendation 4.3**

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*Authorize TCEQ to assess administrative penalties for dam safety violations.*

#### **Agency Response to 4.3**

TCEQ supports the recommendation to authorize the agency to assess administrative penalties for dam safety violations. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 4.3**

Victoria J. Li, Director – Watershed Protection Department, City of Austin

Brandt Mannchen, Houston

#### **Against 4.3**

Ross Jones, Coleman

#### **Modification**

6. Modify Recommendation 4.3 to specify that TCEQ cannot assess administrative penalties for dam safety violations related to dams that are classified as low-hazard by TCEQ at the time the violation occurred. (Charles McMahan, Member – Sunset Advisory Commission)

### **Recommendation 4.4**

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

#### **Agency Response to 4.4**

TCEQ supports this recommendation. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 4.4**

Representative Lon Burnam, Member – Texas House of Representatives

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

**For 4.4** (continued)

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

**Against 4.4**

None received.

**Modifications**

7. Include a check on how to prevent abuse of the Supplemental Environmental Projects program. (Representative Lon Burnam, Member – Texas House of Representatives)
8. In lieu of adopting Recommendation 4.4, modify current statute that allows TCEQ to defer payment of all or part of an administrative penalty for public utilities. (Carol Batterton, Executive Director – Water Environment Association of Texas, Austin)
9. Revise TCEQ Supplemental Environmental Projects policies applicable to local governmental entities to provide more flexibility in the approval of projects on-site and when a project has already been completed, already included in a respondent's budget, or already committed to be undertaken. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
10. Allow local governments to do SEPs but also fine them. (Brandt Mannchen, Houston)
11. Give the TCEQ Commission limited ability to address private sector respondents entering in Supplemental Environmental Projects subject to stringent requirements for evaluating a company's ability to pay its financial obligations and monitoring its cleanup activities. (Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin)

## ***Commission Decision***

Adopted Recommendations 4.1, 4.2, and 4.4.

## ***Legislative Action***

House Bill 2694 requires TCEQ to structure its general enforcement approach in rule. In addition, the bill requires TCEQ to regularly assess, update, adopt, and make public its specific enforcement policies, including its policy on the calculation of penalties. The Legislature modified the Sunset provision to require TCEQ to include consideration of deterrence to prevent the economic benefit of noncompliance in its enforcement policies. (Recommendation 4.1) The bill increases the administrative penalty caps for 20 of TCEQ's programs. The table on the following page, *Penalty Cap Level*, shows what each new penalty cap is under this legislation. (Recommendation 4.2)

The bill authorizes TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment, including bringing the respondent into compliance or

remediating harm. The bill requires TCEQ to develop a policy to prevent regulated entities from systematically avoiding compliance. This policy will include an assessment of the entity's financial ability to pay administrative penalties, the ability to come into compliance or remediate harm, and the need for corrective action. (Recommendation 4.4)

***Penalty Cap Level***

<b>Program Violation</b>	<b>Cap</b>	<b>Program Violation</b>	<b>Cap</b>
Air Quality	\$25,000	Underground Injection Control	\$25,000
Edwards Aquifer	\$25,000	Underground Water	\$25,000
Industrial and Hazardous Waste	\$25,000	Waste Tires	\$25,000
Land over Municipal Solid Waste Landfills	\$25,000	Water Quality	\$25,000
Medical Waste	\$25,000	Occupational Licenses	\$5,000
Municipal Solid Waste	\$25,000	On-Site Sewage Disposal	\$5,000
Petroleum Storage Tanks	\$25,000	Used Oil	\$5,000
Radioactive Substances	\$25,000	Used Oil Filter	\$5,000
Subsurface Excavation	\$25,000	Water Saving Performance Standards	\$5,000
Toxic Chemical Release Reporting	\$25,000	Public Water Utilities	\$5,000



# Issue 5

## ***TCEQ Does Not Have the Tools Necessary to Effectively Protect Surface Water Availability During Drought or Emergency Conditions.***

### **Background**

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In Texas, surface water in streams, rivers, and lakes is considered state water.<sup>1</sup> The Texas Commission on Environmental Quality (TCEQ) is responsible for managing state surface water and primarily accomplishes this through issuing and enforcing water rights permits. A person wanting the right to use surface water in Texas must obtain a permit or have a certificate of adjudication issued by a court. Most water rights are issued on a perpetual basis; however some permits are issued for a term that may not exceed 10 years if sufficient water is available. Texas provides five main exemptions – both in statute and rule – to the requirement to obtain a water permit: domestic and livestock use, wildlife management use, use for petroleum production in the Gulf, sediment control for surface coal mining, and emergency uses for county or rural fire departments or other public service emergencies. TCEQ manages about 6,200 active water rights permits, approximately 70 percent of which are held by agricultural interests. Other examples of water rights holders include wholesale and retail water suppliers, municipalities, and industries.

Surface water generally is allocated by the “first in time, first in right” doctrine, which creates senior and junior water rights.<sup>2</sup> A senior water right permit gets the first call on water before any permit issued at a later date. A senior permittee or rights holder can request diversion or storage of water, called a senior or priority call, that may require junior permit holders to curtail or suspend all diversion or storage of surface water in that basin until the needs of the senior permit holder are met. Statute requires each person who has a water-use permit or has impounded, diverted, or otherwise used state water, to annually file a written report to TCEQ to assist the agency with managing an inventory of water resources.<sup>3</sup>

For areas of the state needing close management of water rights, watermaster programs help ensure compliance with water rights allocations by using TCEQ field staff to monitor stream flows, reservoir levels, and water use in select river basins. Statute authorizes the courts, the TCEQ Commission, or the TCEQ Executive Director to appoint a watermaster. A watermaster area can also be created by the Legislature, as was done in the Concho River. Water right permit holders in the basin pay for watermaster programs through fees assessed by the agency. TCEQ has three watermaster programs:

- Rio Grande – serves the Rio Grande Basin below Fort Quitman to the Gulf of Mexico and a portion of the Nueces-Rio Grande Coastal Basin;
- Concho – serves the Concho River segment of the Colorado River Basin; and
- South Texas – serves the Guadalupe, Lavaca, Lavaca-Guadalupe Coastal, Nueces, San Antonio-Nueces Coastal, San Antonio, and a portion of the Nueces-Rio Grande Coastal River Basins.

Water rights holders in a watermaster area are required to ask permission before diverting or taking water, and provide water usage reports, in addition to other operational information, as needed by the watermaster. Watermasters may require reductions or suspensions in water use on a priority date basis during times of drought to manage water availability.

Factors such as water use amounts, drought, and other weather conditions affect surface water conditions. To prepare for drought conditions, statute requires wholesale and retail water suppliers, and irrigation districts to develop drought contingency plans, and update and submit the plans to TCEQ every five years.<sup>4,5</sup> Drought contingency plans outline triggers for implementation during various stages of water shortages or drought, and specific, quantified targets for water-use reductions. Examples of drought contingency plan strategies include public education programs, restrictions on non-essential water use, water rate incentives or penalties, and use of alternative or reserve water supplies.

The need for effective management of surface water will become more important with population growth and resulting water demand, limiting water supplies. Texas' population is projected to more than double by 2060 and water demand is expected to increase by 27 percent.<sup>6</sup> Increased demand for water necessitates that TCEQ and its regulated entities use all of the information and tools at their disposal to manage the State's surface water resources.

## Findings

### **TCEQ's statutory authority to curtail or suspend water rights in emergencies is unclear.**

Statute clearly authorizes TCEQ to manage water rights, including the issuance, adjudication, cancellation, and enforcement of those rights, including protecting senior water rights.<sup>7</sup> However, statute does not expressly articulate the agency's duties to enforce the allocation of water to permit holders in areas without a watermaster program. TCEQ's express statutory authority to suspend permit conditions in times of drought or other emergency is limited to permit conditions relating to instream uses or beneficial flows to bays and estuaries.<sup>8</sup> A suspension under this authority makes the water temporarily available for other essential beneficial uses. Statute does not expressly state under what circumstances TCEQ can curtail the right to divert state water under a water right to ensure senior rights are protected and adequate water supplies are available for domestic and municipal needs.

Statute authorizes the Executive Director to execute the duties of a watermaster, listed in the accompanying textbox, in water divisions where no watermaster program exists.<sup>9</sup> However, the Commission must first establish water divisions to administer water rights to enforce this provision.<sup>10</sup> TCEQ

has created two water divisions, one for the South Texas Watermaster Division, for which a watermaster was appointed, and another division for the Colorado-Lavaca River basins. Included in the Colorado-Lavaca River basins is the Concho River segment, for which the Legislature created a watermaster program.

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*Statute does not expressly state when TCEQ can curtail water rights during an emergency.*

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#### **Duties of a Watermaster**

- Coordinate diversions of surface water according to water rights.
- Monitor streamflows, reservoir levels, and water use, as well as provide technical assistance to water right holders regarding water use and needs.
- Control the use of surface water in times of water shortage to prevent the waste of water or unlawful diversions.



During a June 2009 senior call on the Brazos River, a non-watermaster area, TCEQ had to respond quickly to the call. The Executive Director used general authority to enforce water rights and also cited the authority to act as the watermaster where no watermaster is appointed, although the Commission did not first establish a water division. Because time is critical during a water shortage or drought emergency, statutory authority related to water divisions does not allow for the agency to efficiently address water rights issues that arise during a water shortage in those areas where a water division has not been created.

**TCEQ lacks authority to use its water management tools as intermediate steps to prevent more severe water rights restrictions.**

While TCEQ needs to act quickly in an emergency to protect water rights, preventing situations in which it must take severe restrictive action is a preferable overall approach to surface water management. If TCEQ could identify potential shortages and work with water rights permittees to take intermediate action, the agency could avoid getting to the point of having to curtail water. Doing so would allow TCEQ to effectively meet its overall water management goals and not affect permit holders as acutely. Statute provides TCEQ with some water management tools, but stops short of giving TCEQ the authority to effectively use those tools.

- **Water-Use Data.** The lack of current, detailed water-use data maintained by water rights holders prevents TCEQ from obtaining the information about the availability of surface water it needs for its overall management efforts. While water rights holders submit annual water-use reports to TCEQ, they are not required to maintain interim water-use data. During times of drought and water shortages, TCEQ needs to quickly access current use information to determine if water rights holders are compliant with permit requirements. If a permittee draws more water than they are allocated by permit, less water is available for use by other water rights holders. In the recent senior call, water rights holders could not provide TCEQ with up-to-date, detailed water-use data, forcing the agency to rely on outdated data to determine water right restrictions.

In contrast, water rights holders in areas with a watermaster program regularly report water-use data to the watermaster to aid in water availability management. However, water rights holders outside of a watermaster program are not required to maintain detailed water-use data needed by TCEQ to manage water in a way that assists during times of water shortages.

- **Drought Contingency Plans.** While many water entities voluntarily implement drought contingency plans, TCEQ lacks statutory authority to require the entities to implement these plans during a drought emergency. In an extreme drought situation, a large water right holder's

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*Creating water divisions is not an efficient way to deal with critical water shortages.*

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*TCEQ does not have timely access to data needed to manage water rights.*

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*Not implementing drought contingency plans can affect other water rights holders.*

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*During a 2009 senior call, TCEQ totally suspended the water rights of about 100 junior permit holders.*

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refusal to implement a drought plan to reduce water usage can have serious impacts, such as service interruptions, on other water rights owners in the river basin. For example, during a recent drought, TCEQ indicates a city hesitated to implement the later stages of its drought contingency plan to reduce water usage, affecting other water rights holders in the basin and ultimately forcing TCEQ to curtail the city's water rights. Without the ability to require implementation of a drought contingency plan, TCEQ may be forced to take more drastic measures, such as curtailment of water rights, to ensure adequate water availability to meet demand.

**TCEQ does not strategically evaluate the need for additional watermaster programs.**

While TCEQ has statutory authority to create additional watermaster programs, the agency does not regularly assess the need for more watermaster programs. TCEQ has only created one watermaster program through its own authority, the South Texas Program, in 1988. Factors such as calls on senior water rights or water shortages indicate river basins that could benefit from ongoing management of water use. All basins may not need a watermaster program, such as those that experience high water flows and generally have available water. However, opportunities may exist to more effectively manage water rights for some of the remaining major river basins without watermaster programs.

Water rights holders are unlikely to seek the benefits of ongoing water rights management until a water shortage affects water availability, when it is too late to establish a watermaster program. By the time a water shortage results in water curtailment, such as a senior call, the agency must respond quickly, without time to negotiate water allocations. In basins most at risk for these situations, proactive establishment of a watermaster program could prevent water shortage emergencies. A watermaster may have established relationships or detailed information needed to negotiate and stagger the impact of water curtailments among all water users, while still protecting senior rights, rather than totally suspending junior water right holders.

For example, the 2009 senior call in the Brazos River basin developed into a situation in which TCEQ totally suspended the water rights of about 100 junior permit holders, mostly consisting of agricultural and industrial interests, to satisfy the senior call. In addition, to respond to the situation, TCEQ had to rapidly shift field personnel through a significant transfer of resources within the agency. While TCEQ was able to accomplish what it needed to, such an ad hoc response proved to be a costly, disruptive use of agency resources.

## Recommendations

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### *Change in Statute*

#### **5.1 Clarify the Executive Director's authority to curtail water use in water shortages and times of drought.**

This recommendation would clarify that, only during a water shortage or other emergency, the Executive Director may curtail a water right holder's water use or otherwise allocate water to maximize the beneficial use of state water. Under this recommendation, the authority to curtail water use would not depend on the establishment of a water division to administer water rights. In allocating state water during an emergency, the Executive Director should minimize impacts to water rights holders and prevent waste or use in excess of a water right holder's permitted water amount. Under the recommendation, TCEQ would be required to adopt rules outlining how it will use the Executive Director's authority to curtail water usage during a water shortage, including criteria that would trigger curtailment.

#### **5.2 Require water rights holders to maintain monthly water-use information and allow the Commission to access that information upon request.**

This recommendation would require water rights permit holders to maintain water-use data on at least a monthly basis, and to make that information available to TCEQ staff upon request. Since water rights owners should already maintain monthly water usage information to submit in their annual report, the recommendation should not increase the regulatory burden on these entities.

#### **5.3 Authorize TCEQ to require implementation of drought contingency plans during times of a potential water shortage.**

Under this recommendation, entities required to develop drought contingency plans would be required to implement their drought contingency plan upon the agency's request or be subject to potential water right restrictions. TCEQ should develop policies defining when the Executive Director would require implementation of drought contingency plans.

#### **5.4 Require TCEQ to evaluate the need for additional watermaster programs.**

This recommendation would require TCEQ's Executive Director to assess whether a watermaster program is needed in river basins not in a program and report findings and recommendations to the TCEQ Commission. TCEQ would determine criteria or risk factors to be used in its evaluation, such as past or potential senior calls on water rights, potential water shortages, water needs, or whether all water is fully appropriated in the basin. Because water needs and planning will continue to shift, TCEQ would be required to evaluate the need for additional watermaster programs at least once every five years. TCEQ would include the Commission's findings relating to this evaluation in its subsequent biennial report to the Legislature.

## Fiscal Implication Summary

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These recommendations would have no significant fiscal impact. While evaluating the need for watermaster programs requires some staff effort, TCEQ already has the data and expertise required for this work. Any watermaster program created as a result of such an evaluation would not result in a fiscal impact, as water rights permit holders would pay the cost of the program.

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<sup>1</sup> Texas Water Code, sec. 11.021.

<sup>2</sup> Texas Water Code, sec. 11.027.

<sup>3</sup> Texas Water Code, sec. 11.031.

<sup>4</sup> Texas Water Code, sec. 11.1272.

<sup>5</sup> Retail public water suppliers with less than 3,300 connections do not have to submit a copy of their drought contingency plan to the Commission, but must keep a copy of their plan on site for inspection, as needed.

<sup>6</sup> Texas Water Development Board, *2007 State Water Plan* (Austin, Texas, 2007), p. 120.

<sup>7</sup> Texas Water Code, sec. 5.013(a)(1).

<sup>8</sup> Texas Water Code, secs. 5.506 and 11.148.

<sup>9</sup> Texas Water Code, sec. 11.326.

<sup>10</sup> Texas Water Code, sec. 11.325.

# *Responses to Issue 5*

## **Recommendation 5.1**

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*Clarify the Executive Director's authority to curtail water use in water shortages and times of drought.*

### **Agency Response to 5.1**

TCEQ supports clarifying the Executive Director's authority to curtail water use in water shortages and times of drought as an additional tool to ensure fairness in determining the best use of state water. The agency states that it will outline how it will use this authority to curtail water usage during a water shortage, including criteria that would trigger curtailment. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 5.1**

Representative Lon Burnam, Member – Texas House of Representatives

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

### **Against 5.1**

None received.

## **Recommendation 5.2**

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*Require water rights holders to maintain monthly water-use information and allow the Commission to access that information upon request.*

### **Agency Response to 5.2**

TCEQ agrees with the recommendation to require water right holders to maintain monthly water-use information. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 5.2**

Representative Lon Burnam, Member – Texas House of Representatives

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

**For 5.2** (continued)

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

**Against 5.2**

None received.

**Modification**

1. Modify Recommendation 5.2 to clarify that water rights holders would not be required to submit monthly water use reports to TCEQ, but only be required to maintain monthly water use information for the months that the water rights holder actually uses permitted water under the water rights permit. TCEQ would be able to request this information as needed in drought or other emergencies, but the water rights permittee would not be required to regularly submit it any more frequently than annually, as is currently required by statute. (Senator Glenn Hegar, Chair – Sunset Advisory Commission)

**Recommendation 5.3**

*Authorize TCEQ to require implementation of drought contingency plans during times of a potential water shortage.*

**Agency Response to 5.3**

TCEQ agrees with the recommendation authorizing the agency to require implementation of drought contingency plans. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**For 5.3**

Representative Lon Burnam, Member – Texas House of Representatives

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

**Against 5.3**

Dean Robbins, Assistant General Manager – Texas Water Conservation Association, Austin

**Modification**

2. Require drought contingency plans to specify and assume control over water withdrawals from major water users, specifically those of for-profit entities such as natural gas extraction facilities. (C. Victor McDonald, Denton)

## **Recommendation 5.4**

*Require TCEQ to evaluate the need for additional watermaster programs.*

### **Agency Response to 5.4**

TCEQ agrees that the need for additional watermaster programs should be evaluated on a regular basis and states that since watermaster programs are self-supporting, creation of any new program would include the agency's assessment of a fee on the affected water right holders. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 5.4**

Representative Lon Burnam, Member – Texas House of Representatives

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Brandt Mannchen, Houston

### **Against 5.4**

None received.

## ***Commission Decision***

Adopted Recommendations 5.1, 5.2 with Modification 1, and 5.4.

## ***Legislative Action***

House Bill 2694 authorizes the Executive Director to temporarily suspend a water rights holder's water use or otherwise temporarily adjust the diversion of water to water rights holders, during a water shortage or other emergency. Legislative modifications to the Sunset provision clarify that such a suspension or adjustment will be in accordance with the first in time, first in right doctrine for surface water that is in current law. Specifically, the bill provides that in suspending or adjusting water rights, the Executive Director will ensure that the action taken will minimize the impact on water rights holders; maximize the beneficial use of water; prevent waste; consider the rights holder's use of water conservation and drought contingency plans required by law; conform with preferences of uses of surface water in current law; and not require the release of water that has already been diverted and stored according to a water rights permit. TCEQ must adopt rules, including defining a drought or other emergency shortage of water; and specifying the conditions under which the Executive Director may issue an order, the terms of the order including the maximum duration, and procedures for appealing an order. (Recommendation 5.1)

The bill requires water rights permit holders to maintain water-use data on a monthly basis during the months the permittee uses water, and to make that information available to TCEQ staff upon

request. TCEQ will be able to request this information as needed in drought or other emergencies, and the Legislature modified the Sunset Commission provision to allow TCEQ to ask for the information in response to a complaint. The Legislature also modified the provision to clarify that the water-use reporting provisions do not apply to the authority of watermasters, who have reporting authority elsewhere in statute. (Recommendation 5.2 with Modification 1)

House Bill 2694 requires TCEQ's Executive Director to assess, at least once every five years, whether a watermaster program is needed in river basins not in a program and report findings and recommendations to the Commission. TCEQ will determine the factors to be used in its evaluation, and will include findings and recommendations in its biennial report to the Legislature. (Recommendation 5.4)



# Issue 6

## ***Gaps in Petroleum Storage Tank Regulation and Remediation Fee Expiration Threaten the State's Ability to Clean Up Contaminated Sites.***

### **Background**

Leaking underground petroleum storage tanks (PSTs) are the biggest source of groundwater contamination in the state. In fiscal year 2009, they made up 49 percent of all documented groundwater contamination cases, and almost every major aquifer in Texas has been exposed to some level of contamination caused by leaking PSTs.<sup>1</sup> In 1987, largely in response to the greater need to protect groundwater and human health, the Legislature established the PST registration program and developed more stringent regulations for better tank design, installation, monitoring, and owner financial assurance to pay for leaks. The U.S. Environmental Protection Agency (EPA) has delegated the federal authority to regulate and remediate PSTs to the Texas Commission on Environmental Quality (TCEQ).

In 1989, the Legislature formed the PST remediation trust fund to pay for the state-lead program, which finances the cleanup of contaminated PST sites when the owner or operator cannot be found or is unwilling or unable to pay. Today, the fund also reimburses costs associated with remediating leaking PSTs reported before 1998, and covers TCEQ's costs to administer the registration, inspection, and remediation of PSTs.

The fund is a dedicated account in General Revenue that is supported by a statutorily fixed fee on each fuel delivery into a PST, as shown in the table, *PST Remediation Fees*. The fee generated almost \$28.2 million in revenue in fiscal year 2009.

***PST Remediation Fees***

<b>Statutory Fee</b>	<b>Delivery of Fuel Into Petroleum Storage Tank</b>
\$3.75	less than 2,500 gallons
\$7.50	greater than 2,500 but less than 5,000 gallons
\$11.75	greater than 5,000 but less than 8,000 gallons
\$15.00	greater than 8,000 but less than 10,000 gallons
\$7.50	for each 5,000 gallons greater than 10,000

TCEQ evaluates and prioritizes PST sites with verified contamination to determine whether they pose imminent danger. For a description of the types of PST remediation sites TCEQ oversees, see the textbox, *TCEQ's Petroleum Storage Tank Remediation Program*. The basic intent of the program is to pay for the cleanup of older leaking storage tanks and to shift responsibility to owners and operators for proper installation and the financial assurance to pay for any needed cleanup. No matter who takes the lead in remediation, TCEQ approves all the work done from beginning to end, including the initial site evaluation, work plan for cleanup, and completion of the project.

#### ***TCEQ's Petroleum Storage Tank Remediation Program***

TCEQ oversees three different types of PST remediation sites.

**Responsible Party Lead.** The owner of the site pays for the cost of cleanup for a leaking PST reported since 1998.

**Responsible Party Reimbursement.** Sites that reported contamination before 1998 can be reimbursed for the cost of cleanup out of the state remediation fund.

**State Lead.** The responsible owner cannot be found or is unwilling or unable to pay for cleanup, so TCEQ pays the costs out of the state remediation fund.

In fiscal year 2009, TCEQ dedicated 138 FTEs and spent \$49.3 million for PST regulation and remediation. Of that amount, \$47.5 million came from the state PST remediation fund and \$1.8 million came from federal funds. TCEQ also received \$10.7 million in federal stimulus funds for fiscal year 2010. TCEQ finished cleanup of 164 state-lead and reimbursement sites in fiscal year 2009.

## Findings

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### **Gaps in PST regulation allow some responsible parties to avoid paying for damage caused by leaking PSTs, shifting more costs to the State.**

- **Previous Tank Owners and Operators.** Statute does not explicitly hold previous owners or operators responsible for harmful releases that occurred when they controlled a PST. Instead, current tank owners or operators who discover leaking PSTs are responsible for the leak, even if the leak occurred before they took over control. In some cases, current owners or operators may not be able to pay for cleanup and TCEQ finances cleanup out of the PST remediation fund. TCEQ has difficulty requiring the previous owner or operator, who might have controlled the tank when the contamination occurred, to pay a portion of the cleanup cost.

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*TCEQ has difficulty holding previous PST owners and operators responsible for contamination.*

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In contrast, TCEQ has statutory authority to pursue previous owners or operators to help pay for other remediation programs, such as for solid waste facility owners and operators through the state Superfund program.<sup>2</sup> Without the ability to hold previous owners and operators responsible for contamination as appropriate, TCEQ may be unable to ensure that responsible parties perform cleanup, shifting the cost of remediation onto the State and removing the deterrent effect of the program.

- **Common Carriers of Fuel.** Underground PSTs must be certified annually to demonstrate that they are in compliance with technical standards and financial assurance. Common fuel carriers deliver fuel to PSTs and could potentially contribute to groundwater contamination if they deliver to an uncertified PST that is leaking. Although federal law requires states with EPA-delegated PST programs, like Texas, to prohibit common fuel carriers from delivering to uncertified underground PSTs and take enforcement action against violators, statute does not provide TCEQ with this authority. Previously, Texas statute prohibited delivery to uncertified underground tanks and provided for penalties, but in 2005, the Legislature rescinded this provision. Without this requirement, EPA could potentially revoke federal grant funds and TCEQ's delegated permitting and remediation authority over PSTs, giving Texas less flexibility and freedom to tailor regulations to local needs.

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*Although EPA requires Texas to prohibit fuel delivery to uncertified tanks, TCEQ does not have this authority.*

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**Expiration of the PST remediation fee threatens TCEQ’s ability to regulate and remediate leaking petroleum storage tanks.**

The Legislature established the PST remediation fund as a limited solution to cover the costs of PST remediation until more stringent installation and financial assurance requirements could eventually address the problem of leaking PSTs and reduce the need for the fund. The Legislature scheduled the remediation fee to expire, but subsequently extended and reduced the fee in 2001, 2005, and 2007, as TCEQ continued to identify remediation needs. The fee is set to expire again in 2011. If the fee actually expires on this deadline, PST remediation efforts would only continue with specific appropriations from the Legislature, presumably from the remaining balance in the fund, which is currently about \$140 million.

TCEQ will continue to need state funding for remediation after the fee expires. Although the Legislature originally expected all state-lead and responsible-party-reimbursement sites to be cleaned up by the time the remediation fee expired, TCEQ estimates that approximately 650 sites requiring state funds for remediation will still remain after 2011. In addition, TCEQ will probably always need funding for state-lead sites. Even if TCEQ completes cleanup on all existing state-lead and responsible-party-reimbursement sites, it continues to add about 20 sites to the state-lead program each year, and is unlikely to stop finding new contaminated sites soon.

TCEQ also requires funding for ongoing regulation of PSTs, including its administrative costs related to registration, investigation, enforcement, and remediation of PSTs. Although TCEQ would still receive federal funds and would have the statutory authority to reinstate a previously suspended registration fee on PST facilities, these sources would not cover TCEQ’s costs to administer PST regulation.

To maintain its current program and take on new state-lead sites, the agency estimates that remediation and regulation state costs will total \$31.4 million in the first year and \$30.4 million in the second year after the fee expires. Even as the costs of remediation declines as the agency cleans up leaking sites, the fund balance would likely be depleted within five years, and no funding would be available to pay the agency’s ongoing costs of PST regulation, which the agency estimates to be about \$10.4 million per year, not including federal funding.

**Statute limits TCEQ’s ability to prevent potential groundwater contamination from identified non-compliant PSTs.**

TCEQ identifies abandoned and out-of-service underground PSTs that do not comply with regulations and for which the agency has not confirmed contamination. TCEQ usually finds out about these tanks when doing a routine inspection of a PST. Upon finding non-compliant underground PSTs, TCEQ can require removal or upgrade of the tanks at the owners’

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*TCEQ will not be able to clean up all eligible PST sites before the PST remediation fee expires in 2011.*

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*TCEQ cannot use the PST fund to remove dangerous non-compliant PSTs until contamination has occurred.*

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cost, but many owners are financially unable to do so. Although TCEQ can use state remediation funds to check for contamination, it cannot use those funds to remove tanks until it confirms contamination has actually occurred. Restricting the funds in this way potentially blocks TCEQ from being able to prevent or mitigate groundwater contamination at those sites.

## Recommendations

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### *Change in Statute*

#### **6.1 Require previous tank owners or operators to share responsibility, as appropriate, for contamination from leaking PSTs.**

This recommendation would make previous tank owners or operators responsible for cleaning up contamination that occurred when they controlled a PST, similar to solid waste facility previous owner or operator responsibility in TCEQ's Superfund program. The recommended language would track statutory language that allows TCEQ to hold multiple PST owners or operators liable, to make TCEQ's approach to PST-liability consistent. The recommendation would:

- authorize TCEQ to require previous owners and operators to pay for corrective action associated with contamination for which they are responsible;
- provide that a previous owner or operator is not liable if no portion of the release occurred during that person's control of the tank;
- provide that previous owners or operators hold the burden of proof in defending liability; and
- apply current multiple-party responsibility requirements to previous owners and operators.

This recommendation would not affect parties already responsible for PST remediation. The recommendation would require TCEQ to adopt rules as necessary to implement this provision. In implementing this provision, TCEQ would determine who is responsible for remediation but would follow the process in statute to apportion costs.

#### **6.2 Prohibit delivery of certain petroleum products to uncertified tanks and provide for administrative penalties.**

Under this recommendation, common fuel carriers would be prohibited from delivering to uncertified underground tanks, according to the requirements of federal law. TCEQ would be authorized to enforce this law and impose administrative penalties against violations, with penalties deposited into General Revenue. The recommendation would require TCEQ to adopt rules as necessary to implement and enforce this prohibition.

#### **6.3 Reauthorize the PST remediation fee, change the current fee levels to caps, and authorize the Commission to set fees in rule.**

This recommendation would remove the expiration date for the PST fee from statute and change the current fixed fee levels to caps. The recommendation would require TCEQ to set the fee levels by rule, up to the cap in statute, at a level necessary to cover PST regulation and remediation costs as appropriated by the Legislature. The public would have the opportunity to comment on proposed fees through the rulemaking process.

#### 6.4 Expand use of the remediation fee to allow TCEQ to remove non-compliant PSTs that pose a contamination risk.

This recommendation would allow the use of PST remediation funds to remove non-compliant, out-of-service PSTs when the owner is financially unable. The recommendation would require TCEQ to put protections in place to prevent PST owners from abusing the system in ways that would force the State to pay for PST remediation when the owner should be responsible. TCEQ should assess the potential risk of contamination from the identified site and require owners wanting to participate to prove financial inability to pay. In any given year, TCEQ would decide whether to use funding from PST remediation fees, subject to appropriations, to pay for PST removal.

### Fiscal Implication Summary

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Overall, these recommendations would have a positive fiscal impact to the State. The fiscal impact for adding statutory provisions on previous owner responsibility could not be estimated because it depends on the number of previous owners that can be found and are financially able. For each fiscal year from 2012 to 2016, reinstating common carrier liability would add an estimated \$560,000 to General Revenue from administrative penalties for violating the law. This estimate is based on the number of administrative orders TCEQ issued for violations from 2001 to 2005, when it had the authority to enforce the prohibition.

Extending the PST remediation fee would add an estimated \$27 million to the PST Remediation Fund in fiscal year 2012, up to \$28.2 million in fiscal year 2016, assuming the fees were charged at the statutory caps. However, the recommendation assumes that the fee revenue would be appropriated to the agency to fund the program, resulting in no net fiscal impact to the remediation fund. This change would prevent the Legislature from having to deplete the current fund balance of \$140 million. The fee levels would be expected to decline over time as TCEQ completed remediation of existing contaminated sites and the costs of the state-lead program decreased. Removing non-compliant tanks would not have a fiscal impact because TCEQ would decide how much to dedicate to PST regulation, remediation, and tank removal based on priorities and annual appropriations.

#### *Texas Commission on Environmental Quality*

<b>Fiscal Year</b>	<b>Gain to the General Revenue Fund</b>
2012	\$560,000
2013	\$560,000
2014	\$560,000
2015	\$560,000
2016	\$560,000

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<sup>1</sup> The percentage of groundwater contamination cases caused by PSTs was provided by TCEQ.

<sup>2</sup> Texas Health and Safety Code, sec. 361.271.



# Responses to Issue 6

## Recommendation 6.1

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*Require previous tank owners or operators to share responsibility, as appropriate, for contamination from leaking PSTs.*

### Agency Response to 6.1

TCEQ agrees with the recommendation addressing previous tank owner and operator liability, with a modification.

### Agency Modification

1. Include statutory language creating express liability for current landowners so that they are treated in a consistent manner as previous tank owners and operators.

(Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### For 6.1

Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

### Against 6.1

None received.

### Modifications

2. Modify Recommendation 6.1 to provide a statute of limitations for previous owners and operators of seven years from when the contamination from a leaking PST was discovered by TCEQ. Previous owners and operators should not be held liable for more than seven years after they have sold the property. (Senator Robert Nichols, Member – Sunset Advisory Commission)
3. Modify Recommendation 6.1 to clarify that TCEQ is responsible for demonstrating that a party is a previous owner or operator and is also liable for the contamination, before the burden shifts to that party to make a defense that the release did not happen during the party's ownership or operation. (Senator Robert Nichols, Member – Sunset Advisory Commission)

4. Clarify that the burden of proof in defending liability only rests with the previous owner or operator of a petroleum storage tank only in circumstances where the previous owner or operator specifically acted to avoid or shift liability inappropriately. (Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin)
5. Require that liability for previous tank owners only arise upon a finding of an omission or negligence by the previous tank owner. (Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin)
6. Remove language in the recommendation that assigns the burden of proof in defending liability to previous owners and operators, and ensure that the burden of proof in defending liability remains with current PST owners and operators. (Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin)
7. Require TCEQ to recognize and respect contractual agreements between parties apportioning responsibility and liability for a site which may or may not be impacted by a release from a PST at the time of a contract. In addition, include a thorough review and consideration of existing statutes to ensure the consistency of TCEQ's approach, especially those already providing a private cause of action. (Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin)

## **Recommendation 6.2**

*Prohibit delivery of certain petroleum products to uncertified tanks and provide for administrative penalties.*

### **Agency Response to 6.2**

TCEQ agrees with the recommendation. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 6.2**

Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Brandt Mannchen, Houston

### **Against 6.2**

None received.

### **Modifications**

8. Provide that administrative penalties accrue to the program. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
9. Require TCEQ to incorporate provisions to validate delivery certificates through the internet, and change how it calculates administrative penalties associated with violations of the delivery prohibition to distinguish those violations not accompanied by an actual release



or harm to the environment and others that do. Administrative penalties for violations that do not harm the environment should be consistent with comparable penalties for violations associated with documentation. (Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin)

### **Recommendation 6.3**

*Reauthorize the PST remediation fee, change the current fee levels to caps, and authorize the Commission to set fees in rule.*

#### **Agency Response to 6.3**

TCEQ agrees with providing the agency with the latitude to continue this fee and to assess it in rule. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

#### **For 6.3**

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

#### **Against 6.3**

None received.

#### **Modifications**

10. Require fee caps to be indexed to the cost of construction price. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
11. If the PST program is continued, revamp the program to ensure that sites are remediated in a timely and cost-efficient manner similar to the Oil Field Cleanup Program administered by the Railroad Commission. (Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin)
12. Provide for a delayed effective date for reauthorizing the PST fee and provide that the new revenues not be collected until TCEQ has fully utilized the fund balance. (Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin)
13. Reauthorize the remediation fee, but retain the fee level in statute and review the fee level every biennium. (Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin)

## **Recommendation 6.4**

*Expand use of the remediation fee to allow TCEQ to remove non-compliant PSTs that pose a contamination risk.*

### **Agency Response to 6.4**

TCEQ agrees with the recommendation to allow the use of the PST remediation fund, when an owner is financially unable to do so, to remove non-compliant underground tanks that pose a risk. The agency states that it has encountered numerous cases through field investigations and subsequent enforcement actions where the owners are financially unable to either upgrade or remove the out-of-compliance underground tanks. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 6.4**

Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Brandt Mannchen, Houston

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

### **Against 6.4**

None received.

### **Modification**

14. Provide that the use of PST funds to remove non-compliant tanks is limited to extraordinary circumstances involving a threat or risk to public health or the environment. (Chris Newton, President – Texas Petroleum Marketers and Convenience Store Association, Austin)

## ***Commission Decision***

Adopted Recommendations 6.2 through 6.4, including a modification to 6.3 to instruct TCEQ, in setting the PST Remediation fee in rule, to reduce the fee levels as the cost of the PST program declines.

## ***Legislative Action***

House Bill 2694 prohibits common fuel carriers from delivering regulated substances to tanks unless the tank has been issued a valid and current registration and certification from TCEQ, as provided for in other law. TCEQ may assess administrative penalties for violations, and the Commission must adopt rules to enforce this provision. The Legislature modified the Sunset Commission provision by creating an affirmative defense if the person delivering the fuel relied

on a valid, paper certificate shown or displayed by the owner/operator; a temporary delivery authorization; or information obtained from TCEQ's website not more than 30 days before the delivery. (Recommendation 6.2)

The bill reauthorizes five petroleum storage tank (PST) remediation fees by removing language providing for their expiration on August 31, 2011, and changes the current fee levels to caps. The Commission must set fees in rule, up to the cap in statute, in an amount not to exceed the amount necessary to cover the cost of the program, as appropriated to the agency by the Legislature. (Recommendation 6.3 with Commission modification)

The bill allows TCEQ to use PST remediation funds to take corrective action to remove petroleum storage tanks that are non-compliant, out of service, pose a contamination risk, and are owned or operated by a person who is financially unable to remediate the tank. The Commission must adopt rules relating to this provision, including determining financial ability to pay and an assessment of potential contamination risk, to prevent PST owners from abusing the system in ways that would force the State to pay for PST remediation when the owner should be responsible. (Recommendation 6.4)

The Legislature added to the Sunset Commission provisions to allow TCEQ to enter into direct award contracts for petroleum storage tank remediation projects, under certain circumstances, that transition from the responsible party reimbursement remediation program to the state-lead program, as the reimbursement program winds down.



# Issue 7

## ***TCEQ Lacks Guidance on How to Fund the Texas Low-Level Radioactive Waste Disposal Compact Commission.***

### **Background**

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In 1993, Texas formed a compact (the Compact) with Vermont and Maine – the latter of which withdrew from the Compact in 2004 – to dispose of low-level radioactive waste (low-level waste) in a facility to be built in Texas. The Legislature also created the Texas Low-Level Radioactive Waste Disposal Compact Commission (Compact Commission) to administer the Compact for management and disposal of low-level waste generated in compact states. Although the Legislature originally intended to have a state-owned and operated disposal facility, over 20 years the State was never able to develop a disposal site. As a result, in 2003, the Legislature amended state law to allow one private company to pursue a license to operate a disposal facility.

In 2009, the Texas Commission on Environmental Quality (TCEQ) granted a license to a private company to construct and operate a disposal facility in Andrews County to dispose of both compact and federal waste in adjacent, but separate disposal areas.<sup>1</sup> The facility is in the pre-construction phase, but the licensee expects that the facility will be operational and ready to accept compact waste within the next 18 months. By state law, when the licensee accepts compact waste into the compact area of the facility, it transfers the title of the compact waste to the State.<sup>2</sup> In this way, the State has the liability for the compact waste and disposal site, is the fee simple owner of the compact waste disposal site, and is responsible for any possible future contamination after the facility closes.

TCEQ regulates the disposal of low-level radioactive waste by issuing a disposal license, monitoring the disposal facility, establishing a compact waste disposal fee schedule, and enforcing the disposal license under applicable law and rule. The Compact Commission establishes the volume of compact waste to be disposed of in the compact facility through 2045, while TCEQ, through conditions in the disposal license, determines the maximum volume and total radioactivity to be accepted into the disposal facility. The Compact Commission is also authorized to make decisions relating to low-level radioactive waste importation and exportation into or out of the Compact for management and disposal. The terms of the Compact, including the creation of the Compact Commission, have the force of both state and federal law as they were enacted by the Legislature and ratified by the United States Congress.

The Compact Commission is a separate legal entity from its member states.<sup>3</sup> The Compact Commission itself is made up of eight members, six of whom represent Texas and are appointed by the Governor, and two of whom represent Vermont. The Compact Commission met for the first time in early 2009. As the compact waste disposal facility begins operating, the Compact Commission will likely become more active, meeting more frequently to pass rules and consider importation and exportation decisions. Law requires the Compact Commission to conduct its business, hold meetings, and maintain public records according to the laws of the host state – in this case this includes adhering to the Open Meetings Act and the Public Information Act.<sup>4</sup> In addition, the Compact Commission must adhere to the Administrative Procedure Act in adopting its rules.<sup>5</sup>

As it is a separate legal entity from member states and not a state agency, and has only recently been formed, the Compact Commission has no appropriations pattern or full-time equivalent

positions, though it has employed an executive director to oversee the Compact Commission's business. In addition, state law provides that the members of the Compact Commission are entitled to reimbursement for actual and necessary expenses in performing their duties.<sup>6</sup> Law requires the Compact Commission to keep accurate accounting of all receipts and disbursements subject to annual audit to be included in its annual report to the Legislature.<sup>7</sup> The Compact Commission is currently funded by a pro rata share between Texas and Vermont, with Texas providing 75 percent of funding. In Texas, the Compact Commission is funded through a rider in TCEQ's appropriation pattern, which provides for \$100,000 for each of the fiscal years 2010 and 2011. Under this arrangement TCEQ provides expense reimbursements to the Compact Commission under a contract. The Compact Commission is seeking operational and contingency appropriations for the next biennium through TCEQ's Legislative Appropriations Request.

However, this funding stream is a short-term arrangement before the compact waste disposal facility is operational. State law requires TCEQ to establish, in rule, reasonable disposal fees to be paid by persons who deliver low-level radioactive waste to the compact waste disposal facility that is collected by the licensed operator, a private company.<sup>8</sup> By law, the disposal fee schedule will include the costs of state regulation and be sufficient to reasonably support the activities of the Compact Commission.<sup>9</sup> State law also requires that Texas and Andrews County each receive 5 percent of gross receipts generated by waste disposal activities.<sup>10</sup> TCEQ is currently considering a proposed compact waste disposal fee application submitted by the licensed disposal facility operator, but has not yet published a rule. TCEQ's fee schedule adoption process is subject to public participation and the schedule will be finalized through expedited rulemaking after any contested case hearing.

## Findings

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### **The Legislature has little budget oversight over the Compact Commission, whose actions will have a significant impact on the environmental and financial health of Texas.**

- **State Liability.** Texas, and not the Compact Commission nor the disposal facility licensee, holds liability for compact waste brought into the state. Low-level radioactive waste can be radioactive for a long time, and potential future contamination could not only have a severe impact to the environment and human health, but to the State, which bears the ultimate financial responsibility for maintaining and cleaning up the compact waste disposal facility site.

When the Legislature created the Compact Commission, state law contemplated that the State would own and operate the disposal facility and maintain ultimate responsibility for the compact waste and liability associated with it. Since that time the State has changed course – the State retains responsibility but the facility will be operated by a private company that may not be liable for long-term costs. This shift – from state-control to a private for-profit venture – has created a different dynamic, bringing to light potential gaps in legislative oversight on how decisions related to acceptance of commercial low-level radioactive waste to the compact waste disposal facility will be made. The bottom line, however, is that the State continues to have an interest in ensuring these

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*Texas bears the ultimate responsibility for maintaining and cleaning up the compact waste disposal site.*

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decisions will protect the State financially and environmentally. As the site begins operations in the near future, the Compact Commission's consideration of importation and exportation decisions will be of great importance to the State, as described in the in the textbox, *Low-Level Radioactive Waste Importation*.

### ***Low-Level Radioactive Waste Importation***

Federal and state law establish compacts for the effective management and disposal of low-level radioactive waste generated in member states. To encourage states to participate in compacts, federal law authorizes compacts to prohibit or limit importation of low-level waste for management and disposal.

The Texas-Vermont compact requires party states to contribute \$25 million to the State to cover costs associated with regulation and risk, since Texas owns the compact disposal facility and waste long-term. The Compact Commission has the authority to enter into agreements to allow for importation of waste generated outside of party states. However, the Compact does not require these import agreements to include any financial contribution to Texas to account for risk or liability associated with the imported waste.

The Compact Commission recently proposed a rule to allow the importation of waste from 36 non-party states and other potential sources, none of which potentially would be subject to the \$25 million contribution. Texas will take title and be responsible for all low-level radioactive waste accepted into the compact waste disposal facility regardless of whether the waste is generated by party states or is allowed for importation through an agreement. As the Compact Commission considers revisions and republishes its importation rule, Texas will continue to have a vested interest in its outcome.

- **Lack of Legislative Guidance.** State law does not specify how the compact waste disposal fee revenue allocated to support the Compact Commission's operations will flow to the Compact Commission. Since the compact waste disposal facility may be operational before the 2013 legislative session, timing is ripe for the Legislature to make decisions on how to structure Compact Commission funding. Without action, decisions about how funds will be remitted to the Compact Commission, whether directly or through the State, will happen without legislative guidance. In contrast, state law provides for how the collection of the 5 percent of gross receipts statutorily allocated to Texas will flow, and TCEQ has an agreement with the Comptroller of Public Accounts for TCEQ to accept the transfer of funds and audit the funds required to be remitted to general revenue.
- **Potential Conflict.** If the licensed disposal facility were to remit the allocation of the compact waste disposal fee directly to the Compact Commission, without the benefit of legislative oversight, a potential conflict could occur. The licensed disposal facility's total revenue is dependent on both the regulatory authority of TCEQ and the total amount of waste disposed at the site – an amount that could be affected by importation decisions made by the Compact Commission. This situation puts the Compact Commission in the conflicting position of

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*Timing is ripe for the Legislature to weigh in on the Compact Commission's funding structure.*

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*By affecting the total volume of waste accepted to the site, the Compact is in the position of holding its own purse strings.*

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*TCEQ's and the Compact Commission's current funding agreement is untenable long-term.*

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impacting total disposal volume of commercial low-level radioactive waste that directly affects its revenue source, essentially holding its own purse strings. The Legislature commonly sees comparable funding mechanisms at state agencies, such as TCEQ, which receives major funding from fees assessed on entities it regulates. However, in these cases, the Legislature retains oversight of state agencies' budgets through the appropriations process, ensuring agencies only spend the money authorized, and are not incentivized to overcharge to build their budgets.

- **Cumbersome Budgeting Structure.** Without further statutory direction, TCEQ will determine the Compact Commission's allocation through its rule establishing the compact waste disposal fee – putting TCEQ in a position in which it de facto determines the Compact Commission's budget. The review of a disposal rate application and the TCEQ rulemaking process, which take a significant amount of time, is not structured to be responsive to changing budget needs from year to year, the way the biennial appropriations process is. Given that the Compact Commission's funding source is dependent on the future compact waste disposal at the site, setting its long-term budget – through specifying the allocation of the compact disposal fee for Compact Commission expenses – in rule without opportunity to make timely changes, is an exercise that could result in under- or over-funding. In addition, TCEQ's current funding agreement with the Compact Commission – to reimburse the Compact Commission in accordance with appropriations rider – is untenable on a long-term basis, as it inappropriately places TCEQ in the position of determining what expenditures are appropriate, and wastes TCEQ resources to oversee Compact Commission reimbursements.
- **Quasi-public Status.** Finally, while the Compact Commission is a legal entity separate from the State, it also has responsibilities directly related to the State's financial and environmental health. State and federal law already acknowledge the Compact Commission's quasi-public status, requiring it to adhere to Texas' open meetings, public information, and administrative procedure law in conducting its business.

### **The Legislature funds five interstate river compact Commissions through TCEQ's appropriations pattern.**

TCEQ administers other interstate compact commissions, including acting as a mechanism for those compact commissions to receive funding appropriated by the Legislature. In 2005, the Legislature rolled Texas' five independent interstate River Compact Commissions – those for the Canadian, Pecos, Red, Rio Grande, and Sabine Rivers – into TCEQ and began to fund them through the agency's appropriations. The five Commissions are funded by line item in TCEQ's appropriations pattern, and TCEQ has a memorandum of agreement that allows the River Compacts to retain their operational independence, even though they are technically a part of TCEQ.



## Recommendation

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### ***Change in Statute***

#### **7.1 Clarify the Compact Commission's funding mechanism.**

Under this recommendation, revenue allocated by TCEQ's rule-based compact waste disposal fee to the Compact Commission's operation would be remitted to a newly created General Revenue Dedicated Account. The dedicated fund would receive only the portion of the compact waste disposal fee allocated to cover the costs of the Compact Commission's operations from the licensed disposal facility, as defined by TCEQ's adopted rule. The Legislature would then appropriate funds to the Compact Commission from this account through the Compact Commission's rider in TCEQ's appropriations pattern. Since state and federal law both provide that this allocation go toward reasonably supporting the operations of the Compact Commission, this recommendation would provide that the funds deposited into this new account only be used for that purpose.

This recommendation does not intend to make the Compact Commission a state agency, and it does not provide for full-time equivalent positions for the Compact Commission in TCEQ's appropriations. Rather, legislative appropriations would be made in either a lump sum or up to a limit, and the Compact Commission would have control over expenditures according to its adopted budget. The Compact Commission would continue to submit funding requests to the Legislature through TCEQ's Legislative Appropriations Request. However, moving forward, TCEQ would simply transfer the money to the Compact Commission, and not be in the position of overseeing or controlling reimbursements.

## Fiscal Implication Summary

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This recommendation would not result in a fiscal impact to the State.

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<sup>1</sup> Federal waste is low-level radioactive waste, or mixed low-level radioactive waste and hazardous waste, that the federal government is responsible for under state law. Texas Health and Safety Code, sec. 401.2005.

<sup>2</sup> Texas Health and Safety Code, secs. 401.205 and 401.2051.

<sup>3</sup> Texas Low-Level Radioactive Waste Disposal Compact Consent Act, 42 USC 2021d, sec. 3.03 (2006).

<sup>4</sup> Texas Low-Level Radioactive Waste Disposal Compact Consent Act, 42 USC 2021d, sec. 3.04 (2006).

<sup>5</sup> Texas Low-Level Radioactive Waste Disposal Compact Consent Act, 42 USC 2021d, sec. 3.05(4) (2006).

<sup>6</sup> Texas Health and Safety Code, sec. 403.004.

<sup>7</sup> Texas Low-Level Radioactive Waste Disposal Compact Consent Act, 42 USC 2021d, sec. 3.04(5) (2006).

<sup>8</sup> Texas Health and Safety Code, sec. 401.245.

<sup>9</sup> Texas Low-Level Radioactive Waste Disposal Compact Consent Act, 42 USC 2021d, sec. 4.04(4) (2006).

<sup>10</sup> Texas Health and Safety Code, secs. 401.244(a) and 401.2445.



# Responses to Issue 7

## Recommendation 7.1

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*Clarify the Compact Commission's funding mechanism.*

### Agency Response to 7.1

TCEQ agrees that the Compact Commission's funding mechanism should be clarified and that a separate General Revenue Dedicated Account should be established to financially support Compact Commission activities. The agency also expects that revenues to support the regulatory activities at the TCEQ should be deposited to the existing TCEQ Low Level Waste Account #88. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### For 7.1

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Michael Ford, Chairman – Texas Low-Level Radioactive Waste Disposal Compact Commission

Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin

Brandt Mannchen, Houston

Robert Wilson, Lockhart

### Against 7.1

None received.

### Modifications

1. Do not attach the Compact Commission financially to a state organization that has a specific role within the Compact and can take different positions from the Compact Commission that lead to tangible effects regarding the Commission's ability to operate. (Michael Ford, Chairman – Texas Low-Level Radioactive Waste Disposal Compact Commission)
2. Require the annual budget reporting by the Compact Commission to be publicly available and provide legislative guidance on reasonable and allowable expenditures to the Compact Commission. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
3. Fund the Low-level Compact Commission out of General Revenue Dedicated Account #88 (Low-level Radioactive Waste) until the low-level radioactive waste disposal site is operational and the Compact is receiving revenue from disposal fees. (Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin)

## ***Commission Decision***

Adopted Recommendation 7.1.

## ***Legislative Action***

House Bill 2694 creates a new General Revenue dedicated account to fund the Compact Commission. The bill requires TCEQ to deposit the portion of the compact waste disposal fee allocated to the Compact Commission into the account, which may only be used to support the operations of the Compact Commission. The Legislature will appropriate funds to the Compact Commission from this account through the Compact Commission's rider in TCEQ's appropriations pattern. (Recommendation 7.1)

# Issue 8

## ***The Statutory Cap on Emissions Limits TCEQ's Ability to Adequately Fund the Title V Air Permit Program.***

### **Background**

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Facilities that emit air contaminants must pay either the Air Emissions Fee or the Air Inspection Fee, whichever is greater, to support TCEQ's air programs. The Air Emissions Fee is based upon a cost of \$25 per ton of regulated pollutants, adjusted annually for increases in the Consumer Price Index since 1989, with a cap of 4,000 tons per year of emissions.<sup>1</sup> TCEQ rule establishes the rate per ton, while state law establishes the emissions cap and provides for inflationary increases.<sup>2</sup> The fee is charged on emissions of Carbon Monoxide, Nitrogen Oxides, Lead, particulate matter, Sulfur Dioxide, volatile organic compounds, and other regulated pollutants. Facilities pay fees on emissions of each pollutant up to the cap. The Air Emissions Fee is designed to cover costs of the Title V program including preparing regulations, reviewing applications, modeling and monitoring emissions, enforcing permits, and preparing emissions inventories. The Air Inspection Fee is based on facility type and is designed to recover costs of inspections and other enforcement activities.<sup>3</sup> Statute directs both fees to different General Revenue Dedicated Funds. The table, *TCEQ Air Facility Fees*, gives greater detail on the number of payers and the amount collected for each fee.

***TCEQ Air Facility Fees  
FY 2009***

<b>Fee</b>	<b>Facilities Paying</b>	<b>Amount Collected</b>	<b>General Revenue Dedicated Account</b>
Air Emissions Fee	1,360	\$32.7 million	Title V Operating Permit Fee Account
Air Inspections Fee	1,810	\$10.2 million	Clean Air Account

### **Findings**

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#### **Texas may be in jeopardy of losing federal approval of the Title V air permitting program if fee revenue is not increased.**

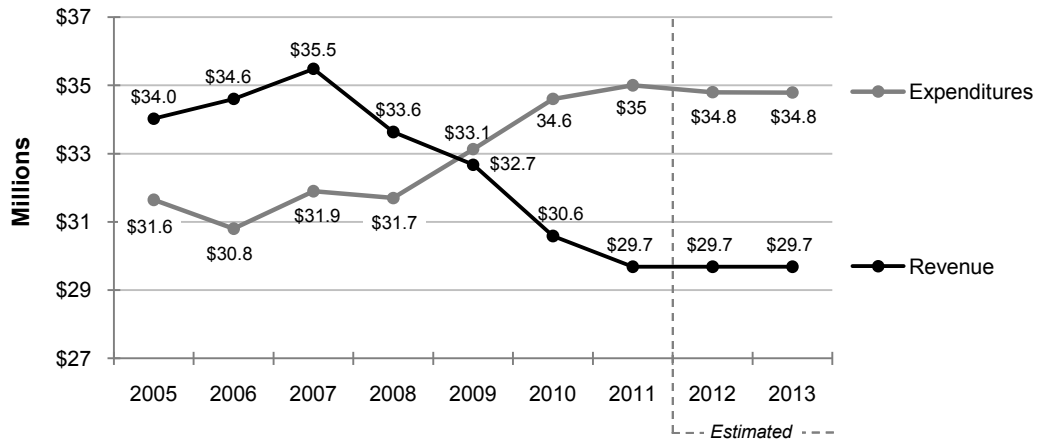
Revenue from the Air Emissions Fee as it is currently configured in agency rule and statute is no longer adequate to support the Title V program. Revenue from the fee has steadily declined as industries have more effectively controlled their emissions, and in fiscal year 2009 revenues fell below needed expenditures to support the program. In fiscal year 2010, the fee returned \$30.6 million while program costs totaled \$34.6 million, a \$4 million shortfall. The graph on the following page, *Air Emissions Fee*, shows this decline in revenue compared to the amount of funds spent on maintaining the Title V permitting program with projections for the next biennium. While the deficit has continued to grow since it appeared, the agency has been able to cover its spending needs by using unspent balances in the Title V Operating Permit Fees Account but these balances are projected to be

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*Revenue from the Air Emissions Fee falls short of Title V permit program costs by \$4 million.*

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### Air Emissions Fee – FY 2005 to 2013



depleted during fiscal year 2012.<sup>4</sup> TCEQ attributes the rise in expenses for the Title V program to higher costs associated with implementing new and revised federal requirements and increased agency personnel costs.

Declining revenue from the Air Emissions Fee endangers Texas’ status as a federally approved state program. Federal rules require states, like Texas, that have approved Title V air permitting programs to adequately fund the program through a fee based on the quantity of emissions of criteria air pollutants.<sup>5</sup> States that do not collect enough revenue run the risk of EPA issuing a notice of deficiency, and potentially disapproving the program. Potential consequences of federal disapproval of Texas’ Title V program would result in a series of sanctions including higher emissions offsets in nonattainment areas, the loss of federal transportation funds, and the creation of a program for federal issuance of Title V permits in place of Texas’ program.

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*Adjusting the emissions cap would provide for a more equitable funding structure.*

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### **Increasing the Air Emissions Fee to raise the needed revenues contributes to the inequitable treatment of industry.**

TCEQ has the authority to increase the fee amount above its current level of \$25 per ton to address the looming deficit. By applying the fee to emissions below the cap, however, the existing fee structure would make such a fee increase more inequitable than it already is. This inequity happens because the fee structure does not provide for facilities to pay for emissions greater than the cap of 4,000 tons per year, per regulated pollutant. The effect is that these facilities pay considerably less on a per-ton basis than facilities with emissions less than the cap. Without the ability to adjust the cap, TCEQ misses an opportunity both to collect revenue needed to support the Title V program and to provide for a more equitable funding structure.

## Recommendation

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### *Change in Statute*

#### **8.1 Authorize TCEQ to administratively adjust the annual emissions tonnage cap for the Air Emissions Fee when necessary to adequately fund the Title V Operating Permit program.**

Under the recommendation, TCEQ would be given statutory authority to adjust the emissions cap above the current level of 4,000 tons per year, per regulated pollutant as needed to ensure Texas' compliance with federal requirements for sufficient funding. TCEQ would only be permitted to make these adjustments on an annual basis, with Commission approval, and in accordance with appropriations authority granted in the General Appropriations Act, but would not be required to use rulemaking procedures. This recommendation would give the agency flexibility needed to adjust both the fee per ton and the emissions cap to provide an equitable approach for spreading costs. This recommendation would not affect existing TCEQ authority to change the fee per ton by rule.

## Fiscal Implication Summary

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This recommendation would result in additional revenues to the General Revenue Dedicated Title V Operating Permit Fee Account to cover the Account's shortfalls. The impact would depend upon the adjustment in the emissions cap that TCEQ determines necessary to ensure Texas' compliance with federal requirements for sufficient funding and in accordance with appropriations authority granted in the General Appropriations Act. The current projected shortfall between the amount needed to adequately fund the program and the amount raised by the current fee is \$5.1 million in fiscal year 2012.

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<sup>1</sup> Texas Administrative Code, Title 30, part 1, rule 101.27.

<sup>2</sup> Texas Health and Safety Code, sec. 382.0621.

<sup>3</sup> Texas Administrative Code, Title 30, part 1, rule 101.24.

<sup>4</sup> Texas Commission on Environmental Quality, *Legislative Appropriations Request for Fiscal Years 2012 and 2013*, (Austin, Texas, August 23, 2010), p. 6.E. Page 22 of 23.

<sup>5</sup> 40 C.F.R., sec. 70.9 (b) (2010).





# *Responses to Issue 8*

## **Recommendation 8.1**

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*Authorize TCEQ to administratively adjust the annual emissions tonnage cap for the Air Emissions Fee when necessary to adequately fund the Title V Operating Permit program.*

### **Agency Response to 8.1**

TCEQ agrees with efforts to provide the agency with various options to secure the level of funds needed to support the federal Title V Air Permit program activities. The agency states that the manner chosen by the agency to assess the fee will be to only collect revenue amounts sufficient to support the appropriations for this program by the Legislature, which includes adequate support to manage the federally delegated program. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 8.1**

Senator Wendy Davis, Member – Texas Senate

Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Brandt Mannchen, Houston

Luke Metzger – Environment Texas, Austin

David Weinberg, Executive Director – Texas League of Conservation Voters

League of Women Voters of Texas

### **Against 8.1**

Luke Bellsnyder, Executive Director – Texas Association of Manufacturers, Austin

John W. Fainter, Jr., President and CEO – Association of Electric Companies of Texas, Austin

Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin

Hector Rivero, President/CEO – Texas Chemical Council, Austin

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

### **Modifications**

1. Require TCEQ to provide the Sunset Commission and Legislature a full accounting and justification of program expenditures, and require that any increase in fees be subject to the rulemaking process. (Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin)
2. Increase the cost of air emissions permits to fight TCEQ's funding deficit. (Harriet Irby, Pantego)
3. Remove the annual emissions tonnage cap for the Air Emissions Fee. Create a graduated scale with higher costs per ton being imposed on large emitters. (C. Victor McDonald, Denton)
4. Increase the Air Emissions Fee from \$25 per ton of regulated pollutant to \$35 per ton. (Hector Rivero, President/CEO – Texas Chemical Council, Austin)

## ***Commission Decision***

Not adopted. The Sunset Commission took no action on Issue 8.

## ***Legislative Action***

No action needed.

*Water and Wastewater  
Utility Regulation Transfer*

*Supplement to the Sunset Staff Report  
on the Public Utility Commission*



# ***The State Could Benefit From Combining Regulatory Functions Related to Gas and Water Utilities in the Public Utility Commission.***

## **Background**

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The Public Utility Commission (PUC), the Railroad Commission of Texas, and the Texas Commission on Environmental Quality (TCEQ) each carry out utility regulation. One of the statutory charges to the Sunset Commission is to review the extent of overlapping programs and their potential for consolidation.<sup>1</sup> The concurrent Sunset reviews of these three agencies this biennium present a rare opportunity to evaluate the utility regulations at PUC, the Railroad Commission, and TCEQ for their consolidation potential. Adding further reason to review this potential, Texas is unusual in separating utility regulatory functions in three agencies. As pointed out in the PUC Sunset staff report, nearly all states have only one agency that regulates electric, telecommunications, natural gas, and water utilities.<sup>2</sup>

**Public Utility Commission.** PUC regulates the rates and services of electric and telecommunications companies in Texas as a substitute for competition where it does not exist or lacks robustness. Although recent legislative changes have restructured and deregulated major portions of the electric and telecommunications markets, PUC continues to have significant ratemaking and other responsibilities in areas where competition is lacking. Within the large part of the state that is open to electric competition, PUC still oversees rates of transmission and distribution utilities that operate as monopolies in the deregulated market. Outside these competitive areas, PUC is fully responsible for rates of investor-owned electric utilities that continue to generate, transport, and sell electricity to the public. PUC also has varying degrees of regulatory responsibility over local telephone service.

In setting rates for utilities under its regulations, PUC's basic mission is to determine the utility's reasonable revenue requirement for operation and how that requirement can be turned into rates paid by different customer classes. The typical course for contested rate cases is for PUC staff to prepare its case, which, along with the utility's original request and information from parties intervening in the case, goes to the State Office of Administrative Hearings (SOAH) for a neutral determination of findings and conclusions that are proposed to the PUC Commission for final decision. In addition to these rate responsibilities, PUC approves Certificates of Convenience and Necessity (CCNs), defining areas these utilities must serve; monitors service quality for rate-regulated utilities; and addresses consumer complaints about their utility service.

In fiscal year 2009, the agency operated with 189 authorized staff and a budget of \$14.2 million. Its rate responsibility covers four investor-owned electric utilities, eight transmission and distribution utilities, and 63 local telephone companies. For these utilities, PUC conducted 41 electric and 12 telephone rate proceedings. Details of PUC's operations, as well as the Sunset Commission's recommendations on its operations, can be found in the July 2010 Sunset report on the agency.<sup>3</sup>

A separate agency, the Office of Public Utility Counsel (OPUC), represents the interests of residential and small commercial consumers in rate and other matters before PUC. OPUC often intervenes as a party in PUC proceedings, and is authorized to intervene on behalf of residential consumers in appeals of gas utility rates to the Railroad Commission when asked to do so by a municipality.<sup>4</sup> OPUC reports that it has participated in proceedings before the Railroad Commission twice, once in 1985 and once in 2000.

**Railroad Commission of Texas.** Gas utility regulation has a long history at the Railroad Commission dating to the 1920s. Today, the agency carries out rate-related regulation of about 200 investor-owned natural gas utilities to help ensure fair and equitable gas rates in the monopolistic gas utility industry. An investor-owned utility often serves customers within a city, as well as in the “environs” surrounding a city. Texas also has 84 municipally owned natural gas utilities, but the Railroad Commission does not have rate jurisdiction over them.

The Railroad Commission has original jurisdiction over investor-owned gas utility rates outside a municipality as well as rates a company can charge for transporting gas to the city limit. Cities have rate jurisdiction over investor-owned gas utilities within their boundaries, but utilities may appeal city decisions to the Railroad Commission.<sup>5</sup>

The Railroad Commission typically holds hearings for major contested cases in which it has original jurisdiction or cases on appeal from a city rate decision. Generally, the Railroad Commission staff presents its case before a Railroad Commission hearing examiner and technical examiner, who preside together over hearings and develop a proposal for decision for Commissioners’ consideration and ruling. In fiscal year 2009, the Railroad Commission received nine filings for full ratemaking review. Five of these cases came to the agency under its original jurisdiction, and the remaining four cases came to the Railroad Commission on appeal.

Statute allows adjustments for gas utility rates through other procedures without requiring an administrative hearing. Utilities may apply to make interim rate adjustments for designated infrastructure investments between full rate cases, subject to filing a full rate case within five years. The Railroad Commission staff may authorize a utility to make cost-of-service adjustments in tariffs that are approved by Commission order as part of a full rate case and specified in the underlying tariff. A gas utility may also apply to recover unreimbursed costs of relocating facilities to accommodate public construction projects, such as roads. Gas utilities took advantage of these adjustments 13 times in fiscal year 2009.

Among other aspects of the regulation of gas utilities, the Railroad Commission conducts audits of intrastate gas utilities to verify that utilities are billing residential and small commercial customers according to authorized rates, and that utilities are remitting the proper amount of gas utility tax. The Railroad Commission also handles utility-related consumer complaints and inquiries from residential and small commercial consumers, and business-to-businesses complaints involving negotiated rates between businesses.

The Railroad Commission’s Gas Services Division, with about 24 employees, is primarily responsible for gas utility rate-related regulation and operated with expenditures of about \$1.39 million in fiscal year 2009, not counting indirect support from administrative functions throughout the agency. Attorneys from the Office of General Counsel, totaling about two full-time equivalent employees, also participate directly in the Railroad Commission rate-related regulation.

**Texas Commission on Environmental Quality.** Water and wastewater rate regulations in Texas date back to 1913. In 1975, when the Legislature established the Public Utility Commission to regulate utilities, it included authority to oversee retail public utilities for water and wastewater service. In 1986, the Legislature transferred this authority to the Texas Water Commission, now part of TCEQ. At that time, the Legislature considered the Water Commission a better fit for water utility regulation because of its familiarity with the special issues of small water systems prevalent in the water industry compared to PUC’s orientation toward complex ratemaking for huge electric and telecommunications utilities.

In fiscal year 2009, TCEQ regulated a total of 3,938 water and wastewater utilities. TCEQ is responsible for ensuring that retail public utilities' rates, operations, and services; and wholesale and submetering rates are just and reasonable. It also has the authority to grant CCNs and ensure that utilities have the financial, managerial, and technical capability to provide adequate and continuous service within their certificated areas. TCEQ has original jurisdiction for rates of investor-owned water and wastewater utilities (IOUs) outside cities and within cities that have surrendered their rate jurisdiction to the agency. TCEQ has appellate jurisdiction over rates of districts, water supply corporations, cities providing service outside their city limits, IOUs operating inside a city, and utilities owned by counties within 50 miles of the Mexico border. TCEQ also has appellate jurisdiction over the wholesale rates of potable water and wastewater service providers. TCEQ basically does not have either original or appellate jurisdiction for municipally owned water and wastewater utilities operating *inside* cities.

In a case of original jurisdiction, an IOU filing a rate change application must give notice to its customers at least 60 days before the effective date of the increase. TCEQ reviews the application and the required notice, checking for deficiencies and ensuring the utility has a CCN. If the application and the notice are sufficient, the utility is allowed to begin charging the proposed rates while the application is pending. TCEQ staff evaluates the proposed rate change, performing an audit and site visit, and reviewing complaints and compliance history. Rate evaluation staff also work with other TCEQ staff to check the utility's compliance with water and wastewater environmental requirements.

This process includes a protest mechanism by which customers may have the case referred to SOAH for a hearing and provisions for establishing interim rates if a proposed increase results in an unreasonable economic hardship on the utility's customers. Cases not protested or settled through mediation may be approved administratively by the Executive Director. Otherwise, if a case goes to a contested hearing, SOAH makes a proposal for the Commission's final decision.

Appellate cases, generally for districts, water supply corporations, and city customers outside city limits, work similarly to the protest provision for original jurisdiction cases. Customers must file a petition with TCEQ within 90 days of the effective date of a rate change to protest that change and have the case referred to SOAH for hearing. TCEQ staff then conducts cost-of-service and quality-of-service reviews, which generally require the same level of review as for cases under original jurisdiction.

At SOAH, the process for hearing the protest is the same as that described above for IOUs. In original and appellate rate cases, both TCEQ's Executive Director and the Office of Public Interest Counsel are always parties to rate cases at SOAH and before the Commission. TCEQ assists consumers and utilities with inquiries and complaints regarding customer service and protection rules, and has recently added staff to oversee the assistance function.

TCEQ has about 21 employees that conduct water and wastewater utility rate and CCN regulation and assist customers. Funding for these functions totaled about \$1.5 million in fiscal year 2009. In that year, TCEQ conducted 125 rate reviews, of which 76 were contested; of these, seven had evidentiary hearings. TCEQ also processed 287 CCN applications, referred 30 CCN cases to SOAH, and made three final Commission decisions.

## Findings

**With its core mission of utility oversight, PUC’s expertise and structure are focused on handling rate-related regulation efficiently and fairly.**

- Focus on Utility Ratemaking.** The Legislature established PUC in 1975 to regulate utilities, and although its operations have changed over its 35-year history, PUC still carries out ratemaking functions as one of its primary focuses. Even after the restructuring of the telecommunications and electric markets in most of Texas to encourage competition, PUC continues to have major rate-related regulatory functions, particularly in the electric industry, but also with local telephone service. PUC’s staff and its Commission are geared toward overseeing utilities and ensuring that regulated utility rates are just and reasonable.
- Development of Expert Staff.** PUC ratemaking staff has expertise in economic regulation and is large enough to specialize on specific areas of responsibility. Rate regulation staff are largely Certified Public Accountants and other financial analysts who evaluate a utility’s cost of service and other revenue requirements, and translate that amount into a reasonable rate of return and a schedule of rates to be charged to different customer classes. Infrastructure staff, often engineers, help evaluate facilities-related questions, such as depreciation, for use in determining a utility’s revenue needs. Personnel advising PUC Commissioners have no connection with other PUC offices on ratemaking matters, developing their own separate expertise. As a separate agency, SOAH has its own expert staff of administrative law judges dealing with utility issues in its Utility Division.
- Organizational Structure for Fair Ratemaking.** PUC’s organizational structure has evolved in large part to promote fairness in decision making. State law prohibits agency personnel involved in rendering decisions or making findings of fact and conclusions of law from communicating with parties to a case without the opportunity for all parties to participate.<sup>6</sup> This requirement is aimed at ensuring that all parties have an equal, and therefore fair, opportunity to hear and persuade decision makers.

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*PUC is well structured for utility oversight and ratemaking.*

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### Separation of Ratemaking Duties at PUC

Staff Acting as Party to Case	Entities Involved in Neutral Hearing and Decision Making
Legal	PUC Commissioners
Rate Regulation	State Office of Administrative Hearings
Infrastructure and Reliability	Staff Advising Commissioners

PUC’s separation of staff with party status and staff involved in decision making into physically distinct offices, as summarized in the chart, *Separation of Ratemaking Duties at PUC*, significantly reduces the possibility of inadvertent, improper communication between them. SOAH’s involvement as a separate agency, apart from PUC, further insulates the decision-making process from improper influence. Finally, PUC actively trains its entire staff on their proper role and the lines of communication they should not cross.



- **Attention to Consumer Complaints.** In response to the State’s transition toward competitive telecommunications and electric markets, PUC now gives much stronger attention than in its early days to complaint resolution. PUC has its own division of about 21 employees to manage complaints, including those involving rates, for the entire agency, helping to ensure agency-wide consistency and focus on customer protection issues. Receiving complaints at its call center and from other sources, these employees respond to all complaints, including rate-related matters; investigate jurisdictional complaints; and provide information to address inquiries.<sup>7</sup>
- **Extensive and Accessible Online Records.** PUC keeps all filings in docketed cases, as well as other information, available to the public online. This resource is significant, given the immense volume of records developed through PUC’s various proceedings. The online document management system contributes to the transparency of PUC operations.

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*PUC’s online document system makes its records easily accessible to the public.*

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**Although ratemaking functions at the Railroad Commission and TCEQ are working, transferring these duties to PUC offers potential benefits from aligning the State’s utility regulation within one agency.**

- **Gas Utility Rate Regulation.** Gas utility regulation has worked over its long history at the Railroad Commission and benefits from interconnections between rate regulation and other programs within the Railroad Commission. One important tie is the connection between pipeline safety and ratemaking. For example, the Railroad Commission staff can help inform utility staff about a utility’s degrading and dangerous pipelines and the utility’s revenue needs to fix the problem.

Despite these beneficial aspects of regulating gas utilities at the Railroad Commission, several opportunities for improving regulation by aligning it at PUC also exist, as outlined below.

***More focused expertise in ratemaking at PUC.*** PUC has about 22 full-time equivalent employees directly involved in ratemaking, whereas the Railroad Commission has a staff of about five performing these functions. The Railroad Commission’s technical staff must multi-task in performing several ratemaking functions such as financial analysis, calculation of fair rates of return, and calculation of plant depreciation. At PUC, these functions tend to be exercised by staff specialized in each area. Consolidating duties, especially of this specialized nature, would provide a greater opportunity to develop and maintain focused expertise that is essential in ratemaking.

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*PUC’s larger ratemaking staff offers additional ratemaking expertise.*

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***Beneficial separation of roles in PUC’s organizational structure.*** PUC’s larger ratemaking staff and more defined approach to ratemaking allows it to separate staff involved in different phases of the rate case in a way that is not possible at the Railroad Commission. Specifically, PUC’s

process clearly separates those who provide testimony and technical expertise in advocating the staff case; those who preside over hearings and develop findings of fact and conclusions of law; and those who advise Commissioners on the case. This structure improves impartial decision making by limiting opportunities for inadvertent or improper communication between advocating staff and staff involved directly in assisting the decision making process.

***Greater independence in hearings through use of SOAH.*** Different from PUC’s process for hearing utility rate cases, the Railroad Commission is authorized, but not required to contract with SOAH for carrying out administrative hearings in contested cases.<sup>8</sup> The Railroad Commission relies on its own staff attorneys to preside as hearings examiners over contested rate cases. Use of SOAH for administrative hearings is now typical for most agencies unless good reasons exist to hold hearings in-house. SOAH specializes in hearings, and in fact, has a division devoted to hearing utility cases. External hearings promote independence from any potential pressures that might come from inside or outside an agency. SOAH also has the capability to conduct hearings throughout much of the state, as well as Austin.

While challenges would arise from separating interrelated functions between the Railroad Commission and PUC, the two agencies could still communicate and share information on these issues. The agencies could look to the federal government for a model on coordinating issues between pipeline safety and ratemaking. The federal government separates these two functions, with the Federal Energy Regulatory Commission regulating interstate gas rates and the U.S. Department of Transportation regulating pipeline safety. Also, in Texas, the Railroad Commission is responsible for safety of intrastate pipelines throughout the state, but cities set rates for their own municipal gas systems and, frequently, for investor-owned utilities operating within their boundaries.

- **Water and Wastewater Utility Rate Regulation.** TCEQ conducts the economic regulation of these utilities’ rates and services. As with the Railroad Commission, this regulation has worked and also has benefitted from the environmental regulation of other TCEQ programs. For example, programs for ensuring public drinking water standards and protecting the environment from sewage discharges can identify problems that these water utilities need to address.

Although these strengths exist at TCEQ, oversight of water and wastewater utilities could benefit from an overall realignment and consolidation of utility regulation, as outlined below.

***Improved focus on TCEQ’s core mission.*** Measured against TCEQ’s huge environmental mission, the economic regulation of utilities is a smaller function, but its effects on Texas ratepayers can be significant. Transferring the functions would allow TCEQ to better focus on its core

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*Gas utility ratemaking and pipeline safety functions are separated at the federal and local level.*

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*Transferring utility functions would better focus TCEQ on its core environmental quality mission.*

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mission under its umbrella of ensuring environmental quality and take advantage of PUC's focus and processes, making PUC an umbrella utility regulatory agency. Much the same expertise regarding financial analysis and calculating fair rates of return already exists at PUC, where it can be further focused and enhanced. In addition, PUC's more established ratemaking and CCN processes offer benefits in regulating the increasingly larger, more sophisticated water corporations that TCEQ currently deals with.

***Improved consumer assistance at PUC.*** In permitting and rate cases, utilities may hire consultants and lawyers who are reimbursable through rates. Consumers, however, have limited resources to pay for representation, making the need for their interest to be represented more important. PUC's consumer protection staff effectively focuses on utility consumer complaints and outreach. In addition, the Office of Public Utility Counsel (OPUC) represents residential and small commercial utility consumers in areas of PUC's jurisdiction. While TCEQ's Office of Public Interest Counsel (OPIC) represents the public interest in utility cases, and has been directed by TCEQ's Commission to assist utility customers in understanding the contested case and mediation process, it has no statutory authority to represent consumers the way OPUC does. In addition, OPIC does not employ or contract with economists or other technical specialists to provide needed expertise in rates cases, as OPUC does.

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*OPIC has no statutory authority to represent consumers the way OPUC does.*

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***Improved funding opportunities.*** TCEQ funds water and wastewater utility rate and CCN regulations through a combination of statutory fees. Three statutory fees collected by TCEQ relate to applications for a CCN; application for the sale, transfer, or merger of a CCN; or application to change rates.<sup>9</sup> The three fees raised only about \$28,000 in fiscal year 2009, a small fraction of the costs of rate and CCN regulation. Because these fees would have to be set at prohibitively high levels to raise the revenue needed, they are not well-suited to support the costs of water and wastewater utility regulation.

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*TCEQ's utility regulation depends on a customer fee set at different levels depending on the type of utility.*

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TCEQ also receives revenue from the Water Utility Regulatory Assessment to pay for costs associated with utility and district regulation. Customers of public water and wastewater utilities pay an assessment of 1 percent of their total utility charge, while customers of water supply or sewer service corporations and utility districts are assessed at 0.5 percent.<sup>10</sup> Although TCEQ regulates the utility rates of these three categories differently, the former being original jurisdiction and two latter being appellate jurisdiction, the assessment covers TCEQ's utility regulatory costs of more than just rate regulation, including CCN regulation. In addition, since TCEQ experiences no significant difference in the amount of workload and resources needed for the rate regulation of these two categories, the inequity is not justified.

As with the Railroad Commission, TCEQ and PUC could work together to address challenges caused by separating environmental and economic regulation of water and wastewater utilities. TCEQ could easily coordinate with PUC to ensure the flow of needed information to effectively regulate these utilities. Much as TCEQ utility staff work with water quality staff in separate divisions of the agency to ensure that utilities are in compliance with environmental and drinking water requirements, a similar process could be established with PUC to ensure effective regulation, if a transfer were to occur. In addition, such a transfer would not affect either agency's ability to take enforcement against one of these entities, as each regulatory program has its own enforcement provisions.

## Recommendations

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### *Change in Statute*

#### **S 1.1 Continue the Public Utility Commission for 12 years.**

The Sunset staff report on PUC, published in July 2010, concluded in Issue 3 that Texas has a continuing need to regulate the electric and telecommunications industries and oversee evolving competition in the industries. The report left pending the question of whether these regulatory functions should be continued at PUC or in other agencies until completion of the Sunset staff reports on TCEQ and the Railroad Commission. Now that these other reviews have been completed, staff recommends that PUC be continued for 12 years, with additional functions as indicated in the recommendations below.

#### **S 1.2 Transfer gas utility regulation from the Railroad Commission to the Public Utility Commission.**

This recommendation would transfer the responsibility that resides at the Railroad Commission for gas utilities to PUC. Under the recommendation, PUC would administer these regulations under the same original and appellate jurisdiction over rates as currently exists at the Railroad Commission. The transfer would include the Railroad Commission's existing efforts regarding utility rates and services, consumer complaints, reports, and audits. Generally, the same regulatory approaches that exist now in gas utilities statutes would continue to apply at PUC, including provisions for interim rate adjustments, cost-of-service adjustments, and cost-recovery surcharges. Collection of the Gas Utility Tax would also transfer to PUC.

The recommendation would provide for the transfer to be completed by March 1, 2012, and would provide for planning and coordination to occur between the Railroad Commission and PUC to implement the transfer. A transition team would be established with high-level employees of both agencies to develop plans regarding the transfer to PUC of obligations, property, personnel, powers, and duties for gas utility functions and sharing of records and information. The team would develop ways to coordinate on areas of interrelated responsibilities, such as the impact of the Railroad Commission's pipeline safety requirements on the rates of gas utilities. The recommendation would also require the agencies to develop memoranda of understanding, as needed, to implement the plans developed by the transition team. Statute would require the memoranda to be completed by February 1, 2012.

### **S 1.3 Require the use of the State Office of Administrative Hearings in contested gas utility cases.**

This recommendation would remove the option in law to have contested gas utility cases heard at SOAH, and instead require them to be heard at SOAH, the same as all other utility cases. This recommendation would apply regardless of whether gas utility regulation is ultimately transferred to PUC. As with other agencies using SOAH, the responsible agency would maintain final authority to accept, reverse, or modify a proposal for decision made by a SOAH judge.

### **S 1.4 Transfer responsibility for regulating water and wastewater rates and services from TCEQ to PUC.**

This recommendation would transfer TCEQ's existing authority for water and wastewater utilities regarding retail, wholesale, and submetering rates; Certificates of Convenience and Necessity; reporting requirements; and consumer assistance and complaints to PUC. TCEQ would continue to have responsibility for ensuring that utilities meet drinking water standards, sewage treatment requirements, and review of IOU Drought Contingency Plans.

Regarding rates, PUC would assume the same original and appellate jurisdiction as it currently exists at TCEQ to ensure that retail public utility rates, operations, and services are just and reasonable. To administer these regulations, PUC would have the same reporting requirements as TCEQ for these utilities, including annual service and financial reports and tariff filings, as well as information about affiliate interests. PUC would have responsibility for providing consumer assistance and resolving complaints regarding regulated water and wastewater services.

This recommendation, like for gas utilities above, would provide for the transfer to be completed by March 1, 2012, and for planning and coordination to occur between TCEQ and PUC to implement the transfer. A transition team would be established with high-level employees of both agencies to develop plans regarding the transfer to PUC of obligations, property, personnel, powers, and duties for water and wastewater utility functions and sharing of records and information. The recommendation would also require the agencies to develop memoranda of understanding, as needed, to implement the plans developed by the transition team. Statute would require the memoranda to be completed by February 1, 2012.

The transition team would develop ways to coordinate on areas of interrelated responsibilities between the two agencies, especially regarding meeting federal drinking water standards and maintaining adequate supplies of water; meeting established design criteria for wastewater treatment plants; demonstrating the economical feasibility of regionalization; and serving the needs of economically distressed areas. Ongoing efforts would also be needed to coordinate responsibilities for service standards and the sharing of information and utility data between the two agencies.

PUC would have responsibility for ensuring accuracy of meters, instruments, and equipment for measuring the utility service. TCEQ would need to maintain responsibility for quantity, quality, pressure and other conditions relating to the supply of the service. TCEQ should also continue to have the authority to appoint temporary managers for abandoned water and wastewater utilities under its responsibility to ensure adequate capacity of public water systems, but should coordinate with PUC regarding the financial aspects of these appointments. Emergency operations would need to be shared by both PUC and TCEQ to ensure adequate utility oversight and maintenance of drinking water and wastewater discharge requirements, and emergency and temporary rates for nonfunctioning systems.

**S 1.5 Eliminate the existing water and wastewater utility application fees and adjust the Water Utility Regulatory Assessment Fee to pay for utility regulation at PUC.**

Under this recommendation, filing fees that currently reside at TCEQ for applications for rate changes, CCNs, and the sale, transfer, or merger of a CCN would be repealed. These fees cannot adequately cover the costs associated with these regulatory actions, and statute provides that the Utility Regulatory Assessment Fee cover regulatory costs associated with utilities and districts. To ensure the fee covers all regulatory costs, the recommendation would equalize the 0.5 percent customer assessment for non-profit utilities and utility districts at 1.0 percent – the same level as for public utilities. The increased revenue would cover the cost of utility rate regulation at PUC while also paying TCEQ's ongoing costs associated with its water resource management responsibilities.

The recommendation would provide for the Legislature to appropriate revenues from the Utility Regulatory Assessment Fee collections to PUC to cover its costs for the transferred utility regulations. The Legislature would make these appropriations from the Water Resource Management Account, but only from the amounts collected from the utility regulatory assessment. Statute would continue to require TCEQ to collect the fee from water utilities. Under this recommendation, TCEQ would be required to remit funding for utility regulation to PUC, based on the level of the legislative appropriation. The transfer of funds could occur by interagency contract, and TCEQ would not be responsible for PUC's use of the funds.

This recommendation would pay for utility regulation through the Utility Regulatory Assessment Fee that was established for this purpose. The recommendation would not change the existing mechanism for TCEQ to collect the fee from water and wastewater utilities, providing an administrative efficiency that could be jeopardized if another fee or collection process were established. Having TCEQ transfer funds to PUC for utility regulation as envisioned under this recommendation may present some challenges as the agencies coordinate, but comes closest to the State's current approach to paying for water and wastewater utility regulation.

**S 1.6 Require OPUC to represent residential and small commercial interests relating to water and wastewater utilities, contingent on the transfer to PUC.**

This recommendation would expand the role of OPUC to represent the interests of residential and small commercial consumers in water and wastewater utilities matters, but only if regulatory oversight is transferred to PUC, as specified in Recommendation S 1.4. Under this recommendation, OPIC would not be involved in water and wastewater utility matters at PUC. If the realignment of utility regulations at PUC does not occur, OPIC would retain its existing authority to represent the public interest in water and wastewater utility matters that remain at TCEQ.

**S 1.7 Require PUC to make a comparative analysis of statutory ratemaking provisions under its authority, contingent on any transfers, to determine opportunities for standardization.**

This recommendation would require PUC to make a comparative analysis of its own authority and any new ratemaking or other authority transferred to PUC. PUC would report to the Legislature any recommendations about opportunities to standardize these ratemaking requirements in time for consideration in the 2013 legislative session.

### **S 1.8 Require PUC to analyze the staffing requirements, contingent on any transfers, and report potential changes in staffing needs to the Legislative Budget Board and the Governor’s budget office.**

This recommendation would require a report to the Legislative Budget Board and the Governor’s budget office at the same time PUC submits its Legislative Appropriations Request for the 2014-2015 biennium. The report should detail any staffing changes, including reductions that the agency recommends related to savings from consolidated functions. This recommendation gives PUC the opportunity to gain first-hand knowledge about the programs transferred and the staffing required to meet program needs.

## **Fiscal Implication Summary**

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Overall, the recommendations to continue the Public Utility Commission and add to its current responsibilities the regulation of gas utilities and water and wastewater utilities would not immediately result in savings to the State. The recommendations to realign utility regulation would require the transfer of about \$3.1 million and 47.5 employees from the Railroad Commission and TCEQ. Additionally, opportunities to adjust fees and assessments for paying the costs of regulating water and wastewater utilities at PUC and other water resource management needs at TCEQ could raise an additional \$5.6 million annually.

### **Public Utility Commission**

The recommendation to continue PUC with its current functions and existing organizational structure would continue to require the agency’s annual appropriation of about \$118.3 million. This funding includes about \$14.2 million for support operations, and about \$104.1 million in pass-through funding to electric companies to provide discounts to low-income electric customers in areas of the state open to electric competition.

The other recommendations requiring PUC to conduct a comparative analysis of ratemaking provisions and to analyze staffing requirements of any transferred functions could be performed with current resources.

### **Railroad Commission**

Based on fiscal year 2009 expenditures, the recommendation to move gas utility regulation from the Railroad Commission to PUC would require the transfer of about \$1.39 million and 24.4 full-time equivalent employees directly associated with the Commission’s Gas Services Division. All but about \$151,000 in appropriated receipts and dedicated funds would transfer from General Revenue. Additionally, one-half an FTE directly involved in ratemaking in the Railroad Commission’s Office of General Counsel would move to PUC along with about \$36,000 in General Revenue.

The recommendation to require the use of the State Office of Administrative Hearings to conduct gas utility contested rate hearings would result in increasing SOAH’s budget and staff by about \$101,000 in General Revenue and 1.5 FTEs, with corresponding reductions from the Railroad Commission’s Office of General Counsel.

An amount for indirect support from the Railroad Commission’s administrative operations would need to be added to amounts transferred to PUC and SOAH, but that amount could not be estimated.

## Texas Commission on Environmental Quality

The recommendation transferring regulation of water and wastewater utilities from TCEQ to PUC would require the transfer of about \$1.5 million and 20 employees from TCEQ to PUC to conduct rate and CCN regulation and to provide needed consumer assistance. The recommendation could also require an adjustment in PUC’s contract with SOAH to pay the cost of contested case hearings related to water and wastewater utility cases, but the amount of that adjustment could not be determined.

To cover these costs at PUC without relying on General Revenue funding, a separate recommendation provides for equalizing the utility regulatory assessment for water supply corporations and districts at 1 percent. Beyond covering the costs of utility regulation at both TCEQ and PUC, ensuring all water and wastewater utilities pay the same assessment rate would increase revenue by about \$5.6 million annually.

The recommendation to transfer responsibility for representing consumer interests in water and wastewater utility matters from OPIC to OPUC would require the transfer of one employee and approximately \$81,000.

### Texas Commission on Environmental Quality

Fiscal Year	Gain to General Revenue Dedicated – Water Resource Management Account No. 153
2012	\$5.6 million
2013	\$5.6 million
2014	\$5.6 million
2015	\$5.6 million
2016	\$5.6 million

1 Texas Government Code, sec. 325.011(6).

2 Sunset Advisory Commission, *Commission Decisions – Public Utility Commission, Electric Reliability Council of Texas, and Office of Public Utility Counsel* (Austin, Texas, July 2010), p. 28. Online. Available: [www.sunset.state.tx.us/82ndreports/puc/puc\\_dec.pdf](http://www.sunset.state.tx.us/82ndreports/puc/puc_dec.pdf). Accessed: October 25, 2010.

3 Ibid.

4 Texas Utilities Code, sec. 101.052.

5 Texas Utilities Code, sec. 102.001.

6 Texas Government Code, sec. 2001.061.

7 Public Utility Commission, *Self-Evaluation Report*, (Austin, Texas, September 2009), p. 185. Online. Available: [www.sunset.state.tx.us/82ndreports/puc/ser.pdf](http://www.sunset.state.tx.us/82ndreports/puc/ser.pdf). Accessed: October 24, 2010.

8 Texas Utilities Code, sec. 102.006. The Legislature first made the Railroad Commission’s use of SOAH mandatory in 2001, but changed the provision to be permissive in 2003.

9 Texas Water Code, sec. 13.4521 and 13.4522.

10 Texas Water Code, sec. 5.701(n)(1).



# Responses

## Recommendation S 1.1

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*Continue the Public Utility Commission for 12 years.*

### **Public Utility Commission Response to S 1.1**

PUC supports this recommendation. (Paula Mueller, Interim Executive Director – Public Utility Commission)

### **For S 1.1**

Carol Biedrzycki – Texas Ratepayers’ Organization to Save Energy, Austin

Lanetta Cooper, Staff Attorney – Texas Legal Services Center, Austin

Randall Chapman – Texas Legal Services Center, Austin

John W. Fainter, Jr. – Association of Electric Companies of Texas, Inc., Austin

Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin

Glenn Morris – Fort Worth

**Staff Comment:** All these individuals expressed support for continuing PUC for 12 years, either when responding to the full Sunset staff report on PUC earlier this year or in later responses after the Sunset hearing on the Railroad Commission and TCEQ.

### **Against S 1.1**

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

### **Modification**

1. Continue the Public Utility Commission for six years. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin; Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)

## Recommendation S 1.2

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*Transfer gas utility regulation from the Railroad Commission to the Public Utility Commission.*

### **Public Utility Commission Response to S 1.2**

The Public Utility Commission appreciates the Sunset Staff’s confidence in PUC’s ability to take on additional duties, and is prepared to undertake responsibility for regulation of gas utilities, should these recommendations ultimately be adopted by the Legislature. (Paula Mueller, Interim Executive Director – Public Utility Commission)

## **Railroad Commission Response to S 1.2**

The agency as a whole did not provide a formal, written response to the Supplement to the Sunset Staff Report on the Public Utility Commission. Chairman Williams and Commissioner Carrillo provided oral and written feedback on the transfer of gas utility regulation to PUC; however, these comments were not represented as the agency's formal position but as personal positions.

### ***Chairman Williams' Response to S 1.2***

As stated in oral and written testimony, Chairman Williams opposes the transfer of gas utility regulation from the Railroad Commission to the Public Utility Commission. He says that the transfer had an allure to him at one time. Now, when he thinks of his last four or five years at the Commission, he can think of nothing worse to do. Chairman Williams points out that Texas already has a bifurcated system, with cities having the right to set rates first with appeals to the Railroad Commission. The transfer to PUC would divorce ratemaking from safety, issues of reliability, and the general welfare of the company. While at the federal level the Office of Pipeline Safety handles some matters and FERC handles others, Chairman Williams notes that the pipelines they regulate do not go to homes and small businesses, which makes a difference.

In written comments, Chairman Williams indicates that the Commissioners' cost of service decisions have properly balanced the interests of consumers and the utilities. He indicates that, since 2005, Commissioners have approved the hearing examiners' cost of service and revenue recommendations over 93 percent of the time. In one case, GUD 9670, the Commissioners reached different conclusions than the hearing examiners, but the decisions involved major and novel public policy issues. (The Honorable Michael Williams, Chairman – Railroad Commission of Texas)

### ***Commissioner Carrillo's Response to S 1.2***

Commissioner Carrillo opposes the transfer of gas utility regulation from the Railroad Commission to the Public Utility Commission. Commissioner Carrillo states that transferring gas utility rate setting could result in the re-litigation of well-established precedents at tremendous expense to all parties, and offers questionable and comparatively insignificant savings.

Also, Commissioner Carrillo notes that the Railroad Commission is responsible for assuring the safe transportation and delivery of natural gas, and safety regulations imposed by the Railroad Commission, which represent a substantial piece of the cost of natural gas delivery, could undermine the approved gas utility rates. (The Honorable Victor Carrillo, Commissioner – Railroad Commission of Texas)

### **For S 1.2**

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Jay Doegey and Odis Dolton, Co-Chairs – Atmos Cities Steering Committee, Arlington

Joel Foy, Atmos Energy residential customer, Dallas

T.D. and Steve Howell – Howell Oil & Gas, Inc., Marshall

**For S 1.2** (continued)

Urban “Obie” O’Brien, Vice President for Governmental and Regulatory Affairs - Apache Corporation, Houston

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Robert J. Vann II, Fort Worth

**Against S 1.2**

Teddy Carter, Director of Public Affairs – Texas Independent Producers and Royalty Owners Association, Austin

Ronald Kitchens – CenterPoint Energy, Austin; and Scott E. Rozzell, Executive Vice President and General Counsel – CenterPoint Energy, Austin

Patrick Nugent, Executive Director and James Mann, Attorney – Texas Pipeline Association, Austin

David J. Park, Vice President, Rates and Regulatory Affairs – Atmos Energy, Mid-Tex Division, Dallas

Mark Sutton, Executive Director and Robert Dunn, Past President – Gas Producers Association, Tulsa, Oklahoma

Ben Seabee, Vice President for Governmental Affairs – Texas Oil and Gas Association, Austin

**Modification**

2. If there is any effort to move any part of the regulation of gas utilities to PUC, it should exclude any regulation of pipelines. (Patrick Nugent, Executive Director – Texas Pipeline Association, Austin)

**Recommendation S 1.3** \_\_\_\_\_

*Require the use of the State Office of Administrative Hearings in contested gas utility cases.*

**Public Utility Commission Response to S 1.3**

If Recommendation S 1.2 is adopted, PUC supports this recommendation, with the following modification.

PUC Modification

3. Modify the recommendation to clarify that PUC Commissioners themselves can conduct hearings on gas utility matters without using SOAH, just as they can now in areas of regulation currently under PUC. This authority is granted to PUC Commissioners in Government Code, Section 2003.049. Usually PUC Commissioners conduct hearings only when important policy questions or issues of first impression are involved, so PUC

does not anticipate that Commissioners would ordinarily conduct gas utility rate hearings. However, the ability to conduct hearings when appropriate would provide useful flexibility.

(Paula Mueller, Interim Executive Director – Public Utility Commission)

**Staff Comment:** PUC’s modification captures the intent of the recommendation. PUC Commissioners should maintain the same authority to hear gas utility cases that they now have for other areas of PUC regulation.

### **Railroad Commission Response to S 1.3**

Neither the agency staff nor the Commission as a whole provided a formal, written response to the Supplement to the Sunset Staff Report on the Public Utility Commission. Commissioner Carrillo and Chairman Williams provided oral or written feedback on the use of SOAH in contested gas utility cases; however, they indicated such comments were personal and did not necessarily reflect the sentiment of other Commission members.

#### **Chairman Williams’ Response to S 1.3**

In written comments, Chairman Williams recommends maintaining all contested case hearings, including natural gas ratemaking, at the Commission. (The Honorable Michael Williams, Chairman – Railroad Commission of Texas)

#### **Commissioner Carrillo’s Response to S 1.3**

Commissioner Carrillo strongly disagrees with the recommendation to transfer contested gas utility cases to the State Office of Administrative Hearings. Commissioner Carrillo says that the Railroad Commission has enormous in-house expertise among its technical staff, attorneys, and hearing examiners that is absolutely critical to the effective and efficient administration of its various regulatory programs. Commissioner Carrillo also states that the recommendation limits the Railroad Commission’s ability to reverse or modify a SOAH decision beyond what is available to other agencies, such as TCEQ and PUC. (The Honorable Victor Carrillo, Commissioner – Railroad Commission of Texas)

**Staff Comment:** The Public Utility Commission and Texas Commission on Environmental Quality do have broader authority than that given in the Administrative Procedure Act to modify a finding of fact or conclusion of law made by an Administrative Law Judge of the State Office of Administrative Hearings. Both commissions have the authority to change findings that they determine are not supported by a preponderance of the evidence, a grant not included in the APA.

#### **Affected Agency Response to S 1.3**

The State Office of Administrative Hearings (SOAH) states that if the Legislature decides to transfer contested gas utility cases from the Railroad Commission to PUC, SOAH could draw on its extensive experience and knowledge in utility work to learn the Railroad Commission’s subject matter without difficulty and to be proficient in it quickly.

### State Office of Administrative Hearings Modification

4. If gas utility regulation does not transfer to PUC, use one funding mechanism to fund SOAH for the Railroad Commission's enforcement hearings as well as the Railroad Commission's gas utility hearings.

(Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

*Staff Comment:* If gas utility hearings were transferred to PUC, Sunset staff has recommended for SOAH's General Revenue appropriation to pay for PUC's gas utility hearings, consistent with SOAH's funding for other PUC cases. However, if gas utility regulation stays at the Railroad Commission, it would be appropriate for the Railroad Commission to contract for SOAH to hear gas utility cases, just as Sunset staff recommended for enforcement cases, so that the Railroad Commission has one consistent method of paying for SOAH services.

#### **For S 1.3**

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Jay Doegey and Odis Dolton, Co-Chairs – Atmos Cities Steering Committee, Arlington

T.D. and Steve Howell – Howell Oil & Gas, Inc., Marshall

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

#### **Against S 1.3**

Teddy Carter, Director of Public Affairs – Texas Independent Producers and Royalty Owners Association, Austin

Patrick Nugent, Executive Director and James Mann, Attorney – Texas Pipeline Association, Austin

Mark Sutton, Executive Director and Robert Dunn, Past President – Gas Producers Association, Tulsa, Oklahoma

Bob Thompson, Austin

#### **Modification**

5. Require the use of the State Office of Administrative Hearings for enforcement cases from the Railroad Commission as well. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

*Staff Comment:* The Sunset Staff Report on the Railroad Commission of Texas recommends transferring enforcement hearings from the Railroad Commission to the State Office of Administrative Hearings in Issue 3 of that report.

## Recommendation S 1.4

*Transfer responsibility for regulating water and wastewater rates and services from TCEQ to PUC.*

### **Public Utility Commission Response to S 1.4**

The Public Utility Commission appreciates the Sunset Staff's confidence in PUC's ability to take on additional duties, and is prepared to undertake responsibility for regulation of water and wastewater utility rates and services, should these recommendations ultimately be adopted by the Legislature. (Paula Mueller, Interim Executive Director – Public Utility Commission)

### **Texas Commission on Environmental Quality Response to S 1.4**

TCEQ agrees with the recommendation to transfer responsibilities for regulating water and wastewater rates and services from TCEQ to the Public Utility Commission. If this recommendation is adopted TCEQ states it will work with PUC to assure an efficient and transparent transition, including the development of a Memoranda of Understanding. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **Affected Agency Response to S 1.4**

#### State Office of Administrative Hearings Modification

6. The State Office of Administrative Hearings (SOAH) suggests that, if water and wastewater utility cases transfer from TCEQ to PUC, SOAH's General Revenue appropriation should be increased to pay for its services to PUC, consistent with how other PUC hearings at SOAH are handled. TCEQ's current contract with SOAH for hearing services would be reduced by an appropriate amount since TCEQ would not be paying for water and wastewater hearings at SOAH.

(Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

**Staff Comment:** To fund the cost of contested case hearings for water and wastewater utilities at SOAH, the staff recommendations intend for SOAH to pay for these cases from its General Revenue appropriation, consistent with SOAH's funding for other PUC cases.

### **For S 1.4**

Orville R. Bevel, Jr., Chairman – Texans Against Monopolies Excessive Rates (TAMER), Chandler

Gina Brown, Montgomery

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler

David Frederick – Texans Against Monopolies Excessive Rates (TAMER), Austin

Roger Lampman, Comfort

**For S 1.4** (continued)

Kathy Nielsen, Roanoke

David W. Schumaker – Coalition for Equitable Water Rates

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

**Against S 1.4**

Terry Franks – Aqua Texas, Southwest Water Company, and San Jose Water

Michael R. Farrell, Vice President and General Manager – Southern Utilities Company

Kent Watson, Legislative Chairman – Texas Rural Water Association, Austin

Mark H. Zeppa, Executive Director – Independent Water and Sewer Companies of Texas, Austin

**Modifications**

7. If water utility ratemaking is transferred to PUC, establish either a universal interim rate or a rate hold-off period until final water rates have been approved by PUC. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
8. Continue all water utility cases at TCEQ and provide the Office of Public Utility Counsel with jurisdiction to intervene in TCEQ water cases. (Kent Watson, Legislative Chairman – Texas Rural Water Association, Austin)

**Recommendation S 1.5** \_\_\_\_\_

*Eliminate the existing water and wastewater utility application fees and adjust the Water Utility Regulatory Assessment Fee to pay for utility regulation at PUC.*

**Public Utility Commission Response to S 1.5**

If Recommendation S 1.4 is adopted, PUC supports this recommendation. (Paula Mueller, Interim Executive Director – Public Utility Commission)

**Texas Commission on Environmental Quality Response to S 1.5**

TCEQ agrees with the recommendation, with modification.

TCEQ Modification

9. Transfer a portion of the Utility Regulatory Assessment Fee to PUC from the Water Resource Management Account and require that the fee payers remit to each agency a percentage of the Utility Regulatory Assessment Fee in proportion to the amounts appropriated to each agency by the Legislature.

(Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**For S 1.5**

Orville R. Bevel, Jr., Chairman – Texans Against Monopolies Excessive Rates (TAMER), Chandler

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

**Against S 1.5**

Kent Watson, Legislative Chairman – Texas Rural Water Association, Austin

Mark H. Zeppa, Executive Director – Independent Water and Sewer Companies of Texas, Austin

**Modifications**

10. Deposit revenues to an account solely controlled by PUC and, if new information supports a uniform assessment for all regulated water utilities, set the Water Utility Regulatory Assessment to be revenue neutral, or at the level only required to support the current program. (Stephen Minick, Vice President of Governmental Affairs – Texas Association of Business, Austin)
11. Leave the Water Utility Regulatory Assessment Fee the same, and instead raise application fees to pay for water utility regulation. (Kent Watson, Legislative Chairman – Texas Rural Water Association, Austin)
12. Require cities to pay the Water Utility Regulatory Assessment Fee for areas where the State has appellate jurisdiction. (Kent Watson, Legislative Chairman – Texas Rural Water Association, Austin)

**Recommendation S 1.6**

*Require OPUC to represent residential and small commercial interests relating to water and wastewater utilities, contingent on the transfer to PUC.*

**Public Utility Commission Response to S 1.6**

If Recommendation S 1.4 is adopted, PUC supports this recommendation. (Paula Mueller, Interim Executive Director – Public Utility Commission)

**Texas Commission on Environmental Quality Response to S 1.6**

TCEQ supports the transfer to OPUC of responsibilities related to representation of residential and small commercial consumers in water and wastewater utility matters, if PUC is given regulatory oversight of water and wastewater utility activities. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)



### **Affected Agency Response to S 1.6**

The Office of Public Utility Counsel supports this recommendation. (Sheri Givens, Public Counsel – Office of Public Utility Counsel)

#### **For S 1.6**

Orville R. Bevel, Jr., Chairman – Texans Against Monopolies Excessive Rates (TAMER), Chandler

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

#### **Against S 1.6**

Kent Watson, Legislative Chairman – Texas Rural Water Association, Austin

Mark H. Zeppa, Executive Director – Independent Water and Sewer Companies of Texas, Austin

#### **Modification**

13. Provide that a fee be assessed on consumers of gas and water utilities, similar to the fee collected to fund the Office of Public Utility Counsel, to support additional funding for OPUC. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin; Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)

### **Recommendation S 1.7**

*Require PUC to make a comparative analysis of statutory ratemaking provisions under its authority, contingent on any transfers, to determine opportunities for standardization.*

#### **Public Utility Commission Response to S 1.7**

If Recommendations S 1.2 and S 1.4 are adopted, PUC supports this recommendation. (Paula Mueller, Interim Executive Director – Public Utility Commission)

#### **For S 1.7**

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

#### **Against S 1.7**

None received.

## Recommendation S 1.8

Require PUC to analyze the staffing requirements, contingent on any transfers, and report potential changes in staffing needs to the Legislative Budget Board and the Governor's budget office.

### Public Utility Commission Response to S 1.8

If Recommendations S 1.2 and S 1.4 are adopted, PUC supports this recommendation. (Paula Mueller, Interim Executive Director – Public Utility Commission)

### For S 1.8

Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin

Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

### Against S 1.8

None received.

### Modification

14. Require OPUC, as well as PUC, to report similar staffing information to the Legislative Budget Board and the Governor's budget office. (Tom “Smitty” Smith – Public Citizen, Austin; and Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)

## Commission Decision

Adopted Recommendations S 1.1, S 1.3, S 1.4, S 1.5, S 1.6, S 1.7, and S 1.8.

## Legislative Action

The Legislature considered all Sunset Commission recommendations from the *Supplement to the Sunset Staff Report on the Public Utility Commission* in three separate Sunset bills:

- Senate Bill 661, containing Sunset recommendations on PUC, ERCOT, and OPUC and addressing *Supplement* Recommendations S 1.1, S 1.4, S 1.6, S 1.7, and S 1.8;
- Senate Bill 655, containing Sunset recommendations on the Railroad Commission of Texas and incorporating *Supplement* Recommendation S 1.3; and
- House Bill 2694, containing Sunset recommendations on TCEQ and addressing *Supplement* Recommendation S 1.5.

The Legislature did not adopt the recommendations related to PUC, ERCOT, OPUC, and the Railroad Commission, as S.B. 661 and S.B. 655 failed to pass. (Recommendations S 1.3, S 1.4, S 1.6, S 1.7, and S 1.8) House Bill 2694 contains part of Recommendation S 1.5 related to funding

utility regulation at TCEQ, but does not include any adjustment in the regulatory assessment fee level. The bill repeals filing fees for applications for rate change; Certificates of Convenience and Necessity (CCNs); and the sale, transfer, or merger of a CCN. The Legislature added language to provide that assessments collected may be appropriated by rider to an agency with duties related to water and sewer utility regulation or to an agency with a duty to represent residential and small commercial consumers.

Senate Bill 661 contained a provision to continue PUC for 12 years, as recommended by the Sunset Commission in *Supplement* Recommendation S 1.1. After S.B. 661 failed, the Legislature continued PUC for two years in Senate Bill 652, and placed PUC under a limited scope Sunset review next biennium to assess the appropriateness of Sunset Commission recommendations from this biennium.



# *On-site Wastewater Treatment Research Council*



*Council at a Glance*  
*(November 2010)*





# Council at a Glance

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In 1987, the Legislature established the On-site Wastewater Treatment Research Council (Council) to award competitive research grants to:

- improve the quality and affordability of on-site wastewater treatment systems; and
- enhance technology transfer of on-site wastewater treatment through educational courses, seminars, symposia, publications, and other forms of information dissemination.

The Council also hosts an on-site sewage conference to present its research and help educate industry participants. Although the Council receives administrative support from the Texas Commission on Environmental Quality (TCEQ), it operates as an independent entity and has a separate 2011 Sunset date.

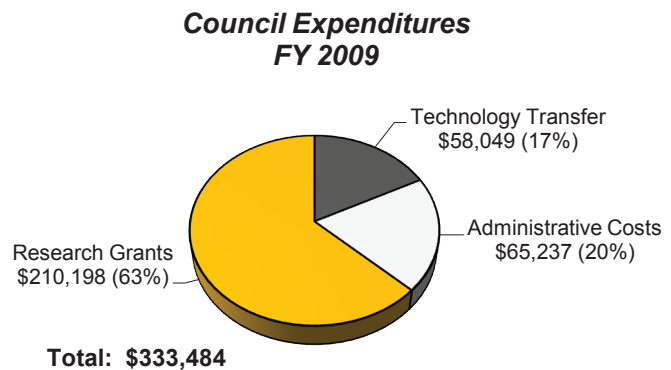
## Key Facts

- **Council.** The 11-member Council is appointed by the Governor for staggered, two-year terms. The textbox, *On-site Wastewater Treatment Research Council Membership*, lists the Council members and the fields they represent as required by statute. Council members meet once a quarter and their main duties include prioritizing research topics and awarding grants.

### ***On-site Wastewater Treatment Research Council Membership***

<b>Member</b>	<b>Qualification</b>	<b>Term Expires</b>
Janet D. Meyers, Chairwoman	Home Builder	2012
Brian L. Padden, Vice-Chairman	Soil Scientist	2011
Scott Adams	Rural Water Quality Specialist	2012
Elaine “Anne” Boatright	Public Member	2011
Brian Christian	TCEQ Employee	2012
Jaime Garza	TCEQ Employee	2011
Richard D. Gerard	Local On-site Sewage Regulator	2012
Sockalingam “Sam” Kannappan	Engineer	2011
Carl M. Russell, Jr.	Real Estate Developer	2011
William F “Dubb” Smith III	Home Builder	2011
Ronald “Ron” J. Suchecki, Jr.	On-site Sewage Industry	2012

- Funding.** The Council receives funding from a \$10 fee on permits to construct on-site sewage facilities charged by TCEQ, or local governments with TCEQ-delegated on-site sewage programs. TCEQ collects the fee and deposits it into general revenue, and the Legislature appropriates funding to the Council through a rider on TCEQ's appropriations pattern. In fiscal year 2009, the Council spent a total of \$333,484 on research grants, technology transfer, and administrative costs.



- Staff.** The Council has no staff, but pays about \$54,000, or approximately 16 percent of grant appropriations, each year to contract with TCEQ for administrative support, including two administrative staff that provide services equivalent to one full-time employee. Administrative support services include preparing the budget, drafting requests for grant applications, drafting grant contracts, assisting with the grant evaluation process, and providing recordkeeping and secretarial assistance. The Council also receives legal counsel from the Office of the Attorney General. The Council has no facility of its own.
- Research Grants.** Statute gives the Council authority to award grants to accredited colleges and universities, other governmental entities, or public and private research centers. Most grant awards cover multiple years. The Council funded five grants in fiscal year 2009, as shown in the textbox, *On-site Sewage Grants*. Since 1989, the Council has awarded about \$4.2 million to fund 70 grants.

**On-site Sewage Grants  
FY 2009**

Research Project	Recipient	Grant
Test of constructed wetlands.	Baylor University	\$21,270
Comparison of the reduction of bacterial numbers and virulence by multiple on-site wastewater treatment methods.	Baylor University	\$30,906
Design manual for surface application of on-site sewage facilities wastewater effluent.	Texas Tech University	\$32,342
Application rates for on-site surface application.	Texas Tech University	\$33,275
Effectiveness and utility of surface application.	Texas Tech University	\$92,405
<b>Total</b>		<b>\$210,198</b>

- Educational Conference.** The Council contracts with an outside firm to hold an annual conference that showcases funded research and offers continuing education credits for professionals and regulators in the on-site sewage industry. The Council collects attendee fees outside of the appropriations process to reimburse the conference contractor for most of the cost of the conference. In fiscal year 2009, the conference cost \$144,766 and had 1,100 attendees.

*Issue*



# Issue 1

## ***Texas Does Not Need a Separate, Stand-Alone Council to Fund On-site Sewage Research.***

### **Background**

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In 1987, the Legislature established the On-site Wastewater Treatment Research Council (Council) to award competitive research grants to improve the quality and affordability of on-site wastewater treatment systems and to educate the industry and public about on-site wastewater regulations and innovation. On-site systems, also known as on-site sewage facilities, treat wastewater at sites not connected to public lines. The most-well known type of on-site facility is a septic system. The Council also manages an annual conference that showcases funded research and offers continuing education credits for professionals and regulators in the on-site sewage industry.

The 11-member Council, appointed by the Governor, oversees the grantmaking process and the annual conference. In fiscal year 2009, the Council obligated \$387,729 for five research grants, technology transfer, and administrative costs. The Council has no full-time staff, but contracts with the Texas Commission on Environmental Quality (TCEQ) for administrative support. The Council has a Sunset date of September 2011.

To give grants, the Council receives feedback from TCEQ and stakeholders such as the on-site sewage industry and homebuilders, chooses a research topic, and issues a request for grant application. Any interested colleges or universities, other governmental entities, or public or private research centers are eligible to apply. TCEQ staff draft the requests, verify that applications are administratively complete, assist with the grant selection process, and draft grant contracts once the Council awards grants. Evaluation of the grant applications occurs in open meetings and involves a competitive process in which the Council chooses recipients based on a set of guidelines intended to ensure the research improves the quality and affordability of on-site sewage facilities. Research projects usually receive grant funding for multiple years.

### **Findings**

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#### **Texas benefits from on-site sewage research funded by Council grants.**

At the time the Legislature established the Council, on-site sewage facilities had a history of failure due to poor regulation and poor design. Wastewater from failing sewage facilities poses a hazard to human health and the environment from pollution of groundwater and surface water. Although these facilities have improved since that time, Texas still benefits from on-site sewage research. Almost twice as many on-site sewage facilities are installed each year than in 1987 and Texas has several different ecological zones with a diversity of soil types that make different types of on-site facilities necessary.<sup>1</sup> The loss of this research could hinder the development and advancement of on-site sewage technology, affecting the State's ability to protect its water resources from wastewater contamination. The Council's

grant program is self-supporting through fees and no other entity in Texas provides grants for on-site sewage research.

The Council's research has benefited on-site sewage regulation at TCEQ. For example, TCEQ incorporated research from a Council-funded study on restaurant on-site sewage into its recent rule revisions in that area.<sup>2</sup> Other studies funded by the Council have also supported research goals of the Legislature and TCEQ, such as understanding how on-site sewage facilities can remove toxic pharmaceuticals from wastewater.

Despite these anecdotal success stories, the full benefits of on-site sewage research and the effectiveness of the grant program are unclear. Some research funded by Council grants has been published in academic journals. The Council also posts research on its website and provides a venue for it to be presented at its annual conference. However, the Council has no formal process to evaluate whether its research is improving wastewater treatment or making on-site sewage facilities more affordable.

**Texas does not need a separate council to issue on-site sewage research grants.**

While having a council can provide valuable expertise in choosing what research grants to fund, a separate state entity to issue grants is not needed. TCEQ staff manage most administrative functions for the Council, such as tracking the budget and drafting contracts. In this structure, the Council's main responsibilities are to choose research topics and grant recipients. At the time the Council was formed, Texas did not have a consolidated, umbrella agency responsible for environmental regulation as it does now in TCEQ. The State also did not have the experience in using grants to help meet environmental objectives that currently exists. TCEQ already administers 14 other grant programs, such as the Air Quality Research Program, which provides competitive grants for scientific projects that address issues in Texas air quality.

None of TCEQ's grant programs have separate boards. For most of TCEQ's grants, agency staff with expertise in the grant area solicit, evaluate, and approve grant applications. In some cases, such as with many of the grants awarded under the Texas Emissions Reduction Plan, the Executive Director must give final approval of grant awards. TCEQ also has structures in place to allow for stakeholder input in the grantmaking process. Many stakeholder groups, such as for the agency's Clean Rivers program, provide input on program guidelines and grant allocations and contribute feedback on agency priorities for these programs.

Administration of a research grant program that funds the development of new and innovative processes does not conflict with TCEQ's regulatory activities. TCEQ balances the relationship between regulation and research in its other grant programs. For instance, TCEQ regulates Municipal Solid Waste facilities and also issues grants for projects to reduce waste and encourage

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*The Council has no formal process to evaluate research effectiveness.*

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*TCEQ staff already manage most administrative functions for the Council.*

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recycling. In addition, the coordination of research grants and regulation can complement the agency's regulatory effort, as evidenced by TCEQ's incorporation of Council-funded research into regulatory requirements in the past. In fact, the structural disconnect between Council research and on-site sewage regulation at TCEQ can lessen the effectiveness of the research. Although the Council has recently asked for input from TCEQ on research topics and has worked with TCEQ to incorporate its research into TCEQ rules, this has not always happened in the past.

**The Council has encountered challenges in managing its educational conference.**

For 14 years, TCEQ managed the Council's on-site sewage conference to present grant research and oversaw the conference funding that came from attendee fees. In 2007, after TCEQ indicated that it would no longer administer the conference, the Council began to contract out management of the conference directly. The Council also oversees a bank account for the collection of conference fees since it does not have an account within the Treasury. Since that time, the Council's management of its conference has been somewhat problematic. Every year since the transfer, conference fee revenue has not covered costs and the Council has had to augment the conference's costs by using grant appropriations, taking away from opportunities to fund more research. The Council paid \$13,086, about 4 percent of total appropriations, out of grant funding for the 2009 conference.

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*The Council has yet to arrive at a good overall solution for managing conference revenue.*

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The Council has struggled to develop a better oversight process for the conference bank account. For instance, the conference contractor has control of writing checks out of the conference bank account and in 2010 mistakenly wrote checks without the Council's approval. The Council has acknowledged this problem and placed greater controls over the contractor, but it has yet to arrive at a good overall solution for managing conference revenue. Since the Legislature has minimal oversight of this money because it is outside of the appropriations process, extra safeguards are needed to prevent fraud. In contrast, TCEQ has large legal and financial resources, already manages other conferences, and has the accounting safeguards in place to prevent fraud and abuse.

## **Recommendations**

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### ***Change in Statute***

#### **1.1 Abolish the On-site Wastewater Treatment Research Council and transfer authority to award grants for on-site sewage research to the Texas Commission on Environmental Quality.**

This recommendation would remove the On-site Wastewater Treatment Research Council and its Sunset date from statute, and transfer its grantmaking functions to TCEQ. The statute would authorize the Commission to administer and award grants for the same purposes currently allowed under the Council, and assume all existing Council grants, contracts, and projects. TCEQ would

choose research topics, request and evaluate applications, and approve grant awards. To maintain the expertise currently provided by the Council, this recommendation would require TCEQ to seek input from stakeholder experts when choosing research topics, awarding grants, and holding the conference. As part of this recommendation, the Commission should continue the on-site sewage conference and consider whether to combine it with the agency's other conferences.

The recommendation would move the Council's future fee revenue from undedicated general revenue to the Water Resource Management Account (0153), a dedicated account within general revenue, to be appropriated by the Legislature. This would allow funding for the grant program to come out of the same account as TCEQ's other water quality programs, ensuring consistency and clarity in how the agency funds this function.

### **Management Action**

#### **1.2 Direct TCEQ to evaluate the benefits of on-site sewage research and clearly communicate them to the public.**

The recommendation would direct TCEQ to conduct evaluations of past or current projects routinely to determine if the results of that research have been useful to the public and the State's on-site sewage industry. The agency should also write brief descriptions of the purpose and potential benefits of the research projects it funds and post this and other information about the program on its website. By evaluating the benefits of the research, the Legislature can better assess the need for the program. This management action would be accomplished within existing funds for program administration.

#### **1.3 Direct TCEQ to form a working group to consider stakeholder input when issuing grants.**

Under this recommendation, TCEQ would form a working group that would be active when the agency is performing this grantmaking function and needs technical expertise on the subject of on-site sewage facilities. The working group would be composed of a diverse group of stakeholders representing different geographical areas and technical expertise.

## **Fiscal Implication Summary**

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This recommendation would have no fiscal impact to the State. The recommendation assumes that TCEQ would receive the current level of appropriations of \$330,000 annually for on-site sewage research, and would use a portion of appropriations for administrative costs as is current practice. Based on 2009 expenditures, this recommendation would lead to cost savings of approximately \$11,000 from a reduction in travel and compensation for council members, increasing funds available for research.

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<sup>1</sup> In the late 1980s, about 15,000 on-site wastewater systems were licensed, compared to 36,798 in fiscal year 2008 alone.

<sup>2</sup> Texas Administrative Code, Title 30, part 1, rule 285.32(f)(1).



# ***Responses to Issue 1***

## **Recommendation 1.1**

*Abolish the On-site Wastewater Treatment Research Council and transfer authority to award grants for on-site sewage research to the Texas Commission on Environmental Quality.*

### **Council Response to 1.1**

The Council does not agree with this recommendation, and believes Texas does need a separate, stand-alone council to fund on-site sewage research. (Janet Meyers, Chair – On-site Wastewater Treatment Research Council)

### **Affected Agency Response to 1.1**

The Texas Commission on Environmental Quality agrees that it is in a position to assume the On-site Wastewater Treatment Research Council grant-making responsibilities. TCEQ states that it understands that it would administer and award grants for the same purposes currently allowed under the council. The agency also states that it will consider whether the on-site sewage conference should continue as a stand-alone or in association with other agency conferences.

### **Texas Commission on Environmental Quality Modification**

1. If the Legislature transfers the Council's activities to TCEQ, require fee revenue to be deposited to the TCEQ Water Resource Management Account #153, instead of General Revenue Account #001.

(Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**Staff Comment:** If adopted, Recommendation 1.1 already requires fee revenue to be deposited in the Water Resource Management Account #153, instead of General Revenue.

### **For 1.1**

None received.

### **Against 1.1**

Kosse Maykus, Southlake

James F. Prochaska, President – JNM Technologies, Inc., Bryan

John Redfern, Tyler

William F. Smith IV, Dripping Springs

Ronald J. Suchecki, Jr. – Hoot Systems, China Spring

**Against 1.1** (continued)

Tim Taylor, R.S., Texas On-site Wastewater Association Management Consultant – Texas On-site Wastewater Association, Nacogdoches

Joe C. Yelderman, Jr., Professor – Baylor University, Woodway

**Recommendation 1.2**

*Direct TCEQ to evaluate the benefits of on-site sewage research and clearly communicate them to the public.*

**Council Response to 1.2**

The Council is capable of providing benefit analysis of on-site sewage research and can clearly communicate those benefits to the public as part of its ongoing operation via its website and conference.

Council Modification

2. Direct TCEQ to evaluate whether completed research affects existing rules, in the on-site sewage area or any other area regulated by TCEQ.

(Janet Meyers, Chair – On-site Wastewater Treatment Research Council)

**Affected Agency Response to 1.2**

The Texas Commission on Environmental Quality agrees there is always a need to reassess and evaluate the benefits of the research grants. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

**For 1.2**

None received.

**Against 1.2**

Kosse Maykus, Southlake

John Redfern, Tyler

William F. Smith IV, Dripping Springs

Ronald J. Suchecki, Jr. – Hoot Systems, China Spring

Tim Taylor, R.S., Texas On-site Wastewater Association Management Consultant – Texas On-site Wastewater Association, Nacogdoches

Joe C. Yelderman, Jr., Professor – Baylor University, Woodway

## **Recommendation 1.3**

*Direct TCEQ to form a working group to consider stakeholder input when issuing grants.*

### **Council Response to 1.3**

The Council states that this management action does nothing more than reinvent the wheel. The Council's structure provides a public face and binding public input into the grant award process. (Janet Meyers, Chair – On-site Wastewater Treatment Research Council)

### **Affected Agency Response to 1.3**

The Texas Commission on Environmental Quality supports the formation of a working group that would provide input regarding on-site sewage facilities when performing its grant awarding duties. TCEQ states that it will work with interested parties to ensure the stakeholder group is composed of diverse individuals representing different geographical areas and technical expertise. (Mark R. Vickery, P.G., Executive Director – Texas Commission on Environmental Quality)

### **For 1.3**

None received.

### **Against 1.3**

Kosse Maykus, Southlake

John Redfern, Tyler

William F. Smith IV, Dripping Springs

Ronald J. Suchecki, Jr. – Hoot Systems, China Spring

Tim Taylor, R.S., Texas On-site Wastewater Association Management Consultant – Texas On-site Wastewater Association, Nacogdoches

Joe C. Yelderman, Jr., Professor – Baylor University, Woodway

## ***Commission Decision***

Adopted Recommendations 1.1 through 1.3.

## ***Legislative Action***

House Bill 2694 removes the On-site Wastewater Treatment Research Council and its Sunset date from statute, and transfers its grantmaking functions to TCEQ. The bill authorizes TCEQ to administer and award grants for the same purposes currently allowed under the Council, and assume all existing Council grants, contracts, and projects. TCEQ must seek input from stakeholder experts when choosing research topics, awarding grants, and holding the educational conference. The bill moves the Council's future fee revenue from undedicated General Revenue to the Water Resource Management Account. (Recommendation 1.1)

As management recommendations not needing statutory change, Recommendations 1.2 and 1.3 did not result in legislative action.

# *New Issues*



*New Issues*





# New Issues

## Texas Commission on Environmental Quality

The following issues were raised in addition to the issues in the staff report. These issues are numbered sequentially to follow the staff's recommendations.

### General

9. As the Legislature considers potential budget cuts, urge the Legislature to resist aggressive cuts to fee-based agencies, like TCEQ and the Railroad Commission, that protect citizens' health and safety; and consider finding funding for these agencies from stronger penalties assessed to industry bad actors. (Congressman Michael C. Burgess, M.D. – 26th Congressional District of Texas)
10. Establish an intermediary, ombudsman office to assist citizens in traversing the complicated division of responsibilities between the Railroad Commission and the Texas Commission on Environmental Quality. Require the Ombudsman to have a comprehensive understanding of each agency's role and to immediately direct citizens to the proper office in either agency to assist with their specific cases. (Congressman Michael C. Burgess, M.D. – 26th Congressional District of Texas)
11. Expand the use of Texas Emission Reduction Plan funds to be used to purchase, operate, maintain, and support short-term and long-term air quality monitoring equipment to evaluate levels of air contaminants, including particulate matter, nitrogen oxides, volatile organic compounds, air toxics, and carbon monoxide. (Senator Wendy Davis, Member – Texas Senate)
12. Direct TCEQ to promptly release information relevant to the health and safety of the public, even if further action is contemplated or required. (Senator Wendy Davis, Member – Texas Senate)
13. Prohibit TCEQ from being a party in a contested case hearing, and only allow it to act as an information resource for both litigants. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
14. In water issues, provide the Environmental Protection Agency, or another state authority, with case-by-case intervention-case review or veto authority. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
15. Require TCEQ to enforce federal law. (Joseph Ely, Bay City)
16. Require TCEQ to follow the Safe Drinking Water Act and Clean Air Act. (Donna Hoffman, Communications Coordinator – Sierra Club, Lone Star Chapter, Austin)
17. Require TCEQ to follow state and federal law. (Jim Marston, Texas Regional Director – Environmental Defense Fund, Austin)

18. Remove the authority for TCEQ Commissioners to overrule an Administrative Law Judge or OPIC. (Tim and Sharlene Fey, New Braunfels)
19. Require the TCEQ Commission to abide by the legal decisions of Administrative Law Judges in contested cases. (James Klein, Chair – Clean Economy Coalition of Corpus Christi, Corpus Christi)
20. Create one all-encompassing environmental agency instead of separate environmental departments and agencies that have responsibilities over a single environmental issue. Require this agency to take into account the complete environmental impact including air, water, industrial discharge, endangered species, road safety, and other. (Tim and Sharlene Fey, New Braunfels)
21. Create a buffer between TCEQ and the Governor's Office. (Ellen Hansen, Austin)
22. Require an administrator or manager from another state agency to go to TCEQ for six months to identify and report any marginal activities that TCEQ can stop doing. (Ellen Hansen, Austin)
23. Create a system for TCEQ to collect dollars from polluters, which the State would distribute to schools to pay for costs of autism and asthma. (Ellen Hansen, Austin)
24. Create performance measures for TCEQ that reflect its mission. (Ellen Hansen, Austin)
25. Prohibit TCEQ employees at managerial and higher levels from taking jobs with regulated industries within 24 months of termination. (Linda Hanratty – League of Women Voters of Texas, Fort Worth)
26. Disallow TCEQ employees from quitting and working for applicants for a substantial period if a permit is actively being applied for. (Muriel Tipps, Cedar Lane)
27. Charge an interim committee with redefining and focusing TCEQ's mission, goals, resources, and measures. (Ellen Hansen, Austin)
28. Establish a Chief Geoscientist position at TCEQ, responsible for ensuring that Professional Geoscientist licensure is consistently required by TCEQ in accordance with the Texas Geoscientist Practices Act. (Barbara Roeling, P.G., Chairman – Texas Board of Professional Geoscientists, Austin)
29. Require TCEQ to develop a strategic vision of environmental issues, including regional assessment of existing permit holders, water users, emissions and other users. (Muriel Tipps, Cedar Lane)
30. Require TCEQ to better assess a regional picture rather than a statewide picture, and include each major permit holder involved in this process with performance incentives and poor performance penalties. (Muriel Tipps, Cedar Lane)
31. Create an incentive based system for the implementation of environmental management systems. (Muriel Tipps, Cedar Lane)

32. Re-organize TCEQ from its current organizational structure by function or process to organization by media, i.e. air, water, waste. (Kathleen Hartnett White, Distinguished Senior Fellow and Director – Armstrong Center for Energy and the Environment of the Texas Public Policy Foundation, Austin)
33. Strengthen resources and services in the 16 regional offices by creating four HUB offices in current regional offices of Dallas/Fort Worth, San Antonio, Houston, Amarillo/Midland and transfer select Austin HQ functions to HUB and/or regional offices. (Kathleen Hartnett White, Distinguished Senior Fellow and Director – Armstrong Center for Energy and the Environment of the Texas Public Policy Foundation, Austin)
34. Strengthen the science on which management decisions and public policy are based by strategically organizing and staffing a small but high-powered Office of the Chief Engineer to act as the senior technical, scientific advisor to the Executive Director, Commissioners and Divisions. (Kathleen Hartnett White, Distinguished Senior Fellow and Director – Armstrong Center for Energy and the Environment of the Texas Public Policy Foundation, Austin)
35. Increase regulatory transparency by clearly requiring in state law that TCEQ conduct cost-effectiveness analysis for all TCEQ rules. (Kathleen Hartnett White, Distinguished Senior Fellow and Director – Armstrong Center for Energy and the Environment of the Texas Public Policy Foundation, Austin)
36. Require more environmentally meaningful performance measures that measure environmental outcomes in contrast to administrative outputs. (Kathleen Hartnett White, Distinguished Senior Fellow and Director – Armstrong Center for Energy and the Environment of the Texas Public Policy Foundation, Austin)
37. Require TCEQ to include a thorough statistical evaluation by independent, credentialed statisticians in all evaluations of regulations, permit applications, and summary reports involving collection, manipulation, analysis, or interpretation of data. (Venice Scheurich, Conservation Chair – Coastal Bend Group of the Sierra Club, Corpus Christi and Donna Hoffman, Communications Coordinator – Sierra Club, Lone Star Chapter, Austin and the Alliance of Uranium Research and Action)
38. Direct TCEQ to use independent engineering consultants and universally accepted methods of statistical analysis to choose the location for baseline monitoring wells in the regulation for restoring and or protecting groundwater values for mining permits, hazardous waste site monitoring, and surface disposal of radioactive waste. (Brian Burke, Corpus Christi)
39. Direct TCEQ to use statisticians to review all Human Health Risk Assessment Work Plans for establishing the Exposure Point Concentration (EPC). (Brian Burke, Corpus Christi)
40. Require wastewater discharge samples should be reviewed by independent labs. (Brian Burke, Corpus Christi)
41. Direct TCEQ to not adjust data collected for water or air contaminants for margin of error, thus reducing the risk indicator. (Brian Burke, Corpus Christi)

42. Require that air and water monitoring equipment meet EPA standards and be designed to collect data at minimal analytical or detectible levels. (Brian Burke, Corpus Christi)

### **Commission Structure**

43. Require that one TCEQ Commissioner have expertise in public health or medicine. (Representative Rafael Anchia, Member – Sunset Advisory Commission; and Wesley W. Stafford, M.D. and Jeffrey Levin, M.D. – Texas Medical Association)
44. Replace the three-member appointed Commission with one elected Commissioner. (Representative Rafael Anchia, Member – Sunset Advisory Commission)
45. Replace the three-member appointed Commission with one elected Commissioner; make the elected Commissioner's picture, name, and public contact information public; and require a yearly performance evaluation to be conducted and made public. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
46. Increase the number of TCEQ Commissioners and require each to have up-to-date knowledge about health effects from all sources. (Tim and Sharlene Fey, New Braunfels)
47. Require the three-member Commission to be elected instead of appointed, and require that one Commission member be a physician with public health experience. (Dr. Robert T. Fitzgerald, Vice President – Medina County Environmental Action Association, Inc., Hondo)
48. Expand the number of appointed full-time TCEQ Commissioners from three to five. (Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin)
49. Require that at least one TCEQ Commissioner be a physician. (James Klein, Chair – Clean Economy Coalition of Corpus Christi, Corpus Christi)
50. Require the three-member Commission to be elected rather than appointed. (Camille White, South Padre Island and Neil McQueen – Clean Economy Coalition, Corpus Christi)
51. Change the composition of the TCEQ Commission to include members representing seniors, kids, the environment, and citizens. (James H.F. Williams, Houston)
52. Change the composition of the TCEQ Commission to include members representing children, the elderly, and at-risk communities close to polluting industries. (Madeleine Crozat-Williams, Houston)

### **Mission Statement**

53. Specify TCEQ's mission in law as: "The mission of the Texas Commission on Environmental Quality is the protection of public health and the environment." (Representative Rafael Anchia, Member – Sunset Advisory Commission; Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin; and Mel Caraway, Pastor – Oak Park UMC, Paris)
54. Remove the phrase "consistent with sustainable economic development" from TCEQ's mission statement. (Linda Hanratty – League of Women Voters of Texas, Fort Worth)

55. Include public health as part of TCEQ's mission. (Teresa Klein – Clean Economy Coalition, Corpus Christi and Trish O'Day, Co-President – Austin Physicians for Social Responsibility, Austin)
56. Rewrite TCEQ's mission statement as "The Texas Commission on Environmental Quality strives to protect our state's human and natural resources. Our goal is clean air, clean water, and clean industry." (Nikki M Kuhns, San Antonio)

**Public Participation, Information, Assistance, and Notice**

57. Enhance transparency and provide the public with information about new drilling rules and regulations by requiring regularly scheduled town hall meetings and forums by both elected officials and regulators. (Congressman Michael C. Burgess, M.D. – 26th Congressional District of Texas)
58. Make available to the public, in a user-friendly manner, TCEQ's use of third-party quality assurance testing. The information would include plain-language analyses of the data posted on its website; explanations of higher-than-normal readings, dangers that result from higher-than-normal readings, and how to prevent higher readings; and explanations of every side of the data, including whether further agency or industry action is needed. (Congressman Michael C. Burgess, M.D. – 26th Congressional District of Texas)
59. Require TCEQ to provide notification of permit applications immediately upon filing via email alert. (Brian Burke, Corpus Christi)
60. Require TCEQ to make permit applications, including all exhibits and appendices, available electronically on PDF when the administrative review is complete. (Brian Burke, Corpus Christi)
61. Extend the time period for submitting comments and making a request for a public meeting from 30 to 60 days. (Brian Burke, Corpus Christi)
62. Direct TCEQ to use objective criteria and a low threshold for scheduling public meetings. (Brian Burke, Corpus Christi)
63. Direct TCEQ to schedule public meetings before the draft permit is issued. (Brian Burke, Corpus Christi)
64. Require applicants make their applications available over the Internet for any application for an individual permit. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
65. Direct TCEQ to consider the timing of public input opportunities, so that input is not scheduled so late in the process. (Eddie Chew – Border Interfaith, El Paso)
66. Encourage direct communication between TCEQ and Texas residents, and prioritize receiving, reviewing, and responding to citizen concerns in a thorough and timely manner. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))

67. Require newspaper notices to run for more than one day and contain more specific information about the proposed operation. Direct TCEQ to consider if individuals in the immediate vicinity should receive special, personalized notification from TCEQ at the onset. (Tim and Sharlene Fey, New Braunfels)
68. Require TCEQ notification signs posted on the applicant's property to be properly maintained. Require that the applicant's name be on the signs. (Tim and Sharlene Fey, New Braunfels)
69. Require permit applications and supporting documents to be more readily available. Direct TCEQ to consider if individuals in the immediate vicinity should be offered copies of documents, free of charge, from the applicant or TCEQ at the onset of the process. (Tim and Sharlene Fey, New Braunfels)
70. Provide the Office of Public Interest Counsel with resources to represent protestants, in a fair and equitable manner. Provide that OPIC has equal weight, or even more, in making recommendations and influencing the TCEQ Commissioners. (Tim and Sharlene Fey, New Braunfels)
71. Provide that protestants not have to pay for lawyers and experts to represent them in SOAH hearings. (Tim and Sharlene Fey, New Braunfels)
72. Direct TCEQ to improve the public's ability to participate in agency decisions, including its approach to granting standing. (Tim and Sharlene Fey, New Braunfels)
73. Direct TCEQ to use new technology to improve the public's ability to access and participate in agency decisions. (Linda Hanratty – League of Women Voters of Texas, Fort Worth)
74. Require public notification for residents in the geographical area where there is a request for an expansion of a permit. (Maitri Smithhisler, Chair – Neighborhood Protection Alliance of Richardson, Richardson)
75. Require TCEQ to publish legal notices in newspapers outside of the Texas Register. Require TCEQ, once a year, to publish a notice in three to four statewide papers to inform the public that it has stakeholder groups that will meet throughout the year to give input to the agency on its guidelines, rules, policies, and planning documents, and to also tell them of the availability of e-mail lists for the latest information regarding the entities regulated by TCEQ. Require the notice to be published in both the print and on-line versions of these newspapers and indicate how the public can get on the e-mail lists or contact the agency by phone or mail. Require the notice to include a way for individuals to be informed of any enforcement actions in their area. If not cost prohibitive, direct the agency to publish notice in a newspaper seeking public input on local enforcement issues. (GK Sprinkle, Austin)
76. Require an entity once a year or whenever an entity gets or has a "poor" compliance history numerical rating, to publish this information on its compliance history in a newspaper in the county or counties in which it serves the public. Require the entity to include the internet web address for accessing information on the TCEQ website regarding its compliance history. Direct TCEQ to make its website compliance information history and its website permitting and enforcement actions more complete and easier to access. Require the entity

to include its name, location by city and county, its rating and classification along with the date it was rated. Require the entity to list any violations, state enforcement orders, state and federal court judgments, federal consent decrees, criminal convictions, and chronic excessive-emissions events that have been recorded as part of its compliance history during the past year or time period which resulted in a change in the compliance history numerical rating. (GK Sprinkle, Austin)

77. Require TCEQ to make available all public comments received during the public comment and public meeting period verbatim on its website, at the earliest possible, legally permissible time, after the close of the comment period. (Mina G. Williams, Corpus Christi and Brian Burke, Corpus Christi)

## **Permitting**

### ***Permitting – General***

78. Expressly require that TCEQ permits comply with federal law. (Representative Lon Burnam, Member – Texas House of Representatives)
79. Grant TCEQ specific authority to deny permits and to grant contested cases hearings for permit renewals even when the renewals make no express change. (Representative Lon Burnam, Member – Texas House of Representatives)
80. Require all permits to be renewed via full review every five years, not the current ten. (Brian Burke, Corpus Christi)
81. Require permit holders to submit a plan to meet all new federal and state rules and regulations within six months of the final publication of the new rules and regulations. (Brian Burke, Corpus Christi)
82. Require that all permits held by a permitted entity, including air, wastewater, and hazardous waste permits, be reviewed at the same time. (Brian Burke, Corpus Christi)
83. Deny permits when SOAH recommends denial. (Donna Hoffman, Communications Coordinator – Sierra Club, Lone Star Chapter, Austin)
84. Direct TCEQ to allow consolidation of multiple permit requests on the same site. (Donna Hoffman, Communications Coordinator – Sierra Club, Lone Star Chapter, Austin and the Alliance of Uranium Research and Action)
85. Develop more transparency in TCEQ's permitting process. (Neil McQueen – Clean Economy Coalition, Corpus Christi)
86. Prohibit Commissioners from approval contingent on “patching up” a proposed permit application; rather, they would be required to deny the permit. (Tim and Sharlene Fey, New Braunfels)
87. Require that applicants only get two chances to correct permit applications at TCEQ. (Jennifer Real – Citizens/Residents Oppose Wells (CROW), Conroe)

88. Mandate permit applicants provide documentation to TCEQ to prove information provided on permits. (Jennifer Real – Citizens/Residents Oppose Wells (CROW), Conroe)
89. Require TCEQ, at a minimum, to proceed with genuine care and caution, drawing on scholarly scientific studies independent of commercial interests, or those of the industries, to assure that any risk is at a minimum, and every possible preventative measure has been taken to protect common resources that support the public's well-being and genuine business interest. (Elizabeth Riebschlaeger, Cuero)
90. Hold chronic poor performance accountable and deny permit renewals. (Muriel Tipps, Cedar Lane)
91. Prohibit applications for permits, amendments, or renewals from being processed if the applicant owes fees or penalties. (League of Women Voters of Texas)

***Permitting – Standard Permits and Permits By Rule***

92. Require Standard Permits (SPs) and Permits by Rule (PBR) to be applicable only to narrowly-defined source categories; include the specific emission limits applicable to all sources that may seek coverage under the SP or PBR; and include specific monitoring and reporting requirements sufficient to demonstrate compliance with the SP or PBR. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
93. Require TCEQ, at the time of adoption, to demonstrate that the emissions that may be authorized pursuant to the SP or PBR will not cause or contribute to a violation of air quality standards. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
94. Require a facility's registration to use a SP or be permitted by rule to be posted on a publicly accessible internet website, and require that TCEQ be provided with the web address link for the registration materials. Require TCEQ to post on its website the identity of all owners and operators filing such registration and the web address link required. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
95. Give the public at least 30 days to file written comments on a facility's registration to be permitted by rule, or before a facility's registration to use a SP is considered accepted by the Executive Director. Authorize the Executive Director to grant an additional 30 days to file comments upon a showing of good cause. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
96. Require that the Notice of the Executive Director's acceptance of a registration to use a SP be posted on TCEQ's website, given that a SP is effective any time after receipt of written notification from the ED that there are no objections or 45 days after receipt by the ED of the registration, whichever occurs first, except where a different time period is specified for a particular SP. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
97. Subject the Executive Director's acceptance of a registration to use a SP and a facility's registration to be permitted by rule to TCEQ's motion to overturn process. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)



98. Prohibit facilities with a bad compliance history, repeat violators, or to facilities that are part of a major emissions source from being eligible for SPs and PBRs. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
99. Require consolidation of all SPs covering a facility into the facility’s site-specific permit at the first available opportunity, when the permit is amended or renewed, but no later than five years after the registration to use a SP or to be permitted by rule. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
100. Require incorporation of all SPs and PBRs covering a facility into the facility’s site-specific permit, rather than be referenced. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
101. Require that SPs and PBRs covering a facility that are consolidated into the facility’s site-specific permit undergo Best Available Control Technology and impacts review. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
102. Prohibit a facility’s site-specific permit from being voided when the facility meets the requirements for a PBR and/or SP. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
103. Cap emissions from “permits by rule” near or in any non-attainment area. (Tom “Smitty” Smith, Director – Public Citizen, Austin)

#### ***Permitting – Air***

104. Authorize TCEQ to deny renewal of an air permit for good cause, including failure to maintain compliance with the Texas Clean Air Act or the terms of the existing permit or inability to meet all applicable state and federal air quality standards and regulations. (Representative Rafael Anchia, Member – Sunset Advisory Commission)
105. Require applicants to have independent comprehensive on site monitoring to assure that they are complying with emission limits. (Brian Burke, Corpus Christi)
106. Clarify that TCEQ is authorized to impose additional monitoring requirements in permits across-the-board; if the facility is in a non-attainment area or subject to any TCEQ program which identifies areas of air quality concerns, such as Air Pollution Watch Lists; if the facility is a major facility; if the facility emits any pollutant of concern; and/or additional monitoring is necessary as a matter of enforcement against the facility. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
107. Authorize TCEQ to impose different and/or more stringent emission requirements when amending or renewing air permits if the facility is located within an area included within the Air Pollutant Watch List and the facility emits an air contaminant on the Air Pollutant Watch List; the facility is located in an area designated as nonattainment of a National Ambient Air Quality Standard and TCEQ has adopted a State Implementation Plan to demonstrate attainment; or new or revised state or federal air quality standards are applicable to the facility for which an amendment or renewal is sought. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

108. Authorize TCEQ to hold a hearing on an air permit amendment, modification, or renewal for any good cause determined by the Commission, even if the amendment, modification or renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
109. Repeal or revise statutes that restrict hearings on air permit amendments, modifications, or renewals, including Health & Safety Code Section 382.058 relating to concrete plants and Health & Safety Code Section 382.056(g) relating to amendments, modifications, or renewals that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
110. Authorize TCEQ to deny renewal of an air permit for good cause, including failure to maintain compliance with the Texas Clean Air Act or the terms of the existing permit or inability to meet all applicable state and federal air quality standards and regulations. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
111. Give TCEQ clear-cut authority to turn down a bad actor’s permit or the renewal of its permit. (David Weinberg, Executive Director – Texas League of Conservation Voters)
112. Clearly authorize TCEQ to deny an air permit for good cause. (League of Women Voters of Texas)
113. Authorize TCEQ to impose new and/or more stringent conditions in permit renewals or amendments, whether the applicant/permittee agrees or not. (League of Women Voters of Texas)
114. Authorize TCEQ to deny a permit renewal if it finds construction of the facility has never been completed, the facility has never been commercially operated, or the facility has ceased operation for the preceding five years or more. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
115. Repeal the statutory provision that allows a qualified facility to make physical and operational changes without obtaining a permit or other approval from TCEQ. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
116. Require notice of all changes by a qualified facility without obtaining a permit or other approval from TCEQ to be posted on a publicly accessible internet website, and require that TCEQ be provided with the web address link for the for the notice. Require TCEQ to post on its website the identity of the qualified facility making such changes and the web address link required. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
117. Give the public at least 30 days to file written comments on all changes by a qualified facility without obtaining a permit or other approval from TCEQ. Give the public at least 30 days to file written comments on all changes by a qualified facility if “pre-change” notice to TCEQ is required. Give the public at least 15 days to file written comments on all other changes by a qualified facility without obtaining a permit or other approval from TCEQ. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

118. Require the notice of the change(s) required to be given to TCEQ by a qualified facility to be posted on TCEQ's website. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
119. Subject changes by a qualified facility without obtaining a permit or other approval from TCEQ to TCEQ's motion to overturn process. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
120. Require notice of all permit alterations to be posted on a publicly accessible internet website, and require that TCEQ be provided with the web address link for the notice. Require TCEQ to post on its website the identity of the facility making such alterations and the web address link required. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
121. Require TCEQ to specify by rule which permit alterations should be required to be subject to public notice and comment. Require all such permit alterations to be posted on a publicly accessible internet website, and require that TCEQ be provided with the web address link for the notice. Require TCEQ to post on its website the identity of the facility making such alterations and the web address link required. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
122. Give the public at least 30 days to file written comments on all permit alterations before Executive Director approval. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
123. Require TCEQ to post the notice of the Executive Director's approval of permit alterations on TCEQ's website. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
124. Subject alterations to a permit to TCEQ's motion to overturn process. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
125. Require TCEQ to have an independent audit and evaluation of air modeling results. Require TCEQ to use real, scientific data as opposed to using standardized modeling assumptions. Require TCEQ to properly follow EPA guidance documents. (Tim and Sharlene Fey, New Braunfels)
126. Require TCEQ to conduct post-reviews to see if permit conditions are effective, and if not, require necessary changes. (Tim and Sharlene Fey, New Braunfels)
127. Eliminate distinctions between "minor source" and "major source" in the air permitting process. (Tim and Sharlene Fey, New Braunfels)
128. Require TCEQ to equally scrutinize all industries and prohibit any industry from emitting particulate matter above state levels. (Tim and Sharlene Fey, New Braunfels)
129. Require TCEQ to be proactive and place air monitors near clusters of facilities. (Tim and Sharlene Fey, New Braunfels)

130. Require TCEQ to consider compliance history outside of the State of Texas, particularly for New Source Reviews. Require TCEQ to view applicants in combination with their affiliated or parent companies. (Tim and Sharlene Fey, New Braunfels)
131. In New Source Reviews, require TCEQ to analyze land use in depth. Require TCEQ and the applicant to confer with residents at the onset of the process. Require TCEQ to keep abreast of current developments in the area of proposed facilities, such as annexation, urbanization, new schools, bus routes, and new housing developments and change its recommendations appropriately. (Tim and Sharlene Fey, New Braunfels)
132. In New Source Reviews, require TCEQ to mandate buffer zones on the applicant's property to minimize nuisance conditions. (Tim and Sharlene Fey, New Braunfels)
133. Require MACT-like emission controls on new permits within 200 kilometers of a non-attainment area. (Tom "Smitty" Smith, Director – Public Citizen, Austin)
134. Require that any professional employee at the Air Pollution Control Division of TCEQ, that makes a decision that increases the exposure of the public or changes the nature of public exposure to any toxic chemical, to submit a sworn affidavit to the appropriate public file, under penalty of perjury, explaining how their actions were consistent with protecting the safety, health, and welfare of the public. (Jim Tarr, President – Stone Lions Environmental Corporation, Rolling Hills Estates, California)

***Permitting – Cumulative Effects***

135. Develop regional plans for permit reviews that would summarize data from all permits in existence and their air emissions and wastewater discharges along with Clean Air and Clean Water mandates and limits to emissions and discharges. (Brian Burke, Corpus Christi)
136. Direct TCEQ to analyze applications using a regional plan that represents a defined geographic region or body of water. (Brian Burke, Corpus Christi)
137. Require that applications for air permits analyze air quality and emissions with a five to ten mile radius or what would be the urban or rural airshed. (Brian Burke, Corpus Christi)
138. Require TCEQ to evaluate and consider the cumulative effects on ambient air quality, public health and property from all expected air contaminant emissions from any facility or proposed facility and from other facilities located within a prescribed distance from the facility or proposed facility, alternatively, within a distance specified by TCEQ rule. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
139. Require TCEQ to evaluate and consider the formation of ozone due to the cumulative effects of the facility's expected emissions, authorized emissions from issued permits for a new major source or a major modification to an existing major source, and actual authorized emissions from all permitted facilities located within a prescribed distance from the facility or proposed facility, or within a distance specified by TCEQ rule. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

140. Require TCEQ to formalize cumulative effects analysis in rule. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
141. Require TCEQ to consider cumulative effects of proposed new or expanded air permits and combined air emission from clusters of facilities. Require TCEQ to evaluate proposed new pollution in light of existing pollution. (Tim and Sharlene Fey, New Braunfels)
142. Require TCEQ to consider cumulative effects of pollutants. (Wendi Hammond, Plano)
143. Require TCEQ to consider the cumulative impacts of all sources of pollution when determining permitting. (Mary Beth Maher, Austin and Teresa Klein – Clean Economy Coalition, Corpus Christi)
144. Require TCEQ to take a comprehensive approach to permitting, including considering cumulative effects on particular industries and taking a regional approach to issuing permits. (Allison Sliva, Bay City)
145. Require TCEQ and applicants to look at cumulative impacts on downwind communities within 200 kilometers of source. (Tom “Smitty” Smith, Director – Public Citizen, Austin)
146. Require TCEQ to analyze cumulative impacts of new or expanded pollution emissions on the overall air quality, public health, and property in an airshed. (League of Women Voters of Texas)

***Permitting – Air Pollutant Watch List and Effects Screening Levels***

147. Require TCEQ to adopt the air pollutant and/or toxics watch list as enforceable standards in rules. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and League of Women Voters of Texas)
148. Require TCEQ to establish and maintain an air pollutant and/or toxics watch list for each air contaminant that TCEQ determines exceeds federal or state ambient air quality standards or health effects screening levels; designate areas of the state where modeled or monitored ambient air concentrations of one or more air contaminants exceed any ambient air quality standards or health effects screening levels adopted by TCEQ; and ensure that the emission requirements in any permit issued in a designated area are consistent with any ambient air quality standards or health effects screening levels adopted by TCEQ. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
149. Require TCEQ to adopt the effects screening levels list as enforceable standards in rules. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
150. Require TCEQ to adopt effects screening levels (ESLs) for all air contaminants that evaluate the potential for adverse health effects to occur as a result of exposure to concentrations of the air contaminants; adopt ESLs at least as stringent as those adopted by the EPA; and require emission sources to comply with any adopted ESLs. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

### **Permitting – Oil and Gas**

151. Provide TCEQ with clear authority to set limits for air emissions during all phases of oil and gas drilling and production, including well emissions. (Representative Rafael Anchia, Member – Sunset Advisory Commission; Jim Marston, Texas Regional Director and Ramon Alvarez, Ph.D., Senior Scientist – Environmental Defense Fund, Austin)
152. Enhance TCEQ's authority to respond to air emission permitting associated with rapid energy production in dense urban environments, including the ability to revoke or alter permit requirements to address public health risks and the power to effectively manage the cumulative effects of concentrated well sites and related equipment in urban settings. (Representative Rafael Anchia, Member – Sunset Advisory Commission and Senator Wendy Davis, Member – Texas Senate)
153. Direct TCEQ to consider rules for mandating air emissions control technology with regard to natural gas drilling and production. (Senator Wendy Davis, Member – Texas Senate)
154. Direct TCEQ to establish rules for evaluating the risks of storm water runoff from natural gas operation sites. (Senator Wendy Davis, Member – Texas Senate)
155. Require by rule TCEQ look at water supply issues, especially groundwater, in the Barnett Shale and the Eagle Ford Shale. (Senator Wendy Davis, Member – Texas Senate)

**Staff Comment:** While TCEQ has jurisdiction over surface water quantity in Texas, it does not have jurisdiction over groundwater quantity, which is regulated by local Groundwater Conservation Districts, and coordinated by the Texas Water Development Board.

156. Grant TCEQ clear and express air permitting authority over every part of oil and gas drilling. (Representative Lon Burnam, Member – Texas House of Representatives)
157. Establish regulation for oil and gas fracking, and deny or cancel any permit requests until regulation is in place. (Ellen Hansen, Austin)
158. Require TCEQ to certify that fracking chemicals will not harm the environment of the health of Texans. (Elizabeth Riebschlaeger, Cuero)

### **Permitting – Injection Wells**

159. Require public input, perhaps in the form of letters of support from two levels of local government, about the local need for a Class I non-hazardous commercial injection well and their desirability. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
160. Require TCEQ to encourage the public to take part in proceedings if a Class I non-hazardous commercial injection well permit is contested, including providing for local hearings. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
161. Require Class I non-hazardous commercial injection well applicants to bear the burden of proof that the well location will not have negative consequences in terms of traffic safety, noise pollution, air pollution, or declining property values, and require permit denial for

failure to study these impacts or the uncertainty of those impacts. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))

162. Expand the definition of “public interest” to include not only the possible positive economic impacts of new jobs, but also the potential environmental and social costs to a community. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
163. Require any additional testing ordered by TCEQ in a contested case hearing on a Class I non-hazardous commercial injection well to be conducted by a third party; require that a TCEQ representative with appropriate technical expertise be present at testing; and require TCEQ to deny the permit if testing is not done correctly. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
164. Require the State Office of Administrative Hearings, when conducting contested case hearings on Class I non-hazardous commercial injection wells, to include at least one examiner with appropriate technical background in the field of the permit application under review. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
165. Require Class I non-hazardous commercial injection well permit applications to include copies of deeds, leases, or other forms of documentary evidence of property ownership. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
166. Require TCEQ managers to affix their engineering seal to applications for Class I non-hazardous commercial injection well permits signifying their agreement with all calculations and confirming that all requirements have been met. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
167. Expand requirements for TCEQ notifications of permit applications for Class I non-hazardous commercial injection wells to include a copy of the permit application to the mineral lease holder(s) and producer(s), and require TCEQ to send permit applications concurrent with notifications to affected counties. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
168. Establish regulation of Class I injection well surface facilities that offload, process, and temporarily store waste material received at Class I commercial injection wells. The regulation would include, at a minimum, the following.
  - Minimum distance requirements from private residences, private water wells, and other wells should be established and enforced.
  - Hours of operation should be limited so as not to pose a public nuisance.
  - A sample which outlines the complete chemical composition (not just ph) and dilution rate of every load received and processed by the injection well facility must be evaluated by an independent contractor with no ownership or operational relationship to the injection well owner or operator. Written reports of such samples must be maintained by the injection well operator as well as the contractor conducting the sampling and such reports shall be available for periodic monitoring and review by regulators, as appropriate.

- Injection pressures should be monitored and reported to regulators, as appropriate.
- Surface facility design specifications should generally follow the same API requirements used for design of hydrocarbon tank farms and truck loading/unloading facilities.
- Storage tanks should have double bottoms with leak detection alarms. Leaking tanks must be reported to TCEQ and taken out of service until repairs can be made and inspected by TCEQ.
- Storage tanks should have two sets of high liquid level alarms: 1) a high level alarm to warn operators of a potential problem and, 2) a high-high level alarm with automatic shut-in of the tank receiving line.
- Install vapor recovery or odor abatement equipment on all tanks for any facility that receives materials that a normal person would consider to have an obnoxious odor.
- Install pressure control valves to limit injection pressure to the maximum as specified in the permit.
- Install injection pressure recording equipment that provides a continuous pressure record that cannot be manually manipulated.
- Install flow control valves to limit waste injection volume to the maximum specified in the permit.
- Install flow recording equipment that provides a continuous record that cannot be manually manipulated.
- Provide for automatic shut-in upon failure of pressure recording or flow recording equipment.
- Provide for automatic shut-in if injection pressure or flow rate limits are exceeded.
- Install all facility piping above ground with sufficient ground clearance for detection of leaks and for routine maintenance.
- All facility tanks, pumps, and piping must be installed over a reinforced concrete pad. All concrete construction joints must be sealed with an elastomer compatible with the waste material received at the facility. The facility concrete pad must be curbed and have a containment capacity greater than the largest tank plus freeboard.
- Tanks must be hydrostatically tested after installation, but prior to service.
- Piping must be pressure tested after installation, but prior to service.

(Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))

169. Classify commercial Class I non-hazardous injection wells separately from other Class I wells, and apply stricter regulations to commercial wells. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW) and Paula Sewall, Conroe)



170. In evaluating compliance history for Class I injection wells, require the applicant's technical expertise, majority shareholders, and proposed operators to be rated "satisfactory" by the Environmental Protection Agency. Require verification of compliance history if the applicant or the applicant's partners or shareholders change at any time during the permitting process. Require denial of the permit if compliance history is less than satisfactory. Establish specific standards for technical training and certification for all operators in circumstance in which a compliance history is absent. (Karen Darcy-Pawlak – Citizens/Residents Oppose Wells (CROW))
171. Require TCEQ to stop allowing uranium mining companies to amend requirements for restoring water quality to baseline levels. (Donna Hoffman, Communications Coordinator – Sierra Club, Lone Star Chapter, Austin and the Alliance of Uranium Research and Action)
172. Require TCEQ and EPA to stop permitting uranium mining operations near important aquifers. (Donna Hoffman, Communications Coordinator – Sierra Club, Lone Star Chapter, Austin and the Alliance of Uranium Research and Action)

#### ***Permitting – Solid Waste and Recycling***

173. Institute a 10-year term limit for municipal solid waste facility permits. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
174. Issue MSW permits for a term certain, and require MSW landfills to go through renewal. (Bob Thompson, Ph.D., Austin)
175. Require the permittees of municipal solid waste facilities to undergo a Good Neighbor Review of their facility's performance. Require the facilities to publish notices with detailed information on their tonnages recycled, composted, landfilled, or processed, plans for updates in technology, site operating plans, planned expansions. Require the facilities to report details on complaints, violations, penalties assessed and provide for written comments and a public meeting. Require the facility to compile the information from the facility and the public to be made available on the facility's website that would be linked to TCEQ's website, along with their permits and pending amendments and modifications. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
176. Increase the fee to apply for permits, amendments, and modifications from the current \$100 to reflect TCEQ's real costs in reviewing applications, at least for major waste facilities. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
177. Require MSW permits to expire within three years of issuance if the facility is not built. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
178. Provide that counties and communities receive notice that soil boring test results are being done and that a waste facility may be proposed. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

179. Alter county siting powers so that counties can designate areas that include aquifers as off-limits for landfills without having to identify areas that are suitable for landfills. Allow counties to designate MSW facilities outside their borders. Allow counties to require additional protection for aquifers, such as double synthetic lining with leak detection systems between the two liners. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
180. Require applicants for waste permits to determine the source of water of every neighbor within a mile or so, by whatever means are required. If the water well databases are inadequate, require the applicant to keep investigating beyond consulting published and open sources of information, which may not contain complete information about wells and springs. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
181. Allow counties to conduct a land use compatibility analysis and include that analysis with the waste permit application, which should be given substantial weight in the process. Direct TCEQ to develop capability to evaluate the land use compatibility perhaps based on an independent land use analysis. Provide that if only Council of Governments make land use compatibility determinations, deference should also be given to their decision. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
182. Restore automatic public meetings for new solid waste facilities, and require applicants to hold an early public meeting when an application for a new industrial hazardous waste and municipal solid waste facility is submitted. Require TCEQ to only provide written and online materials, as the onus would be on the applicant to hold and publicize the public meeting. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
183. Require applicants for waste permits to update their mailing lists if the old list is more than a year old. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
184. Direct TCEQ to require higher levels of recycling and verify specific end markets for materials before allowing applicants to apply for an Municipal Solid Waste registration instead of a permit. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
185. Require TCEQ to track recycling throughout the state. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
186. Require permits if applicants have violated environmental laws in the past. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
187. Extend the safeguards of HB 2541, related to time frames for processing and removal of materials, to other municipal solid waste facilities and other counties. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
188. Increase financial assurance requirements for municipal solid waste facilities. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
189. Prohibit burying or depositing trash in a floodplain. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

190. Direct TCEQ to enforce the requirement for water quality permits against dumpsites near surface waters. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
191. Expand the list of materials that should not be burned. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
192. Restore the requirement for deed restrictions for on-site dumping so that future owners are aware of past dumping on the property. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
193. Raise the existing \$1.25 per ton Solid Waste Disposal fee on landfilling and adjust it every five years to account for inflation. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin and Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
194. Direct TCEQ to dedicate resources from the Solid Waste Disposal surcharges towards fulfilling the public education responsibilities of the Computer TakeBack Law passed in 2007. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
195. Require TCEQ to inform local governments of the Computer TakeBack Law and significantly expand its public education efforts in this area. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
196. Change Texas’ electronic recycle law to include enforceable minimum collection goals for each company so that all companies set up effective collection programs. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
197. Define “reasonably convenient” collection in Texas’ Computer TakeBack Law to establish minimum availability for drop-off collection options to areas based on population densities and/or provide incentives for collection goals to service all parts of the state. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
198. Prohibit the trashing of e-waste in landfills, and require landfill operators to post signs, notify contract haulers by mail, and not knowingly take loads with more than an incidental amount of e-waste. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
199. Require TCEQ to close the loophole exempting small generators from having to properly dispose of their mercury-containing lamps. (Alisa Livingstone, Dallas)
200. Require TCEQ, in issuing waste permits, to consider the impact of extraction of water and alternate sources of water on existing water supplies, and determine if water supplies were to be contaminated by a waste facility. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin)
201. Require TCEQ staff to independently assess the technical accuracy and correctness of the application, in the same way that the Railroad Commission staff is required to do. (Robin Schneider, Executive Director – Texas Campaign for the Environment, Austin and Bob Thompson, Ph.D., Austin)

202. Prohibit landfills from being sited over recharge zones, and if allowed, increase engineering requirements and protection for landfills built over aquifers. (Bob Thompson, Ph.D., Austin)
203. Require exhaustive investigations of surrounding areas, residents, and groundwater supplies when determining whether to approve a permit. (Bob Thompson, Ph.D., Austin)
204. Require landfill applicants to evaluate the impact of a proposed landfill on groundwater. (Bob Thompson, Ph.D., Austin)

### ***Permitting – Wastewater***

205. Require applicants for wastewater permits to identify the source of water coming into the facility, the risk to marine life posed by the intake, whether it is treated prior to use, if it is treated prior to discharge, the methods of treatment if any, and the impact on the body of water it is discharge into. (Brian Burke, Corpus Christi)
206. Direct TCEQ to require applicants to use a single standard method of submitting data for wastewater permits. (Brian Burke, Corpus Christi)
207. Require draft permits to utilize and report the requested emission level and the approved emission level in the same parameter as the applicant submitted; and require the draft permit to show what was requested alongside with what is being permitted for easier analysis and scrutiny. (Brian Burke, Corpus Christi)
208. Direct TCEQ to require applicants to use a single standard method of submitting data for storm water runoff with enough specifics to be able to measure storm water runoff. (Brian Burke, Corpus Christi)
209. Require applicants for wastewater permits to develop analyses of the weight of pollutants being discharged in addition to the number of gallons of waste water being discharged. (Brian Burke, Corpus Christi)
210. Require applicants to fully complete all required sections of the wastewater application. (Brian Burke, Corpus Christi)
211. Prohibit applicants for wastewater permits from amending existing permits to discontinue reporting effluent discharges. (Brian Burke, Corpus Christi)
212. Require all new permit applications to be fully completed, including worksheet #2 and the section on storm water discharge. (Brian Burke, Corpus Christi)
213. Provide that applicants expanding an electric plant capacity to generate additional megawatts should withstand a full new sources review and not be considered to be repowering the plant. (Brian Burke, Corpus Christi)
214. Require applicants seeking permitted emissions alteration for change in types of material being handled and moisture level to provide the specific material by material change in moisture or other parameter justifying a reduction in emission levels. (Brian Burke, Corpus Christi)

215. Require applicants to have independent comprehensive on site monitoring to assure that they are complying with discharge limits. (Brian Burke, Corpus Christi)
216. Direct TCEQ to develop a quantitative definition of de minimis degradation consistent with EPA Clean Water Act guidance for use in Tier 1 and Tier 2 reviews. (Victoria J. Li, Director – Watershed Protection Department, City of Austin)
217. Direct TCEQ to use a dynamic water quality model that accounts for nutrient impacts. (Victoria J. Li, Director – Watershed Protection Department, City of Austin)
218. Direct TCEQ to revise wastewater effluent limits to reflect current industry treatment practices, including technologies such as membrane bioreactors. (Victoria J. Li, Director – Watershed Protection Department, City of Austin)
219. Give TCEQ permit writers flexibility to recommend alternative technologies and permits, such as Texas Land Application Permits, when they are more protective and more appropriate for sensitive environments. (Victoria J. Li, Director – Watershed Protection Department, City of Austin)

#### **Permitting – Public Water Supply**

220. Allow small rural churches to take bacteria and chlorine water samples without needing to hire a class D water licensee. (Barbara Dietzel and Sharon Wiggins – Martin Luther Lutheran Church, Victoria)
221. If small rural church water systems are regulated, then grandfather in an existing small rural church well and do not require it to meet the complicated and expensive compliance requirements meant for a new well system. (Barbara Dietzel and Sharon Wiggins – Martin Luther Lutheran Church, Victoria)
222. Allow small rural churches to make exception requests directly to TCEQ without having to pay an engineer to sign the letter. (Barbara Dietzel and Sharon Wiggins – Martin Luther Lutheran Church, Victoria)
223. Remove any requirements for testing the water of small rural churches that is not required of house/domestic wells in the area. (Barbara Dietzel and Sharon Wiggins – Martin Luther Lutheran Church, Victoria)
224. Change the 25/60 rule so that it only applies to a small and rural church when it has a congregational meal and thus provides water to people in a way that might affect the public health. (Barbara Dietzel and Sharon Wiggins – Martin Luther Lutheran Church, Victoria)  
  
*Staff Comment:* The 25/60 rule provides that a building where at least 25 people meet 60 days out of the year must be regulated like a public water system.
225. Remove TCEQ's primacy over public drinking water, and have the Environmental Protection Agency oversee drinking water in Texas. (Nikki M Kuhn, San Antonio)

## **Enforcement**

### ***Enforcement – General***

226. Direct TCEQ to adopt and implement a specific policy that a permit shall be revoked or suspended when deemed appropriate in enforcement actions, pursuant to Water Code Sections 7.302 and 7.303, especially if the respondent is a repeat violator or if TCEQ finds the violations to be willful or grossly negligent. (Representative Rafael Anchia, Member – Sunset Advisory Commission)
227. Direct TCEQ to adopt and implement a specific policy that a permit shall be revoked or suspended when deemed appropriate in enforcement actions, pursuant to Water Code Sections 7.302 and 7.303, especially if the respondent is a repeat violator or if TCEQ finds the violations to be willful or grossly negligent. Direct TCEQ to suspend a permit under any circumstances, until the respondent comes into compliance. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
228. Require TCEQ to revise its Enforcement Initiation Criteria to require automatic initiation of enforcement for all permit violations, unless it finds the violations are de minimis, or are a result of force majeure, an act of God, war, strike, riot or other catastrophe; and for all permit violations that have the potential to harm the environment or public health. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
229. Expand the scope of TCEQ's current Field Citation Program to include additional programs and/or to add additional violations in the current programs subject to field citations. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
230. Direct TCEQ to set and enforce firm deadlines for processing enforcement cases to settlement, for example enforcing the 185-day timeline currently in place. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
231. Direct TCEQ to make targeted, meaningful changes to the present definition/formula of repeat violator by modifying the definition of major violation found in Rule 60.2(c)(1) to ground it to impact-related violations. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
232. Direct TCEQ to amend the current definition found in Rule 60.2(d)(1) relating to repeat violators to include systemic violations of the terms and conditions of TCEQ authorizations. Violations should not be limited to the same violation; rather a pattern of behavior should dictate the use of the term repeat violator. Authorize TCEQ to classify a person as a poor performer if the agency can demonstrate performance issues impacting human health and/or the environment as well as systemic inability, either through lack of resources or disregard for rules and regulations, to comply with the terms and provisions of a TCEQ authorization. Incorporate the agency's Enforcement Initiation Criteria's definitions of certain A, B and C violations and a specific frequency based on an entities size and complexity. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

233. Direct TCEQ to not penalize those who self report emissions inventory. (Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin)
234. Direct TCEQ to require that an emissions event for a reportable quantity be reported as soon as practicable, but not later than the close of the first business day after discovery. (Deb Hastings, Vice President for Environmental Affairs – Texas Oil and Gas Association, Austin)
235. Require TCEQ to get out and inspect a facility that is under an agreed order. (Caroline Reynolds, P.E. – CR Solutions, Austin)
236. Change TCEQ's enforcement policy to revoke or suspend permits, licenses, certificates, or registrations when warranted in enforcement actions. (League of Women Voters of Texas)

***Enforcement – Penalty Policy***

237. Direct TCEQ, in its adopted penalty policy, to adjust its penalty calculation to accurately reflect harm to public health and effectively deter future noncompliance. (Representative Rafael Anchia, Member – Sunset Advisory Commission)
238. Develop and adopt separate media-specific penalty policies. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
239. Direct TCEQ to adopt standard penalties for the most common programmatic violations as a percentage of the statutory limit for major and minor sources, and periodically review and adjust standard penalties as necessary to account for inflation and other relevant circumstances. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
240. Revise the Environmental/Property and Human Health Penalty Matrix in TCEQ's penalty policy to increase the penalties assessed. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
241. Direct TCEQ to recover all of the economic benefit in assessing penalties, whether from avoided or delayed costs, as an add-on to the base penalty, up to the statutory cap allowed for the penalty. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
242. Require TCEQ, in its penalty policy, to fully recover the economic benefit of not complying with the law. (Brandt Mannchen, Houston)
243. Allow the total deferral of economic benefit for local governments, non-profit organizations (such as churches and charitable organizations), and public service entities (such as school districts and hospital districts), provided that compliance is achieved in accordance with the schedule and terms of the enforcement order. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
244. Allow the deferral of up to \$5,000 of economic benefit for small businesses, provided that compliance is achieved in accordance with the schedule and terms of the enforcement order. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

245. Direct TCEQ to revise the penalty policy to explicitly state that a violation should be considered continuous only when there is no way to count it as a series of discrete events. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
246. Direct TCEQ to count a violation covering several units at the same facility as separate violations for each distinct operating unit, not one violation for the entire facility. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
247. Direct TCEQ to tie violations for failing to report under a permit, registration or order, with the reporting frequency for the permit, registration, or order term. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
248. Direct TCEQ to reinstate higher fines with an additional penalty when a facility claims a certain set of facts in order to qualify for a reduction in a penalty, and the facility then takes action which renders the facts inaccurate. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
249. Expressly authorize TCEQ to assess interest charges on delinquent penalties or for late payment of administrative penalties. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)

#### **Texas Low-Level Radioactive Waste Disposal Compact Commission**

250. Review the Compact Commission as part of the 2013 Sunset review cycle. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
251. Prohibit the Texas Low-Level Radioactive Waste Compact Commission from expanding the Andrews County radioactive waste dump to accept wastes from any state other than the Compact States of Texas and Vermont, unless additional states actually join the Texas Compact through legislative action and pay a requisite fee and accept their financial responsibility. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
252. Clarify whether imports are allowed from other states and only authorize imports in emergency situations. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
253. Hold legislative hearings on the financial impacts and increased environmental risks if Texas is opened up to radioactive waste shipments from states other than the Compact states of Texas and Vermont. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
254. Hold legislative hearings on the emergency preparedness of first responders that may potentially have to deal with accidents involving radioactive waste during and after disposal as well as during transit to disposal sites. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)



255. Prohibit the Compact Commission from circumventing TCEQ's authority to establish license conditions, including the volume and source of the waste and clarify that it is TCEQ and not the Compact Commission that decides the volume and radioactivity and source of waste allowed by the license. (Lize Burr, Coalition Coordinator – Alliance for a Clean Texas, Austin)
256. Charge a fee of at least \$55 per cubic foot of waste to states not party to the Compact, for disposal of waste at Texas' low-level radioactive disposal site, to be deposited in General Revenue Dedicated Account No. 88 – the Low-Level Waste Account. (Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin)
257. Charge an additional access fee to states disposing of waste at Texas' low-level radioactive disposal site and not party to the Compact, to be deposited into General Revenue. (Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin)
258. Closely monitor the currently proposed Texas Low-Level Radioactive Waste Disposal Compact Commission rule allowing the import of radioactive waste from states other than Vermont. (Bob Gregory, Chairman and CEO – Texas Disposal Systems, Inc., Austin)
259. Ask the Compact Commission to halt the vote on the Import/Export rule until the legislature has had the opportunity to decide the matter. (Karen Hadden, Executive Director – SEED Coalition, Austin)
260. Require that new importers of waste to Texas' low-level waste disposal site be charged for long-term liability, probably less than \$25 million. (Robert Wilson, Lockhart)

### **Water and Wastewater Utility Rates**

261. Notwithstanding whether water and wastewater utility ratemaking is transferred to the Public Utility Commission, authorize the Executive Director of the regulatory agency to set an interim utility rate. (Senator Robert Nichols, Member – Sunset Advisory Commission)
262. Change the 12 percent return on investment used by TCEQ and large investor-owned water utilities to a reasonable return. (Orville R. Bevel, Jr., Chairman – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
263. Reduce water rates if the water utility operates below a minimum efficiency. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
264. Establish allowances for lifeline water rates for the disadvantaged rate payer who uses minimal gallons, including lower per gallon and monthly rates. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
265. Eliminate the ability to impose a surcharge on water bills. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
266. Continue the implementation of the Return of Investment Capital worksheet. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)

267. Require water utilities to publish annual financial reports to prevent loading up the expenses in a rate case test year. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
268. Require the agency overseeing water rates to provide electronic copies of water rate cases obtained from the utility, and make them available at a reasonable cost to the rate payer. (C.A. Cockrell, Vice President – Texans Against Monopolies Excessive Rates (TAMER), Chandler)
269. Decrease the frequency that a utility can request a rate increase, or require a full audit of the company when the application is submitted. (Jennifer Jones – Rate Payers of Deer Creek Water, Dripping Springs)
270. Require a brief but specific review prior to the approval of the proposed rate. (Jennifer Jones – Rate Payers of Deer Creek Water, Dripping Springs)
271. Require that proposed rates be escrowed from day one until the Commission signs the final order. (Jennifer Jones – Rate Payers of Deer Creek Water, Dripping Springs)
272. Require that attorney fees be paid by customers only for preparation of the application up to the preliminary hearings, and contested case fees be divided based on outcome, with approved rates 50 percent or greater of the proposed rate awarded to the water company and 49 percent or less of the proposed rate attorney fees to the customer. (Jennifer Jones – Rate Payers of Deer Creek Water, Dripping Springs)

### **Dam Safety**

273. Provide that in implementing its dam safety regulations, TCEQ focus its efforts on the most hazardous dams in the state. (Charles McMahan, Member – Sunset Advisory Commission)
274. Direct TCEQ to exempt dams that are classified as low-hazard by TCEQ from adhering to TCEQ's hydrologic and hydraulic criteria. (Charles McMahan, Member – Sunset Advisory Commission)
275. Instruct TCEQ to “grandfather” the owners of certain pre-existing small dams from retroactive imposition of agency rules that utilize hydrologic and hydraulic criteria different from the criteria applied when the dams were engineered and constructed. (Representative Mark Shelton, Member – Texas House of Representatives; Ralph Duggins, Fort Worth; John Brittingham, Athens; R. Gregory Lamb, President – Gunstream Land Corporation, Winnsbro; Ross Jones, Coleman; and James Wright, Coleman)
276. Grandfather in small dams and exempt them from TCEQ dam safety regulations. (John J. Vay – Charca Ltd., Austin)

### **Miscellaneous**

277. Direct TCEQ to repeal its rule that requires y-type strainers be installed on below ground double-check backflow prevention assemblies on landscape irrigation systems. (William M. Aldrup)

278. Ensure that TCEQ has the capability to meet the three-year inspection frequency requirement of the Energy Policy Act for underground storage tanks. (Al Armendariz, Regional Director – Region 6, United States Environmental Protection Agency)
279. Direct TCEQ to schedule quarterly forums and share the presentation, including issues of compliance, with environmental groups, local industry groups, and academia to disclose findings from air monitoring, showcase initiatives, and to solicit feedback from the community on area priorities. (Brian Burke, Corpus Christi)
280. Direct TCEQ to schedule quarterly forums and share the presentation, including issues of compliance, with environmental groups, local industry groups and academia to disclose findings from water monitoring, showcase initiatives and to solicit feedback from the community on area priorities. (Brian Burke, Corpus Christi)
281. Create a central clearing house or method for sharing and integrating data collection and findings related to water quality monitoring. (Brian Burke, Corpus Christi)
282. Strengthen the TMDL program with increased monitoring for a broader range of parameters thought to be present. (Brian Burke, Corpus Christi)
283. Expand criteria for TMDL impaired waters to include salinity, water temperature, etc., so it is not limited to dissolved oxygen. (Brian Burke, Corpus Christi)
284. Revise or eliminate regulatory obstacles in the TERP program that currently exclude grant applicants that can bring emissions reductions through the deployment and operation of natural gas vehicles. (Gary D. Compton, Counsel for Clean Energy Fuels – Jackson Walker L.L.P., Austin)
285. Require TCEQ to cap on-site sewage facility permit fees that TCEQ and authorized agents charge on applications to install an on-site sewage facility. (Stephen V. Kirks, Red Rock)
286. Create an ongoing producer take back program for unused pharmaceuticals, involving unused pharmaceutical collections boxes/kiosks in pharmacies or other secure, permanent facilities located throughout the state. (Kim Mote, Chair – Texas Product Stewardship Council)
287. Amend the Texas Solid Waste Disposal Act to grant TCEQ the flexibility to satisfy minimum federal requirements for state programs and retain state primacy related to coal combustion residuals in the event that federal rules are finalized. (Michael J. Nasi – Texas Coal Combustion Products Coalition)
288. When TCEQ audits, inspects, and reviews documents that reveal information that indicates that a licensed entity or person may have committed a violation of another state licensing board, require TCEQ to forward relevant information to the pertinent licensing board. (Barbara Roeling, P.G., Chairman – Texas Board of Professional Geoscientists, Austin)
289. Create a state of the art, sophisticated TMDL program that has modeling that includes plug-ins from the Texas Water Development Board, the Soil and Water Conservation Board, Texas Parks and Wildlife Department, TCEQ, and River and Navigation Authorities. (Muriel Tipps, Cedar Lane)

290. Increase monitoring stations throughout the state, especially in heavily permitted areas, require private industry to pay for a portion of these stations, and require some entity to compile and coordinate all the data. (Muriel Tipps, Cedar Lane)

## ***Commission Decision***

Adopted New Issue 53, as modified to make it a management action to direct TCEQ to amend its mission to read: “The Texas Commission on Environmental Quality strives to protect our state’s public health and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste.”

Instead of New Issue 268, adopted a new issue to require the agency overseeing water rates to provide electronic copies, when available, of water rate cases obtained from the utility, and make them available at a reasonable cost to the rate payer.

Adopted New Issues 273 and 274.

Adopted a new issue, not previously listed, to require appointed official(s) serving as a member of the Texas Commission on Environmental Quality to resign from office before accepting any campaign contributions if running for elected office.

## ***Legislative Action***

In House Bill 2694, the Legislature modified a Sunset Commission provision to require the regulatory agency overseeing water and wastewater utility rates to provide electronic copies of all water rate case information obtained from the utility upon request and at a reasonable cost, to the extent that the information is electronically available and not confidential. House Bill 2694 also requires information provided to the regulatory agency to be provided to the Office of Public Utility Counsel, upon request, at no cost. However, separate legislation giving the Office responsibility for representing consumers in water utility matters did not pass. (Commission alternative to New Issue 268)

House Bill 2694 provides that in implementing its dam safety regulations, TCEQ focus its efforts on the most hazardous dams in the state. (New Issue 273) The Legislature added to the Sunset Commission provision to exempt from safety requirements dams that are on private property, not located within a municipality, have a maximum capacity of less than 500 acre feet, are classified as low or significant hazard, and are in a county with population of less than 215,000. Dam owners will still have to comply with maintenance and operation requirements. These exemption provisions expire in four years.

The bill also authorizes TCEQ to enter into a compliance agreement with a dam owner who is required to reevaluate the adequacy of an existing dam because of a hazard reclassification by TCEQ. The compliance agreement may include timeframes to bring the dam into compliance with TCEQ’s criteria and could include compliance deferral, if the Commission determines that it is appropriate.

House Bill 2694 requires a member of the Texas Commission on Environmental Quality running for elected office to resign from office before accepting any campaign contributions. (New Issue)

As management recommendations not requiring statutory change, New Issue 53 as modified by the Commission and New Issue 274 did not result in legislative action.



# *New Issues*

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## ***Supplement to the Sunset Staff Report on the Public Utility Commission***

New issues previously contained in the *Supplement* dealt only with gas utilities. Those issues have been moved to the New Issues section of the *Sunset Commission Final Report on the Railroad Commission of Texas* and appear under the heading of “Gas Utility Regulation.”





# *New Issues*

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## *On-site Wastewater Treatment Research Council*

None received.



# *Provisions Added by Legislature*



*Provisions Added by Legislature*



# Provisions Added by Legislature

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## **1. Amend the process for contested case hearings for permits, including party status.**

House Bill 2694 requires the Executive Director to participate as a party in contested case hearings at the State Office of Administrative Hearings. The Executive Director's role in a contested case hearing is to provide information to complete the administrative record and to support the Executive Director's position developed in the proceeding. A state agency, not including a river authority, may not contest the issuance of a permit, but may submit comments. Finally, the bill requires all discovery to be completed before the prefiled testimony deadline in a contested case hearing at the State Office of Administrative Hearings, with the exception of water and wastewater utility ratemaking hearings.

## **2. Create an expedited public hearing process for permit amendment applications for electric generating facilities to comply with Maximum Achievable Control Technology standards.**

The bill requires TCEQ to provide an opportunity for public hearing and comment, in accordance with current law for federal operating permits, for permit amendment applications to allow electric generating facilities to comply with Maximum Achievable Control Technology (MACT) standards. The bill requires TCEQ to issue a draft permit within 45 days of receiving the application; requires submission of requests for a contested case hearing within 30 days of the draft permit's issuance; and provides that if a hearing is requested, TCEQ must issue or deny a permit within 120 days of the draft permit's issuance. The bill provides for notice, motions for rehearing, and judicial review in accordance with current law. The Commission must adopt rules for this process within 180 days of the effective date of the bill. These provisions expire on the sixth anniversary of the date the Environmental Protection Agency approves MACT standards.

## **3. Create timelines for TCEQ to review and approve amendments to certain water management plans.**

The bill addresses TCEQ's review of certain applications to amend water management plans. The provision applies to an application consisting of a reservoir operation plan for the operation of two water supply reservoirs, for a plan that was originally required by court order adjudicating the water rights for those reservoirs. The bill requires the Executive Director to complete a technical review within one year of the application's administrative completion. The bill allows the applicant 30 days to provide additional information to TCEQ and provides for a tolling period. House Bill 2694 provides for public comment opportunities, and requires the Commission to act on a hearing request and the application within 60 days.

## **4. Expand the Water Code's definition of agriculture to include aquaculture.**

House Bill 2694 expands the definition of agriculture to include aquaculture, defined as the business of producing and selling cultured species raised in private facilities, for the purposes of TCEQ's water rights regulation.

**5. Change the requirements for water district financial reporting to TCEQ.**

The bill changes the threshold, from \$100,000 to \$250,000, in gross receipts collected by a water district for it to be able to elect to file an annual financial report with TCEQ instead of a full financial audit.

**6. Amend rate change notification requirements for certain utilities.**

House Bill 2694 extends time for notification of a rate change to rate payers for a municipally owned utility or political subdivision to 60 days, instead of the 30 required by current law. The bill also authorizes municipally owned utilities or political subdivisions to provide the notice electronically.



# *Appendices*



# *Appendices*



# Appendix A

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## TCEQ Air Permitting and the EPA

The Environmental Protection Agency (EPA) has recently formally disapproved some of Texas' air permitting rules, which are part of Texas' State Implementation Plan (SIP), administered by the Texas Commission on Environmental Quality (TCEQ). The Federal Clean Air Act requires states to develop SIPs, which detail how a state will comply with federal requirements. SIPs are enforceable documents developed by the state, but overseen by EPA. EPA approves or rejects SIPs, and can replace SIPs with Federal Implementation Plans.

Texas only has one SIP, consisting of many parts, including information about Texas' air monitoring, emissions inventory, modeling, and control strategies, which explain how TCEQ proposes to come into compliance with federal air quality standards as well as its new source review permitting program. TCEQ frequently revises the SIP to take into account EPA's changing standards for air pollutants, changes in federal and state law, and changes in technology and science. TCEQ's Commission must adopt SIP rule revisions before forwarding them to EPA for approval.

By federal law, EPA generally has six months to determine if a SIP submittal is complete, and then 12 months to approve or disapprove it.<sup>1</sup> In Texas' case, at least one SIP revision waited for a formal disapproval from EPA for more than 15 years.<sup>2</sup> The difference in time between the effective date of state rules and their approval or rejection by EPA is referred to as the SIP gap. In the case of lengthy SIP gaps, states may go forward in implementing their rules before EPA approves them. This can become problematic when EPA later disapproves the rule, as happened recently with TCEQ's flexible permitting program.

In 2008, several Texas business groups – the Business Coalition for Clean Air Appeal Group (BCCA), Texas Association of Business, and Texas Oil and Gas Association – filed suit against EPA to force the agency to rule on 30 of Texas' SIP revisions. In 2009, EPA and the business groups agreed to a schedule by which EPA would act on the revisions. TCEQ currently has 15 separate SIP rule packages awaiting EPA action. EPA officially approves or disapproves SIP revisions by publishing notice in the Federal Register.

The most commonly discussed objection from EPA on Texas' air permitting program relates to TCEQ's flexible permitting program. TCEQ's flexible permitting program allows entities with new source review permits for new construction or modification, to have permits that allow for emissions caps for an entire site rather than emission limits for individual pieces of equipment on the site. TCEQ submitted the program to EPA in 1994, and the Legislature recognized the flexible permit program in subsequent amendments to the Texas Clean Air Act. EPA disapproved the program in July 2010 and took issue with the enforceability of these permits, expressing concerns that the permitting program may allow facilities to circumvent federal permitting requirements.

EPA has also objected to individual Title V permits as they come up for revision, citing the facilities' flexible permit as the reason for objecting. EPA is offering all 122 flexible permit holders an opportunity to confer, by December 21 of this year, with EPA on how they will bring their permits into compliance with EPA requirements and receive a federally enforceable permit, which essentially results in "deflexing" a permit. This process is ongoing. In addition, the Texas Attorney General, BCCA Appeal Group,

## Appendix A

Texas Oil and Gas Association, and Texas Association of Manufacturers filed a lawsuit against EPA in July, 2010 challenging EPA's final disapproval of TCEQ's 1994 flexible permit rules. This lawsuit is currently pending.

TCEQ and EPA have also been working to come to agreement on EPA concerns relating to TCEQ's air permitting rules related to public participation; qualified facilities; and new source review reform. In response to EPA concerns, TCEQ has adopted new rules for public participation and qualified facilities; these rule revisions are awaiting EPA approval. In addition, the Texas Attorney General, BCCA Appeal Group, Texas Oil and Gas Association, and Texas Association of Manufacturers filed suit against EPA in June 2010 challenging EPA's final disapproval of TCEQ's 1996 qualified facilities rules; that lawsuit is also pending.

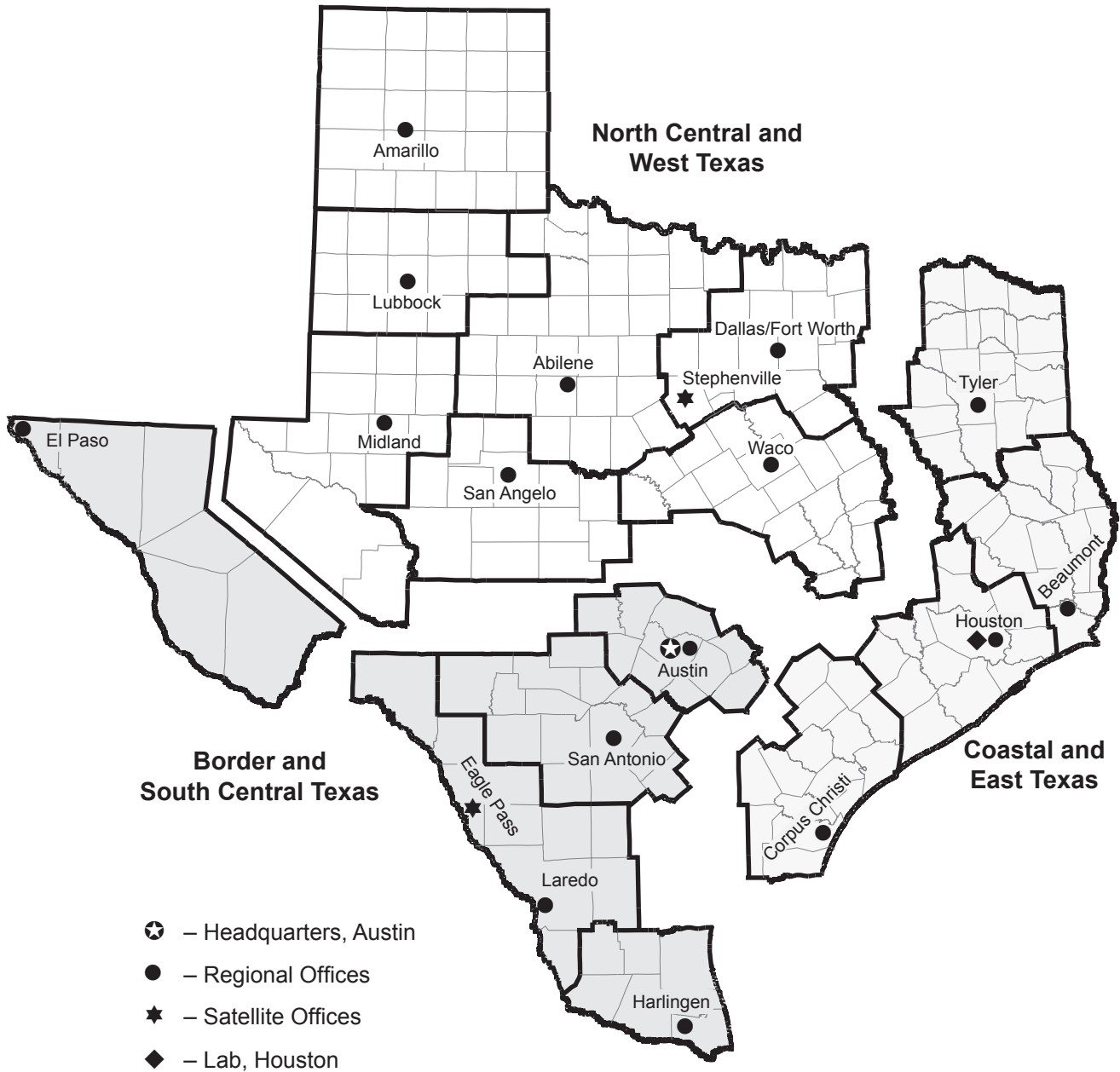
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<sup>1</sup> Clean Air Act, 42 U.S.C., sec. 7410(k) (1990). EPA may also take other actions including partial approval, partial disapproval, and conditional approval.

<sup>2</sup> TCEQ submitted Texas' Flexible Permit rules to EPA for review on November 1994 and EPA formally disapproved the rules in July 2010.

# Appendix B

## TCEQ Areas and Regions







# Appendix C

## Major TCEQ Permits, Registrations, and Authorizations

Permit	Explanation	Active Permits	Number Issued in FY 2009
<b>Air</b>			
<i>State Clean Air Act</i>			
De Minimis Facilities/Sources	Sources with very low emissions, such as natural gas-fired home water heaters.	N/A	N/A
Permit by Rule (PBR)	Required for facilities with minimal emissions, but greater than the De Minimis standard.	36,082	3,237 <sup>1</sup>
Standard Permits	Required for similar classes of facilities as PBRs, but with higher emissions, such as concrete batch plants.	2,471 <sup>2</sup>	554
New Construction or Modification Permit	Case-by-case permits negotiated with applicants to implement emission controls and achieve emission limits. They have higher emissions than Standard Permits.	7,802	1,166
Prevention of Significant Deterioration	Required for facilities located in areas meeting National Ambient Air Quality Standards (NAAQS) and with emissions exceeding federal significant emission levels.	612	28
Nonattainment Permit	Required for facilities located in areas not meeting NAAQS and with emissions exceeding federal significant emission levels.	50	3
<i>Federal Title V Operating Permits</i>			
General Operating Permit	Applies to broader classes of facilities, and consolidates all applicable air requirements into a single document, similar to a Standard Permit. Examples include trench burners and landfills.	1,198	260
Site Operating Permit	Consolidates all air requirements at a large specialized site, such as a chemical process plant.	502	529
<b>Water and Wastewater</b>			
Texas Pollutant Discharge Elimination System (TPDES), and Texas Land Application Permit (TLAP) Wastewater Permits	Required for wastewater discharges directly to surface water and disposal of wastewater by evaporation, irrigation, or land application of sludge, for industrial and municipal purposes.	28,726	8,866
Public Drinking Water System Permits	Required for water systems that have at least 15 connections and serve at least 25 people 60 days out of the year.	6,738	N/A
Water Utilities and Districts Creation	Authorizations required for the creation of new water and wastewater utilities and districts.	1,537	21

## Appendix C

### **Major TCEQ Permits, Registrations, and Authorizations**

Permit	Explanation	Active Permits	Number Issued in FY 2009
Water Utilities and Districts, Certificates of Convenience and Necessity (CCN)	Required to establish the service boundary and quality-of-service requirements for water and wastewater utilities and districts.	2,925	287
Water Utilities and Districts, Rate Change Applications, and Appeals	As regulated utilities, TCEQ determines the cost of service, depreciation, and rate of return for investor-owned utilities.	N/A	125
Water Rights Water Use Permits	Required to use surface water in Texas, unless used in small amounts for feed and livestock, wildlife management, emergencies, or other minor uses.	6,221	78
<b>Waste</b>			
Municipal Solid Waste Permits and Registrations	Required for municipalities generating waste, such as landfills, based on the source of the waste.	442	13
Industrial and Hazardous Waste Permits	Required for commercial and non-commercial sites where industrial or hazardous waste is managed, stored, or disposed.	188	3
Industrial and Hazardous Waste Registrations	Required for generators, receivers, and transporters of industrial and hazardous waste.	7,124	300
Used Oil Waste Registrations	Registration required for collection centers, handlers, and filter handlers.	2,809	3,158 <sup>3</sup>
Waste Sludge Transporters	Registration required for transporters of many different types of sewage sludge, such as chemical toilet waste.	1,217	1,416 <sup>3</sup>
Medical Waste Registrations	Authorizations required for companies that handle or treat sharps, samples, and medical wastes from hospitals, clinics, and similar settings.	40	56 <sup>3</sup>
Underground Injection Control Permits	Required for sites injecting municipal, industrial, or hazardous wastes into wells; and fluids to extract uranium or sulfur.	2,360	101
Radioactive Waste Licenses	Required for low-level radioactive waste disposal, commercial by-product material disposal, source material (uranium) recovery, and processing and storage of radioactive waste.	12	1
Tire Registration	Required to transport, process, recycle, store, or manage scrap tires in Texas.	10,608	91

## Appendix C

### **Major TCEQ Permits, Registrations, and Authorizations**

Permit	Explanation	Active Permits	Number Issued in FY 2009
<b>Other Authorizations</b>			
Dam Safety Construction Plans	Authorization to construct a new dam.	N/A	55
On-Site Sewage System Facility (OSSF) Authorized Agents	Authorization giving local governmental bodies (Authorized Agents) authority to inspect and issue licenses for on-site sewage systems.	342	24
On-Site Sewage Facility Systems	Authorizations to construct OSSF systems in cases where TCEQ acts as the Authorized Agent.	N/A	831
Occupational Licenses	Required for professionals whose performance can impact the environment and human health, such as landscape irrigators and wastewater operators.	51,083	21,062 <sup>4</sup>
Dry Cleaner Registrations	Registration required for dry cleaner drop stations and solvent distributors.	3,038	3,010
Petroleum Storage Tanks	Registration required for owners of underground petroleum storage tanks.	27,449	548

<sup>1</sup> Total is unknown because registration is not required for most PBRs. This number reflects only the 20 PBRs that require registration and voluntary registrations.

<sup>2</sup> This number reflects 13 Standard Permits that require registration and voluntary registrations.

<sup>3</sup> The fiscal year 2009 number is greater than active permits since it includes all new registrations, renewals, and updates.

<sup>4</sup> Includes renewals and new issuances.



# Appendix D

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## **Federally Delegated or Approved Environmental Program Reports**

The following summarizes the U.S. Environmental Protection Agency's (EPA) reports on TCEQ's federally delegated programs. This Appendix does not summarize TCEQ's comments or actions to address these reports.

### **Federal Clean Air Act Title V Operating Permit Program**

In its August 25, 2006 report, EPA said that TCEQ was generally in compliance with its approved program requirements, including improving issuance and ensuring consistency of Title V permits; implementing public participation requirements; and meeting fee revenue requirements. Needed improvements included quickly completing issuance of remaining Title V permits, improving public access to information and data resources, improving the way it provides a rationale for issuing permits, and providing information regarding compliance history and results of an enforcement database search.

### **National Pollutant Discharge Elimination System Program**

In its July 26, 2007 report, EPA commended TCEQ and noted that the health of the Texas Pollutant Discharge Elimination System (TPDES) program had resulted in TCEQ being placed under reduced oversight by EPA. Specifically, EPA commended TCEQ for the issuance of permits, maintaining the national goal of 90 percent of permits current; its knowledgeable pretreatment staff and its excellent job of conducting pretreatment program audits; and its public participation and data management. EPA noted challenges for TCEQ in meeting the implementation schedule for determining the reasonable potential for whole effluent toxicity (WET) and establishing WET limits based on reasonable potential for lethal or sub-lethal toxicity. EPA also noted that Texas is one of only two states that do not include bacterial effluent limits and monitoring in all domestic wastewater permits and that TCEQ needs to continue progress in reducing the backlog for municipal separate storm sewer systems.

### **Texas Nonpoint Source Program**

In its August 23, 2010 report, EPA noted that TCEQ is effectively managing its Clean Water Act Section 319 grants and conducts appropriate oversight of its program. EPA was encouraged by the emphasis that TCEQ places on prioritizing watersheds for funding to achieve water quality restoration, and it commended TCEQ for monitoring the status of projects and addressing issues cooperatively and in a timely manner. Areas for improvement included making progress towards reducing TCEQ unliquidated obligations, estimated at about \$10 million.<sup>1</sup> EPA also wanted TCEQ to increase its participation in Texas' Coastal Nonpoint Source Pollution Control Program and to improve the delisting of impaired water bodies. EPA wants each state to report at least one success story that reflects a full or partial restoration of an NPS impaired water body. Texas has had only two such success stories since the inception of the program in 1990.

### **Total Maximum Daily Load (TMDL) Program**

In its October 10, 2006 report, EPA noted that TCEQ's TMDL Program has a well-defined, mature, and well-implemented Quality System, and that the program is ably led, with competent technical staff, and supported by very capable contractors. EPA reported that the innovative management of 319 and 106 Program funds and the implementation of TMDL projects reflect well on the agency and

## Appendix D

the TMDL Program. EPA further commended TCEQ for its cooperative spirit and its initiative in making assessments of the TMDL Program and its contractors. However, EPA expressed the need for corrective action in conducting oversight of contractors and reviewing and documenting data from contractors.

### **Public Water Supply Supervision Program**

In its April 5, 2010 report, EPA noted that TCEQ continues to meet the federal requirements upholding public drinking water program primacy, including control of contaminants under the national primary drinking water regulations. EPA commended TCEQ for water system performance above and beyond performance activity measures for drinking water measures, specifically noting that 94.1 percent of the population served by community water systems receive drinking water that meets all applicable health-based drinking water standards through effective treatment and source water protection. Challenges noted include the need to improve the percentage of community water systems receiving a sanitary survey within three years of their last survey. EPA noted the need for TCEQ to improve reporting timeliness, completeness, and accuracy of public drinking water compliance determinations and inventory data. EPA also noted the need to reduce the \$8.5 million in unliquidated obligations in fiscal year 2008 in the Drinking Water State Revolving Fund.

### **National Estuary Program**

In its December 15, 2009 report, EPA noted that the Galveston Bay Estuary Program continues to make significant progress. The Program has made the conservation of biologically productive habitats such as wetlands and riparian corridors a priority, and built the organizational capacity throughout the region to implement it.

### **Resource Conservation and Recovery Act State Hazardous Waste Program**

In its end of year 2009 report, EPA noted that the State met or exceeded most of its 2009 grant commitments. The only exceptions noted were the need for more timely and complete authorization packages, and the goal for hazardous waste inspections, which EPA noted could not be achieved due to hurricane recovery activities.

### **Underground Injection Control (UIC) Program**

In its 2008 report, EPA noted that TCEQ runs an acceptable UIC program. It commended TCEQ for its continued efforts in maintaining a reasonable timeframe for permit issuance and for providing opportunities for public participation. EPA also complimented TCEQ for its coordination between UIC and Source Water Assessment and Protection programs and for making source water programs more effective. EPA noted the impact that resource limitations may have on the number of mechanical integrity tests, but encouraged TCEQ to try to witness all such tests because of their importance in protecting underground sources of drinking water. EPA also noted significant concerns with TCEQ's processing of a permit application for four non-hazardous waste wells in Montgomery County.

### **Underground Storage Tank / Leaking Underground Storage Tank Program**

In its December 15-16, 2009 report, EPA noted that remediation has been initiated at 94 percent of all confirmed releases and completed at 89 percent. EPA noted that TCEQ continues to make progress on closing out contaminated sites and taking aggressive enforcement when violations are found. EPA

## Appendix D

expressed concerns about meeting the three-year inspection frequency required by the Energy Act despite recent progress in this area. EPA also raised concerns about the need to reinstate common carrier liability for fuel deliveries to uncertified petroleum storage tanks. EPA also noted that proposed changes for the training of operators would increase requirements on in-house training providers to provide documentation and keep ongoing records of those trained.

### **Integrated (Radioactive) Materials Performance Evaluation**

On June 14, 2010, the Nuclear Regulatory Commission (NRC) completed its report on the Texas Department of State Health Services for radioactive materials licensing, and TCEQ, for recovery, processing, and disposal regulations. The NRC found TCEQ's (and the Department's) performance to be satisfactory. The NRC generally found TCEQ's inspectors for low-level radioactive waste disposal and uranium recovery to be well qualified and knowledgeable. Licensing actions for in-situ recovery facilities were of high quality and consistent with NRC procedures. Investigations were thorough and appropriate enforcement actions taken, given the scope of violations noted. Improvement areas included the need for documenting training and qualifications of low-level radioactive waste staff and documenting all investigations.

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<sup>1</sup> In its response, TCEQ noted that most spending does not occur for two to three years until contracts are actually awarded for work plans, subcontractors selected, and construction and monitoring plans approved. TCEQ further noted that while funds may be unliquidated, they have been encumbered.





# Appendix E

## Compliance History Formula

TCEQ's compliance history formula accounts for components required in statute and additional components the agency has determined assist in evaluating entities' compliance history. Each component reflects a certain type of compliance action, whether good or bad, and is worth a certain number of points that when added together result in a final numerical score. So that TCEQ can judge compliance history, ranges of scores correspond to different classifications, as shown in the table, *Classification Point Ranges*.

**Classification Point Ranges**

Classification	Point Range
Poor	more than 45 points
Average	0.10 points to 45 points
High	fewer than 0.10 points

The higher the score is, the worse the performance. To understand how negative components increase the score and positive components decrease the score, see the chart, *Compliance History Components*. Besides specific components, the agency's Executive Director may reclassify a *poor* performer as *average* after considering these factors:

- voluntary on-site assessments;
- voluntary pollution prevention programs;
- early compliance with future state or federal environmental requirements;
- implementation of non-certified environmental management system;
- owner with high or average performance that buys or owns one facility with poor performance;
- voluntary reporting of violation outside of Audit Privilege Act.

Points Category	Compliance History Components
Violation Points	<ul style="list-style-type: none"> <li>• <b>Final enforcement orders, court judgments, and consent decrees.</b> Broken down by major, moderate, and minor violations. Adds as much as 160 points per violation.</li> <li>• <b>Notices of Violation.</b> Enforcement actions for violations issued before a Commission order. Each major violation adds 5 points, moderate adds 3 points, and minor adds 1 point.</li> <li>• <b>Criminal convictions.</b> State and federal criminal convictions relating to environmental law. Adds 500 points for each felony, and 250 points for each misdemeanor.</li> <li>• <b>Number of chronic excessive emissions events.</b> Adds 100 points for each occurrence.</li> </ul>
Repeat Violator Points	<ul style="list-style-type: none"> <li>• <b>Repeat violator.</b> Commits multiple major violations on separate occasions. Adds 500 points.</li> </ul>
Audit Act Points	<ul style="list-style-type: none"> <li>• <b>Notice of intended audit under Audit Privilege Act.</b> Subtract 1 point for each notice.</li> <li>• <b>Violations disclosed under Audit Privilege Act.</b> Based on major, moderate, or minor violations disclosed. Subtract 5 points for major, 3 points for moderate, and 1 point for minor.</li> </ul>
Investigation Points	<ul style="list-style-type: none"> <li>• <b>Investigations, excluding citizen complaints.</b> Divides the score by the total number of investigations. 1 point for each investigation.</li> </ul>
Certified EMS Points	<ul style="list-style-type: none"> <li>• <b>Certified Environmental management system.</b> Voluntary system for improving environmental compliance that must be operated for at least 1 year. Reduces the score by 10 percent.</li> </ul>

## Appendix E

TCEQ calculates compliance history scores by taking each occurrence of a particular compliance action and multiplying it by the number of points given to that component. For instance, every major violation dealt with in an adjudicated final court judgment is worth 160 points, so two adjudicated judgments would equal 320 points. Then, the agency adds all the points together under each component category and plugs the totals into the *Compliance History Formula*, which calculates the final score.

### ***Compliance History Formula***

$$\left( \frac{(\text{Violation points}) + (\text{Repeat Violator points}) - (\text{Audit Act points})}{\text{Number of Investigations} + 1} \right) \times (0.9 \text{ if certified EMS})$$

EMS = Environment Management System

# Appendix F

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## Staff Review Activities

During the review of the Texas Commission on Environmental Quality (TCEQ) and the On-site Wastewater Treatment Research Council (Council), Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with TCEQ and Council personnel; attended Commission agenda hearings and Council meetings; attended numerous advisory committee, working group, rulemaking, and interim legislative meetings and hearings; spoke with staff from key legislative offices; conducted interviews and solicited written comments from interest groups and the public; reviewed TCEQ and Council documents and reports, state and federal statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar entities; and performed background and comparative research using the Internet.

In addition, Sunset staff also performed the following activities unique to TCEQ.

- Accompanied TCEQ and Railroad Commission staff on a tour of natural gas drilling, hydraulic fracturing, and production sites, and a natural gas compressor station.
- Met with local government officials in the Barnett Shale region.
- Observed TCEQ inspections of water supply systems in Denton County.
- Toured Bosque River impaired water bodies, TCEQ water monitoring sites, and a Concentrated Animal Feeding Operation.
- Toured a uranium mining operation under development in South Texas, including the mining site and processing plant.
- Toured Houston area oil refineries and petrochemical plants, TCEQ continuous air monitoring sites, TCEQ water laboratory, and superfund sites.
- Attended Houston town-hall meeting on environmental quality.
- Toured low-level radioactive waste disposal facility site in Andrews County.
- Attended TCEQ-sponsored Environmental Trade Fair and Conference in Austin and a Commission work session in San Antonio.
- Attended TCEQ hearings conducted by the State Office of Administrative Hearings.
- Met with each member of the TCEQ Commission.
- Interviewed staff from the Comptroller of Public Accounts, Office of Attorney General, Railroad Commission of Texas, Public Utility Commission of Texas, Texas Department of Insurance, Texas Parks and Wildlife Department, and the U.S. Environmental Protection Agency.
- Worked with staff from Legislative Budget Board and State Auditor's Office.



SUNSET STAFF REVIEW OF THE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL

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