

SUNSET ADVISORY COMMISSION

STAFF REPORT WITH COMMISSION DECISIONS

Texas Commission on Environmental Quality

Texas Low-Level Radioactive Waste Disposal Compact Commission

2022-23

88TH LEGISLATURE



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Cover photo: The Texas State Capitol was completed in 1888. With the Goddess of Liberty atop the dome, the Texas State Capitol Building is 19 feet taller than the U.S. Capitol Building in Washington, D.C. The photo shows the south facade of the Capitol. Photo Credit: Janet Wood

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**TEXAS LOW-LEVEL RADIOACTIVE WASTE
DISPOSAL COMPACT COMMISSION**

SUNSET STAFF REPORT WITH COMMISSION DECISIONS

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HOW TO READ SUNSET REPORTS

For each agency that undergoes a Sunset review, the Sunset Advisory Commission publishes three versions of its staff report on the agency. These three versions of the staff report result from the three stages of the Sunset process, explained in more detail at [sunset.texas.gov/how-sunset-works](https://www.sunset.texas.gov/how-sunset-works). The current version of the Sunset staff report on this agency is noted below and can be found on the Sunset website at [sunset.texas.gov](https://www.sunset.texas.gov).

Sunset Staff Report

The first version of the report, the Sunset Staff Report, contains Sunset staff's recommendations to the Sunset Commission on the need for, performance of, and improvements to the agency under review.

CURRENT VERSION: Sunset Staff Report with Commission Decisions

The second version of the report, the Sunset Staff Report with Commission Decisions, contains the original staff report as well as the commission's decisions on which statutory recommendations to propose to the Legislature and which management recommendations the agency should implement.

Sunset Staff Report with Final Results

The third and final version of the report, the Sunset Staff Report with Final Results, contains the original staff report, the Sunset Commission's decisions, and the Legislature's final actions on the proposed statutory recommendations.

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SUNSET COMMISSION DECISIONS

Summary

The following material summarizes the Sunset Commission's decisions on the staff recommendations for the Texas Commission on Environmental Quality (TCEQ) and the Texas Low-Level Radioactive Waste Disposal Compact Commission, as well as modifications and new recommendations raised at the public hearing.

As the state's environmental regulator, TCEQ must balance protecting Texans from the dangers associated with pollution while also ensuring its regulation of industries that cause pollution does not unduly impede the state's economic growth. TCEQ performs admirably administering many complex programs, and the Sunset Commission recommends the agency be continued. However, the commission also found confusion and misperceptions persist about TCEQ's role and authority, necessitating greater transparency from TCEQ's commission regarding its decision-making processes and additional opportunities for public input and dissemination of public information. The Sunset Commission also concluded TCEQ should update its enforcement practices to better focus on the riskiest actors and ensure staff treat potential violations consistently and based on severity, including through updates to its compliance history rating formula and raising administrative penalties from a maximum of \$25,000 to \$40,000 per day.

The Sunset Commission also reviewed the Texas Low-Level Radioactive Waste Disposal Compact Commission. Under the terms of a compact between Vermont and Texas, the compact commission approves and monitors the importation and exportation of low-level radioactive waste in these two states. Considering the importance of monitoring such a hazardous material and the interest of the state in overseeing the compact's implementation, the Sunset Commission recommends extending the compact commission's Sunset date for 12 years.

ISSUE 1

TCEQ's Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.

Recommendation 1.1, Alternative Recommendation Adopted — Replace the original staff recommendation with the following. Require the public comment period for a permit application remain open for at least 36 hours after the conclusion of a public meeting for air permit applications with a consolidated notice of receipt of application and intent to obtain permit (NORI) and notice of application and preliminary decision (NAPD), if a public meeting is held.

As a management action, direct TCEQ to extend the deadline to request a contested case hearing to 36 hours after the conclusion of a public meeting for air permit applications with a consolidated NORI and NAPD, if a public meeting is held.

Recommendation 1.2, Adopted as Modified — Direct TCEQ's commission to vote in a public meeting on the acceptable level of health-based risk used in the development of toxicity factors for permitting and other regulatory actions. (Management action — nonstatutory)

Recommendation 1.3, Adopted as Modified — Direct TCEQ to develop a guidance document that explains what information the commission needs to evaluate whether a person is potentially affected by a permit application and states that each request is reviewed on a case-by-case basis, considering all the factors in its rule, including — but not limited to — distance. (Management action — nonstatutory)

Recommendation 1.4, Adopted — Direct TCEQ to adopt a policy guiding its rule review process to ensure that identified deficiencies in the rules are addressed. (Management action — nonstatutory)

Recommendation 1.5, Adopted as Modified — Require TCEQ to post all permit applications and associated materials on TCEQ's website once the agency determines the application to be administratively complete and include the website's address in any public notice issued for the permit. For water right permit applications, the posting would also include maps and supporting material. Posting online may be in lieu of placing the required documents in a public building. Require TCEQ to consider and accommodate if there are affected persons in areas of the state lacking internet availability who might need assistance with access to the documents, particularly if there is heightened interest or in response to comment or request.

As a management action, direct TCEQ to review and update its website to improve accessibility and functionality. When updating its website, TCEQ should make easily accessible to the public, and provide to regional water planning groups, the webpage link to the database of groundwater conservation districts, municipal utility districts, special utility districts, river authorities, water systems, water control and improvement districts, etc. with contact information and separated by county.

Recommendation 1.6, Adopted — Direct TCEQ to evaluate its current use of advisory committees to provide more public involvement in rulemaking and other decision-making processes, and continue advisory committees by rule, as appropriate. (Management action — nonstatutory)

ISSUE 2

TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable.

Recommendation 2.1, Adopted as Modified — Direct TCEQ to review and update the agency's compliance history rating formula to ensure it accurately reflects a regulated entity's record of violations, including considerations of site complexity and cumulative violations or multiple violations of the same type. TCEQ should specifically consider major, moderate, and repeat occurrences of the same minor violations when calculating compliance history ratings. Finally, TCEQ should regularly update an entity's compliance history rating throughout the year as the agency receives additional information that could alter the rating.

When updating the agency's compliance history rating formula, TCEQ should determine whether its current formula adequately allows for comparing the compliance performance of facilities of similar complexity. If TCEQ determines that the current formula does not meaningfully assess compliance performance among complex facilities, the agency should develop a separate compliance history rating formula for facilities that are sufficiently complex to warrant application of a separate formula.

Also, direct TCEQ to re-evaluate its compliance history rating formula to ensure a facility's compliance rating does not improve if the facility reports an unauthorized air pollution emission and seeks an affirmative defense. (Management action — nonstatutory)

Recommendation 2.2, Adopted — Require TCEQ to consider all violations when classifying an entity as a repeat violator.

Recommendation 2.3, Adopted — Require TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operational status.

Recommendation 2.4, Adopted — Direct TCEQ to reclassify recordkeeping violations based on the potential risk and severity of the violation. (Management action — nonstatutory)

Recommendation 2.5, Adopted as Modified — Direct TCEQ to develop and implement clear guidance to evaluate affirmative defense requests for air emissions. Under this recommendation, TCEQ is also directed to establish a centralized committee of agency staff authorized to review and approve all applications for an affirmative defense related to unauthorized air pollution emissions. (Management action — nonstatutory)

Recommendation 2.6, Adopted — Direct TCEQ to modify its approach to nuisance complaints to make better use of the agency's investigative resources.¹ (Management action — nonstatutory)

ISSUE 3

TCEQ's Oversight of Water Could Better Protect the State's Scarce Resources.

Recommendation 3.1, Adopted as Modified — Remove the abolishment clause for the E-Flows Advisory Group and E-Flows Science Advisory Committee and require the advisory group to adopt a biennial statewide work plan for adaptive management updates of environmental flow standards. Continue the Bay and Basin Stakeholder Committees and Expert Science Teams with renewable five-year terms for members, which continue in effect until a replacement member is named or a vacancy occurs through resignation or inability to continue to serve.

Recommendation 3.2, Not Adopted — Require TCEQ to hold its annual meeting regarding priority groundwater management area studies in a public setting.

Recommendation 3.3, Alternative Recommendation Adopted — Replace the original staff recommendation with the following. Direct TCEQ to publish a report on the status of its water availability models (WAMs) as they are updated, including the development and structure of WAMs, information on ongoing WAM updates, prioritization for other WAM dataset updates, and estimated cost for the prioritized updates. As part of this recommendation, TCEQ should post this report on its website. (Management action — nonstatutory)

ISSUE 4

TCEQ and OPIC Lack Certain Transparent and Efficient Processes for OPIC to More Effectively Represent the Public's Interest.

Recommendation 4.1, Adopted — Direct OPIC to consider developing and using umbrella contracts to procure expert assistance. (Management action — nonstatutory)

Recommendation 4.2, Adopted — Direct TCEQ commissioners to take formal action on OPIC's rulemaking recommendations. (Management action — nonstatutory)

ISSUE 5

The State Has a Continuing Need for the Texas Commission on Environmental Quality.

Recommendation 5.1, Adopted — Continue the Texas Commission on Environmental Quality for 12 years and remove the Sunset date of the agency's enabling statute.

Recommendation 5.2, Adopted — Update the standard across-the-board requirement related to board member training.

Recommendation 5.3, Adopted — Update the standard across-the-board requirement regarding the separation of duties of commissioners from those of staff.

ISSUE 6

The State Benefits From Continued Legislative Oversight of the Texas Low-Level Radioactive Waste Disposal Compact Commission.

Recommendation 6.1, Adopted — Amend the compact commission's Sunset review date to 2035.

ADOPTED NEW RECOMMENDATIONS

Permits and Notice Requirements

- Require TCEQ, when posting or sending out notices on all permit applications and permit amendments, to include, at a minimum, the name of the applicant, type of permit, and address of the proposed or existing site.
- Create a new permit for the operation of a temporary concrete batch plant that supports a public works project. This public works permit will operate under the existing environmental regulations required by the standard concrete batch plant permit. This new permit can only be used in conjunction with a specific public works project.
- Require TCEQ to provide notice when it receives an application to create a new district, such as a municipal utility district, to state representatives and senators that represent any portion of the proposed district's boundaries.
- Expand TCEQ's authority to include both newspaper and electronic publication notice for pending environmental permit applications. The electronic publication should include posting on a website as well as an option to receive notifications through email. Federal requirements for newspaper or public location notification would be in addition to electronic publication. Require TCEQ to consider and accommodate if there are affected persons in areas of the state lacking internet availability who might need assistance with access to the notices, particularly if there is heightened interest or in response to comment or request.

Enforcement and Compliance

- Increase statutory limits on administrative penalties for all violations with a current cap of \$25,000 per day to \$40,000 per day.

- Create the Compliance Training and Safety Program within TCEQ's Small Business and Local Government Assistance program. As part of this recommendation, authorize TCEQ to divert qualifying facilities to receive additional training and on-site follow-up by TCEQ staff in response to minor or moderate violations that do not present an imminent threat to public health or safety, rather than formal enforcement action. Establish that facilities would be eligible for participation in the program once in a 24-month period.
- Authorize TCEQ to review and potentially suspend a facility's compliance history rating in the event of exigent circumstances, such as an emergency event causing death or injury.

Public Meetings, Comments, and Access

- Expressly authorize the commission the discretion to hold virtual public meetings in lieu of in-person public meetings. Require TCEQ to consider and accommodate if there are affected persons in areas of the state lacking internet availability that might need assistance with access to the meetings, particularly if there is heightened interest or in response to comment or request.
- Direct TCEQ, upon receiving public comments that are not under the jurisdiction of the agency, to answer the comment with information on the agency or organization with the relevant jurisdiction. (Management action — nonstatutory)
- Direct TCEQ to prepare and deliver a report by September 1, 2023, to the Legislature on its efforts to enhance public participation and language access as part of its November 3, 2020, Informal Resolution Agreement with the EPA. (Management action — nonstatutory)
- Direct TCEQ to consider developing Spanish language versions of its online form through which individuals may submit a complaint. (Management action — nonstatutory)

Fiscal Implication Summary

Overall, most of the Sunset Commission's recommendations could be implemented by TCEQ using existing resources and would not have a fiscal impact to the state. Some recommendations may result in a positive or negative fiscal impact, as discussed below, though the exact impact cannot be estimated at this time. The recommendation to extend the Sunset date for the Texas Low-Level Radioactive Waste Disposal Compact Commission would not have a fiscal impact to the state.

- The recommendation to post permit application documents online and improve the agency's website could require additional resources, depending on the nature of the changes the agency makes to its website and IT infrastructure. However, expanding TCEQ's authority to use electronic publication notice for pending environmental permit applications could result in greater efficiencies.
- The recommendations to regularly update compliance history ratings and to develop an online system for regulated entities to report continued operations would require additional resources to develop new or improved software, but exact costs will depend on how TCEQ decides to utilize existing or new systems and cannot be estimated at this time.
- The recommendation to remove the abolishment clause for the E-Flows Advisory Group and E-Flows Science Advisory Committee and require the advisory group to adopt a biennial statewide work plan could require additional resources depending on the number of river basins scheduled for environmental flow standards updates.

- The recommendation to increase the statutory limits on administrative penalties from \$25,000 to \$40,000 could have a positive fiscal impact to the state, depending on the number of violations resulting in increased penalties, but cannot be estimated at this time.
- The recommendation to create the Compliance Training and Safety Program could have a negative fiscal impact to the state resulting from the loss of administrative penalty revenue as some permit holders are diverted from the enforcement process. The exact fiscal impact, however, cannot be estimated at this time.

¹ Page 38 of the report contains an error regarding the number of nuisance investigations conducted by TCEQ. The report should read, “During fiscal years 2011 through 2021, TCEQ investigators performed 9,331 odor-based nuisance investigations, spending an average of 12.3 hours per investigation, and a total of 114,524 investigation hours.” (altered text underlined) The staff report incorrectly states these statistics were all from fiscal year 2021.

SUMMARY OF SUNSET STAFF REPORT

As the state's environmental regulator, the Texas Commission on Environmental Quality (TCEQ) charts a path between often competing objectives to promote public health and safety, protect the state's natural resources and environment, and foster economic growth. TCEQ faces a unique challenge — to protect the public and the state from dangers associated with the very activities TCEQ is required to permit and regulate, namely the emission, discharge, or disposal of hazardous chemicals and pollution into the air, water, and soil. Overall, the Sunset review found TCEQ performs admirably administering its complex programs and should be continued. However, the Sunset review also observed confusion and misperceptions about how and why TCEQ makes certain decisions, which contributes to a concerning level of distrust of the agency — by regulated entities, environmental advocates, public officials, and the general public.

Often this confusion stems from misunderstandings of what decisions TCEQ actually has authority to make. In many instances, federal regulations and state statute, not TCEQ, prescribe what steps industries must take to earn a permit to operate, what inspections or monitoring the agency must conduct, or which members of the public are allowed to contest a permit. The agency often faces a frustrated public demanding action, but not always understanding TCEQ does not regulate every industrial practice and may not be able to prove a regulatory problem has occurred. On the other side, TCEQ faces industries that suggest most objections to their operations stem not from a provable environmental or public health issue, but from a “not in my back yard” perspective that merely wants to prevent industrial activity in their own communities.

Confronted with conflicting viewpoints and demands, TCEQ's commissioners have in some ways become reluctant regulators. The commission often acts more as a final arbiter, delegating much of the initial decision making to staff and, to a certain extent, encouraging industry members to self-govern and self-police. TCEQ, though, is the entity designated by the Legislature, with its commissioners appointed by the governor, to make the hard policy choices directly impacting the environment. The commissioners' lack of visibility in and ownership of TCEQ decision making has only inspired further frustration and distrust among both the regulated community and environmental advocates. To better address these frustrations, help improve transparency, and restore trust, the commission should adopt key policy decisions, such as what risks to public health are acceptable when granting permits, in a public setting. The agency also needs to reform its processes to provide a more meaningful opportunity for public input in its permitting and rulemaking decisions, and enhance its public information practices to improve transparency of its operations.

TCEQ's commissioners have in some ways become reluctant regulators.

Notwithstanding the limitations in TCEQ's authority, as the state has experienced growth in development that has stretched outward from urban centers to more

Examples of What TCEQ Does and Does Not Regulate

TCEQ Regulates	TCEQ Does Not Regulate
Emissions and discharges of specific pollutants by industrial facilities	Emissions of pollution by cars, airplanes, and other mobile sources
Equipment and procedures required at a facility to prevent and track emissions	Equipment and procedures required at a facility for occupational safety or to prevent industrial accidents or emergencies
Emissions or discharges of pollution that cause a nuisance condition	Nuisances caused by noise, light, traffic, or other non-pollution sources
The amount of pollution that poses an unacceptable risk to human health through prolonged exposure	Zoning ordinances or other restrictions on the appropriate location of a facility
Permits for oil and gas operations related to air emissions and water discharges	Oil and gas exploration generally, as well as other types of surface mining

rural areas, local governments and members of the public place increasing demands upon TCEQ as the most visible state entity protecting the environment. Agency staff are spread thin responding to anything from overturned tanker trucks and smoking gas flares to dust and bad smells in the air — whether or not a potential source of contamination exists or is under TCEQ's jurisdiction, as reflected in the textbox. To that end, the review focused on reducing the time TCEQ investigators spend on nuisance complaints with no threat to public safety and improving enforcement policies to better focus on the riskiest actors. In addition, given how Texas' unprecedented growth and susceptibility to drought have intensified pressure on water availability, the review also studied shortcomings in TCEQ's regulation of the state's water. Accordingly, the review recommends statutory changes to improve the process for setting environmental flow standards, and directs TCEQ to take more transparent and decisive action to address chronic nonuse of surface water.

Sunset staff also reviewed the Texas Low-Level Radioactive Waste Disposal Compact Commission, which is subject to review but not abolishment under the Sunset Act. Under the terms of a compact

between Vermont and Texas, the compact commission approves and monitors the importation and exportation of low-level radioactive waste in these two states and the disposal of the waste at a facility in Andrews County licensed by TCEQ and operated by a private company. Considering the importance of monitoring such a hazardous material and the interest of the state in overseeing the compact's implementation, Sunset staff recommends extending the compact commission's Sunset date for 12 years.

The following material highlights Sunset staff's key recommendations for the Texas Commission on Environmental Quality and the Texas Low-Level Radioactive Waste Disposal Compact Commission.

Sunset Staff Issues and Recommendations

ISSUE 1

TCEQ's Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.

As the primary environmental regulator in Texas, people rely on TCEQ to protect their health and the environment, but shortcomings in transparency and meaningful public participation contribute to public distrust of the agency. By delegating the setting of environmental standards and other key policy

decisions to staff, TCEQ's commission makes it harder for the public to understand and engage in the agency's regulatory functions. During permitting of industrial facilities and other activities that may impact neighboring communities, the timing of public meetings further inhibits the public's opportunity for meaningful input. Also, unclear rules as to who is eligible to contest a permit confuse and frustrate those trying to participate. Finally, improvements to TCEQ's public engagement practices, including its rulemaking process, website, and use of advisory committees would increase the effectiveness of public engagement in its regulatory processes and help bolster the relationship between TCEQ and the general public.

Key Recommendations

- Clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit.
- Direct the commission to vote in a public meeting on key foundational policy decisions that establish how staff approach permitting and other regulatory actions.
- Direct TCEQ to develop a guidance document to explain how it uses the factors in rule to make affected person determinations.

ISSUE 2

TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable.

In Texas, the public and regulated industries rely on TCEQ to encourage compliance and take needed enforcement action to discourage environmental violations and protect public health and natural resources. However, TCEQ's compliance monitoring and enforcement processes could better deter environmental violations, monitor the riskiest actors, and provide more equitable treatment of regulated entities. TCEQ's evaluation of a facility's compliance history treats certain industry participants unfairly, excludes important information, and does not sufficiently inform future permitting and enforcement decisions. Likewise, TCEQ's definition of repeat violators misses habitual noncompliance, and its policies may incentivize industry to conceal vital monitoring and recordkeeping violations. Finally, inefficient administrative processes and the increasing strain of nuisance-based complaint investigations further diminish TCEQ's ability to effectively monitor compliance and initiate necessary enforcement processes.

Key Recommendations

- Require TCEQ's compliance history rating formula to consider all evidence of noncompliance while decreasing the current emphasis on site complexity, and direct the agency to regularly update compliance history ratings.
- Require TCEQ to consider all violations when classifying an entity as a repeat violator.
- Require TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operational status.
- Direct TCEQ to reclassify recordkeeping violations based on the potential risk and severity of the violation.

ISSUE 3

TCEQ's Oversight of Water Could Better Protect the State's Scarce Resources.

Intensifying demand for water in Texas over the coming decades underscores the need to address gaps in TCEQ's regulatory oversight of this natural resource. First, an unclear statutory framework has stalled the state's process for developing environmental flow standards — the minimum water flows required to sustain aquatic life — leaving participants unsure how to proceed with adopting and updating flow standards for the state's river basins and bays. Next, TCEQ's reticence to enforce a statutory prohibition on chronic nonuse of water right permits undermines the state's efforts to ensure surface water availability. Finally, TCEQ's process for initiating priority groundwater management area studies would benefit from taking place in a public setting to help identify critical groundwater shortages.

Key Recommendations

- Remove the abolishment clause for the E-Flows Advisory Group and E-Flows Science Advisory Committee, and require the advisory group to adopt a biennial statewide work plan for adaptive management updates of environmental flow standards.
- Direct TCEQ to conduct a comprehensive study of its water usage data and initiate cancellation proceedings for water right permits with nonuse over 10 years.
- Require TCEQ to hold its annual meeting regarding priority groundwater management area studies in a public setting.

ISSUE 4

TCEQ and OPIC Lack Certain Transparent and Efficient Processes for OPIC to More Effectively Represent the Public's Interest.

Statute creates the Office of Public Interest Counsel (OPIC) within TCEQ to promote the general public interest in proceedings before the commission. While OPIC has the authority to hire outside expert consultants to assist on complex, highly technical contested cases before the commission, an inefficient procurement process prevents OPIC from using this resource. Additionally, the commission does not take formal action on OPIC's annually-reported rule change recommendations, missing an opportunity to ensure additional transparency and promote public trust. Improving these two processes would increase OPIC's effectiveness overall.

Key Recommendations

- Direct OPIC to consider developing and using umbrella contracts to procure expert assistance.
- Direct TCEQ commissioners to take formal action on OPIC's rulemaking recommendations.

ISSUE 5

The State Has a Continuing Need for the Texas Commission on Environmental Quality.

Texas has a longstanding interest in regulating activities that could impact public health or cause serious damage to the state's natural resources. With its statewide presence and experience implementing permitting and enforcement programs, TCEQ is the most appropriate agency to carry out this mission and should be continued. Additionally, the agency's statute should be updated to include certain across-the-board provisions applied during Sunset reviews.

Key Recommendations

- Continue the Texas Commission on Environmental Quality for 12 years and remove the Sunset date of the agency's enabling statute.
- Update the standard across-the-board requirement related to board member training.
- Update the standard across-the-board requirement regarding the separation of duties of commissioners from those of staff.

ISSUE 6

The State Benefits From Continued Legislative Oversight of the Texas Low-Level Radioactive Waste Disposal Compact Commission.

An interstate compact authorizes Texas and Vermont, through the Texas Low-Level Radioactive Waste Disposal Compact Commission, to manage and control the movement and disposal of low-level radioactive waste in the two states. TCEQ licenses a private company, Waste Control Specialists, to operate the compact waste disposal facility, located in Andrews County, Texas. Though complex, multiple state and federal entities conduct robust regulatory oversight of radioactive waste. While the compact commission's role is narrow and federally-defined, the state benefits from continued legislative oversight of it through the Sunset review process.

Key Recommendation

- Amend the compact commission's Sunset review date to 2035.

Fiscal Implication Summary

Some recommendations in Issues 1, 2, and 3 would require additional costs to the state to implement, though the exact costs cannot be estimated at this time. Other recommendations in the report could be implemented by TCEQ using existing resources and would not have a fiscal impact to the state. The recommendation to extend the Sunset date for the Texas Low-Level Radioactive Waste Disposal Compact Commission would not have a fiscal impact to the state.

Issue 1 - The recommendation to improve the agency's website could require additional resources, depending on the nature of the changes the agency makes, and the recommendation to add an additional public meeting would require additional staff time and resources, depending on the number of meetings held.

Issue 2 - The recommendations to regularly update compliance history ratings and develop an online system for regulated entities to report continued operations would require additional resources to develop new software for the program, but those costs cannot be estimated at this time.

Issue 3 - The recommendations in Issue 3 could require additional resources depending on the number of river basins scheduled for environmental flow standards updates and the number of water right permit cancellation proceedings conducted by TCEQ.

AGENCY AT A GLANCE

The Texas Commission on Environmental Quality (TCEQ) serves as the state's environmental quality regulatory agency, whose mission is to protect public health and natural resources consistent with sustainable economic development.¹ TCEQ's regulatory jurisdiction and oversight encompasses Texas' air and water quality, as well as safe management of numerous types of waste. To fulfill its mission, TCEQ:

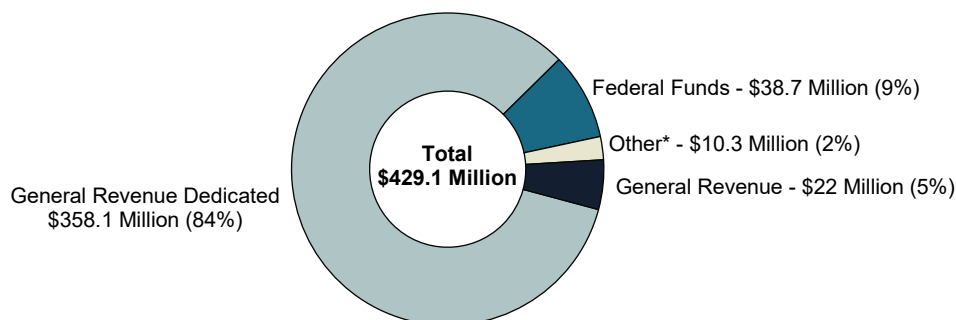
- Issues permits, registrations, and licenses to entities or individuals whose actions potentially affect public health or the environment, including facilities that release contaminants into the air, water, or land.
- Monitors air quality and develops plans to maintain and improve air quality to meet federal and state pollution level targets.
- Monitors water quality and oversees programs to prevent and address water contamination, manages water quantity by issuing surface water permits, ensures the safety of public drinking water systems, and provides general oversight of various types of water districts.
- Oversees the safe management and disposal of waste, including municipal, industrial, hazardous, and low-level radioactive waste, and oversees remediation of sites contaminated by toxic releases.
- Ensures compliance with federal and state environmental laws and several state nuisance laws by inspecting regulated entities, investigating complaints, and taking enforcement action when necessary.
- Promotes and fosters voluntary pollution-reducing and water conservation practices through technical assistance and grant programs, such as the Texas Emissions Reduction Plan (TERP).

Key Facts

- **Governance.** The governor appoints TCEQ's three full-time commissioners from different areas of the state and designates the chair.² Commissioners serve staggered, six-year terms and statute prohibits them from serving more than two terms.³ The commission sets agency direction and policy, adopts rules, and makes final determinations on contested permitting and administrative enforcement matters.
- **Funding.** In fiscal year 2021, TCEQ's activities generated over \$653 million in revenue to the state, including over \$43 million in federal funds, primarily to support TCEQ's air and water quality protection efforts, and \$590 million from 115 regulatory fees, which was deposited into 15 general revenue dedicated accounts, listed in Appendix A.

TCEQ's operating revenue for fiscal year 2021 totaled nearly \$430 million, as shown in the chart on the following page. Separate from its annual budget, TCEQ receives funding to replace mobile sources of air pollution, like old model diesel engines, by awarding grants through the TERP program. In 2019, the Legislature moved funding for TERP into a dedicated trust outside the treasury and increased the program's budget from about \$77 million per year to nearly \$170 million per year, beginning in fiscal year 2022.

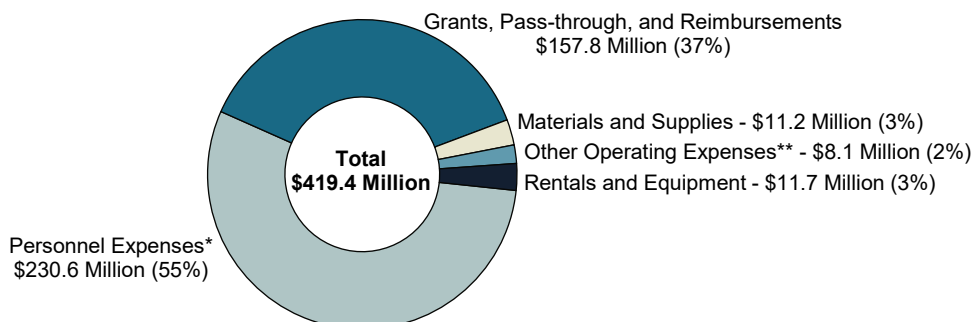
TCEQ Operating Revenue - FY 2021



* Includes interagency contracts and appropriated receipts.

TCEQ's expenditures in fiscal year 2021 totaled nearly \$420 million. The charts below detail those expenditures by category and by the agency's programs and administration. TCEQ's largest expenditures include personnel expenses and grants and pass-through funding. TCEQ spent about \$87 million in contract expenditures during fiscal year 2021 for a range of services, including contracts with local governments and universities to perform air monitoring, water quality monitoring, and complaint investigations. Appendix B describes the agency's use of historically underutilized businesses in purchasing goods and services for fiscal years 2019-21.

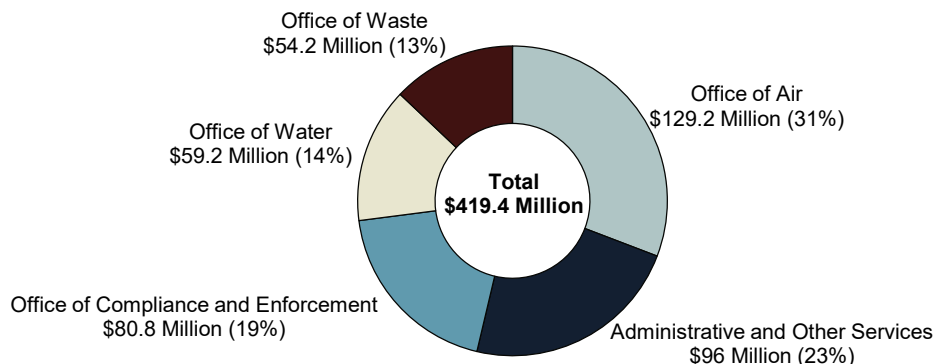
TCEQ Expenditures by Category - FY 2021



* Includes professional and contract services, travel, training, and fringe benefits.

** Includes temporary and other contracted services.

TCEQ Expenditures by Program - FY 2021



- **Staffing.** TCEQ employed over 2,600 staff in fiscal year 2021, about 1,800 of whom were located in TCEQ's headquarters in Austin and about 800 located in TCEQ's 22 regional and satellite offices around the state. As shown in the map on Page 12, TCEQ locates its offices across four major areas of the state, which the agency divides further into 16 different regions. The agency generally organizes its divisions functionally within air, water, and waste permitting operations, compliance and enforcement activities, legal services, and administrative services such as purchasing and human resources. Appendix C compares TCEQ's workforce composition to the percentage of minorities and women in the statewide civilian labor force for the past three fiscal years.
- **Federal delegation.** Both federal and state environmental regulations identify chemicals as hazardous pollutants and establish thresholds and criteria for their presence in the air or water above which may be harmful to human or ecological health. The U.S. Environmental Protection Agency (EPA) largely delegates both the enforcement of federal environmental regulations and the administration of federal environmental programs to TCEQ including: the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act.
- **Permits, registrations, and licenses.** Federal and state law require entities that would potentially emit, discharge, process, store, or dispose of pollutants into Texas' air, water, or soil to receive a permit, registration, or other type of authorization from TCEQ specifying the type of pollutant and amount allowed at each location and from each source. In addition, TCEQ issues occupational licenses for individuals providing services that pose a risk to the environment, such as operators of wastewater treatment facilities or municipal waste landfills. Overall, TCEQ oversees more than 250,000 active authorizations for both companies and individuals, detailed in the textbox, ranging from major petrochemical plants to landscape irrigators.

Generally, permits, registrations, and other authorizations for facilities and pollution sources fall into four main categories.

No impact or "de minimis." Sources whose emissions or discharges are so small they do not require a permit, registration, or authorization — such as laundromats, car washes, and supermarkets.

Permits by rule. Sources that use standardized processes or equipment that TCEQ has determined will emit or discharge an amount of pollutants below levels of concern to human health such that the agency can adopt general regulatory requirements in rule that automatically apply to these facilities — such as animal feeding operations, semiconductor plants, and ceramic factories.

General or standard permits. Sources conducting activities that produce predictable, calculable emission or discharge amounts. TCEQ predetermines permit application requirements and does not make individual assessments of the proposed facility — such as autosshops, stormwater permits, most types of concrete batch plants, and conventional water treatment plants.

Individual permits and registrations. For facilities that have site-specific requirements, produce specific pollutants, or conduct activities that require case-by-case review and approval — such as petrochemical refineries, wastewater treatment operations, solid waste transfer stations, and municipal landfills.

Active TCEQ Authorizations FY 2021

Air quality permits – 92,322
Water-related permits – 44,072
Waste-related permits – 4,424
Registrations – 60,314
Occupational licenses – 55,654

Though each type of permit or registration has specific qualification, renewal, amendment, and public participation requirements, TCEQ generally follows a similar process for reviewing and issuing permits. Most applications must go through an administrative completeness review and a substantive technical review, as well as a period of public notice and opportunity for comment. Some permit applications allow the public to request a public meeting on the application or, for a directly affected party such as nearby landowners, to request a contested case hearing conducted by the State Office of Administrative Hearings (SOAH).

- **Air.** TCEQ uses a combination of planning, monitoring, and permitting programs to assess and protect Texas' air quality. In addition to issuing permits for the construction and operation of facilities that emit contaminants into the air, TCEQ also administers grants, cap and trade, and tax relief programs to encourage pollution control measures. Many of these programs make up a federally required State Implementation Plan, discussed in the textbox. To assess Texas' air quality and compliance with National Ambient Air Quality Standards (NAAQS) for six principal pollutants, known as "criteria air pollutants," TCEQ maintains 403 stationary air monitors at 170 sites across the state and deploys mobile air monitoring units in response to industrial accidents, natural disasters, or complaints of unauthorized emissions.⁴ TCEQ uses air monitoring data to determine whether areas in Texas are in compliance with the NAAQS and as inputs into the agency's modeling work when developing regulations for the State Implementation Plan. The air monitoring data may also be used during the permitting process to demonstrate a proposed permit would not cause or contribute to an exceedance of the NAAQS.

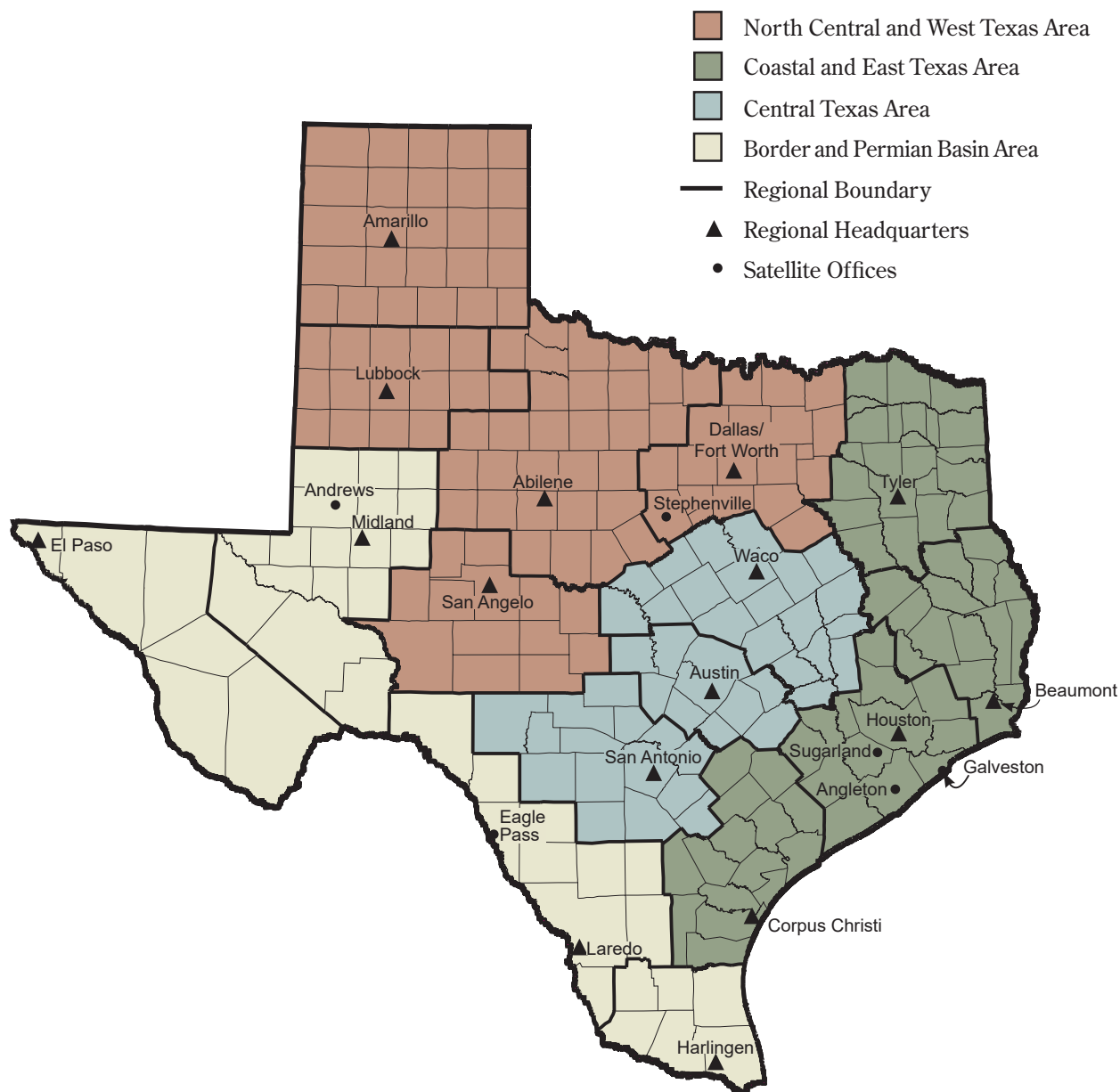
State Implementation Plan

TCEQ's air programs largely support Texas' State Implementation Plan, a set of emission-reducing strategies approved by the EPA and designed to bring Texas into attainment for federal standards for the six criteria air pollutants — carbon monoxide, nitrogen dioxide, ozone, sulfur dioxide, lead, and particulate matter. If the EPA designates a region of the state as not attaining air quality standards, the state must implement federally-required additional emissions control strategies, such as a vehicle inspection and maintenance program, and the state is required to submit emissions inventories and other regular reports to the EPA. Currently, 28 Texas counties have a nonattainment designation, primarily in the Houston, Dallas, San Antonio, and El Paso regions for high ozone levels.

- **Water.** TCEQ monitors and issues permits for activities that affect surface water quantity and quality in Texas, and performs some limited oversight of groundwater quantity and quality.
 - To manage water availability, TCEQ issues water rights permits and administers Watermaster programs in designated river basins, which monitor permitted water usage and enforce the state's prioritization of senior water rights holders' ability to withdraw surface water before junior rights holders in times of scarcity. In fiscal year 2021, TCEQ oversaw over 6,200 water rights permits, issuing nearly 100 new water rights permits and amendments and 300 temporary water rights permits, which allow the withdrawal of small amounts of water and expire after one year.
 - In accordance with the federal Clean Water Act, TCEQ sets and implements surface water quality standards and regulates discharges of pollutants into Texas waterways. For example, these regulations ensure wastewater is treated properly before discharge into surface water. TCEQ also regulates the disposal of treated wastewater from land application through evaporation or irrigation. In cooperation with river authorities and other local partners, TCEQ regularly monitors surface water quality at more than 1,800 sites across the state.

- Finally, TCEQ monitors the safety of public drinking water, overseeing public water systems under the Safe Drinking Water Act, and has general oversight of river authorities, groundwater conservation districts, and other types of water districts.
- **Waste.** TCEQ regulates entities involved in the storage, processing, or disposal of municipal, industrial, hazardous, and low-level radioactive waste, and oversees the cleanup of harmful releases of waste in air, land, and water. For example, TCEQ licenses the Andrews County facility where low-level radioactive waste is disposed and permits the roughly 200 municipal solid waste landfills across the state that receive nonhazardous waste. To protect underground sources of drinking water, TCEQ regulates the use of underground injection wells, such as for disposing of contaminated water from industrial operations or the injection of fresh water for aquifer recharge projects. Finally, TCEQ administers several remediation programs to address contamination, such as the Superfund, Petroleum Storage Tank Remediation, and Dry Cleaner Remediation programs. In fiscal year 2021, TCEQ identified 450 new remediation sites and completed cleanup efforts at another approximately 450 sites.
- **Compliance and enforcement.** TCEQ monitors compliance with federal and state environmental laws, agency rules and regulations, and permit requirements, and takes enforcement action to correct violations or deter future noncompliance. Field investigators conduct routine and complaint-based inspections to evaluate compliance. If TCEQ documents violations, the agency may issue a notice of violation or notice of enforcement. If the violating party does not correct the identified violation, or if the violation risks harm to human health or the environment, TCEQ initiates enforcement proceedings. Matters referred to enforcement may be resolved through an administrative order, field citation, contested case hearing, or civil litigation. Parties may agree to an administrative order and penalty or may contest the order through an appeals process. In fiscal year 2021, TCEQ conducted over 117,000 inspections — approximately half of which were on-site visits and half were records reviews — with about 4,750 based on received complaints. These efforts resulted in TCEQ issuing over 15,700 notices of violations and processing about 2,900 enforcement actions, including over 1,000 administrative orders against regulated entities and more than \$28 million in assessed administrative and civil penalties.
- **Grants and voluntary programs.** TCEQ administers a variety of voluntary programs designed to incentivize pollution-reducing and water conservation practices, provide compliance assistance, and encourage remediation efforts. As previously mentioned, TERP is TCEQ's largest voluntary grant program, awarding grants to reduce air pollution through the replacement of high emissions vehicles, equipment, and engines. TCEQ also provides grants to develop watershed protection plans and best management practices to decrease nonpoint source pollution, where stormwater runoff carries pollutants into surface waters. TCEQ also oversees voluntary cleanup programs to encourage property owners and developers to remediate sites where chemical spills or releases have occurred.
- **Office of Public Interest Counsel.** The Office of Public Interest Counsel (OPIC) within TCEQ represents the general public interest as an independent party to all environmental proceedings before the commission and in contested case hearings before SOAH. The commission appoints the public interest counsel who heads the office and reports directly to the commission. OPIC also reviews TCEQ rulemaking proposals and may recommend needed legislative and regulatory changes to the commission. In fiscal year 2021, OPIC participated in about 100 environmental proceedings and 471 enforcement proceedings before the commission and at SOAH, and nearly 40 rulemaking proceedings.

Texas Commission on Environmental Quality Area Map



¹ Texas Commission on Environmental Quality, "Mission Statement and Agency Philosophy," webpage last modified July 23, 2021, accessed online April 4, 2022, <https://www.tceq.texas.gov/agency/mission.html>.

² All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Sections 5.052 and 5.058, Texas Water Code.

³ Section 5.056, Texas Water Code.

⁴ Clean Air Act, Section 109, 42 U.S. Code Section 7409; 40 Code of Federal Regulations, Part 50 (2022).

ISSUE 1

TCEQ's Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.

Background

As the state's primary environmental regulator, people rely on the Texas Commission on Environmental Quality (TCEQ) to ensure the air they breathe, the water they drink, and the environment they live in is clean and safe. Increasing population and economic development — both the extraction and refinement of natural resources and the production of consumer goods and infrastructure — has resulted in residential and industrial neighborhoods existing closer together than ever before. As such, more people live near, are impacted by, and have more interest and involvement in the various activities and facilities TCEQ regulates — which can range from refineries, landfills, and wastewater plants to gas stations, dry cleaners, and septic tanks.¹

In keeping with its stated mission, TCEQ strives to protect human and environmental health consistent with sustainable economic development.² Subject to certain federal and state requirements, TCEQ sets standards for what amount of pollution can be safely emitted into the air or discharged into the water, and how waste is managed. The agency applies these standards through the permitting of air emissions, wastewater discharges, and waste management. Although the specifics vary by permit type, the standards TCEQ sets determine, among other things, the kind of technology or pollution control equipment required, hours of operation, and limits for each regulated pollutant emitted, discharged, or disposed of by the regulated entity. As more residents become personally affected by these industries, public scrutiny of TCEQ's policies and processes continues to increase, creating the need for more open public engagement and transparent public information.

Findings

Many Texans both distrust and misunderstand TCEQ and the entities it regulates.

Over the course of the review, Sunset staff noted a concerning degree of general public distrust and confusion focused on TCEQ and its ability to effectively regulate in the public interest. Some community stakeholders and environmental advocates see TCEQ as a mere extension of industry, rubber stamping new and expanded facilities, seeming to ignore potential health impacts or public concerns. In contrast, industry depends on the regulatory certainty that meeting certain standards will allow them to operate. Companies often spend a significant amount of time and money working with TCEQ to develop draft permits. As such, permit applicants become frustrated with delays in the permitting process, costs of having to comply with increased regulatory requirements, and negative publicity due to public resistance regarding where industrial activity locates, increased traffic, or other concerns outside TCEQ's purview.

Some perceive
TCEQ as
favoring
industrial
polluters over
public health
and safety.

The general public, buffeted between these viewpoints, understandably struggles with agency decisions and processes that are often conducted outside the public view. While TCEQ reviews research on pollutants and develops scientific standards to protect public health, the public rarely knows of, much less participates in, these processes. This lack of openness and public participation discourages those trying to provide input on how such research and standards impact their day-to-day lives. For example, members of the public often object to a proposed TCEQ permit, arguing the permitted activities do not adequately protect human health or the environment. These individuals are typically unaware the U.S. Environmental Protection Agency (EPA) or TCEQ have already determined the pollution standards are protective enough and TCEQ has set permit requirements according to those standards. TCEQ must issue the permit if an applicant meets the agency's permit requirements. Meanwhile, industry often dismisses public concerns as "NIMBY" — i.e., not in my back yard — regardless of whether the public expresses legitimate environmental concerns. Having little insight into how pollution standards are determined and set, many individuals perceive TCEQ as an agency favoring industrial polluters over public health and safety, environmental protection, or scientific principle.

TCEQ's commission delegates certain key decisions that directly impact public health and natural resources to staff, further degrading public trust and transparency.

The commission does not make certain key scientifically-based policy decisions in an open, public forum, causing confusion about why and how TCEQ approves certain standards or permits. Much of TCEQ's regulatory framework is grounded in scientific analysis that involves highly technical and objective information, such as toxicity factors — the risk posed by individual pollutants to public health at varying increments of exposure. However, this scientific information must ultimately be transformed into regulatory standards, moving from objective science into public policy.

TCEQ must
transform
scientific
information
into regulatory
standards.

For example, while the agency has guidelines for developing toxicity factors and how staff should use them when evaluating a permit, these guidelines have not been formally approved by the commission.³ Determining what effects result from a certain level of exposure to a given pollutant is a clearly defined scientific process best done by subject matter experts. Deciding the acceptable level of exposure and effects on the public, on the other hand, is a policy decision that governs what facilities may be built, what technology they must employ, and what level of safety monitoring must occur. For example, TCEQ is currently reviewing the protectiveness of its standards related to its standard permit for concrete batch plants. This review will rely in part on toxicity screening levels developed through objective science, but will also depend on judgment as to how much impact to surrounding neighborhoods is acceptable.

Recent debates over COVID-19 restrictions provide a good example of this intersection of science and policy. Science may indicate how certain actions will be more or less successful at negating the spread of a virus, but policymakers

must decide what level of precautions to take to protect public health while preserving economic integrity. In a few instances, like the Texas Risk Reduction program's carcinogenic risk level, the commission has specifically established acceptable risk by rule, limiting exposure to certain carcinogenic chemicals to no more than a 1 in 100,000 increase (1×10^{-5}) in the risk of cancer in the population.⁴ However, the commission has not established many other standards related to acceptable risk to guide program implementation across the agency, instead delegating that authority to staff as illustrated in the textbox.⁵

Many decisions, like acceptable levels of risk, are enshrined in TCEQ's staff-created guidance documents, which the commissioners do not publicly approve. However, statute requires the commissioners, as TCEQ's governor-appointed leadership, to establish the general policies of the agency by using the state's open, publicly-accessible rulemaking process.⁶ Delegating policy decisions to staff creates an absence of accountability and transparency, generating mistrust of agency actions. For example, in 2016, the EPA published stricter guidance for ethylene oxide after its analysis showed the chemical to be more harmful than it previously thought.⁷ TCEQ found errors in the EPA's analysis and declined to adopt the proposed guidelines, making Texas the only state to do so at the time. As TCEQ staff conducted its own review of ethylene oxide and developed protectiveness guidance, staff briefed the commission, but the commission did not take any formal, public action to approve the TCEQ-specific guidance.⁸ Many environmental advocates continue to raise questions about the agency's motivation for contradicting federal guidelines. Without a clear and transparent public process for setting the standards underlying the agency's permitting and other decisions, some members of the public will not trust or have confidence in TCEQ's actions and assertions.

Holding public meetings late in the permitting process does not allow for the public to meaningfully impact permit conditions.

Universally, TCEQ staff, community stakeholders, environmental advocates, and industry associations all expressed frustrations during the Sunset review that TCEQ's public meetings during the permit application process rarely result in meaningful public input. Sunset staff observed public meetings more akin to a quality assurance check on TCEQ permitting staff's analysis. TCEQ's permitting process varies from program to program, but it generally includes a review for administrative completeness followed by a technical review of a permit application. While statute requires public meetings for certain permits,

Staff-Created Guidelines for Determining Toxicity Factors

- TCEQ defines "significant excess risk level" for continuous lifetime exposure as an increase in risk of 1×10^{-5} for carcinogens.
- TCEQ interprets "air pollution" to mean the agency can only permit for "direct" effects of air pollution (i.e., direct inhalation or skin contact).
- TCEQ limits permitting to emissions of one chemical at one site, relying on the agency's air modeling and monitoring to account for other factors in air quality.
- TCEQ classifies health effects as non-adverse, less serious, transitional (i.e., between less serious and serious), or as serious effects.
- TCEQ allows an external scientific peer review of an individual toxicity factor if significant public interest exists and resources are available.
- TCEQ will review chemicals with limited toxicity data during the permitting process, setting a default or generic level if toxicity data is uncertain or unreliable.
- TCEQ will calculate conservative health-based toxicity factors to protect against adverse effects.

TCEQ's permitting meetings rarely result in meaningful public input.

Opportunities
for public
participation
should allow
more than
comments on
how the agency
has done its job.

for other permits TCEQ is only required to hold a public meeting if a substantial public interest exists or a state legislator requests it.⁹ In fiscal year 2021, TCEQ held 24 public meetings on permits, each held after the agency had already completed its administrative and technical review and issued the draft permit. By the time TCEQ holds a public meeting for a draft permit, agency staff have often spent several months, sometimes more than a year, conducting extensive engineering, scientific, and legal research and analysis while engaging with the applicant on these matters, all to ensure the draft permit is written to federal and state requirements. As a result, by the time TCEQ proposes a draft permit, staff have essentially determined the draft permit terms comply with regulatory requirements, and only public comments on the adequacy of TCEQ's technical or administrative review are likely to affect the permit.

Opportunities for public participation should allow citizens to provide meaningful information or comments on what an agency's actions should be, not merely a formal exercise for the public to comment on how the agency has done its job. While TCEQ provides an opportunity to provide written comments both before and after the agency has finalized the draft permit, it only provides an opportunity for a public meeting after the draft permit is finalized. Many members of the public who attend permit meetings intend to prevent the issuance of the permit entirely, but those who try to impact what goes into a permit or to contest the protectiveness of permit standards become frustrated when TCEQ states that such matters are outside the purview of the meeting.

This fundamental misunderstanding between the public's expectation and TCEQ's process creates a disjointed interaction where members of the public express their concerns and the agency appears to generally ignore them and grant the permit as written. The industry feels the backlash from the resulting public dissatisfaction, often finding that public meetings only exacerbate ill will towards industry. Finally, elected officials become frustrated when they are the ones requesting meetings to address the concerns of their constituents only to have their constituents' concerns go unanswered.

TCEQ's informal and unclear standards for defining factors of affected person status cause public confusion and frustration.

TCEQ does
not adequately
explain what
a person must
prove to contest
a permit.

TCEQ's current process for determining affected person status generates public confusion and frustration as the agency does not provide adequate information about what a person or entity needs to prove to be eligible to contest a permit. An affected person is someone directly and personally impacted by the operation of a permitted facility, not someone with a general concern about public health or environmental damage. For example, a person living downstream of a wastewater treatment plant discharging treated water into a river who is concerned about their continued use and enjoyment of the river could be an affected person. The affected person determination occurs when a person or entity requests a contested case hearing against a permit, of which the commission granted 22 in fiscal year 2021.¹⁰ By statute, an affected person

must have a “personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing” to contest a permit.¹¹ Statute directs the commission to adopt rules specifying factors they will consider in determining whether a person has this personal justiciable interest.¹² TCEQ rules provide multiple factors to consider, which are described in the accompanying textbox.¹³

However, TCEQ staff and permit applicants often seem to treat unwritten informal guidelines and approximations as hardline rules when recommending or arguing against a person’s standing to participate in the administrative process before the commission. Such important policies should be formalized in publicly available guidance documents or, when appropriate, in rule. However, not all of TCEQ’s existing rules provide clear guidance to the public on what they need to show or prove to the commission, as seen in the examples below.

- **Distance considerations.** While TCEQ rules require a request for a contested hearing to state a person’s location and relative distance to the proposed facility or permitted activity, TCEQ provides no clarification of how the agency will take into account or measure that distance.¹⁴ In public meetings, TCEQ commissioners discuss distance-related conditions, such as air dispersion models or tributaries between a proposed wastewater discharge point and a residence, and will deny a hearing request based on someone being “too far away,” but without clarifying how they reached that determination.¹⁵

Over time, TCEQ has developed a one-mile informal guideline, generally suggesting anyone within a mile of a permitted site is an affected person while anyone farther than a mile is not. However, staff and permit applicants appear to treat this unofficial criterion as if it were a formal rule, as seen in the *2022 Wastewater Treatment Plant Example* textbox, even though previous TCEQ cases have demonstrated someone further than a mile from a permitted site or activity could be an affected person.¹⁶

In addition to how distance will factor into a decision, TCEQ has not clarified from where that distance will be measured. For example, TCEQ lacks a clear standard for where to measure the distance requirements for affected persons for concrete batch permits. Statute defines an affected person for concrete batch plant permits as “a person residing in a permanent residence

Factors to Determine Affected Person Status

1. Whether the interest claimed is one protected by the law under which the application will be considered.
2. Distance restrictions or other limitations imposed by law on the affected interest.
3. Whether a reasonable relationship exists between the interest claimed and the activity regulated.
4. Likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person.
5. Likely impact of the regulated activity on the use of the impacted natural resource by the person.
6. Whether the requestor timely submitted comments on the application that were not withdrawn.
7. For governmental entities, their statutory authority over or interest in the issues relevant to the application.

2022 Wastewater Treatment Plant Example

In a recent contested case for a permit for a wastewater treatment plant, the executive director recommended several parties be granted affected person status, referencing their distance from the site of the plant and the discharge of treated water into a river. Each of those individuals were within one mile of the discharge point for the permit. The executive director recommended TCEQ not grant affected person status to several other individuals “due to the distance of [their] property from the facility,” despite these individuals having the same concerns. The permit applicant also focused on the distance from the discharge point as an argument for people not to be admitted into the contested case.

2021 Concrete Batch Plant Example

The executive director and Office of Public Interest Counsel (OPIC) disagreed on how to measure the 440-yard distance for two parties requesting affected person status. The executive director measured from the center of the permitted site to the person's residence while OPIC measured from the closest point equipment could ever be placed on the site to the residence. The executive director's measurement put the parties 135 to 230 yards outside the statutory boundary, but OPIC's measurement put them within the 440 yards.

within 440 yards of a concrete batch plant.”¹⁷ TCEQ's rules do not specify where to measure that distance from, such as from a property line or from the permitted equipment or building.¹⁸ While TCEQ asserts the agency has consistently interpreted the rule to mean measured from the plant equipment, the absence of written guidance requires a party contesting such a permit to be privy to the agency's previous determinations. Otherwise, the party would have no way of knowing how TCEQ interprets the measurement requirement. This vagueness results in confusion about who can be an affected person, as illustrated in the *2021 Concrete Batch Plant Example* textbox.¹⁹ Contrast this to concrete crushers, which by rule may not be operated within 440 yards of any building operated as a family residence, school, or place of worship.²⁰ For concrete crushers, the agency specifies in rule that it will measure distance from the points closest to each other on the concrete crushing facility and the neighboring building, demonstrating the agency could provide similar clarity and transparency for concrete batch plants and other permit limitations based on distance.²¹

Both the public and industry rely on a level of regulatory certainty from TCEQ.

- **Flooding of personal property.** In the context of wastewater discharge permits, requestors for a contested case sometimes allege that the permit, if issued, would flood or otherwise impact their land along the discharge route. However, TCEQ often dismisses their concerns and requests to contest the permit because “general flooding concerns” alone are outside TCEQ's jurisdiction and cannot be a basis for a personal justiciable interest.²² However, both statute and rule identify the “likely impact of regulated activity on the...use of the property” of the person requesting the hearing as a consideration for affected person status.²³ The Office of Public Interest Counsel (OPIC), an office within TCEQ that promotes the public interest, has identified this as an area where TCEQ should clarify its rules. Specifically, OPIC has recommended that concerns about site suitability and functionality of a discharge route — which may lead to the flooding of an individual's property — not be considered a general concern about flooding, but rather a prevention of nuisance conditions, which are within TCEQ's jurisdiction.²⁴ The public would benefit from more clear guidance on what types of conditions caused by a permitted activity TCEQ considers as impacting the use of property versus conditions that do not fall under its jurisdiction.

Understanding and contesting a permit is a costly and time-consuming effort, especially for individuals, communities, and small citizen groups. TCEQ's denial of hearing requests because these groups are “too far” from an undefined point or their specific, personal concerns are classified as too general and outside TCEQ's purview, can create the public impression of a system too vague to navigate or understand. Just as industry relies on a level of regulatory certainty from TCEQ before investing in expensive and heavily regulated activities, the

public benefits from a level of certainty in the administrative process to know how to appropriately present their case.

TCEQ does not meaningfully review and revise its administrative rules every four years, resulting in outdated rules and a superficial public input process.

Statute requires state agencies to review their rules every four years to determine whether the reasons for initially adopting each rule continue to exist.²⁵ The four-year rule review process is intended to be more than simply posting rules in the *Texas Register* for public comment before readoption. A meaningful rule review should consider whether the initial factual, legal, and policy reasons for adopting each rule are still relevant.²⁶ As part of its analysis, an agency should consider the practical experience the agency, stakeholders, and the public have had with each rule over the past four years.²⁷ The rules an agency adopts to implement its statutory requirements have the force of law until and unless the Legislature or a court overrides the rules or rescinds the agency's authority. As such, outdated rules that do not reflect the agency's current processes leave an agency open to legal liability and reduce transparency to stakeholders.

TCEQ has developed a bifurcated rule review and amendment process that impairs the ability of the public to meaningfully contribute to updating the agency's regulations. While TCEQ has conducted two complete rule reviews over the last 20 years and developed a periodic rule review schedule, the agency does not always initiate rulemaking proposals following these reviews, even when the agency identifies necessary changes. While TCEQ takes public comment during rule review, the agency simply notes comments on proposed changes for the next time TCEQ may open that rule. This practice could further undermine trust that TCEQ seriously considers the public's input and concerns.

TCEQ's bifurcated rule review process also results in regulated entities and members of the public having to interpret and comply with rules that do not accurately reflect current law or agency practice. Sunset staff identified numerous outdated rules, including over 50 references to predecessor agencies to TCEQ that ceased to exist two to three decades ago. Outdated rule language can also generate confusion when regulated entities need to determine if and how they must comply with regulations. For example, recent Sunset reviews of river authorities identified a TCEQ rule, last updated in 1996, that requires river authorities to comply with Historically Underutilized Business (HUB) contracting policies referenced in the General Appropriations Act of 1991.²⁸ With the reference to a 1991 law, some river authorities believe they are exempt from common HUB requirements for state contracting, while other river authorities continue to comply.

Outdated rules reduce transparency and increase agency liability.

TCEQ has numerous outdated rules that can create confusion about how to comply with regulations.

Missing and hard-to-find information on TCEQ's website creates barriers to accessing public information, creating potential for frustration and distrust among the public.

The public expects to find publicly available data on regulated activities and entities on TCEQ's website, but instead often experiences inaccessible, missing, and unusable information, further generating frustration with and distrust of TCEQ. TCEQ's External Relations Division manages the home page and primary navigation of the agency's website. However, individual programs manage and update their own webpages and databases, deciding how to present data related to their program areas, including permit information. This results in much of TCEQ's information dispersed across the website, impeding the public's ability to get a complete understanding of a rule, permit, or regulated entity. In fact, TCEQ staff had to guide Sunset staff on how to use and understand some of TCEQ's publicly available databases.

- **Information is spread across TCEQ's website and not readily accessible.** TCEQ often divides its information among multiple, unlinked webpages, making information difficult to access, as seen in the textbox below.²⁹ For example, TCEQ only posts some permit drafts and final permits online with no centralized and intuitive mechanism for the public to search for permit applications and final permits across air, water, and waste programs. The current method of maintaining the website also leads to missing information. For example, TCEQ's website contains a calendar that purports to hold the upcoming dates for public meetings for everything from permits to rulemaking projects. However, if a program does not correctly create an event webpage for a public meeting that meeting will not appear on the calendar page.

**Examples of Fragmented Webpages and Databases
Obstructing Information Access**

- Compliance history for facilities and for companies operating those facilities is split between two databases whose webpages do not link with each other, and neither indicate the repeat violator status of a permittee.
- Permits and registrations are in three separate databases on TCEQ's website, divided by air, water, and waste. Some permits are located on external websites, which are links on TCEQ's website.
- Information on rulemaking projects is split between three different webpages, which do not all link with each other.
- Occupational licensee information and licensee complaints, violations, and enforcement actions are in two different databases.
- Public meeting information is on program webpages and not always available on the main calendar page.

- **Information not provided in digestible formats.** In some cases, TCEQ provides information online, but in a format that is difficult to access. This can be particularly confusing for a public trying to determine what permit standards are and why a certain entity is getting a permit. For example, both toxicity factors and compliance history databases, which could inform how TCEQ staff are evaluating a permit, are downloadable

online.³⁰ However, the website provides text files with the raw metadata for each database, which cannot be searched or easily manipulated to find information. In contrast, TCEQ sends out daily emails with a color-coded air quality forecast for cities across Texas, allowing someone to quickly and easily see if the quality of the air, including particular contaminants like ozone, will be a concern.

As the public struggles to find what should — and may in fact — be publicly available, some resort to filing public information requests, spending their money and costing TCEQ staff time and effort to acquire information that should already be available online. In fact, TCEQ spends thousands of staff hours a year answering information requests. Sunset conducted a survey of TCEQ staff and found the public information request process frustrates both tenured and newer staff as even they have trouble finding documents. Sunset staff found no evidence that TCEQ intentionally hides information or makes it difficult to obtain, but inaccessible and confusing information frustrates the public and could erode trust in the agency.

TCEQ could make better use of and correctly manage its advisory committees, ensuring ongoing transparency and opportunities for public input in TCEQ decisions.

Given the atmosphere of distrust surrounding TCEQ, the agency could increase opportunities for public input, especially earlier in rulemaking and other decision-making processes, through use of advisory committees. TCEQ has the authority to create advisory committees to gather input and expertise and has done so in the past to support various agency programs.³¹ However, TCEQ has not created an advisory committee for rulemaking. Instead, the agency typically relies on meeting with individual stakeholders early in the rulemaking process. An advisory committee would serve as a formal, open mechanism to field public input early during the rulemaking process, increasing opportunities for public comments and suggestions on agency rules.

Additionally, TCEQ does not fully comply with the statutory procedure for creating or renewing advisory committees. TCEQ rule allows for the creation of advisory committees by commission resolution.³² However, statute abolishes advisory committees after four years unless the agency extends the committee by rule.³³ Currently, the commission improperly extends the dates of advisory committees through commission resolutions and not through rule, as seen in Appendix D. Correctly extending advisory committees and not inadvertently letting them be abolished by function of law would ensure TCEQ and the public are able to avail themselves of the advisory committees' potential to serve as another avenue for meaningful public input.

Inaccessible and confusing information on TCEQ's website frustrates the public.

TCEQ could increase opportunities for public input earlier in the rulemaking process.

Sunset Staff Recommendations

Change in Statute

1.1 Clarify statute to require public meetings on permits to be held both before and after the issuance of the final draft permit.

This recommendation would clarify statutes relating to notices of intent, hearings, and public meetings by requiring TCEQ to hold a public meeting on a permit during the technical review of the permit application and another meeting after the issuance of the draft permit if the current statutory requirements to hold a meeting are met — significant public interest or a legislator's request.

As an accompanying management action, this recommendation would also direct TCEQ to clearly state, in the notices and at the meetings themselves, the purposes of the meetings and current status of the permit, such as if the permit is still undergoing review or is the final draft permit. The first meeting would provide a more informal opportunity for the public to make suggestions about what should go into the permit during TCEQ staff's review of the application and before finalizing the draft permit. The second meeting would allow the public a formal opportunity to submit comments to the agency on the final version of the permit, focused on whether the draft permit meets the legal and technical requirements to be issued. Holding two distinct meetings would help ensure the public has a meaningful opportunity to comment directly to TCEQ and the permit applicant before the agency finalizes the permit. While this recommendation would add an additional public meeting to the permit process, only a fraction of the permits TCEQ handles — 24 in fiscal year 2021 — typically generate public meetings. This small step would help reduce confusion, increase transparency, and create more opportunities for meaningful public participation in the permitting process, moving towards restoring trust that TCEQ considers public input in its decisions.

Management Action

1.2 Direct the commission to vote in a public meeting on key foundational policy decisions that establish how staff approach permitting and other regulatory actions.

This recommendation would direct the commission to review its decision-making processes to ensure it has publicly established all policy decisions that govern TCEQ's regulatory functions. Such policies would include guidelines for determining acceptable risk of exposure to pollutants and whether to follow staff recommendations when they differ from federal guidelines, ensuring the commissioners are the ones formally and publicly adopting scientific work into regulatory standards and practice. Having the commission affirmatively and publicly adopt these policies and standards would help clear up public confusion about how the agency sets standards as well as provide opportunities for the public to make comments before the commission on what those standards should be.

1.3 Direct TCEQ to develop a guidance document to explain how it uses the factors in rule to make affected person determinations.

This recommendation would direct TCEQ to establish a guidance document regarding how the commissioners and the agency consider the factors specified in rule to determine affected person status. For example, the document could discuss how the location of a permitted facility's emissions or discharges might impact a landowner's use of their property in a way that could establish the landowner as an affected party. Additionally, where appropriate, TCEQ should consider clarifying in rule more objective factors, such as how the agency measures distance restrictions as it has done for concrete crushing facilities.

The guidance contemplated in this recommendation would provide more transparency and clarity on determinations of a person's rights in matters before the commission.

1.4 Direct TCEQ to adopt a policy guiding its rule review process to ensure that identified deficiencies in the rules are addressed.

This recommendation would direct TCEQ to adopt a policy formally establishing and explaining its four-year rule review process. The policy should require the review to consider current factual, legal, and policy reasons for readopting each rule, as well as practical experience the agency, regulated community, and public have had with each rule since its adoption or last review. The agency should also include the process for amending its rules in the policy, such as how the agency addresses issues and suggestions made during the rule review process in a meaningful way, ensuring identified potential or needed changes are proposed to the commission for a rulemaking project before the next four-year rule review. The policy should also include how to provide clear notice in the *Texas Register* when a rule will be amended as a result of the rule review, and when amendments will be published, if not during the rule review process. Finally, TCEQ should consider filing its rule review plan with the Office of the Secretary of State for publication in the *Texas Register*. This plan should also address updating outdated rules, including the guidance for river authorities, water districts, and water authorities. TCEQ would provide a copy of the policy to the Sunset Commission by April 12, 2023, to consider during its compliance review of the agency.

1.5 Direct TCEQ to review and update its website to improve accessibility and functionality.

This recommendation would direct TCEQ to ensure better accessibility and functionality of the agency website and review other ways to improve public access to information. Specifically, TCEQ should ensure:

- All public meetings are posted to the calendar page.
- Related webpages link to each other.
- Data is available in downloadable and manipulatable formats.
- Permit applications and final permits are all easily accessible online.
- Public information is easily accessible online.

Ensuring TCEQ's information is clearly and easily available to the public and agency staff would increase transparency and ease of access to data and could potentially help alleviate the burden on staff by reducing the number of public information requests.

1.6 Direct TCEQ to evaluate its current use of advisory committees to provide more public involvement in rulemaking and other decision-making processes, and continue advisory committees by rule, as appropriate.

This recommendation would direct TCEQ to examine how it is currently using its authority to create advisory committees and consider how these committees could involve the public earlier in key agency decisions. TCEQ should prioritize using these public forums to increase public trust, transparency, and as opportunities to participate in the agency's rulemaking and other decision-making processes. Additionally, this recommendation would direct TCEQ to properly extend advisory committees in rule, as required by statute.

Fiscal Implication

These recommendations would result in a cost to the state that cannot be determined at this time. The recommendation to make TCEQ's website more transparent and user-friendly would have some cost to the agency, depending on the nature of the changes the agency makes. This cost cannot be fully estimated at this time as ongoing projects to update legacy IT systems may address some of the problems Sunset identified. Other recommended changes may need a website redesign, requiring staff time and resources to complete. Adding an additional public meeting for some permit applications would require additional travel expenses, administrative costs, and staff time to prepare for and respond to public comments. However, whether these meetings occur, where they occur, and how much extra staff time is required depends on public interest and legislative requests and cannot be determined at this time. All other recommendations could be implemented using existing resources.

¹ Texas Commission on Environmental Quality (TCEQ), "Permits and Registrations," webpage last modified November 1, 2021, accessed online May 10, 2022, https://www.tceq.texas.gov/permitting/business_permitting.html; 30 Texas Administrative Code, Part 1, Chapter 106 (TCEQ, *Permits by Rule*).

² TCEQ, "Mission Statement and Agency Philosophy," webpage last modified July 23, 2021, accessed online April 19, 2022, <https://www.tceq.texas.gov/agency/mission.html>.

³ TCEQ, *TCEQ Guidelines to Develop Toxicity Factors*, 2015, accessed online April 5, 2022, https://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg-442.pdf, pp. iii-iv.

⁴ 30 Texas Administrative Code, Part 1, Chapter 350, Subchapter D, Section 350.72 (1999) (TCEQ, *Carcinogenic Risk Levels and Hazard Indices for Human Health Exposure Pathways*); 30 Texas Administrative Code, Part 1, Chapter 335, Subchapter S, Section 335.563 (TCEQ, *Media Cleanup Requirements for Risk Reduction Standard Number 3*).

⁵ TCEQ, *TCEQ Guidelines to Develop Toxicity Factors*, pp. 1, 8-9, 12, 24, 51, 54-55, and 121.

⁶ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 5.105, Texas Water Code.

⁷ Emily Foxhall, "How dangerous is this common chemical? EPA says Texas has it wrong, the latest in a years-long fight," *Houston Chronicle*, February 6, 2022, accessed online April 5, 2022, <https://www.houstonchronicle.com/news/houston-texas/environment/article/How-dangerous-is-this-common-chemical-EPA-says-16823618.php>.

⁸ Kiah Collier, "A Laredo plant that sterilizes medical equipment spews cancer-causing pollution on schoolchildren," *The Texas Tribune*, December 27, 2021, accessed online April 5, 2022, <https://www.texastribune.org/2021/12/27/laredo-texas-ethylene-oxide/>.

- 9 Section 382.056(k), Texas Health and Safety Code; Section 5.554, Texas Water Code.
- 10 Sections 5.115(a), (a-1), and (b), Texas Water Code.
- 11 Section 5.115(a), Texas Water Code.
- 12 Section 5.115(a-1), Texas Water Code.
- 13 30 Texas Administrative Code, Part 1, Chapter 35, Subchapter C, Section 35.28 (1998) (TCEQ, *Hearing Requests*); 30 Texas Administrative Code, Part 1, Chapter 55, Subchapter F, Section 55.203 (2015) (TCEQ, *Determination of Affected Person*); and 30 Texas Administrative Code, Part 1, Chapter 55, Subchapter G, Section 55.256 (2012) (TCEQ, *Determination of Affected Person*).
- 14 30 Texas Administrative Code, Part 1, Chapter 55, Subchapter F, Section 55.201(d)(2) (2021) (TCEQ, *Requests for Reconsideration or Contested Case Hearing*).
- 15 TCEQ, YouTube video recording of “Commission Agenda - April 13, 2022,” time 26:10-26:50, webpage last modified April 13, 2022, accessed online April 20, 2022, <https://www.youtube.com/watch?v=hi1RUOF9Nsg>.
- 16 TCEQ, Application by City of Liberty Hill for Renewal of TPDES Permit, Docket No. WQ0014477001 (2021) (Executive Director’s Response to Hearing Request) pp. 6-8, 10-15.
- 17 Section 382.058(c), Texas Health and Safety Code.
- 18 30 Texas Administrative Code, Part 1, Chapter 39, Subchapter H, Section 39.411(e)(13) (2020) (TCEQ, *Text of Public Notice*).
- 19 TCEQ, Rhino Ready Mix LLC Concrete Batch Plant Standard Permit Registration 162413, Docket No. 2021-1465-AIR (November 22, 2021), (Office of Public Interest Counsel’s Response to Hearing Requests and Requests for Reconsideration) pp. 6-10.
- 20 30 Texas Administrative Code, Part 1, Chapter 116, Subchapter B, Section 116.112 (2) (2020) (TCEQ, *Distance Limitations*).
- 21 Ibid.
- 22 The Office of Public Interest Council (OPIC), *Annual Report*, TCEQ, 2020, p. 26.
- 23 Section 5.115(a-1)(1)(B), Texas Water Code; 30 T.A.C. 55.203(c)(4).
- 24 OPIC, *Annual Report*, 2020, pp.26-27.
- 25 Section 2001.039, Texas Government Code.
- 26 Ronald L. Beal, *Texas Administrative Practice and Procedure*, New York: Matthew Bender & Company, 2018, Section 3.8, 36-37.
- 27 Ibid.
- 28 30 Texas Administrative Code, Chapter 292, Subchapter B, Section 292.13 (1996) (TCEQ, *Minimum Provisions*).
- 29 TCEQ, “Status of Air Permits and Permit Applications,” webpage last modified August 4, 2021, accessed online April 5, 2022, https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html; TCEQ, “Industrial Hazardous Waste Queries and Notices of Registration,” webpage last modified March 9, 2022, accessed online April 5, 2022, https://www.tceq.texas.gov/permitting/registration/iwh/iwh_query.html; TCEQ, “Commissioners’ Integrated Database,” webpage last modified April 12, 2021, accessed online April 5, 2022, https://www.tceq.texas.gov/agency/decisions/cc/cc_db.html; TCEQ, “Public Hearings for Proposed Rules,” webpage last modified April 1, 2022, accessed online April 5, 2022, <https://www.tceq.texas.gov/rules/hearings.html>; TCEQ, “TCEQ Rule Projects,” accessed online April 5, 2022, <https://www6.tceq.texas.gov/rules/>; TCEQ, “Rule Proposals,” webpage last modified March 30, 2022, accessed online April 5, 2022, <https://www.tceq.texas.gov/rules/prop.html>; TCEQ, “TCEQ Search Licensing or Registration Information,” accessed online April 5, 2022, https://www2.tceq.texas.gov/lic_dpa/index.cfm; TCEQ, “TCEQ Data and Records,” webpage last modified April 4, 2022, accessed online May 23, 2022, <https://www.tceq.texas.gov/agency/data>; TCEQ, “Central Registry,” webpage last modified July 28, 2021, accessed online May 23, 2022, https://www.tceq.texas.gov/permitting/central_registry.
- 30 TCEQ, “TAMIS Web Interface,” accessed online April 5, 2022, <https://www17.tceq.texas.gov/tamis/index.cfm?fuseaction=home.welcome>; TCEQ, “Request Compliance History Information,” webpage last modified April 8, 2022, accessed online April 13, 2022, https://www.tceq.texas.gov/compliance/enforcement/compliance-history/get_list.html.
- 31 Section 5.107(a), Texas Water Code.
- 32 30 Texas Administrative Code, Part 1, Chapter 5, Subchapter B, Section 5.3, (2002) (TCEQ, *Creation and Duration of Advisory Committees Created by the Commission*).
- 33 Ibid.; Section 2110.008(a), Texas Government Code.

ISSUE 2

TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable.

Background

As the primary regulatory authority over the state's natural resources, the Texas Commission on Environmental Quality (TCEQ) enforces compliance with federal and state laws, as well as its own rules, meant to protect against potential harms posed by the many pollution-related activities authorized through the agency's regulatory processes. Along with stringent permit requirements, TCEQ holds regulated entities accountable by monitoring their compliance through regular inspections and investigations, and by taking enforcement action against violations of applicable requirements. Although TCEQ's oversight is limited to emissions, discharge, or disposal of pollutants and does not include overall regulation of industrial process safety, the agency provides vital oversight of regulated entities that pose substantial risk to human health and safety and the environment.

When regulatory compliance efforts fail, however, the short- and long-term costs to the state can be tremendous, as noted in the textbox below. For example, several high-profile emergency events at industrial facilities in recent years have drawn public attention to the important role played by state regulators.¹ Industrial fires and explosions have triggered widespread evacuations and caused weeks-long chemical emissions, releasing harmful toxins that damage air quality. Long-term exposure to contamination raises concerns of serious public health effects like cancer and irreversible damage to natural resources like the destruction of ecosystems. Alongside other regulatory agencies such as the U.S. Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), TCEQ's compliance and enforcement efforts not only help prevent industrial accidents and environmental contamination, but also lead to containment and remediation of any contamination.

The Public Cost of Noncompliance

The costs of a facility failing to comply with regulations do not only fall on those directly impacted by the resulting pollution or other hazards. Through the Superfund program, Texas spends state funds to remediate sites with the worst contamination of hazardous materials. While the state pursues responsible parties for financial liability, it has borne over \$194.5 million in costs over the past 22 years cleaning up 114 sites. Much of the contamination at these sites occurred decades ago, before environmental regulations were in place or before the EPA or TCEQ monitored and enforced environmental compliance. But the ongoing fiscal and environmental costs of these sites demonstrate the importance of TCEQ's compliance monitoring and enforcement efforts. Since 2003, Texas has spent over \$10 million on the remediation of 10 sites with previous TCEQ enforcement actions. In one case, TCEQ performed 79 investigations that resulted in seven enforcement cases. The facility continued to operate, only to have the owner ultimately abandon the 17-acre benzene-contaminated disaster site and flee the country. At another site, TCEQ performed 23 investigations, resulting in two enforcement cases, before the company declared bankruptcy and the lead, chromium, arsenic, and mercury-contaminated property entered the Superfund program.

TCEQ field investigators stationed at the agency's regional offices carry out the initial compliance monitoring efforts. Field investigators conduct federally- and state-mandated inspections of specific regulated entities and investigate complaints received from the public. In fiscal year 2021, TCEQ

performed over 117,000 inspections, including over 64,000 on-site inspections and about 4,750 complaint investigations.² When investigators identify violations, they can employ a range of options to direct an entity into compliance. For less severe violations, TCEQ issues a notice of violation, which informs the regulated entity of its noncompliance and establishes a schedule for resolving it, but TCEQ does not assess a penalty. For a violation that is severe or ongoing — or one not resolved within the timeframe established in the notice of violation — TCEQ initiates formal enforcement proceedings that can result in a range of actions from administrative penalties and emergency orders to corrective action plans and occupational license revocation. For certain violations, a field inspector may issue a field citation directly at the inspection site, or a facility can fix the violation immediately and avoid a notice of violation. For the most serious violations, TCEQ can refer a case to the Office of the Attorney General for civil enforcement or work directly with local prosecutors to pursue criminal penalties. In fiscal year 2021, TCEQ issued over 15,700 notices of violation that led to over 1,000 enforcement orders and over \$28 million in assessed administrative and civil penalties.³

TCEQ's enforcement authority is not limited to issuing penalties for individual violations. Statute also requires TCEQ to assign a compliance history rating to each company and permitted facility the agency regulates, with some exceptions.⁴ TCEQ uses this rating to inform permitting, inspection, and enforcement decisions.⁵ The compliance history rating factors in the severity of identified violations, complexity of the regulated facility, and voluntary steps taken by the entity to achieve compliance.⁶ The rating score rises in response to violations, classifying a facility or company's overall compliance as high, satisfactory, or unsatisfactory, as shown in the Compliance History Ratings table.⁷ Appendix E details the formulas TCEQ uses to calculate the rating.

Compliance History Ratings

Classification	Rating Threshold
High	Below 0.10
Satisfactory	0.10 to 55
Unsatisfactory	Above 55

Findings

TCEQ's compliance monitoring and enforcement processes need improvements to more effectively discourage violations and focus on the riskiest actors.

TCEQ struggles to balance incentivizing compliance and pursuing enforcement.

Both the public and regulated industries depend upon the effectiveness of TCEQ's compliance monitoring and enforcement efforts. The results of inspections and enforcement actions, included in the compliance history ratings, provide information about a company's or facility's level of environmental compliance, which the public can use when making decisions like where to live, who to work for, and what companies to support. Regulated industries also depend upon a robust compliance monitoring and enforcement system, including reliable compliance history ratings. Such a system helps maintain a level business playing field, identifying and punishing bad actors that risk public health and environmental integrity by cutting corners for short-term gain, and rewarding good actors for their investments in safety and newer technology. Companies also express frustration when their industry's reputation is tarnished by the negative actions of a small few.

Over the past two decades, Sunset reviews have consistently found TCEQ struggles to strike an appropriate balance between incentivizing compliance and

taking enforcement action.⁸ Like most comparable state regulatory agencies, the majority of TCEQ's compliance efforts depend on facilities conducting their own monitoring activities and record keeping, leading TCEQ to historically prefer bringing companies into voluntary compliance over taking formal enforcement actions. Yet as the rise in Texas' population has led to corresponding expansion of industrial development across Texas, TCEQ faces challenges to maintain its regulatory presence across its programs, juggling growing numbers of both required inspections and public complaints to investigate. TCEQ has publicly recognized a need to increase levels of compliance and accountability, particularly as it attempts to explain to an increasingly distrustful public that its authority is limited by narrow regulatory requirements and statutory tools.⁹ Once again the Sunset review found TCEQ's efforts do not effectively discourage violations and would benefit from adjustments to better incentivize compliance and focus attention on the riskiest actors.

TCEQ has recognized a need to increase compliance and accountability of regulated entities.

TCEQ's approach to compliance history treats industry participants inconsistently and unfairly, excludes important compliance information, and does not sufficiently inform future permitting and enforcement decisions.

TCEQ's compliance history formula does not include all relevant data, resulting in inaccurate compliance history ratings that do not reflect actual compliance. The formula, described in Appendix E, unfairly impacts small businesses while virtually guaranteeing large entities receive favorable compliance history ratings. Statute requires TCEQ to calculate compliance history ratings on the basis of:

- Major, moderate, and minor violations resulting in enforcement orders, court judgments, consent decrees, and criminal convictions.
- Notices of violation issued within the last year.
- Positive and negative site complexity factors.
- Repeat violator status.¹⁰

Entities without compliance history data — like those that TCEQ has not inspected in the last five-year period — are rated as unclassified.¹¹ Appendix F lists the categories of permits that do not receive regularly scheduled inspections from TCEQ staff. Of the entities TCEQ assigns a compliance history rating to each year, most are classified as high performers, as noted in the table.

Compliance Ratings Categories - FY 2021

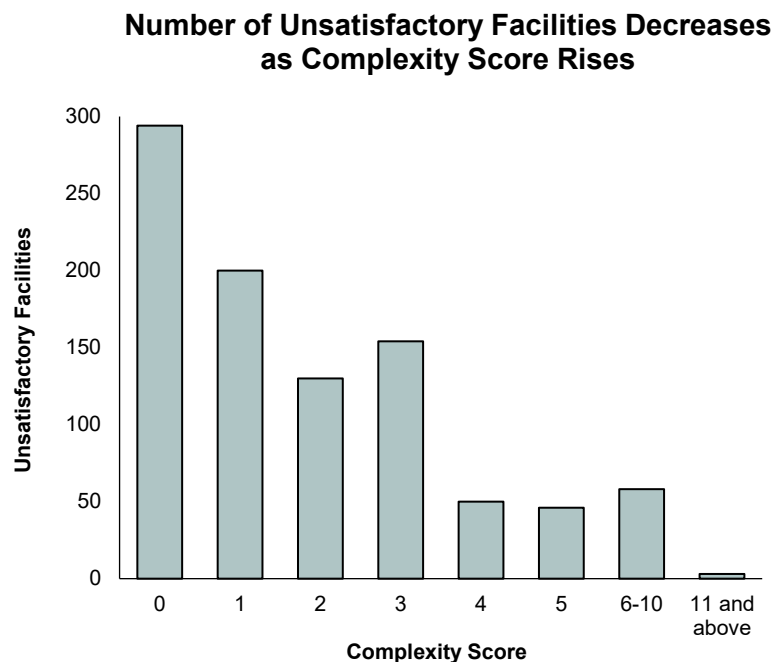
Classification	Number of Entities	Percent of Total
High	38,731	8.68%
Satisfactory	8,368	1.88%
Unsatisfactory	935	0.21%
Unclassified	398,013	89.23%

- **Site complexity distorts the compliance history rating.** TCEQ's compliance history rating formula fails to consider negative aspects of a complex facility, such as potential hazardous impacts to neighboring communities, and all but guarantees large facilities receive satisfactory ratings regardless of their compliance history.¹² In determining compliance history ratings, statute requires TCEQ to consider both positive *and* negative

TCEQ
compliance
history ratings
often reflect
an entity's size
and complexity
rather than
its actual
compliance.

factors related to the operation, size, and complexity of a facility.¹³ However, TCEQ's current approach only treats complexity as a positive factor that improves a facility's compliance history rating. TCEQ assigns a facility a complexity score from zero to 60 based on how large and multifaceted the facility's operations are, factoring in the number of permits and programs tied to the facility and the size of the facility's infrastructure — such as the number of petroleum storage tanks or hazardous waste sites.¹⁴

Inequity between small and large entities. While statute envisions giving credit for the increased challenge a large, complex facility faces to comply with its numerous permits and regulatory requirements, statute also intends for TCEQ to consider and account for aspects of a complex site that raise expectations of compliance. For example, a complex facility may pose a greater risk to the community based on the combination of permitted activities occurring on the property. Similarly, complex facilities often have more staff and resources available to implement practices to promote compliance. TCEQ's current approach does not factor in these aspects of a larger facility. Thus, complex facilities benefit from considerations of their size, while smaller businesses do not receive a proportional consideration of the lower risk they may pose to the community or the fewer resources they have to maintain compliance.



As a result, the rating often reflects a facility's complexity score, rather than its actual compliance, as reflected in the bar graph. TCEQ's formula for calculating compliance history, referenced in Appendix E, divides a facility's violation-related points by its complexity score.¹⁵ Thus, a complex facility must commit significantly more violations than a less complex facility to be considered unsatisfactory. For example, a small facility with a complexity score of 5 and no prior history of violations would be rated unsatisfactory after six to eight moderate violations, while a large facility with a complexity score of 40 with a similar history would

need 40 to 50 moderate violations before being rated unsatisfactory. This means only three of the current 935 unsatisfactory-rated facilities have a complexity score greater than 10, as shown in the *Complex Facilities Rarely Receive Unsatisfactory Ratings* table on the following page. Conversely, 874 facilities, or 93 percent, currently rated as unsatisfactory have a complexity score of five or less.

Inequity among similar entities. TCEQ's current approach also creates inequity among regulated entities of similar size and complexity. A compliance history rating is meant to differentiate between highly compliant entities that make significant efforts to comply with environmental regulations and entities that repeatedly violate environmental laws, rules, and permit requirements. As the *Comparison of Two Compliance Histories* table illustrates, despite the disparity in actual compliance histories of the two example chemical plants, the facility with a higher number of violations and a fatal emergency event has a higher compliance history rating than the facility with fewer violations. Such an imbalanced compliance history rating system not only fails to incentivize compliance, but may also distort public perception of industry actors since the commitment to compliance of one entity is indistinguishable from that of another.

Complex Facilities Rarely Receive Unsatisfactory Ratings

Complexity Score	0 to 5	6 to 10	11 and Above
High	30,914	6,201	1,616
Satisfactory	5,358	1,985	1,025
Unsatisfactory	874	58	3

Comparison of Two Compliance Histories, FYs 2017-21

	Chemical Plant 1	Chemical Plant 2
Customer compliance history rating	0.00, High	0.68, Satisfactory
Facility compliance history rating	0.00, High	0.68, Satisfactory
Complexity score	21	18
Repeat violator?	No	No
On-site compliance investigations	12	7
Desk audit investigations	80	65
Active enforcement orders	2	0
Moderate notices of enforcement	13	1
Moderate notices of violation	26	12
Minor notices of violation	13	4
Emergency response events	2	1
Emissions events	13	0
Discharge events	0	1

Emergency Event Highlight: In 2019, a pipeline malfunction at Chemical Plant 1 resulted in an explosion and major fire. The fire spread to a nearby warehouse storing dry chemical goods. After the fire was extinguished, water-reactive chemicals stored in the warehouse began experiencing chemical reaction with the firefighting liquid, and emissions from the warehouse continued until all products were removed. The fire also spread to storage tanks at the site. The incident resulted in one casualty, 32 injuries, an excessive emissions event, a shelter-in-place order for local residents in the surrounding community, and 375 TCEQ staff emergency response hours. Chemical Plant 2 had no similar emergency event and fewer overall violations, yet has a poorer compliance history rating.

TCEQ's
compliance
ratings do
not factor in
all instances
of an entity's
noncompliance.

- **Key compliance data not included in compliance history ratings.** TCEQ's compliance history rating formula does not factor in all self-reported data or all data on violations corrected at the time of inspection despite their relevance to a facility's compliance history.
 - Entities with air permits are required to submit self-monitored emissions inventories including data from unauthorized emissions events into the State of Texas Environmental Electronic Reporting System (STEERS).¹⁶ In fiscal year 2021, permitted facilities reported exceeding their emissions limits nearly 3,400 times, for an additional 47.8 million pounds of pollution estimated to have been released above allowed levels. Though TCEQ does not pursue enforcement action for these emissions if the facility qualifies for an "affirmative defense," as discussed on Page 36, the agency considers these emission events violations of a facility's permits. Yet TCEQ does not consider these violations when calculating compliance history ratings.
 - During an inspection, TCEQ documents minor violations that the facility corrects during the inspection, but may not take formal enforcement action on these violations. In such cases, TCEQ does not factor these violations into compliance history ratings despite them indicating noncompliance with regulations and potentially indicating a pattern of unsafe behavior. A site may frequently exhibit an easily fixable, but concerning, practice, such as a petroleum storage tank not being properly secured to prevent tampering, vandalism, or unauthorized access. In such an example, even repeat noncompliance may not affect the site's compliance history rating.

By not factoring all instances of noncompliance into compliance history ratings, TCEQ misses an opportunity to further incentivize full compliance. Compliance history ratings are meant to be a complete evaluation of a facility's compliance with regulations, not simply a reflection of formal enforcement history. Additional data could better inform existing compliance ratings, and potentially lead to compliance histories for some of the nearly 400,000 unclassified entities for which TCEQ currently has no compliance information. Any data showing noncompliance would not only better inform TCEQ's operations by enabling the agency to detect a regulated entity's pattern of behavior, but also increase transparency for the public and other regulated entities.

TCEQ does
not proactively
update
compliance
history ratings.

- **Compliance history ratings are only updated annually.** A regulated entity's compliance history rating may not include recent violations or enforcement actions because TCEQ only updates compliance history ratings once per year as required by statute. TCEQ staff run an automated program recalculating compliance history ratings each September, so any violations and enforcement actions taken during the following 12 months are not reflected in a compliance history rating until the next September. While permitting staff can request an updated compliance history report for an individual entity, this calculation must be performed manually. TCEQ

does not proactively update compliance history ratings outside such requests. As a result, the public may learn of a concerning incident at a facility, such as through news of an industrial explosion or chemical release, but find the facility's compliance history rating reported as satisfactory. TCEQ is in the process of amending its rules to update compliance history ratings following serious emergency events at facilities, as discussed in the textbox, but this change will only affect the ratings of facilities that experience these types of events.

Exigent Circumstances Rulemaking

In response to the uptick in emergency events at industrial facilities in recent years, TCEQ is in the process of modifying its rules to allow review and suspended reclassification of an entity's compliance history rating following an emergency event that results in exigent circumstances. Exigent circumstances would include events that cause significant impact to the surrounding community, with substantial emergency response efforts by state and federal authorities, and resulting in urgent consequences.

- **TCEQ staff inconsistently uses compliance history information.** TCEQ does not have clear policies in place to ensure permitting and enforcement staff use compliance history ratings consistently across regions and programs. During the Sunset review, TCEQ staff indicated different ways of using compliance history information and some expressed confusion over the usefulness of compliance history ratings. Regional field inspectors and enforcement staff particularly expressed confusion about the role, if any, compliance history ratings should play in their day-to-day workload. Inconsistent application of compliance histories in the permitting and enforcement processes both undermines TCEQ's ability to focus regulatory efforts on the riskiest facilities and treats industry participants differently based on which staff they may interact with.

TCEQ rule states that "permit actions are subject to compliance history review" and that "the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit."¹⁷ However, TCEQ does not have a standard internal policy regarding evaluation and use of compliance history during the permitting process. Instead, each permitting program has its own policy regarding compliance history considerations in the permitting process. Some programs merely look at the rating to ensure the entity is not an unsatisfactory performer while other programs request updated compliance histories before setting the terms of or approving the permit.

Each permitting program has its own policy on how to consider compliance history.

TCEQ's overly narrow definition of a repeat violator misses habitual noncompliance.

TCEQ has defined a "repeat violator" in a more limited way than statute requires, resulting in further inequity among regulated industry. Statute directs TCEQ to identify repeat violators based on a pattern of violations of the same nature and environmental media — air, water, or waste — over the preceding five years.¹⁸ However, TCEQ has further restricted the definition to only major violations, defined in the textbox on the following page.¹⁹ TCEQ does not consider moderate or minor violations a facility accrues, regardless of how

Definitions of Major, Moderate, and Minor Violations

30 Texas Administrative Code, Part 1, Chapter 60, Section 60.2 - "Classification"

Major Violations

- (A) Violation of a commission enforcement order, court order, or consent decree.
- (B) Operating without required authorization or using a facility that does not possess required authorization.
- (C) An unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment.
- (D) Falsification of data, documents, or reports.
- (E) Any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

Moderate Violations

- (A) Complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by commission rule or permit.
- (B) Complete or substantial failure to submit or maintain records, as required by a commission rule or permit.
- (C) Not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements.
- (D) Any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation.
- (E) Complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit.
- (F) Any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction.
- (G) Maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

Minor Violations

- (A) Performing most, but not all, of a monitoring or testing requirement, including required unit or facility inspections.
- (B) Performing most, but not all, of an analysis or waste characterization requirement.
- (C) Performing most, but not all, of a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports.
- (D) Maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

many, as repeat violations. TCEQ also only considers major violations with the same root citation — the same specific statutory or rule violation — regardless of whether a facility has multiple violations resulting from a common pattern or practice.²⁰ Being classified as a repeat violator affects an entity's compliance history rating, which may impact its ability to receive permits in the future or the terms of a new permit; enhance penalties for future violations; or lead to revocation of the entity's permit.²¹ Narrowing what classifies a facility as a repeat violator unfairly benefits facilities that habitually fail to comply with regulations over those that invest money and effort in meeting environmental protection requirements.

Coupled with the compliance history rating issues discussed earlier, the narrowed definition of a repeat violator has resulted in a compliance approach that does not consistently hold large entities with repeated noncompliance fully accountable. During the review, industry participants and community stakeholders alike emphasized the need for increased, visible, and consistent compliance efforts by TCEQ and expressed concerns about failure to hold bad actors accountable. Entities like those listed in the table accrue dozens of violations, emissions events, and other noncompliance, but TCEQ does not consider them repeat

Landscape of Noncompliance

Below are examples of currently operating facilities, comparing each facility's compliance-related history from fiscal years 2017-21 with its compliance history rating. The larger facilities with significant noncompliance earn satisfactory compliance ratings while smaller facilities with fewer violations are rated unsatisfactory.

Example facility's noncompliance history	Refinery 	Cement plant 	Chemical plant 	Wastewater treatment plant 	Auto body shop 	Residential construction site 
Facility complexity score	53	27	18	11	1	1
Investigations						
On-site investigations	7	10	69	14	3	2
Desk audit investigations	122	97	121	67	0	0
Enforcement actions						
Active enforcement order	9	1	3	1	1	1
Total notices of enforcement	7	7	8	14	1	1
Major violation notices	0	0	0	0	1	1
Moderate violation notices	30	11	25	53	0	0
Minor violation notices	10	2	1	0	0	0
Noncompliance events						
Air emissions events	40	11	43	0	0	0
Water discharge events	9	0	6	33	0	0
Emergency response events	28	0	1	3	0	0
Facility compliance history rating	9.29, Satisfactory	9.29, Satisfactory	6.21, Satisfactory	42.14, Satisfactory	580, Unsatisfactory	620, Unsatisfactory
Repeat violator status	No	No	No	No	Yes	Yes



Emergency event highlight: In 2019, a malfunction resulted in a release and explosion at the chemical manufacturing plant listed above. The shockwave from the initial explosion blew out windows and damaged property within a few miles of the facility. The secondary explosion and subsequent leaks from damaged equipment contributed to the release of contaminants into the atmosphere. The explosions forced approximately 50,000 people to evacuate their homes and the resulting fire burned for a month. This was not this facility's first emergency event.

violators and assigns them a satisfactory compliance history rating. The result is a compliance monitoring and enforcement landscape that does not assure the public or industry participants that good faith efforts will be rewarded and habitual noncompliance will not.

Facilities that self-report violations may receive harsher penalties than those that do not report.

TCEQ’s policy on how to classify certain monitoring and recordkeeping violations may allow industry to conceal more serious violations.

Despite relying heavily on self-reported information from regulated entities, TCEQ does not sufficiently distinguish between serious failures to maintain monitoring equipment and records and minor paperwork violations when classifying violations as major, moderate, or minor. Like most comparable state regulatory agencies, a substantial amount of TCEQ’s monitoring data and compliance assessments come from a regulated entity’s own monitoring systems and other self-reported data. However, TCEQ classifies a failure to maintain this equipment or data as a moderate or minor violation.²² In contrast, unauthorized releases, emissions, or discharges — which are also often self-reported — can be classified as major violations.²³ As a result, a facility that accurately self-reports an unauthorized release of pollutants may receive a harsher penalty than a facility that releases the same or even higher amounts, but that has not kept its equipment functional to track the release. Failing to distinguish between minor paperwork violations and those that impede TCEQ’s ability to monitor compliance may actually incentivize regulated entities to not maintain required records or monitoring equipment. In one case, a TCEQ investigator discovered a facility had reported zero emissions of a hazardous pollutant for many years, but began reporting regular amounts of emissions after replacing its monitoring equipment. TCEQ determined it could not prove the facility had emitted above its permitted level prior to the new monitoring equipment due to the lack of accurate past self-reporting and took no further action.

TCEQ can waive enforcement for certain air pollution emissions events.

Unclear guidelines for determining affirmative defense for air pollution emissions do not incentivize regulated entities to prevent future emissions.

TCEQ does not provide sufficient guidance to its staff when evaluating claims of affirmative defense for air emissions events, resulting in confusion for regulated entities and potentially discouraging compliance. In 2003, TCEQ implemented a rule regarding a legal concept called “affirmative defense” to waive enforcement for air pollution emissions events that are unplanned, unavoidable, and properly reported.²⁴ TCEQ requires entities to report to the agency any unplanned or unauthorized emissions over the reportable quantity thresholds defined by rule. An entity must first assert the affirmative defense then the TCEQ investigator determines whether the entity has met the affirmative defense criteria set in rule.²⁵ If TCEQ staff confirms the criteria was met, the entity is protected from enforcement action and any associated penalties stemming from the unauthorized emission.

Most Unauthorized Emissions are Excused

Fiscal Year	Total Unauthorized Emissions Events	Events Granted Affirmative Defense	Percent Granted Affirmative Defense	Total Chemicals Emitted (Pounds)
2017	3,969	3,473	87.5%	65,501,002
2018	4,431	3,909	88.2%	76,851,799
2019	4,944	4,413	89.3%	120,365,070
2020	4,099	3,521	85.9%	67,923,802
2021	3,397	2,935	86.4%	47,839,985

TCEQ justifies use of the affirmative defense as a narrowly defined and tailored tool that incentivizes voluntary, proactive compliance.²⁶ However, Sunset staff heard concerns about the lack of consistency and predictability as to how TCEQ determines whether regulated entities meet affirmative defense criteria. During the Sunset review, TCEQ staff acknowledged the absence of sufficient guidelines to make affirmative defense determinations consistently. Moreover, data on the frequency of approval of this defense over time suggests the absence of clear guidance may have led agency staff to over-approve the affirmative defense when evaluating emissions events. Although meant to be rigorous and narrowly tailored, the table shows TCEQ investigators have determined regulated entities met the affirmative defense criteria in over 85 percent of unauthorized emissions events in each of the last five years.

Nuisance-based complaints and inefficient administrative processes impede TCEQ's inspection efforts.

Barriers to conducting efficient investigations have impeded TCEQ field staff's ability to prioritize areas of greatest risk to the public. In fiscal year 2021, TCEQ staff conducted over 64,000 in-person inspections, many required by federal or state inspection schedules.²⁷ The Sunset review found TCEQ staff struggles to meet these regular inspection requirements while also prioritizing areas of greatest risk to the public, a situation exacerbated by overwhelming demands of nuisance complaints and the increasing number of regulated entities, as well as administrative barriers.

Responding to nuisance complaints impedes TCEQ's ability to inspect riskier facilities.

- **Strain of nuisance investigations.** Increasing demands from the public to respond to nuisance complaints about facilities or conduct that poses little risk to public health or natural resources detract from TCEQ's ability to inspect and investigate riskier facilities. Various statutory provisions, and most TCEQ-issued permits, include a prohibition against creating a nuisance, requiring TCEQ to respond to nuisance complaints.²⁸ Nuisance complaints can range from odor near landfills or refineries, to dust near quarry operations, to smoke from barbecue restaurants. Without performing an investigation, investigators cannot always tell from the complaint the seriousness of the risk to the public. For example, an odor coming from a

TCEQ received
7,202 complaints
about a single
landfill over six
years.

landfill or refinery may signify a hazardous chemical being released from a breakdown in operations or may simply be an unpleasant byproduct of the facility operating as intended and without risk or demonstrable impact to the community. TCEQ aims to investigate most nuisance complaints within 30 days, but expedites complaints alleging health effects, oil and gas odors, and, by statute, those related to poultry odors.²⁹

TCEQ lacks clear authority to deprioritize nuisance-related complaints that pose little risk to public health. As a result, field inspectors are overburdened by investigations that could better be addressed by counties and local governments. TCEQ must investigate and respond to complaints that may have no serious health or environmental impact, many of which occur at facilities that do not hold TCEQ-issued authorizations. Because the public and even city and county officials view TCEQ as the state authority in this arena, staff may initially investigate some complaints only to find the nuisance does not fall under TCEQ's jurisdiction, such as noise or truck-traffic complaints. In fiscal year 2021, TCEQ investigators performed 9,331 odor-based nuisance investigations, spending an average of 12.3 hours per investigation, and a total of 114,524 investigation hours. To address the growing problem of multiple recurring nuisance complaints, TCEQ developed a policy allowing investigators to consolidate complaints about a single facility without conducting an additional investigation, if an investigation has been conducted within the last two weeks. However, the clock resets at the two-week mark and TCEQ will typically conduct the investigation again, even if previous nuisance investigations were unable to substantiate the same complaints.³⁰ In one case, TCEQ received 7,202 complaints about a single landfill resulting in TCEQ staff performing 275 investigations between 2015 and 2021. According to TCEQ's policies, regional directors may recommend discontinuance of complaint investigations for a particular facility if the region has taken all feasible actions and found no continuing violations, but complaints continue. However, according to TCEQ, only one regional office has used this option in the past five years.

- **Incomplete data on facilities.** TCEQ's lack of accurate data on which facilities are currently in operation prevents field staff from making informed and strategic compliance monitoring decisions and inadvertently provides inaccurate and outdated information to the public. While some entities' permits are active for a specific time period before renewal is required, others receive a permit with no expiration date or a temporary permit. TCEQ does not require the latter types of regulated entities to confirm their continued operations. For example, TCEQ is often not aware when concrete batch plants cease operations, though the plants' work may be tied to road projects or housing developments and discontinue upon completion. Trying to establish which concrete batch plants are still active when performing inspections wastes staff time and effort. Without updated data on which regulated entities are currently in operation, TCEQ field

staff cannot establish accurate inspection schedules, and members of the public do not have access to reliable information about regulated activity in their area.

Sunset Staff Recommendations

Change in Statute

2.1 Require TCEQ's compliance history rating formula to consider all evidence of noncompliance while decreasing the current emphasis on site complexity, and direct the agency to regularly update compliance history ratings.

This recommendation would require TCEQ to update its rules related to how it calculates an entity's compliance history rating. Under this recommendation, TCEQ rules would require the agency to incorporate and consider as part of the calculation of a regulated entity's compliance history rating all available data showing evidence of noncompliance, even if that noncompliance does not result in a formal enforcement action, such as emissions events data submitted into the STEERS system and violations noted during inspections but fixed on-site. In addition, TCEQ would be required to adjust its compliance history rating formula to ensure a facility's complexity does not carry undue weight compared with its actual history of noncompliance. As part of this recommendation and as already expressed in statute, TCEQ's rules would also be required to incorporate both positive and negative considerations of a facility's complexity when developing a compliance history rating.

As a management action, TCEQ should update an entity's compliance history rating throughout the year as the agency receives additional information that could alter the rating, such as new enforcement actions. Also as a management action, this recommendation would direct TCEQ to develop policies and guidance documents for how permitting and enforcement staff across regions and programs should consistently use compliance history ratings in their operations.

These recommendations would ensure TCEQ's compliance history ratings standards apply fairly and consistently across the regulated community and portray a more accurate representation of an entity's compliance with federal and state law and TCEQ rules. The recommendations would also help improve the consistency and usefulness of compliance history ratings to TCEQ staff.

2.2 Require TCEQ to consider all violations when classifying an entity as a repeat violator.

This recommendation would require TCEQ to expand its criteria for classifying a repeat violator to include all levels of violations. TCEQ would set, by rule, the number of moderate or minor violations needed to be classified as a repeat violator. In developing the new criteria, TCEQ should also review using a root citation to define "violations of the same nature" to ensure its definition sufficiently encompasses violations that show a pattern or practice of noncompliance. These updates to TCEQ's classification of repeat violators would better position the agency to accurately identify habitual noncompliance and incorporate this into an entity's compliance history rating. Better monitoring of compliance behaviors would encourage consistent enforcement of the regulated community and further incentivize compliance with federal and state laws and TCEQ rules.

2.3 Require TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operational status.

Under this recommendation, TCEQ would require entities that hold temporary permits or permits with no expiration date, and that do not otherwise have annual reporting requirements, to annually confirm to the agency the regulated facility is still operating. Where feasible, TCEQ should create an online system that can easily be used by regulated entities to confirm ongoing operations. This recommendation would provide TCEQ and the public an accurate assessment of which regulated facilities are active in a certain location at a given time.

Management Action

2.4 Direct TCEQ to reclassify recordkeeping violations based on the potential risk and severity of the violation.

This recommendation would direct TCEQ to reclassify recordkeeping violations in accordance with the potential risk caused by the lack of recordkeeping. TCEQ should elevate those violations where failure to keep accurate records or other monitoring equipment and reports will impair the agency's ability to detect other, more serious noncompliance issues. By differentiating between types of recordkeeping violations, TCEQ could better incentivize self-monitoring and self-reporting requirements and disincentivize efforts to conceal or ignore noncompliance, which would in turn prevent entities complying with self-monitoring and self-reporting requirements from being penalized more harshly than entities out of compliance with those requirements.

2.5 Direct TCEQ to develop and implement clear guidance to evaluate affirmative defense requests for air emissions.

This recommendation would direct TCEQ to revisit its air emissions affirmative defense criteria and develop guidelines for field investigators to use when evaluating affirmative defense requests. These guidelines could include detailed explanations of the affirmative defense criteria, such as what constitutes an "avoidable" emission, and any measures or metrics staff should use when evaluating a facility's compliance with those criteria. Providing clear guidelines for staff to follow would help ensure TCEQ has an agency-wide approach to granting the affirmative defense that is consistent, transparent, and fair. Industry participants would have more predictable standards to meet, encouraging these facilities to take steps to prevent unplanned emissions.

2.6 Direct TCEQ to modify its approach to nuisance complaints to make better use of the agency's investigative resources.

TCEQ should amend its nuisance complaint investigation policy and institute a timeframe cap on repeat investigations that balances public health and safety concerns while protecting limited staff resources. As part of this recommendation, TCEQ regional offices should make use of the discontinuance memo recourse in the case of consistent, unsubstantiated nuisance complaints without alleged health effects.

Fiscal Implication

The recommendations related to technology improvements would have a cost to the state that cannot be estimated at this time. Recommendation 2.1 to update compliance history ratings on an ongoing basis and Recommendation 2.3 to develop an online system for regulated entities to report continued operations would likely require additional staff and resources to implement. Exact costs would depend

upon on how TCEQ implements these recommendations. Other recommendations could be implemented using existing resources. Strengthening TCEQ's ability to deprioritize nuisance complaints should free up investigative staff to focus their time and resources inspecting higher risk facilities.

¹ Emily Foxhall, "Industrial disasters are more worrisome for air quality than hurricanes, TCEQ reports," *Houston Chronicle*, January 28, 2022, accessed online April 22, 2022, <https://www.houstonchronicle.com/news/houston-texas/environment/article/Industrial-disasters-are-more-worrisome-for-air-16814239.php>; Tina Burnside and Jason Hanna, "4 injured after explosion and fire reported at an ExxonMobil refinery in Baytown, Texas, officials say," CNN, December 23, 2021, accessed online April 22, 2022, <https://edition.cnn.com/2021/12/23/us/exxon-refinery-baytown-texas/index.html>; Danielle Prokop, "Untreated sewage will flow to Rio Grande for months, El Paso Water says," *El Paso Monitor*, September 9, 2021, accessed online April 22, 2022, <https://elpasomatters.org/2021/09/09/untreated-sewage-will-flow-to-rio-grande-for-months-el-paso-water-says/>; Jacob Dick, "Port Neches residents still living through TPC explosion one year later," *Beaumont Enterprise*, November 29, 2020, accessed online April 22, 2022, <https://www.beaumontenterprise.com/news/article/Port-Neches-residents-still-living-through-TPC-15759290.php>; Erik Ortiz, "Explosion rocks chemical plant near Cresson, Texas; at least 2 hurt," *NBC News*, March 15, 2018, accessed online April 22, 2022, <https://www.nbcnews.com/news/us-news/explosion-rocks-chemical-plant-near-cresson-texas-least-1-hurt-n856956>.

² Enforcement Division, Office of Compliance and Enforcement, *Annual Enforcement Report: Fiscal Year 2021*, Texas Commission on Environmental Quality, 2021, pp. 8-9, accessed online April 22, 2022, <https://www.tceq.texas.gov/compliance/enforcement/enforcement-reports/annenfreport.html>.

³ *Ibid.*, pp. 10, 14.

⁴ All citations to Texas statutes are as they appear on <http://statutes.legis.texas.gov>. Sections 5.751 and 5.754, Texas Water Code.

⁵ *Ibid.*

⁶ Section 5.754(c), Texas Water Code; Section 5.755(b), Texas Water Code; 30 Texas Administrative Code, Part 1, Chapter 60, Section 60.1(c) (2020) (Texas Commission on Environmental Quality, *Compliance History*).

⁷ 30 Texas Administrative Code, Part 1, Chapter 60, Section 60.2(b) and (g)(2) (2012) (Texas Commission on Environmental Quality, *Classification*).

⁸ Texas Sunset Advisory Commission, *Texas Natural Resource Conservation Commission*, Staff Report, Texas Sunset Advisory Commission, 2000, pp. 23-29, 41-48, accessed online April 22, 2022, <https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Natural%20Resource%20Conservation%20Commission%20%28TCEQ%29%20Staff%20Report%202000%2077%20Leg.pdf>; Texas Sunset Advisory Commission, *Texas Commission on Environmental Quality and On-site Wastewater Treatment Research Council*, Texas Sunset Advisory Commission, 2011, pp. 37-41, 43-51, accessed online April 22, 2022, <https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Commission%20on%20Environmental%20Quality%20Final%20Report%202011%2082%20Leg.pdf>.

⁹ Texas Commission on Environmental Quality, “Commissioner’s Work Session - September 24, 2020,” YouTube video, uploaded September 24, 2020, accessed online April 21, 2022, <https://www.youtube.com/watch?v=UBb5jYOD49Y>.

¹⁰ Sections 5.753(d) and 5.754(c), Texas Water Code.

¹¹ Section 5.754(b)(2), Texas Water Code; 30 T.A.C., Section 60.2(b).

¹² 30 T.A.C. Section 60.2(e) and (g)(1)(M).

¹³ Section 5.754(b)(3), Texas Water Code.

¹⁴ 30 T.A.C. Section 60.2(e). Complexity scores are not capped at 60; however, 60 is the highest complexity score currently assigned to a regulated entity by TCEQ.

¹⁵ 30 T.A.C. Section 60.2(g)(1)(M). The compliance history rating formula also divides by the number of inspections received with no violation, which also benefits complex facilities that receive more frequent inspections.

¹⁶ Section 382.0215, Texas Health and Safety Code; 30 Texas Administrative Code, Part 1, Chapter 101, Subchapter F, Section 101.201, (2015) (Texas Commission on Environmental Quality, *Emissions Event Reporting and Recordkeeping Requirements*).

¹⁷ 30 Texas Administrative Code, Part 1, Chapter 60, Section 60.3(a)(1) (Texas Commission on Environmental Quality, *Use of Compliance History*).

¹⁸ Section 5.754(c)(2), Texas Water Code.

¹⁹ 30 T.A.C. Section 60.2(f).

²⁰ 30 T.A.C. Section 60.2(f)(1). TCEQ’s lack of consideration of moderate and minor violations is confined to repeat violator designations; TCEQ’s Enforcement Initiation Criteria outline how moderate and minor violations proceed through formal enforcement processes.

²¹ Sections 5.754(e), (e-1), and (f), Texas Water Code.

²² 30 T.A.C. Sections 60.2(d)(2) and (3).

²³ 30 T.A.C. Section 60.2(d)(1)(C).

²⁴ Texas Commission on Environmental Quality, *Rule Project No. 2016-040-101-CE*, 2016, p. 1, accessed online April 22, 2022, https://www.tceq.texas.gov/assets/public/legal/rules/hist_rules/Complete.16s/16040101/16040101_pro.pdf.

²⁵ 30 Texas Administrative Code, Part 1, Chapter 101, Section 101.201 (Texas Commission on Environmental Quality, *Emissions Event Reporting and Recordkeeping Requirements*); 30 Texas Administrative Code, Part 1, Chapter 101, Section 101.221 (Texas Commission on Environmental Quality, *Operational Requirements*); 30 Texas Administrative Code, Part 1, Chapter 101, Section 101.222 (Texas Commission on Environmental Quality, *Demonstrations*).

²⁶ TCEQ Comments by the Texas Commission on Environmental Quality Regarding State Implementation Plans, EPA Docket ID NO. EPA-HQ-OAR-2012-0322, accessed online April 22, 2022, <https://www.tceq.texas.gov/assets/public/agency/nc/air/TCEQ-Comments-Supplemental-Notice-for-EPA-R06-OAR-2018-0770.pdf>.

²⁷ Enforcement Division, Office of Compliance and Enforcement, *Annual Enforcement Report*, p. 8.

²⁸ For example, see Sections 361.119, 382.003, and 382.085(a), Texas Health and Safety Code, and Sections 5.176 and 26.0311, Texas Water Code.

²⁹ Section 382.068, Texas Health and Safety Code; Field Operations, Office of Compliance and Enforcement, *Complaint Investigation Manual*, Texas Commission on Environmental Quality, 2021, pp. 25-26; Texas Commission on Environmental Quality, “What If Your Complaint Is About an Odor,” webpage last modified November 3, 2021, accessed online April 22, 2022, https://www.tceq.texas.gov/compliance/complaints/odor_complaint.html.

³⁰ Texas Commission on Environmental Quality, *Field Operations Standard Operating Procedures, Investigation Guidance*, Texas Commission on Environmental Quality, 2018, p. 24.

ISSUE 3

TCEQ's Oversight of Water Could Better Protect the State's Scarce Resources.

Background

Few natural resources are more studied, debated, or regulated than water. Texas' comprehensive State Water Plan predicts that steady population and economic growth, as well as the state's susceptibility to drought conditions, will intensify pressure on the availability of water resources in the coming decades.¹ According to projections, overall water demand will increase across the state, with municipal demand projected to increase more than any other water use category — from 5.2 million acre-feet per year in 2020 to 8.5 million in 2070.² The *Acre-foot* textbox defines the term. Yet existing water supplies are projected to decline 18 percent in the same period, primarily due to an accumulation of sedimentation in reservoirs, diminishing their storage capacity, and depletion of groundwater supplies.³

Acre-foot

An acre-foot, or 325,851 gallons, is the amount of water that will cover an acre of land — about the size of a football field — to the depth of one foot.

To balance current use and future availability of water, Texas' law pairs planning for and management of this important resource at the local and regional level with regulatory oversight at the state level. The Texas Water Development Board (TWDB) administers locally driven regional and statewide water planning to identify areas of projected need and potential future water resources. The Texas Commission on Environmental Quality (TCEQ) enforces state water regulations, primarily through the issuance of water right permits to local government entities, such as municipalities or river authorities, as well as to industrial, agricultural, and private users. The Texas Parks and Wildlife Department (TPWD), which has primary responsibility for protecting the state's fish and wildlife resources, provides recommendations to TCEQ and others regarding instream flows and freshwater inflows.

Texas governs ownership and regulation of water resources depending on their source, differentiating between surface water and groundwater as described in the *Water in Texas* textbox. Surface water is the property of the state and may be acquired — or “appropriated” — through a permitted water right.⁴ Diversion — or taking — of surface water is governed by the doctrine of prior appropriation, often known as “first in time, first in right,” which prioritizes water rights based on the date permitted.⁵ Under this arrangement, a “senior” water right holder may demand to receive all of the water granted by their permit before a later granted — or “junior” — water right holder receives any. In addition, the availability of surface water for permits issued after September 1, 2007, may be limited by environmental flow (e-flow) standards, which aim to ensure sufficient water flows through the state's river basins and bays to support aquatic life and healthy waterways.⁶ Today, most of the state's available surface water has been appropriated through more than 6,200 water right permits issued by TCEQ or its predecessor agencies.

Water in Texas

- Surface water flows in streams, rivers, and lakes or is stored in reservoirs. It primarily supplies municipal and industrial users.
- Groundwater percolates in underground aquifers. It primarily supplies irrigation, livestock, and rural municipal users.

In contrast, the groundwater beneath Texas landowners' property is a private property right.⁷ Under the state's common law rule of capture, landowners may essentially pump as much groundwater as they wish, with few limitations.⁸ However, local groundwater conservation districts (GCD), established to manage

groundwater resources, may set pumping restrictions to achieve “desired future conditions” of underlying aquifers.⁹ As of fiscal year 2021, Texas had 98 GCDs, covering about two-thirds of the state.¹⁰ Though no state agency directly regulates groundwater usage, TWDB monitors a GCD’s setting of desired future conditions and develops models for available groundwater, and TCEQ provides regulatory oversight for a GCD failing to perform its statutory duties.¹¹

Findings

An incomplete statutory framework limits TCEQ’s ability to adopt environmental flow standards to fully protect the health of Texas waterways.

Since the Legislature’s requirement to adopt e-flow protections in 2007, implementation has stalled, revealing an incomplete statutory framework that threatens to undermine the state’s effort to protect water quality, aquatic habitats, and its commercial fishing, recreation, and tourism industries. Statute requires TCEQ to adopt e-flow standards — described in the accompanying textbox — in all of the state’s basins and bays, and, where available, to reserve or “set aside” unappropriated water to satisfy those standards.¹² From 2011-14, the agency adopted e-flow standards for seven of the state’s 11 major basins and bays, as described in Appendix G, and has applied those standards to its water rights permitting process. However, no standards have been adopted for the remaining four basins — the Canadian, Red, Sulphur, and Cypress river basins. Nor have there been updates to existing e-flow standards, envisioned by statute to occur every decade.

E-flow standards

A measure of the quantity and timing of water flows necessary to sustain a sound ecological environment for freshwater and estuarine ecosystems, with pass-through flow generally reflected in cubic feet per second and accounting for seasonal fluctuations of flows in a basin or bay.

Statute sets out a framework for the adoption of e-flow standards, a process that involves multiple state and local entities.

- The nine-member Environmental Flows Advisory Group, made up of six legislators and representatives from TCEQ, TWDB, and TPWD, establishes a schedule of basins for adopting e-flow standards.¹³
- An Environmental Flows Science Advisory Committee, appointed by the E-Flows Advisory Group, serves as an objective, statewide scientific body to assist the advisory group in coordination of e-flow efforts.¹⁴
- The E-flows Advisory Group appoints a local Basin and Bay Area Stakeholders Committee for each river basin to propose the e-flow standards for their basin.¹⁵
- Each local stakeholders committee appoints a Basin and Bay Expert Science Team to develop e-flow analyses and recommendations based on the best science available for the stakeholders committee’s consideration.¹⁶
- TCEQ, TWDB, and TPWD provide technical assistance to each science team and may serve as nonvoting members of each team.¹⁷

- Following review of the science team's analysis, each local stakeholders committee submits e-flow standard recommendations to the E-Flows Advisory Group and to TCEQ for adoption.¹⁸

While this framework successfully governed the adoption of e-flow standards for the seven basin and bay systems specified in the initial statute, confusion and inaction since those adoptions indicates additional statutory direction is needed to ensure regular coordination and continuation of the process.

- **Stalled adoption of e-flow standards.** Without direction from the legislative E-flows Advisory Group, the e-flow process has been in limbo, with TCEQ unable to adopt e-flow standards for four of the state's river basins. The E-flows Advisory Group set an initial schedule for the adoption of e-flow standards for the seven basin and bay systems prioritized in statute, but not for the remaining areas.¹⁹ After establishing the schedule and overseeing the initial process for adoption of standards, the E-flows Advisory Group has not met or produced a legislative report since 2013. Adding to confusion over the status of the e-flow process, statute abolishes all participants — the E-flows Advisory Group, state science committee, local stakeholder committees, and local science teams — once e-flow standards are initially adopted for all basins and bays.²⁰ Since e-flow standards have not been adopted for all basins, these entities have not been abolished. But lack of progress in adopting e-flow standards has left some participants unsure whether the process continues or even if the E-flows Advisory Group exists.²¹
- **Unclear framework for revisions.** Although statute seems to envision local stakeholder committees updating environmental flow standards based on the needs of their basin every 10 years, statute does not clearly articulate the framework for administering this process, referred to as “adaptive management.”²² Local stakeholder committees may propose work plans that include an updated schedule, studies needed to validate or monitor the effectiveness of their e-flow standards, and other strategies to meet the e-flow standards.²³ However, while six stakeholder groups prepared and submitted work plans, the E-flows Advisory Group only approved the work plan for the Sabine-Neches basin in 2011.

Whether stakeholder committees can submit additional work plan proposals or how those plans would be reviewed is unclear without action from the E-flows Advisory Group. In the absence of approved work plans, statute also does not establish any statewide priorities to guide the development of the 10-year updates. Since 2014, the Legislature provided TWDB with roughly \$2 million per biennium to fund studies related to e-flow standards. In that time, TWDB has funded more than 55 such studies, including many identified by local stakeholder committees that could help refine e-flow standards or provide strategies to meet the standards. However, TWDB's efforts have not been guided by any schedule or prioritization from the legislative advisory group, which would help validate these efforts as a good use of state funds.

E-flow standards have been adopted for 7 of the state's 11 river basins and bays.

Statute does not establish any statewide priorities to guide updates to e-flow standards.

Stakeholders suggest TCEQ can amend e-flow standards, but TCEQ believes it must wait for stakeholders.

Also, participants have expressed confusion over when and how to update existing e-flow standards, despite most basins becoming eligible to do so soon. According to the e-flow standard adoption dates, two basins' flow standards were eligible for review in 2021, two will become eligible in 2022, and the remaining become eligible for review in 2024, as described in Appendix G. Stakeholders suggest TCEQ has authority to amend e-flow standards through a rulemaking process, but TCEQ believes it must wait for stakeholders to initiate the process — though the agency has not contacted the local stakeholder committees nor does it know whether any have met or intend to meet. As the E-flows Advisory Group is tasked with setting the original schedule and appointing stakeholder committees, the members could similarly work together to establish a schedule for updating e-flow standards and set statewide priorities to guide TCEQ's and TWDB's efforts and funding decisions. Statute already provides a mechanism for the E-flows Advisory Group to receive technical and scientific input from TCEQ, TWDB, and TPWD as members, as well as the science advisory committee, which it could rely on when setting these priorities.

TCEQ has ceased enforcing a statutory requirement for water right permits that could help ensure surface water availability for future Texans and the environment.

Water right permits have a statutory “use it or lose it” requirement.

Despite growing demand for a scarce resource, in recent years TCEQ has not exercised clear statutory authority and direction to revoke water right permits that fail to meet a statutory “use it or lose it” requirement. Although water right permits are often described as a perpetual property right, statute makes permits subject to full or partial cancellation after 10 years of nonuse.²⁴ In enacting this policy, the Legislature disfavored the type of chronic nonuse that suggests monopolizing water resources for future speculation, favoring instead beneficial use by those with current needs. The Legislature required TCEQ to “actively and continually evaluate outstanding permits and certified filings” and stated the agency “shall carry out measures to cancel wholly or partially the certified filing and permits that are subject to cancellation.”²⁵ Statute requires all water right holders to submit an annual report to TCEQ, for the stated purpose of helping TCEQ administer water rights laws and keeping an accurate inventory of the state's water resources.²⁶ Water right holders must also keep a monthly record of all water diversions and provide that record to TCEQ upon request. Those that fail to keep the required records or provide them to TCEQ are subject to a fine of up to \$500 per day.²⁷ Statute authorizes TCEQ to initiate cancellation proceedings “when the commission finds that its records do not show that some portion of the water has been used during the past 10 years.”²⁸ Only permits for long-term projects like a reservoir or electric generation or some permits held by cities and municipal districts may be exempted from cancellation.²⁹ Additionally, TCEQ may waive cancellation if nonuse resulted from conservation measures, restrictions resulting from a priority call, or drought conditions.³⁰

Agency data on water usage indicates a pattern in which a significant amount of allotted water is not used each year, across a large number of water right permits. An analysis by Sunset staff of TCEQ's water usage reports shows, of the nearly 50 million acre-feet of water permitted for use each year, in the last decade, the highest amount of total reported use was only 39 million acre-feet and the lowest was 20 million acre-feet. In that same period, nearly 3,000 out of the over 5,200 permit holders authorized to divert water, or 58 percent, reported using none of their appropriated water. These permits represent almost eight million acre-feet of appropriated water.³¹

58 percent of water right permit holders reported using none of their appropriated water.

TCEQ generally declines to pursue full or partial cancellation of chronically unused permits, relying on its 1997 water modeling study that concluded canceling water right permits would not result in appreciable amounts of additional available water. However, TCEQ does not regularly analyze its data on actual water usage or verify how much permitted water currently goes unused, nor does the agency track permits in a way to identify which permits could be subject to cancellation proceedings. In the 24 years since the 1997 study, over 2,000 permittees have reported not using any water, but TCEQ pursued cancellation only once during that time.³²

TCEQ notes that identifying permits subject to cancellation would be more complex than simply relying on water usage reports. Some permits "use" water for industrial processes, such as power generation, but report zero usage because the water is not consumed in the process. Other permits with zero usage would be exempt from cancellation for various reasons, such as those dedicated to long-term public supply projects or those without water to divert because of drought conditions. While determining which of the 3,000 permits reporting nonuse merit cancellation under the statute would require time and resources, TCEQ's initial calculation alone estimates at least 1 million acre-feet of permitted water could be subject to cancellation. And even a small portion of that unused water being made available could benefit the state.

Even a small portion of unused water could benefit the state.

- First, canceling water right permits for chronic nonuse would protect the fair application of the prior appropriation doctrine. Some of the permits with 24 years of nonuse have appropriation dates that are senior to right holders who have been using their water. In the event of a future drought, the senior right holders could demand to receive their water despite decades of nonuse and despite junior water right holders' compliance with the statutory usage requirement. If a senior right holder were to make such a demand, TCEQ would be compelled to enforce the senior water right holder's claim under the prior appropriation doctrine.
- Second, additional water made available to reappropriate could decrease the number of rejected permit applications from those seeking new water right permits. TCEQ frequently must inform water right permit applicants no available water exists to appropriate to their request. Water available for new appropriations is limited in many parts of the state, which TCEQ monitors through its water availability models discussed in the textbox on the following page.

Water Availability Models

The state's surface water modeling system, which TCEQ uses for evaluating water right permit applications and accounting for the water expected to be available. The models used to evaluate new permits assume each water right holder will try to use all appropriated water in a given year.

Cancellation of unused water right permits could help ensure others receive their full allotment of water.

- Third, as part of the e-flow process, TCEQ has integrated e-flow standards into its water availability models, ensuring new water right permits incorporate e-flow standards to protect aquatic life and downstream bays and estuaries. Returning unused water would make future appropriations of that water subject to e-flow standards and, depending on the location of the water, could potentially strengthen the impact of the state's environmental flow initiative.
- Finally, TCEQ suggests any additional water saved through permit cancellation would likely shore up the ability of other existing permit holders to receive their appropriated water. Currently, TCEQ grants water right permits for non-municipal uses if modeling shows 75 percent of the water requested will be available 75 percent of the time. In practical terms, this means TCEQ has authorized the diversion of more water than is regularly available. Cancellation of unused water right permits could help ensure their holders would be more likely to receive the full amount of water appropriated under their permits.

TCEQ's process for initiating priority groundwater management area studies lacks public input that could help identify areas of critical groundwater shortage.

Though the decision to study an area of the state for groundwater issues can lead to new local groundwater regulations, the current process TCEQ uses to determine whether to conduct such studies does not include an opportunity for local public input into the decision. By statute, TCEQ and TWDB must meet annually to identify areas of the state that are experiencing, or will experience within the next 50 years, critical groundwater problems such as shortages, land subsidence, and groundwater contamination.³³ TCEQ staff, with TWDB's and TPWD's assistance, then performs a study of the identified area and recommends whether to designate it as a priority groundwater management area (PGMA).³⁴ If the TCEQ commission designates an area as such, statute requires the area to be added to an existing GCD or to a newly created one, unless the commission finds doing so infeasible.³⁵

When meeting to decide whether to study an area for groundwater issues, TCEQ and TWDB meet in a closed setting. The agencies largely rely on regional water plans, TWDB's groundwater availability models, and information about groundwater management areas and existing groundwater conservation districts when deciding whether to conduct a PGMA study. While local entities and stakeholders may informally provide information and suggestions

to study certain areas, a formal structure for stakeholders to request a study of a particular area does not exist. This lack of a formal process prevents stakeholders and other local interests from presenting arguments for the need for a study as well as hearing how the agencies deliberate and how TCEQ ultimately decides whether or not to initiate a PGMA study. The decision to conduct a study would benefit from input from local entities, such as potentially affected municipalities, existing GCDs, and other groundwater users in the area, regarding future water use plans and projects and their impact on surface and groundwater availability.

Sunset Staff Recommendations

Change in Statute

3.1 Remove the abolishment clause for the E-Flows Advisory Group and E-Flows Science Advisory Committee, and require the advisory group to adopt a biennial statewide work plan for adaptive management updates of environmental flow standards.

This recommendation would allow the E-flows Advisory Group and its appointed science advisory committee to remain in existence to continue to coordinate the adoption of and periodic updates to e-flow standards. The E-flows Advisory Group would be required to adopt a biennial comprehensive statewide work plan for adaptive management of e-flow standards of each basin and bay in the state. The work plan should specify the basins and bays scheduled to undergo review and potential update of their e-flow standards during the upcoming biennium, as well as which basins and bays need additional study in preparation for such updates. Under this recommendation, the legislators on the advisory group would prioritize the focus of the agencies involved in supporting the e-flow process, while TCEQ would handle the administrative tasks associated with implementation. TWDB would continue to fund and manage environmental flow studies, and TPWD would continue to provide technical assistance regarding instream flows and freshwater inflows.

To facilitate the development of the biennial statewide work plan, statute would direct TCEQ to submit a biennial status report to the E-flows Advisory Group on the implementation status and effectiveness of current e-flow standards and the progress made over the past biennium. The report should include information submitted by TCEQ, TWDB, and TPWD describing their e-flow-related efforts in the prior two years, as well as each agency's recommendations regarding updates to the biennial work plan. The report should also include information on TCEQ's implementation of other statutory requirements related to e-flow standards, including the status of setting aside unappropriated water for flow protection.

The E-flows Advisory Group would continue to receive proposed local work plans submitted by the local basin and bay area stakeholder committees, and could request analysis and recommendations from the state science advisory committee as needed. Because statute currently abolishes the local stakeholders and science committees upon abolishment of the E-flows Advisory Group, this recommendation would change statute to abolish these committees upon adoption of new or updated e-flow standards for their basin. Statute would clarify the E-flows Advisory Group would reappoint a local stakeholder committee for a basin or bay scheduled for adaptive management updates, which would then make recommendations to TCEQ to update its e-flow standards using the same process outlined in statute for the development of the original standards.

3.2 Require TCEQ to hold its annual meeting regarding priority groundwater management area studies in a public setting.

Under this recommendation, TCEQ and TWDB would consider areas for conducting PGMA studies in a public meeting, subject to open meetings requirements, including the opportunity for public comment. Allowing interested local parties to participate by providing information and recommendations on PGMA studies would ensure TCEQ and TWDB receive information about existing groundwater conditions and issues, as well as future planning and projects that may impact groundwater availability over the next 50 years. Holding a public meeting would also provide more transparency into the decision of which areas of the state need a PGMA study.

Management Action

3.3 Direct TCEQ to conduct a comprehensive study of its water usage data and initiate cancellation proceedings for water right permits with nonuse over 10 years.

Under this recommendation TCEQ should review the data it collects regarding water usage to determine which water right permits violate statute's nonuse requirement and use this information to take steps to cancel those water right permits. TCEQ would have discretion to develop the appropriate steps and timetable for this process, given current gaps in the agency's data and lack of institutional experience with conducting cancellation proceedings. At a minimum, TCEQ should conduct a comprehensive analysis of the usage reports it collects from water right holders to identify both the permits with nonuse over the preceding 10-year period that are most likely subject to cancellation and other data or information TCEQ would need to conduct cancellation proceedings. For example, TCEQ could begin the process by identifying water right permits with multiple decades of nonuse that have no apparent exemption or explanation for the nonuse. As appropriate, TCEQ should then initiate cancellation proceedings to cancel all or part of the unused water right permits, in accordance with statute. Once TCEQ takes initial steps to comply with statutory cancellation requirements, the agency should identify further resources it needs to support this process and include those as part of its upcoming Legislative Appropriations Request.

Fiscal Implication

The recommendations regarding e-flow standards would have a cost to the state that cannot be estimated at this time. Members of the E-flows Advisory Group are entitled to reimbursement for travel expenses, and TWDB previously provided some compensation and travel reimbursement to the state science committee and the local science teams when developing initial e-flow standards.³⁶ However, exact costs each year would depend upon the schedule adopted by the E-flows Advisory Group. In addition, these recommendations assume the Legislature continues to appropriate \$2 million biennially to TWDB for the purpose of funding e-flow studies. The recommendation to pursue cancellation of water right permits for chronic nonuse would likely result in TCEQ evaluating permit requirements and holding additional contested case hearings as part of the cancellation proceedings, but costs for those additional actions would depend on the number of permits TCEQ identifies for cancellation and cannot be estimated at this time. Other recommendations could be implemented using existing resources.

¹ Texas Water Development Board (TWDB), *2022 State Water Plan*, accessed online April 4, 2022, <https://www.twdb.texas.gov/>.

² *Ibid.*, pp. 6, 53.

³ *Ibid.*, p. 65.

⁴ All citations to Texas statutes are as they appear on <http://statutes.legis.texas.gov>. Sections 11.021 and 11.022, Texas Water Code; TWDB, *2022 State Water Plan*, p. 76.

- 5 Section 11.027, Texas Water Code.
- 6 Section 11.1471(d), Texas Water Code.
- 7 Section 36.002, Texas Water Code.
- 8 TWDB, *2022 State Water Plan*, p. 76.
- 9 Section 36.002, Texas Water Code.
- 10 TWDB, “Groundwater Conservation District Facts,” accessed online April 19, 2022, https://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp. In addition to the 98 GCDs, Texas has three other districts that manage groundwater: the Harris-Galveston Subsidence District, Fort Bend Subsidence District, and the Edwards Aquifer Authority.
- 11 Sections 36.0015, 36.1072, and 36.3011, Texas Water Code.
- 12 Sections 11.0235 and 11.1471, Texas Water Code. As of now, TCEQ has not formally “set aside” any unappropriated water through the e-flow process, choosing instead to incorporate e-flow standards into its water right permitting decisions.
- 13 Sections 11.0236 and 11.02362, Texas Water Code.
- 14 Section 11.02361, Texas Water Code.
- 15 Section 11.02362(f), Texas Water Code.
- 16 Section 11.02362(i), Texas Water Code.
- 17 Section 11.02362(k), Texas Water Code.
- 18 Section 11.02362(o), Texas Water Code.
- 19 Section 11.02362(e), Texas Water Code.
- 20 Sections 11.0236(m), 11.02361(g), and 11.02362(s), Texas Water Code.
- 21 Statute also directs the E-flows Advisory Group to pursue other activities to encourage sufficient environmental flows, such as developing public and private market-based approaches to dedicating water toward e-flows. Section 11.0236(i), Texas Water Code.
- 22 Section 11.02362(p), Texas Water Code.
- 23 Section 11.1471(f), Texas Water Code.
- 24 Section 11.172, Texas Water Code.
- 25 Section 12.012, Texas Water Code.
- 26 Section 11.031, Texas Water Code.
- 27 Ibid.
- 28 Section 11.174, Texas Water Code.
- 29 Sections 11.173(b) and 11.184, Texas Water Code.
- 30 Section 11.173(b), Texas Water Code.
- 31 Statute also directs TCEQ to evaluate cancellation of water right permits for chronic under-use in addition to full nonuse. Section 12.012, Texas Water Code. Comparing each water right holder’s highest usage report over the past decade with the permit’s total appropriation, a total of 28 million acre-feet from over 4,500 permits could potentially be subject to cancellation.
- 32 TCEQ reports only once pursuing cancellation of water permits in the past 20 years. In 2003, TCEQ cancelled a group of 67 permits in the Rio Grande basin, resulting in around 800 acre-feet of returned appropriated water.
- 33 Section 12.012, Texas Water Code.
- 34 Section 35.007, Texas Water Code.
- 35 Ibid.
- 36 Sections 35.008 and 35.013, Texas Water Code.

ISSUE 4

TCEQ and OPIC Lack Certain Transparent and Efficient Processes for OPIC to More Effectively Represent the Public's Interest.

Background

Statute creates the Office of Public Interest Counsel (OPIC) within the Texas Commission on Environmental Quality (TCEQ) to act as a party in all proceedings before the commission to ensure TCEQ promotes the public's interest.¹ OPIC strives to provide balance to the agency proceedings by voicing the public interest perspective and ensuring that all relevant evidence is made part of the record so the commission can make informed decisions.² OPIC also provides comments to the commission on proposed rules and policy that affect the public. By commission rule, OPIC must consider several factors when determining the "nature and extent" of the public interest, as listed in the textbox, *OPIC Public Interest Factors*.³ Statute also requires OPIC to provide an annual report to the commission summarizing the office's performance, budgetary needs, and recommendations for legislative and regulatory changes.⁴

With a budget of almost \$620,000 in fiscal year 2021, the office is led by the Public Interest Counsel, who is appointed by the commission, and employs an additional six attorneys and an executive assistant.⁵ In fiscal year 2021, OPIC participated in 618 different proceedings before the commission, including 22 contested cases, 37 rulemaking projects, and 471 enforcement proceedings.⁶

OPIC Public Interest Factors

- Impact to human health.
- Impact to environmental quality.
- Impact to use and enjoyment of property.
- Impact to the general populace.
- Interest expressed by the public.
- Impact to economic growth.
- Conservation or judicious use of state resources.
- The need for facilities or services and alignment with TCEQ's water and wastewater regionalization policy.

Findings

Inefficiencies in hiring expert consultants hinder OPIC's ability to fully advocate for the public interest in certain contested cases.

OPIC's current process of procuring technical expertise for contested cases takes too long, undermining its ability to obtain outside help when needed.

As the entity specifically charged with representing the general public interest before the commission, statute authorizes OPIC to hire outside technical support and expertise to carry out its functions, including assistance in contested case proceedings.⁷ OPIC contracts with experts on a case-by-case basis to participate in contested cases at the State Office of Administrative Hearings (SOAH), reserving this option for the most complicated and technical issues as seen in the textbox, *OPIC's Use of an Expert Consultant*.⁸ Because not all permit applications proceed to a contested case hearing, OPIC has chosen not

OPIC's Use of an Expert Consultant

In 2015, OPIC requested and received \$5,000 for expert consulting services in a complex water use permit application for a reservoir. The expert provided OPIC with a report on the applicant's water conservation plan to help OPIC evaluate the applicant's compliance with statutory and regulatory requirements.

to expend time, effort, and money on technical expertise if an application is not going to be contested or is likely to settle, which is why OPIC generally does not pursue the possibility of retaining an expert until the commission refers a case to SOAH. Statute and agency practice limit the time available for conducting contested case hearings:

- Statute limits contested case hearings to a maximum of 180 days.
- TCEQ commissioners typically allow 180 days for contested case hearings, but occasionally allow as little as 120 days for less technically complex cases.
- SOAH reserves 60 days of that time for the judge to issue a proposal for decision.⁹

As a result, once a case reaches a preliminary hearing at SOAH and OPIC identifies issues needing expert assistance, OPIC typically only has between 60 and 120 days to obtain and consider an expert's report. However, OPIC may take up to 60 days to find an expert, execute a contract with them, request and receive funding from TCEQ's legal department, and for the expert to initiate working on the case. As a result, the expert has, at most, 60 days to review a highly technical permit TCEQ staff may have spent a year or more developing, and to consult with OPIC on the specific issues at hand in the contested case. Due to these constraints, OPIC could not identify a single permit application during fiscal years 2017-20 that would have afforded the office enough time to procure an expert consultant.¹⁰

A contract-when-needed approach limits OPIC's ability to hire outside experts.

This contract-when-needed-approach has not provided the flexibility OPIC needs to best take advantage of outside expertise. In contrast, for some of its other programs, TCEQ enters into more flexible "umbrella contracts" with vendors to prepare for work that may need to be done over an extended period of time. Umbrella contracts set up agreements for work in anticipation of future need and can span multiple fiscal years. Contractors are paid when they do the work, not when they sign the contract. For example, TCEQ uses umbrella contracts with companies who perform various remediation work on Superfund and clean up projects spanning multiple years and various types of jobs. In these cases, the contract is already in place to use whenever the service is needed.

The commission misses an opportunity to take public action on OPIC's recommended regulatory changes to ensure transparency and promote public trust.

Although OPIC's annual report to TCEQ includes suggested rule changes, the commission is not required — nor has it chosen — to take formal action on those recommendations.¹¹ As shown in the table on the following page, OPIC has made repeated suggestions to the commission to improve agency processes, especially those that OPIC finds cause public frustration and inefficiencies for participants in TCEQ matters.¹² While commissioners occasionally make general public comments on OPIC's recommendations, they do not take formal action on them.¹³

Recurring OPIC Rule Change Recommendations

Rule Change Recommendations	Annual Report		
	FY 18	FY 19	FY 20
Recommended clarifying the Texas Pollutant Discharge Elimination System rules so that individuals' concerns that issuing a permit could lead to standing water, nuisance, or inundation of their property would not be dismissed as "general concerns about flooding," which are outside TCEQ's jurisdiction.	✓	✓	✓
Recommended allowing concurrent applications for a wastewater discharge permit and a water reuse permit. OPIC found many cases where a utility promised to reuse and not discharge wastewater into a stream or river, but the public grew frustrated when they did not see this promise reflected in the initial required discharge permit.	✓	✓	
Recommended requiring SOAH administrative law judges to issue a proposal for decision no later than 30 days after the arguments in a contested case hearing are complete, rather than 60 days. This change would provide more time for participants to present their cases in contested case proceedings.	✓	✓	✓
Recommended the executive director request certain applications be sent directly to SOAH for a contested case hearing. Statute authorizes the executive director or applicant to do this in cases where there is a large public interest and reasonable certainty the permit will be contested. However, the executive director currently only exercises the authority if the applicant agrees.	✓	✓	✓

TCEQ's consideration of OPIC's recommendations does not align with how the agency treats rule change recommendations from the rest of TCEQ staff or the public. TCEQ has a process for staff to recommend rule changes through the executive director, which the commission considers in a public meeting and either formally rejects or approves for a rule proposal to be published in the *Texas Register* for public comment. Similarly, statute requires TCEQ to formally consider a petition for rule change filed by a member of the public and either begin a rulemaking process or reject the petition within 60 days with a written explanation of the denial.¹⁴

The absence of discussion and formal action by the commission on OPIC recommendations presented in the annual report not only misses an opportunity to potentially address matters of public interest in a public setting, but also risks the appearance the commission does not value OPIC's suggestions. During its review, Sunset staff consistently heard public concerns the commission ignores and minimizes OPIC's opinions. While the commission may consider OPIC's proposals outside of a public setting and has ultimate authority over which rules it finds appropriate to adopt, by not actively and publicly discussing or following up on OPIC's recommendations, the commission only lends weight to this perception, further undermining public trust in TCEQ.

Sunset Staff Recommendations

Management Action

4.1 Direct OPIC to consider developing and using umbrella contracts to procure expert assistance.

This recommendation would direct OPIC to consider hiring expert consultants through umbrella contracts, which establish a contractual relationship and set the price for work well before the work is needed. OPIC could identify multiple individuals or entities that would essentially be available on standby to provide expertise on common but technically complex issues that arise during contested cases. The office would enter contracts setting the price for providing this type of expertise at a future date. Once a contract is in place, OPIC would only need to request funding for expert work on an individual contested case, at the time when the work is needed. Establishing umbrella contracts up front would reduce the time it takes to obtain experts and help ensure OPIC can access expert assistance to promote the public interest.

4.2 Direct TCEQ commissioners to take formal action on OPIC's rulemaking recommendations.

This recommendation would direct TCEQ commissioners to formally act on OPIC's regulatory recommendations, as it currently does for other TCEQ staff rule proposals and public rulemaking petitions. Commissioners would vote or take formal action at a public commission meeting, which could include either initiating a rulemaking project based on OPIC's recommendation, scheduling further discussion on the recommendation at a public meeting, or rejecting the recommendation with a written explanation of the denial. Taking public action on OPIC's recommendations would provide a more transparent way to assure the public that the commission has fully considered OPIC's suggestions.

Fiscal Implication

These recommendations could be implemented with existing resources and would have no fiscal impact to the state. The recommendations are designed to streamline contracting processes at TCEQ and OPIC in particular, and increase the transparency of OPIC's role in rulemaking. Improving the process for acquiring and using experts would allow OPIC to more efficiently use available funds to represent the public's interest in contested case hearings. Requiring commission action on OPIC recommendations would require additional time at the commission meetings and could result in additional rulemaking projects, which TCEQ could implement with existing resources. While the recommendations would require commission and staff time to complete, they should improve agency operations and efficiency in the long term.

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- ¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 5.271, Texas Water Code.
- ² Ibid.; Texas Commission on Environmental Quality, “Office of the Public Interest Counsel,” webpage last modified April 12, 2021, accessed online April 6, 2022, https://www.tceq.texas.gov/agency/decisions/participation/public_interest.
- ³ 30 Texas Administrative Code, Part 1, Chapter 80, Subchapter C, Section 80.110 (2012) (Texas Commission on Environmental Quality, *Public Interest Factors*).
- ⁴ Section 5.2725, Texas Water Code.
- ⁵ The Office of Public Interest Counsel (OPIC), *Annual Report*, Texas Commission on Environmental Quality, 2021, p. 7.
- ⁶ Ibid.
- ⁷ Section 5.274(b), Texas Water Code.
- ⁸ OPIC, *Annual Report*, 2021, pp. 8-9; OPIC, *Annual Report*, Texas Commission on Environmental Quality, 2020, p. 9.
- ⁹ Ibid.; Section 2003.047(e-2), Texas Government Code.
- ¹⁰ OPIC, *Annual Report*, 2020, p. 10.
- ¹¹ Section 5.2725, Texas Water Code.
- ¹² OPIC, *Annual Report*, 2020, pp. 19-28; OPIC, *Annual Report*, Texas Commission on Environmental Quality, 2019, pp. 12-25; OPIC, *Annual Report*, Texas Commission on Environmental Quality, 2018, pp. 22-36. OPIC had no regulatory change recommendations for fiscal year 2021.
- ¹³ Texas Commission on Environmental Quality, “Commission Agenda - September 5, 2018,” video uploaded September 18, 2019, accessed online April 21, 2022, <https://www.youtube.com/watch?v=bcBhApsBgIE&list=PLwzfZK5z8LrHwIesBZwPqGQByH911Wfkd&index=2>, at 7:30-10:00; Texas Commission on Environmental Quality, “Commission Agenda - September 11, 2019,” video uploaded September 11, 2019, accessed online April 21, 2022, <https://www.youtube.com/watch?v=r79Gu63Cxls&list=PLwzfZK5z8LrGy83uPXX9M2Tr9pYA66-oJ8&index=8>, at 14:30-16:03; and Texas Commission on Environmental Quality, “Commission Agenda - September 9, 2020,” video uploaded September 9, 2020, accessed online April 21, 2022, <https://www.youtube.com/watch?v=E0O-ilfeydo&list=PLwzfZK5z8LrH47ilfeydo&list=PLwzfZK5z8LrH47acUsp1sSJOhm93IbOAK&index=17>, at 15:25-22:30. OPIC had no regulatory change recommendations for fiscal year 2021.
- ¹⁴ Section 2001.021(c), Texas Government Code.

ISSUE 5

The State Has a Continuing Need for the Texas Commission on Environmental Quality.

Background

As the state's environmental quality regulatory agency, the mission of the Texas Commission on Environmental Quality (TCEQ) is to protect the state's public health and natural resources, consistent with sustainable economic development.¹ To carry out this broad mission, TCEQ performs a range of functions common across all three of the state's environmental "media" — air, water, and waste — from monitoring and regulating the release of pollutants to managing remediation efforts at environmental disaster sites to assisting small businesses and local governments with complying with federal and state environmental laws and regulations. Much of the agency's regulations govern the permitting and licensing of facilities and occupations that release hazardous chemicals that could potentially degrade public health or the environment. TCEQ's \$430 million operating budget supports over 2,600 staff who work at its Austin headquarters and 22 regional and satellite offices across the state, and provides over \$163 million in pass-through funding that benefits environmental protection and conservation programs at county and municipal governments.

Findings

Texas has a continuing interest in overseeing protection of the state's environmental quality.

With a history of environmental regulations that pre-date landmark national legislation, Texas has a longstanding interest in regulating private and public activities that could impact public health or cause serious damage to the state's abundant and economically important natural resources. Texas citizens and businesses benefit from protecting the quality of our air and water, ensuring proper disposal of waste, and cleaning up sites with hazardous chemicals. TCEQ monitors the quality of the state's natural resources, testing air and water samples through a network of 170 air monitoring sites and over 1,800 surface water monitoring sites. TCEQ encourages businesses it regulates to comply with limitations on amounts of pollution allowed to be emitted, discharged, or stored into the state's air, water, and soil through inspections and complaint investigations, education efforts, and enforcement actions. In fiscal year 2021, the agency conducted over 117,000 inspections and levied more than \$28 million in administrative and civil penalties.

In addition, TCEQ administers several programs that help the state meet national environmental standards while allowing Texas to design and implement regulatory efforts tailored to the state's diverse geography and population. TCEQ often acts under delegated authority from the U.S. Environmental Protection Agency and other federal agencies, implementing programs to comply with the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and other federal environmental laws. These delegations allow Texas to receive about \$40 million in federal funds each year to support

TCEQ tailors its regulatory efforts to the state's diverse geography and population.

TCEQ indicates
a trend of
improving
environmental
conditions
across Texas.

TCEQ's operations, including installing pollution monitoring equipment and remediating contaminated sites in the state.

Though the subject of controversy and complaints, both from regulated industries and from environmental organizations, TCEQ points to several indicators reflecting a generally successful trend of improving environmental conditions across the state. Emissions of air pollutants have decreased over the past decade as the state seeks to meet stricter federal standards. The number of impaired water bodies has trended downward since 2010, and recent efforts to reduce the number of non-compliant public water systems means 99 percent of Texans have access to water that meets federal standards.

No substantial benefits would result from transferring TCEQ's functions to a different state agency.

Sunset staff considered organizational alternatives for administering TCEQ's programs but concluded no significant benefit would result from transferring functions or merging TCEQ with the state's other natural resource agencies, many of which do not have regulatory authority or responsibilities. TCEQ's size, structure, and statewide presence allow it to maintain a singularity of focus on environmental quality while operating a variety of regulatory and assistance programs impacting air, water, and waste disposal.

No other agency
provides the
same level
of regulatory
oversight as
TCEQ.

While other state agencies also perform functions relating to environmental quality, none offer the same broad regulatory oversight TCEQ provides across air, water, and waste disposal programs. The Texas Water Development Board administers the state water supply and flood planning processes and provides financial assistance to communities for water infrastructure and conservation projects. The Texas State Soil and Water Conservation Board helps ranchers and farmers adopt conservation practices and address water quality issues, and provides grants to repair and maintain flood control dams. However, neither agency wields regulatory authority. The last Sunset review of TCEQ resulted in the transfer of rate-related regulation of water and wastewater utilities to the Public Utility Commission, but otherwise left TCEQ as the primary regulatory authority over water. No other state agency has a related focus over the state's air quality or disposal of waste. And while the Railroad Commission of Texas' jurisdiction overlaps in certain areas with TCEQ's role, the Railroad Commission's environmental responsibilities focus on its regulation and enforcement of oil and gas drilling and surface and uranium mining.

While organizational structures vary, all 50 states regulate environmental quality and pollution control.

Among the states, a variety of organizational structures exists for permitting, monitoring, and remediating hazardous chemicals and other pollutants. However, every state has a unified agency dedicated to protecting their state's environmental quality from excessive degradation. In some, these agencies also oversee regulation of energy resources akin to the jurisdiction of the Public Utility Commission and the Railroad Commission. In others, the jurisdiction

over environmental quality is merged with oversight of agriculture or natural resources, such as at the Texas Department of Agriculture or Texas Department of Parks and Wildlife. The level of federal delegation over environmental standards and programs also varies among the states. Ultimately, though, all state environmental regulatory agencies share the common goal of protecting air, water, and soil from hazardous emissions and discharges.

TCEQ's statutes do not reflect standard language typically applied across the board during Sunset reviews.

The Sunset Commission has developed a set of standard across-the-board recommendations (ATBs) that it applies to all state agencies reviewed unless an overwhelming reason exists not to do so. These ATBs reflect an effort by the Legislature to place policy directives to prevent problems from occurring, instead of reacting to problems after the fact. ATBs are statutory administrative policies adopted by the Sunset Commission that contain “good government” standards. The ATBs reflect review criteria contained in the Sunset Act designed to ensure open, responsive, and effective government.

- **Board member training.** TCEQ's statute contains standard language requiring commissioners to receive training and information necessary for them to properly discharge their duties. However, statute does not contain newer requirements for all topics the training must cover, such as a discussion of the scope of, and limitations on, the commission's rulemaking authority. Statute also does not require the agency to create a training manual for all commissioners or specify that commissioners must attest to receiving and reviewing the training manual annually.
- **Policymaking and staff functions.** While TCEQ's statute requires the agency to develop and implement policies separating the respective responsibilities of the commissioners and staff, statute does not specifically provide for separating the commissioners' policymaking functions from the day-to-day administrative functions of managing the agency. Updating the provision would help avoid confusion about who is in charge of operations, which can undermine an agency's effectiveness.

TCEQ's reporting requirements continue to be needed.

The Sunset Act establishes a process for the Sunset Commission to consider if reporting requirements of agencies under review need to be continued or abolished.² The Sunset Commission has interpreted these provisions as applying to reports that are specific to the agency and not general reporting requirements that extend well beyond the scope of the agency under review. Reporting requirements with deadlines or that have expiration dates are not included, nor are routine notifications or notices, or posting requirements.

State law requires TCEQ to produce 18 types of reports to the Legislature, with several combined into larger, consolidated reports, as detailed in Appendix H. These reports broadly cover TCEQ's responsibilities across environmental

All state environmental agencies share the goal of protecting air, water, and soil.

media, including reports on enforcement actions, air emission events, surface and groundwater issues, and waste and recycling programs. Sunset staff evaluated the purpose served by these reports and concluded each report provides the Legislature with valuable information regarding TCEQ's activities and should be continued.

Sunset Staff Recommendations

Change in Statute

5.1 Continue the Texas Commission on Environmental Quality for 12 years and remove the Sunset date of the agency's enabling statute.

This recommendation would continue TCEQ until September 1, 2035, and would also remove the Sunset date of the agency's statute to ensure only the agency, not its statute, expires.

5.2 Update the standard across-the-board requirement related to board member training.

This recommendation would require the agency to develop a training manual that each commissioner attests to receiving annually, and require existing commissioners' training to include information about the scope of and limitations on the commission's rulemaking authority. The training should provide clarity that the Legislature sets policy, and agency boards and commissions have rulemaking authority necessary to implement legislative policy.

5.3 Update the standard across-the-board requirement regarding the separation of duties of commissioners from those of staff.

This recommendation would require the agency to adopt policies to clearly separate the commissioners' policy functions from agency staff's day-to-day operations.

Fiscal Implication

Continuing TCEQ would require an annual appropriation from the Legislature, which was about \$430 million in fiscal year 2021. The recommendations would not result in any additional fiscal impact to the state.

¹ Texas Commission on Environmental Quality, "Mission Statement and Agency Philosophy," webpage last modified July 23, 2021, accessed online April 4, 2022, <https://www.tceq.texas.gov/agency/mission.html>.

² All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Sections 325.0075, 325.011(13), and 325.012(a)(4), Texas Government Code.

COMPACT COMMISSION AT A GLANCE

Pursuant to the U.S. Low-Level Radioactive Waste Policy Amendments Act, states may create a compact to manage the disposal of low-level radioactive waste generated within participating states, though host states may also accept waste generated in nonparty states.¹ As discussed in the textbox below, federal law classifies low-level radioactive waste separately from high-level radioactive waste — such as fuel rods — produced from reactions that occur inside nuclear reactors. In 1998, Congress ratified a compact between Texas, Vermont, and Maine to establish the Texas Low-Level Radioactive Waste Disposal Compact Commission. After Maine repealed the compact in 2002 following the closing and decommissioning of its one nuclear reactor, only Texas and Vermont remained in the compact. In 2009, the Texas Commission on Environmental Quality (TCEQ) licensed Texas' only current disposal facility for Class A, B, and C low-level radioactive waste, known as the compact waste disposal facility, which a private company called Waste Control Specialists (WCS) operates in Andrews County. The company built and began operating the facility in 2012. The compact commission oversees the disposal of low-level radioactive waste by performing the following functions:

- Monitors the available capacity for low-level radioactive waste at the compact waste disposal facility.
- Approves the shipment of low-level radioactive waste into the compact waste disposal facility and out of Texas or Vermont.
- Adopts a contingency plan for the disposal of low-level radioactive waste in the event the compact waste disposal facility closes.

Low-Level Radioactive Waste

Common sources of low-level radioactive waste include medical equipment with radioactive components or protective clothing and other supplies used in the presence of nuclear materials. Federal law divides low-level radioactive waste into three categories found in radioactive isotopes of certain elements:

- Class A – waste with the lowest amount of radioactivity, measured in curies, that accounts for the vast majority (over 90 percent) of low-level waste.
- Class B – waste with higher curie counts that must meet stricter requirements related to its packaging to ensure stability when stored.
- Class C – waste with the highest amount of radioactivity, but still below what is considered high-level radioactive waste, that must meet strict requirements for both packaging and additional storage measures.

Class B or C waste may be disposed of only at a facility specifically licensed for such radioactive waste. The Resource Conservation and Recovery Act (RCRA), which regulates the storage of hazardous non-radioactive waste that meets land disposal restrictions, allows under certain conditions very low activity Class A waste to be disposed of at a RCRA-licensed facility.

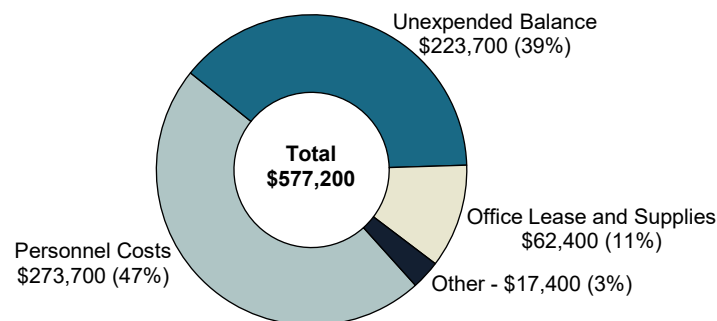
Key Facts

- **Governance.** The compact commission has eight commissioners. The governor of Texas appoints six commissioners, one of whom must be a legal resident of Andrews County, to staggered six-year terms.^{2,3} The governor of Vermont appoints at least one commissioner, as well as one alternate, who have no terms and serve at the pleasure of the governor.⁴ As the host state for the compact waste disposal facility, Texas' governor selects the chair and vice chair of the compact commission.⁵

- **Funding.** Texas generates revenue from fees levied for disposal of low-level radioactive waste at the compact waste disposal facility. Since opening, the facility has generated over \$63 million in revenue for the state.

As the host state, the compact requires Texas to reimburse costs associated with operation of the compact commission.⁶ The Legislature appropriates funds from a general revenue dedicated account, which is funded through licensing fees for facilities that store, process, and dispose of radioactive materials and a fee on total gross compact waste receipts for low-level radioactive waste disposal. The remainder of the dedicated account goes to the operational costs of TCEQ's Radioactive Materials Licensing and Compliance programs. In fiscal year 2021, the Legislature appropriated the compact commission \$577,200. As shown in the chart, the compact commission spent more than half that amount on personnel costs and office functions, and lapsed almost \$224,000 back to the general revenue dedicated account for TCEQ to use in the subsequent fiscal year.

Compact Commission Expenditures - FY 2021



- **Staffing.** The compact commission personnel are not state employees. Instead, the compact commission contracts for two employees, an executive director and assistant executive director, to perform the compact commission's day-to-day work. The compact commission also contracts for accounting, auditing, information technology, and government relations functions. Because of the compact commission staff's small size, Sunset staff did not prepare an analysis comparing the compact commission's workforce composition to the overall civilian labor force.
- **Texas' compact waste disposal facility.** WCS operates the compact waste disposal facility as part of a large site in Andrews County where it also operates three other radioactive waste facilities, detailed in the textbox. WCS chose the Andrews County site due to a thick layer of red bed clay and significant distance from any potable groundwater source to prevent any radioactive waste contamination. Statute protects the federal and state government against liability while WCS operates the facility.⁷

While WCS owns the compact waste disposal facility, the state owns the land on which the facility was built and the low-level radioactive waste disposed within it, including all liabilities for future containment and monitoring of the facility once closed. Currently, WCS has constructed 475,000 of the nine million cubic feet of storage authorized under its compact

WCS Facilities in Andrews County

- WCS operates the compact waste disposal facility, which receives Class A, B, and C low-level radioactive waste approved for disposal under the compact.
- WCS operates two federal waste disposal facilities: one receives mixed RCRA and federal low-level radioactive waste, and one receives by-product material for disposal on behalf of the Department of Energy.
- WCS operates a RCRA waste disposal facility that receives hazardous waste, including the Class A lowest-level radioactive waste, as a commercial service to private waste generators.

waste disposal facility license, and has filled about 200,000 cubic feet or about 2 percent of the total authorized space. TCEQ collects reports from WCS and is required to complete a study at least once every four years of the remaining capacity of the compact waste disposal facility.⁸

- **TCEQ's role.** As the state regulator of radioactive waste disposal sites, TCEQ licenses WCS to run the compact waste disposal facility and the company's three other disposal facilities. With regards to the compact waste disposal facility, TCEQ sets the disposal fees and works closely with the compact commission to monitor waste entering the facility. Before WCS can dispose of waste at the facility, TCEQ conducts a legal review of the contract between the entity seeking disposal of waste and WCS and a technical review of the proposed waste characteristics. TCEQ also inspects shipments as they arrive at the compact waste disposal facility.
- **Interstate disposal of radioactive waste.** Waste from Texas and Vermont, as compact members, does not require compact commission approval before disposal at the compact waste disposal facility. The compact commission has authority to approve applications from other parts of the country outside Texas and Vermont to dispose of waste at the compact waste disposal facility based on certain statutory limits.⁹ Under the compact, the amount of imported waste from nonparty states may not exceed 30 percent of the available storage.¹⁰ The compact also caps the amount of curies of nonparty waste that may be disposed of at the compact waste disposal facility at 275,000 per year.¹¹ Statute prohibits WCS from disposing of waste originating outside the U.S.¹² The compact commission also considers and approves requests to export low-level radioactive waste from Texas and Vermont that generators wish to dispose of somewhere other than the compact waste disposal facility.

Each import and export agreement details the waste's volume, curie level, and other characteristics. The compact commission meets every six to eight weeks to review and approve importation and exportation applications. In fiscal year 2021, the compact commission approved 30 importation agreements for the disposal of nearly 20,000 cubic feet of waste at the compact waste disposal facility, as well as two exportation agreements.

- **Contingency planning and reporting.** The compact requires the compact commission to prepare, adopt, and implement a contingency plan for the disposal and management of low-level radioactive waste should the compact waste disposal facility close.¹³ WCS provides the compact commission monthly reports on available capacity at the compact waste disposal facility, including a breakdown of party state and nonparty state waste disposed of at the facility. The compact commission adopted updates to its contingency plan on March 12, 2020. Additionally, the compact commission must provide an annual report to the governors and presiding officers of the legislatures of the compact member states regarding its activities.¹⁴

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- ¹ Low-Level Radioactive Waste Policy Amendments Act, 42 U.S. Code, Sections 2021 and 2021c.
- ² All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 403.001(a), Texas Health and Safety Code.
- ³ Section 403.002, Texas Health and Safety Code.
- ⁴ 10 VSA Section 7062.
- ⁵ Section 403.006, Texas Health and Safety Code; Section 3.04(4), Texas Low-Level Radioactive Waste Disposal Compact.
- ⁶ Ibid.; Section 4.04(4), Texas Low-Level Radioactive Waste Disposal Compact.
- ⁷ Section 401.211, Texas Health and Safety Code.
- ⁸ Section 401.208(a), Texas Health and Safety Code.
- ⁹ Section 401.207(b), Texas Health and Safety Code.
- ¹⁰ Section 401.207(e)(1)(B), Texas Health and Safety Code.
- ¹¹ Section 401.207(e)(2), Texas Health and Safety Code.
- ¹² Section 401.207(c), Texas Health and Safety Code.
- ¹³ Section 403.006, Texas Health and Safety Code; Section 3.04(7), Texas Low-Level Radioactive Waste Disposal Compact.
- ¹⁴ Ibid.; Section 3.04(8), Texas Low-Level Radioactive Waste Disposal Compact.

ISSUE 6

The State Benefits From Continued Legislative Oversight of the Texas Low-Level Radioactive Waste Disposal Compact Commission.

Background

Since congressional ratification in 1998, an interstate compact has authorized Texas and Vermont to manage and control the amount of low-level radioactive waste disposal in the two states without running afoul of federal interstate commerce regulations. In operation since 2009, the eight-member Texas Low-Level Radioactive Waste Disposal Compact Commission is responsible for administering the compact by monitoring the importation and exportation of low-level radioactive waste in Texas and Vermont. As the host state, Texas provides the location for disposing of the waste.

Statute authorizes the Texas Commission on Environmental Quality (TCEQ) to license and regulate one low-level radioactive waste disposal facility under the compact, called the compact waste disposal facility.¹ Since 2009, TCEQ has licensed the private company Waste Control Specialists (WCS) to serve as the owner and operator of this facility in Andrews County, with an initial 15-year license and the possibility of 10-year renewals. Operational since 2012, the facility disposes of all three classes of low-level radioactive waste — Class A, B, and C from lowest radioactivity to highest — and is the only active commercial location in the country for disposing of Class B and C waste.² The land on which WCS built the facility and the waste the facility disposes of are property of the state of Texas.

For Texas to serve as the host state, the compact required Vermont to pay an additional \$25 million to Texas and \$2.5 million to Andrews County.³ The purpose of the compact commission is to ensure generators of low-level radioactive waste in the two “party states,” or the entities that broker on their behalf, have sufficient space to dispose of their waste, and to encourage reduction of radioactive waste generation overall.⁴ Radioactive waste generated in Texas and Vermont does not need approval from the compact commission for disposal at the facility. However, as discussed in the *Radioactive Waste Importation Process* textbox on the following page, Texas statute authorizes the compact commission, in conjunction with TCEQ, to approve low-level radioactive waste importation into Texas from “nonparty states” up to a certain amount per year and over the life of the facility.⁵ The compact also authorizes the compact commission to approve the exportation of such waste out of the party states for disposal elsewhere or for processing the waste before returning it for disposal in the compact waste disposal facility, as discussed in the *Radioactive Waste Exportation Process* textbox.⁶

Radioactive Waste Exportation Process

An entity seeking to transport low-level radioactive waste generated within Texas or Vermont to a site outside of these states must request and receive approval from the compact commission. To do so, the entity completes an export request form, which includes a description of the waste, and submits it to the compact commission. If, after posting the export request to the compact commission website, the compact commission approves the request, the entity transports the waste to its destination.

Radioactive Waste Importation Process

An entity with low-level radioactive waste generated outside of Texas and Vermont seeking to import the waste into Texas for disposal must enter into an import agreement with the compact commission. To do so, the entity submits an application for agreement to the compact commission, WCS, and TCEQ. TCEQ reviews the application to certify the waste is authorized for disposal and reviews the contract between WCS and the entity to ensure it conforms to antitrust requirements.

WCS cannot accept waste without TCEQ's certification and the compact commission does not consider an import application until TCEQ certifies the application and authorizes the disposal.⁷ Once TCEQ certifies the application and approves the contract, the compact commission's technical committee reviews the application and recommends an action to the compact commission. If approved, generators of small amounts of radioactive waste may begin shipping waste to the compact waste disposal facility. Generators of large amounts, over 15,000 curies, must apply for a curie release letter before shipping the waste to ensure the shipment will not exceed the annual curie cap. Radioactive waste brokers must provide a manifest of all waste, source of generation, state and compact of origin, and exportation authorizations from other compacts before the compact commission will approve a conditional release letter allowing for disposal.

The entity ships the waste to the compact waste disposal facility where two onsite TCEQ employees inspect the shipment, review the manifest, and verify the shipment meets all applicable requirements before WCS disposes of the waste at the facility. If TCEQ detects an issue with a shipment, it prevents the waste from entering the facility until the discrepancy is resolved or requires the shipment be returned. The TCEQ employees track the amount of waste brought into the facility and ensure WCS properly disposes of the waste.

The compact commission monitors where and by whom radioactive waste was generated, tracks the facility's available capacity in volume and radioactivity, and updates its contingency plan for handling future waste disposal in case WCS ceases operation of the compact waste disposal facility.⁸ To approve an importation of radioactive waste into Texas, the compact commission evaluates multiple factors. In addition to characteristics like the waste's volume, type, and radioactivity, the compact commission considers the economic impact on Texas and Vermont, waste generators in these states, and WCS. For an exportation, the compact commission considers these factors and also the timing of the exportation and the location receiving the waste for disposal.⁹

In addition to the compact waste disposal facility, the WCS site houses three other facilities for disposal of hazardous waste as well as Class A and federally-owned low-level radioactive waste and by-product material. The compact commission has no involvement with these facilities. Additionally, high-level radioactive waste cannot be disposed of in a stand-alone facility in Texas due to recently passed state legislation that prohibits TCEQ from issuing certain permits for these types of facilities.¹⁰ The Nuclear Regulatory Commission (NRC) is the only governmental entity with authority over the interstate commerce of high-level radioactive waste, such as spent nuclear fuel rods.

Findings

The state benefits from robust regulatory oversight of radioactive waste by multiple state and federal entities.

Because radioactive waste carries public health risks that can last for thousands of years, Texas has an inherent and fundamental interest in fully participating in the various federal and state mechanisms to regulate and monitor this hazardous material. The state vests primary regulatory oversight of low-level

radioactive waste disposal with TCEQ, granting the agency exclusive authority to grant, deny, renew, revoke, suspend, or amend the compact waste disposal facility license and directly regulate the facility.¹¹

The compact commission monitors the movement of low-level radioactive waste into and out of the state. However, as discussed previously, the compact commission does not consider an import application until TCEQ certifies the application and authorizes the disposal, and WCS cannot accept waste without TCEQ's certification.¹² TCEQ rules establish fees for the compact waste disposal facility, and the agency reviews WCS contracts for antitrust compliance and the compact commission's import applications for licensure compliance. TCEQ also enacts rule changes to comply with the NRC requirement that state and federal regulations of radioactive waste be compatible. Finally, as a condition of its license, WCS conducted a performance assessment covering up to one million years, showing that use of the land will be safe long into the future after the site is closed, and TCEQ's most recent evaluation of the WCS facility confirmed this assessment.¹³

Multiple other governmental entities provide additional oversight of the generation, transportation, and disposal of radioactive waste in Texas. The Department of State Health Services (DSHS) and NRC at the federal level share regulatory authority over the transportation of radioactive waste within the state. NRC also regulates two active nuclear power plants as well as research and test reactors in Texas. The Texas Radiation Advisory Board, an 18-member governor appointed board, reviews, evaluates, and makes recommendations on state radiation policies, programs, and proposed rules and regulations. Membership includes individuals from the public, industry, and academia. The advisory board's responsibilities include advising TCEQ, the compact commission, DSHS, and the Railroad Commission of Texas on rulemaking regarding radioactive waste.

While the compact commission carries out a narrow, federally-defined role, the state benefits from continued legislative oversight.

The compact commission's role is limited, technical, and largely governed by a congressionally-ratified agreement, which restricts state legislative control more than for a typical state agency governed by state statute. Statute expressly establishes the compact commission as an independent entity created by federal law, governed by the compact, and specifies it is not a state agency.¹⁴ The compact commission does not employ state employees, instead using five private contractors to perform the compact commission's administrative duties. Due to its status, several state agency requirements, like record retention provisions, do not apply to the compact commission.

However, Texas benefits from the periodic assessment of the compact commission the Sunset process provides, particularly since the state has placed certain statutory requirements on the compact commission and its functions, such as subjecting it to Texas' open government laws, including the Open Meetings,

TCEQ confirmed WCS's assessment that the land the facility is on will be safe for at least one million years.

Statute expressly establishes the compact commission is not a state agency.

Public Information, and Administrative Procedures acts. While the compact precludes abolishing the compact commission, statute subjects the compact commission to a regular Sunset review to ensure compliance with those open government laws as well as other hallmarks of Sunset review, such as accountability, efficiency, and effectiveness.¹⁵ Additionally, the compact requires Texas, as the host state, to pay for the compact commission's operations, which requires a state appropriation, necessitating some legislative oversight. Finally, the compact commission has an integral role in ensuring the viability of safe transport and disposal of radioactive waste in Texas, and the compact gives both the legislature and compact commission discretion and authority to execute this role.

While the disposal of low-level radioactive waste is complex, the state provides enough mitigation mechanisms in case of the compact waste disposal facility's closure.

Texas owns the long-term liabilities of the disposal site, but WCS must pay for the site's operational and capital costs.

Using a private company to operate the disposal site creates a complicated relationship where the state's and the operator's interests are not always aligned. Texas owns the long-term liabilities of the disposal site, but WCS must pay the up-front operational costs and the capital costs to expand the disposal site. In overseeing the importation and exportation of waste, the compact commission has to balance the compact's purpose of managing and restricting the amount of interstate commerce around low-level radioactive waste disposal in the party states with the need to ensure the compact waste disposal facility is profitable enough for WCS to continue to operate it.¹⁶ This balance is complicated by TCEQ setting the rates for waste disposal that generate revenue for WCS, the state, and Andrews County.

The state has significant insight into WCS's financial and operational health.

Statute requires the compact commission to adopt a contingency plan for the possible event of a lack of a licensed operator at the facility, a requirement the compact commission complied with in March 2020. However, during the Sunset review, some stakeholders expressed concerns about WCS's desire and ability to continue to own and operate the facility. Sunset staff evaluated the many mechanisms and actions taken by the state to mitigate the risk of an unforeseen closure of the compact waste disposal facility and found them to be sufficient. First, to obtain its license WCS provided to TCEQ a contingency plan and financial assurance for the facility's closure. In addition, at least every four years TCEQ has to study the compact waste disposal facility's capacity, which it has done three times since the facility became operational in 2012.¹⁷ Based on its study, TCEQ can prohibit WCS from accepting any additional nonparty compact waste if the capacity of the facility will be limited. The most recent study in 2020 projected that by 2044, the facility would only reach about 32 percent of the volume and 15 percent of the radioactivity authorized under its license.¹⁸ The information from this study, combined with the review and approval of all WCS importation contracts and the authority to audit WCS' financial records and waste manifest information to ensure accurate fee payments, provides TCEQ and the state significant insight into the company's financial and operational health. Meanwhile, the compact

commission is required to use the information from TCEQ's study to anticipate the future capacity needs of the compact waste disposal facility.¹⁹ Per the terms of the compact, TCEQ must provide the compact commission with any data and information necessary for implementation of the compact commission's responsibilities.²⁰ The compact commission may also choose to deny requests to import non-compact waste into Texas should it become concerned about available space at the compact waste disposal facility. As part of its duty to ensure contingencies in case of facility closure, the compact commission has begun requesting additional data from WCS to determine when the compact commission may need to limit imports of waste due to inadequate capacity.

Sunset Staff Recommendation

Change in Statute

6.1 Amend the compact commission's Sunset review date to 2035.

Because the compact commission is not subject to abolishment under the Sunset Act, but the Legislature and the public benefit from continued legislative oversight of it, this recommendation would extend the Sunset date in the compact commission's statute to 2035, placing it under Sunset review again in 12 years.

Fiscal Implication

Continuing the compact commission would require an annual appropriation from the Legislature, which was approximately \$577,000 in fiscal year 2021. The recommendation would not result in any additional fiscal impact to the state.

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- ¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 401.202(b), Texas Health and Safety Code.
- ² 10 Code of Federal Regulations, Section 61.55.
- ³ Section 403.006, Texas Health and Safety Code; Section 5.01, Texas Low-Level Radioactive Waste Disposal Compact.
- ⁴ Ibid.; Section 1.01, Texas Low-Level Radioactive Waste Disposal Compact.
- ⁵ Section 401.207, Texas Health and Safety Code.
- ⁶ Section 403.006, Texas Health and Safety Code; Sections 3.05(7) and (8), Texas Low-Level Radioactive Waste Disposal Compact.
- ⁷ Section 401.207(d), Texas Health and Safety Code.
- ⁸ Ibid.; Section 3.04(7), Texas Low-Level Radioactive Waste Disposal Compact.
- ⁹ 31 Texas Administrative Code, Part 21, Chapter 675, Subchapter B, Section 675.21(g) (2011) (Texas Low-Level Radioactive Waste Disposal Compact Commission, *Exportation of Waste to a Non-Party State for Disposal*).
- ¹⁰ Chapter 2 (HB 7), Acts of the 87th Texas Legislature, 2nd Called Session, 2021.
- ¹¹ Section 401.202, Texas Health and Safety Code.
- ¹² Section 401.207(d), Texas Health and Safety Code.
- ¹³ Texas Commission on Environmental Quality, *Capacity Report on Low-Level Radioactive Waste: Report to the 87th Texas Legislature*, November 2020, p. 47, accessed online April 8, 2022, https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/104-20.pdf.
- ¹⁴ Section 403.0051, Texas Health and Safety Code.
- ¹⁵ Section 403.0054, Texas Health and Safety Code.
- ¹⁶ Section 401.246, Texas Health and Safety Code.
- ¹⁷ TCEQ, *Capacity Report*, p. 1.
- ¹⁸ Ibid., p. 47.
- ¹⁹ Section 401.208(d), Texas Health and Safety Code.
- ²⁰ Section 403.006, Texas Health and Safety Code; Section 4.05(4), Texas Low-Level Radioactive Waste Disposal Compact.

APPENDIX A

TCEQ General Revenue Dedicated Accounts - FY 2021

Account Name	Account Balance	Account Number
Texas Emissions Reduction Plan Account	\$2.1 billion	5071
Clean Air Account	\$294.5 million	0151
Solid Waste Disposal Fee Account	\$128.1 million	5000
Petroleum Storage Tank Remediation Account	\$93.6 million	0655
Water Resource Management Account	\$64.9 million	0153
Hazardous and Solid Waste Remediation Account	\$30.2 million	0550
Low-Level Radioactive Waste Fund Account	\$22.3 million	0088
Dry Cleaning Facility Release Fund Account	\$20.6 million	5093
Waste Management Account	\$17.5 million	0549
Operating Permit Fee Account	\$15.7 million	5094
Occupational Licensing Account	\$10.5 million	0468
Environmental Radioactive Perpetual Care Account	\$7.9 million	5158
Watermaster Administration Account	\$2.0 million	0158
Workplace Chemicals List Account	\$1.9 million	5020
Environmental Testing Lab Accreditation Account	\$1.1 million	5065

All accounts are established in statute.

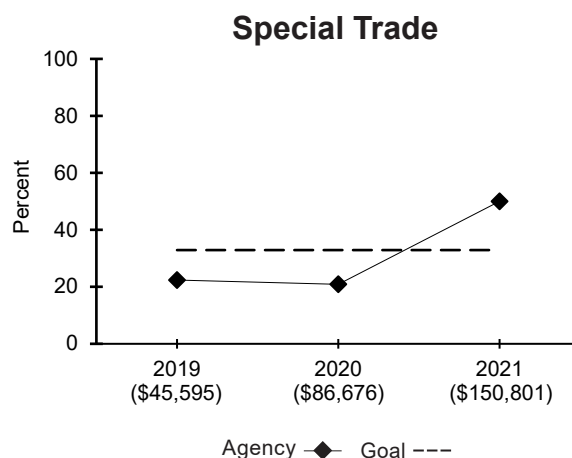
APPENDIX B

Historically Underutilized Businesses Statistics, FYs 2019-21

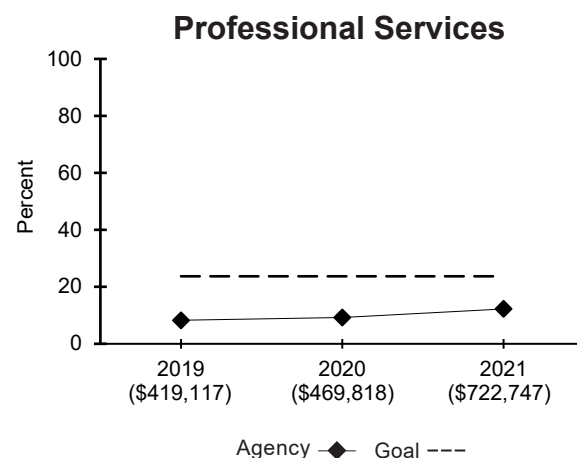
The Legislature has encouraged state agencies to increase their use of historically underutilized businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.¹

The following material shows trend information for the Texas Commission on Environmental Quality's use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in statute.² In the charts, the dashed lines represent the goal for HUB purchasing in each category, as established by the comptroller's office. The diamond lines represent the percentage of agency spending with HUBs in each purchasing category from fiscal years 2019-21. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category.

The agency did not have any heavy construction or building construction purchases in the past three fiscal years. The agency exceeded statewide purchasing goals in each of the past three fiscal years for other services and commodities and in fiscal year 2021 for special trade. The agency did not meet statewide purchasing goals for special trade in fiscal years 2019 and 2020 and professional services in each of the last three fiscal years, citing a small pool of contractors who provide specialized remediation services.

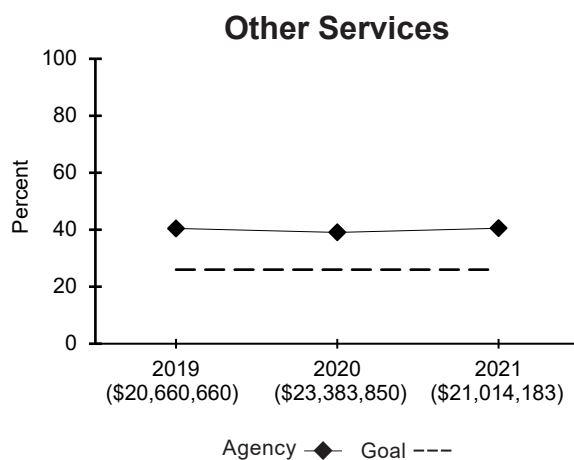


The agency fell short of the statewide goal for spending in special trade in fiscal years 2019 and 2020, but it exceeded the goal in 2021.

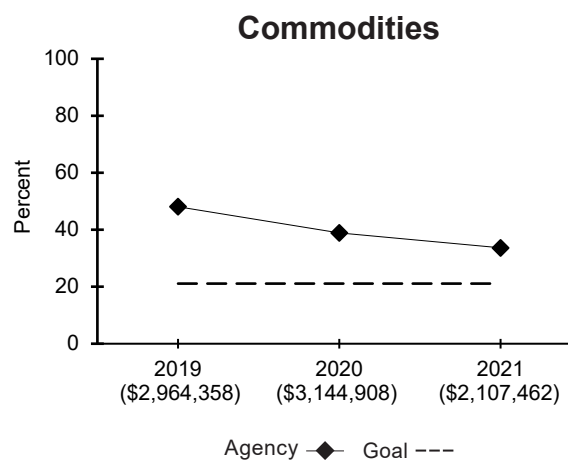


The agency fell short of the statewide goal for spending in professional services in each of the past three fiscal years.

Appendix B



The agency exceeded the statewide goal for spending in other services in each of the past three fiscal years.



The agency exceeded the statewide goal for spending in commodities in each of the past three fiscal years.

¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 325.011(9)(B), Texas Government Code.

² Chapter 2161, Texas Government Code.

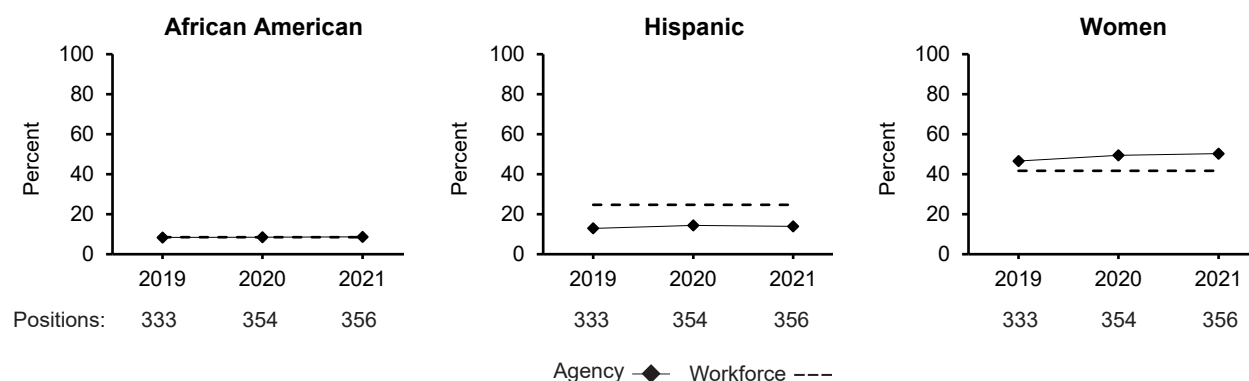
APPENDIX C

Equal Employment Opportunity Statistics, FYs 2019-21

In accordance with the requirements of the Sunset Act, the following material shows trend information for the employment of minorities and women in all applicable categories by the Texas Commission on Environmental Quality.¹ The agency maintains and reports this information under guidelines established by the Texas Workforce Commission.² In the charts, the dashed lines represent the percentages of the statewide civilian workforce for African Americans, Hispanics, and women in each job category.³ These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The diamond lines represent the agency's actual employment percentages in each job category from fiscal years 2019-21.

The agency failed to meet statewide civilian workforce percentages for Hispanics in all categories. The agency exceeded or met civilian workforce percentages for women and African Americans in the administration and administrative support categories, but not professional or technical categories. The agency has no employees in the service/maintenance, skilled craft, or protective services categories.

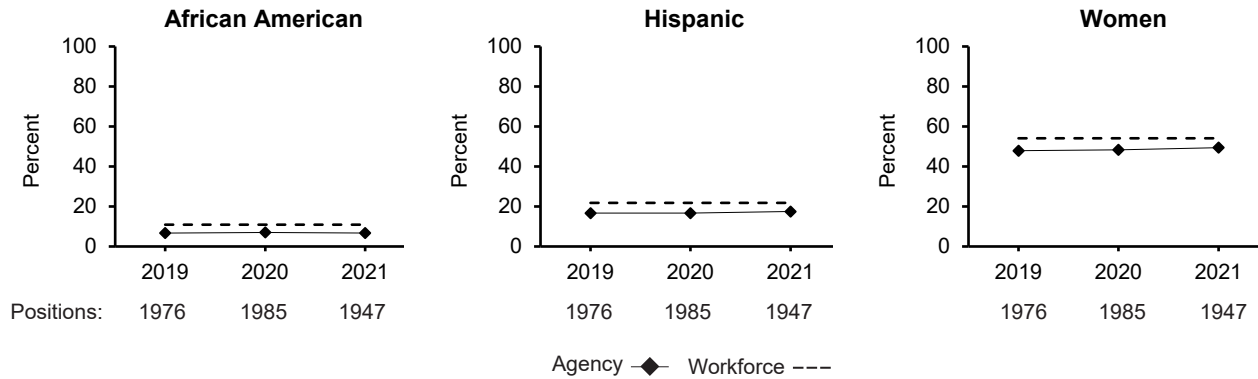
Administration



The agency exceeded civilian workforce percentages for women and matched percentages for African Americans in the last three fiscal years, but it fell short of the percentage of Hispanics in each of the last three fiscal years.

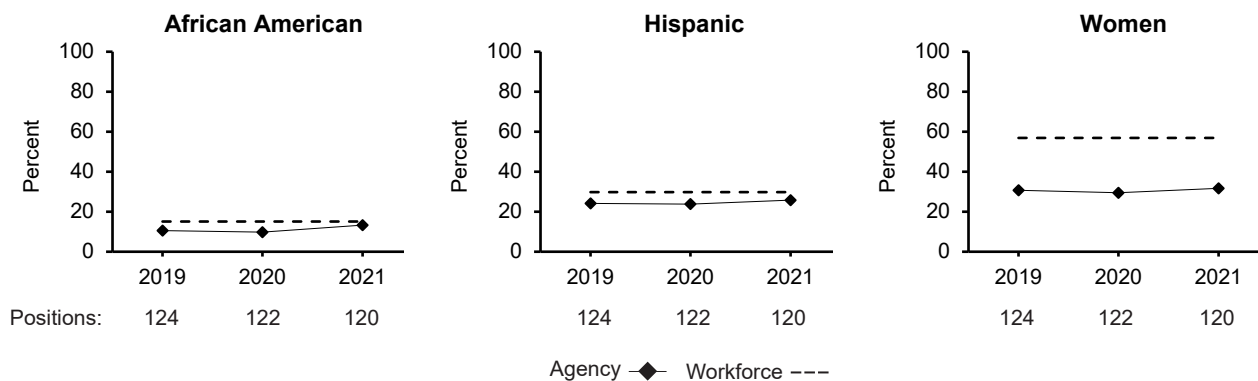
Appendix C

Professional



The agency failed to meet statewide civilian workforce percentages in all three categories in each of the past three fiscal years.

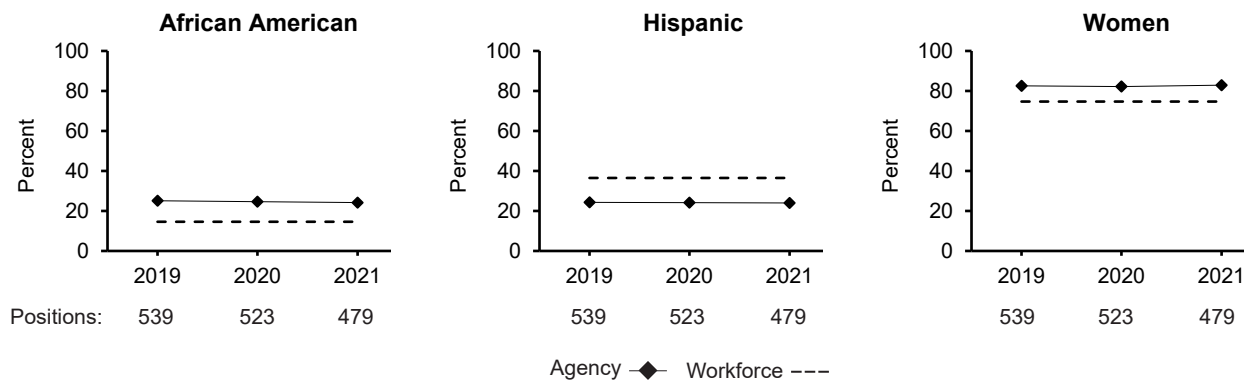
Technical



The agency failed to meet statewide civilian workforce percentages in all three categories in each of the past three fiscal years.

Appendix C

Administrative Support



The agency exceeded statewide civilian workforce percentages for African Americans and women in each of the past three fiscal years, but it fell short of the percentage of Hispanics in each of the past three fiscal years.

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- ¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 325.011(9)(A), Texas Government Code.
- ² Section 21.501, Texas Labor Code.
- ³ Based on the most recent statewide civilian workforce percentages published by the Texas Workforce Commission.

APPENDIX D

Creation and Extension of Advisory Committees

The table below lists Texas Commission on Environmental Quality's (TCEQ) advisory committees and the statutory authority for each committee's creation. Unless exempt from the requirements of Section 2110 of the Texas Government Code, as indicated below, TCEQ must extend the expiration date of these committees through rule. Instead, TCEQ has continued most advisory committees through a commission resolution.

Advisory Committee	Statutory Citation	Continued or Expired by
Not Exempt from Section 2110, Texas Government Code		
Brazos Watermaster Advisory Committee	Section 11.4531, Texas Water Code	Commission resolution extending to the first of September 30, 2022, or until next budget approved.
Concho River Watermaster Advisory Committee	Section 11.557, Texas Water Code	Commission resolution extending to the first of September 30, 2022, or until next budget approved.
Irrigator Advisory Council	Chapter 1903, Texas Occupation Code	Commission resolution extending until February 1, 2027.
Municipal Solid Waste Management and Resource Recovery Advisory Council	Sections 363.041-046, Texas Health and Safety Code	Commission resolution extending until August 31, 2027.
Rio Grande Watermaster Advisory Committee	Section 11.3261, Texas Water Code	Commission resolution extending to the first of September 30, 2022, or until next budget approved.
South Texas Watermaster Advisory Committee	Section 11.3261, Texas Water Code	Commission resolution extending to the first of September 30, 2022, or until next budget approved.
Water Utility Operating Licensing Advisory Committee	Section 5.107, Texas Water Code	Commission resolution extending until August 31, 2024.
Exempt from Section 2110, Texas Government Code		
Dry Cleaner Remediation Advisory Committee	Section 374.004, Texas Health and Safety Code	Statutory expiration date of September 1, 2041.
Small Business Compliance Assistance Advisory Panel	Section 507, Federal Clean Air Act (42 USC 766(1)(f)); Section 5.135, Texas Water Code	Required by federal law and not subject to Section 2110, Texas Government Code.
Environmental Flows Advisory Group	Section 11.0236, Texas Water Code	Exempt from expiration under Section 2110, Texas Government Code.
Environmental Flows Science Advisory Committee	Section 11.02361, Texas Water Code	Exempt from expiration under Section 2110, Texas Government Code.
Tax Relief for Pollution Control Property Advisory Committee	Section 11.31, Texas Tax Code	Exempt from expiration under Section 2110, Texas Government Code.
Galveston Bay Council	Section 5.107, Texas Water Code	Required by federal funding regulations.

APPENDIX E

Compliance History Rating Formulas

Texas Commission on Environmental Quality (TCEQ) calculates a compliance history rating for every facility and company that holds eligible permits. Evidence of noncompliance causes a rating to increase, with the final score classifying the facility or company as shown in the accompanying chart.

Classification	Rating Threshold
High	Below 0.10
Satisfactory	0.10 to 55
Unsatisfactory	Above 55

Facility/Site Rating (RN)

Every facility receives a compliance history rating that reflects compliance with TCEQ regulations during the preceding five-year compliance history period. Points are added for each type of violation noted at the facility during that period, as well as for having chronic emissions events or being designated a repeat violator. Points are subtracted for voluntary compliance activities including violations found through self-audit practices.

$$\left[\frac{(\text{Violation Points}) + (\text{Chronic Excessive Emission Event Points}) + (\text{Repeat Violator Points}) - (\text{Self Audit Points})}{(\text{Number of investigations} \times 0.1) + (\text{Complexity Points})} \right] \times (\text{Voluntary Program Points}) \text{ (if applicable)}$$

Company/Person Rating (CN)

Company ratings reflect a cumulative compliance history rating for all the facilities and sites owned or operated by that company or individual during the five-year compliance history period. The rating weights a company's complex sites more heavily in the calculation by multiplying each facility/site rating by its percentage of the total complexity points associated with the company, before adding the facility/site ratings together.

$$\left[\text{RN Compliance History Rating} \times \frac{\text{Complexity Points for the RN}}{\text{Sum of the complexity points for all related RNs associated to the CN}} \right]$$

APPENDIX F

Permitted Facilities and Activities Without Regularly Scheduled Inspections

Air

- De Minimis facilities
- New Source Review minor permits
- Permit-by-rule authorizations
- Standard permit authorizations

Examples of the above include but are not limited to:

- Agricultural sources
- Air curtain incinerators
- Certain types of landfills
- Concrete batch and asphalt plants
- Oil and gas sites
- Paint and body shops
- Rock crushers
- Sand blasting facilities
- Various manufacturing facilities

Waste

- Dry cleaners
- Medical waste generators
- Medical waste mobile medical waste treater
- Medical waste transporters
- Municipal solid waste types V-IX
- Municipal solid waste recycling
- Petroleum storage tank install, removal, and common carrier
- Underground injection control class V waste disposal wells
- Universal waste handlers, transporters, storage
- Used oil burner
- Used oil/filter collector, generator, and processor
- Used tire generator, transporter, processor, and storage

Water

- Animal feeding operations general permit
- Boat sewage disposal
- Commercial livestock trailer washout
- Discharges to surface waters from motor vehicles cleaning facilities
- Edwards Aquifer authorizations
- In-house laboratory
- Livestock manure compost
- Meat processing
- On-site sewage facility aerobic treatment units
- Reclaimed water production
- Sand and gravel washing
- Satellite wastewater treatment plant
- Shrimp industry
- Sludge transporter, beneficial land use, land disposal, processing, and incineration permits
- Stormwater construction general permits
- Stormwater multi-sector general permits
- Surface coal mining, preparation, and reclamation activities
- Wastewater collection systems (lift stations)
- Wastewater domestic reclaimed water use
- Wastewater general permits
- Wastewater industrial water reuse
- Wastewater Texas land application permit
- Water rights permits outside of Watermaster areas

APPENDIX G

Environmental Flow Standards Implementation Status

Bay and Basin System*	Environmental Flow Standards Adoption Date	Adaptive Management Work Plan Submitted by Committee	Adaptive Management Work Plan Approved by Advisory Group	Schedule for Revision of Standards Proposed by Work Plan	10 Year Schedule for Revision of Standards
<u>Sabine-Neches</u> Sabine and Neches Rivers; Sabine Lake Bay	April 2011	December 2010	September 2011	September 2018	N/A
<u>Trinity-San Jacinto</u> Trinity and San Jacinto Rivers; Galveston Bay	April 2011	May 2012	Not yet approved	5 year period, not specified	May 2021
<u>Colorado-Lavaca</u> Colorado and Lavaca Rivers; Matagorda and Lavaca Bays	August 2012	June 2012	Not yet approved	August 2022	August 2022
<u>Guadalupe-San Antonio</u> Guadalupe, San Antonio, Mission, and Aransas Rivers; Mission, Copano, Aransas, and San Antonio Bays	August 2012	May 2012	Not yet approved	August 2017	August 2022
<u>Nueces</u> Nueces River; Corpus Christi and Baffin Bays	February 2014	November 2012	Not yet approved	March 2019	March 2024
<u>Rio Grande</u> Rio Grande, Rio Grande Estuary, and Lower Laguna Madre	February 2014	Not yet submitted	N/A	N/A	March 2024
<u>Brazos</u> Brazos River; Associated Bay and Estuary System	February 2014	November 2013	Not yet approved	March 2024	March 2024

* The environmental flow process has not been initiated in the Canadian, Red, Sulphur, and Cypress river basins.

APPENDIX H

Texas Commission on Environmental Quality Reporting Requirements

Report Title	Legal Authority	Description	Recipient	TCEQ Evaluation
1. Activities of the Texas Groundwater Protection Committee (TGPC) Report to the Legislature	Section 26.405(4), Texas Water Code	Reports TGPC activities during the preceding biennium, discusses selected groundwater protection issues, and provides recommendations for legislation to improve groundwater protection.	Governor, Lieutenant Governor, Speaker of the House	Continue
2. Aggregate Production Operations (APO) Survey	Section 28A.054, Texas Water Code	Reports on the results of TCEQ's required survey to locate unregistered active APOs, as well as the number and general location of registered APOs, number of inspectors trained in multiple areas related to APO inspections, number of inspections conducted, and results of the inspections.	Governor, Lieutenant Governor, Speaker of the House	Continue
3. Biennial Report	Section 5.178(a), (b), Texas Water Code	Reports on TCEQ's activities during the preceding fiscal biennium and the agency's recommendations for needed legislation.	Governor and Legislature	Continue
4. Appendix to Biennial Report: TCEQ Annual Assessment of Complaints Received	Section 5.1773, 5.178, Texas Water Code	Reports on TCEQ's review of complaints, complaint analyses, and impact of any changes made in the agency's complaint policy.	Governor and Legislature	Continue
5. Capacity Report on Low-Level Radioactive Waste	Section 401.208, Texas Health and Safety Code	A study on the available volume and curie capacity of the low-level radioactive waste disposal facility in Andrews County.	Legislative standing committees	Continue
6. Computer Equipment Recycling Program, Report on the	Section 361.961, Texas Health and Safety Code	Report on the computer equipment recycling program.	Legislature	Continue
7. Dry Cleaner Environmental Response Fund, Report on the	Section 374.056, Texas Health and Safety Code	Information regarding the Dry Cleaning Facility Release Fund, ranking of sites, and the extent of corrective action conducted.	Governor, Lieutenant Governor, Speaker of the House, legislative standing committees	Continue

Appendix H

Report Title	Legal Authority	Description	Recipient	TCEQ Evaluation
8. Enforcement Actions, Report on	Section 5.126(a), (b), (c), Texas Water Code	Reports TCEQ's enforcement actions for the preceding fiscal year compared to enforcement actions of the preceding five fiscal years, and describes the enforcement actions of each regulatory program, including the number of inspections, notices of violations, and enforcement actions; type of enforcement actions; amount of penalties assessed, deferred, or collected; and any other information the agency determines relevant.	Governor, Lieutenant Governor, Speaker of the House	Continue
9. Environmental Flows Science Advisory Committee, Report on Recommendations of the	Section 11.02361(f), Texas Water Code	Report on actions taken in response to recommendations of the Environmental Flow Science Advisory Committee and, for each recommendation not implemented, the reason it was not implemented.	Environmental Flows Advisory Group	Continue
10. Emissions Events	Section 382.0215(g), Texas Health and Safety Code	Reports on TCEQ's assessment of emissions events, including actions the agency has taken in response to these events, and is included in TCEQ's Annual Enforcement Report.	Governor, Lieutenant Governor, Speaker of the House	Continue
11. Governmental Alternative Fuel Fleet Grant Program Report	Section 395.014, Texas Health and Safety Code	Reports the number of grants awarded, vehicles replaced, refueling infrastructure funded, total emissions reductions achieved, and other information about the grant program.	Governor, Lieutenant Governor, Legislature	Continue
12. Vehicle Inspection Stations, Report on Performance of	Section 382.205(c), Texas Health and Safety Code	If TCEQ, in consultation with the Department of Public Safety, chooses to contract with private entities to provide testing equipment, training, and related services to vehicle inspection stations, TCEQ reports the findings of its annual review of the performance of each entity contracted for such services.	Governor, Lieutenant Governor, Speaker of the House	Continue
13. Priority Groundwater Management Areas (PGMAs) and Groundwater Conservation Districts (GCD) Report to the Legislature	Section 35.018, Texas Water Code	Reports on activities undertaken during the preceding two years relating to the creation and operation of GCDs, study and designation of PGMAs, and relevant recommendations.	Governor, Lieutenant Governor, Speaker of the House	Continue

Appendix H

Report Title	Legal Authority	Description	Recipient	TCEQ Evaluation
14. Small Business Lower Emission Vehicle Incentives Report	Section 386.116(d), Texas Health and Safety Code	Reports TCEQ's actions and results of TCEQ's incentive grants to encourage the use of lower emission vehicles by small businesses, and is included in the agency's biennial plan report on the Texas Emissions Reduction Plan.	Legislature	Continue
15. Television Equipment, Report on Sale, Recovery, and Recycling	Section 361.987, Texas Health and Safety Code	Reports information regarding each television manufacturer's report as applicable, a summary of stakeholder comments, and any other relevant information.	Legislative standing committees	Continue
16. Texas Emissions Reduction Plan (TERP) Biennial Report to the Texas Legislature	Section 386.057(b), (c), and (d), Texas Health and Safety Code	Reports TCEQ's review of effectiveness of programs established under TERP and provides a summary of TCEQ activities.	Legislature	Continue
17. Use of Solid Waste Fee Revenue Report	Section 361.014, Texas Health and Safety Code	Describes how TCEQ spent money collected through solid waste disposal and transportation fees.	Legislature	Continue
18. Water Districts and Authorities Findings	Section 12.081(b), Texas Water Code	Reports TCEQ's findings on water districts and authorities from the agency's charge to supervise, investigate, regulate, and require audits, inspections, evaluations, and engineering reports.	Governor, Lieutenant Governor, Speaker of the House	Continue

APPENDIX I

Staff Review Activities

During the review of the Texas Commission on Environmental Quality (TCEQ) and the Texas Low-Level Radioactive Waste Disposal Compact Commission, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with TCEQ and compact commission personnel; attended commission meetings; met with staff from key legislative offices; conducted interviews and solicited written comments from interest groups and the public; reviewed TCEQ and compact commission documents and reports, state statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar state entities in other states; and performed background and comparative research.

In addition, Sunset staff also performed the following activities unique to TCEQ:

- Interviewed TCEQ commissioners and surveyed staff.
- Toured and interviewed staff at TCEQ field offices in San Antonio, Houston, and Dallas/Fort Worth and TCEQ labs in Austin and Sugar Land.
- Accompanied TCEQ inspectors on inspections of several regulated facilities and observed air monitoring stations and mobile monitoring vehicles.
- Visited several current state and federal Superfund clean up sites and Brownfields program sites redeveloped as commercial and retail properties.
- Visited two sites overseen by the TCEQ Watermasters programs and accompanied TCEQ staff collecting water samples.
- Observed TCEQ public meetings on permits, rulemaking projects, and contested case hearings before the State Office of Administrative Hearings.
- Toured several different permitted facilities of varying size and complexity.
- Toured the Houston ship channel and neighborhoods impacted by current and past industrial activity in Houston, Dallas, and New Braunfels.
- Attended two public forums hosted by statewide and local stakeholder groups, a statewide water supply and conservation conference, a meeting of the Texas Radiation Advisory Board, and TCEQ's trade fair and conference.
- Interviewed staff from the U.S. Environmental Protection Agency, Texas Water Development Board, Railroad Commission of Texas, Texas Parks and Wildlife Department, and the Texas State Soil and Water Conservation Board.

Sunset Staff Review of the
Texas Commission on Environmental Quality
Texas Low-Level Radioactive Waste
Disposal Compact Commission

REPORT PREPARED BY

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