Texas Air Control Board

July 1984

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SUMMARY

The Texas Air Control Board has the primary responsibility for protecting the air quality of the state. The board was established in 1965 and over time, the legislature has given the board extensive authority to control emissions of air pollutants. The board is a nine member policy body comprised of five public members and four members with specific experience requirements. The board carries out its responsibilities through two basic functions: issuing permits for construction and operation of facilities that will emit air contaminants; and enforcing permit conditions and board regulations on all facilities.

The permit process requires proposed facilities that will be a source of air contaminants to be reviewed prior to their construction. These facilities are required to use the best available technology to control air emissions before a permit is issued. Facilities constructed prior to 1971, when the agency began reviewing plans and issuing permits, are not required to obtain a permit. However, these facilities must still comply with all board rules and regulations designed to control emissions of air contaminants.

The agency's enforcement function actively seeks to ensure that facilities comply with agency regulations and permit conditions. Enforcement activities range from regular inspections and complaint investigations, to bringing civil action against companies that consistently do not comply with board requirements. The agency operates 12 regional offices across the state to assist in their enforcement efforts.

Enhancing the air quality of Texas is important for protection of the health and physical property of the state's population. The regulatory functions of the TACB continue to be needed to ensure that the quality of the air meets acceptable standards to provide this protection.

The agency has generally carried out its functions in an efficient and effective manner. However, if the legislature decides to continue the agency, various improvements could be made in the operation of these functions. In addition, four issues were identified which would cause both a change in state policy and which offered both significant advantages and disadvantages.

Approaches for Sunset Commission Consideration

I. MAINTAIN THE AGENCY WITH MODIFICATIONS

A. Policy-making Structure

1. **Board composition should include members with expertise in toxicology and demonstrated commitment to safeguarding the environment.**

The current structure of the board includes five public members and four members with particular experience requirements. Although this structure was determined to be helpful in developing agency policy, two modifications were identified which would strengthen the existing experience requirements. Requiring the industrial medicine member to have experience in toxicology would provide additional experience relevant to the boards area of authority. Having a member with a demonstrated involvement in efforts to safeguard the environment would balance the experience of the member from the manufacturing or industrial concern.

2. **Board composition should ensure representation of major geographical areas of the state.**

A geographical balance is not required by the statute and does not currently exist on the board. Since facilities subject to board regulation are located throughout the state, it would be appropriate for the statute to require an equitable geographic distribution of members.

3. **The board's chairperson should be appointed by the governor instead of elected by other board members.**

Currently, the board chair is elected from the membership. Having the governor appoint the chair would provide greater continuity between executive and board policy.

4. **Statutory authority for the board to issue variances is no longer needed and should be removed.**

Variances allow a company to operate in non-compliance with regulations if compliance would unnecessarily put them out of business. The variance provisions have not been used since 1975, and new regulations generally provide sufficient time for compliance. For these reasons, the board's authority to grant variances is no longer necessary and should be removed.

B. Overall Administration

1. **The agency should be required to collect fees to offset the cost to the state of regulating the emission of air contaminants.**

The board's current fee structure results in collections that recover only a small portion of the agency's costs. Generally speaking, some portion of the cost of regulating an industry or business should be borne by the regulated group. To address this problem, the statute should be amended to require the agency's fee system to recover between 25 and 50 percent of the state's costs of the permitting and enforcement functions of the agency.

C. Evaluation of Programs

1. Permits

a. Public hearings on permit applications should be required when requested by those with valid concerns.

The statute does not require a hearing to be held on permit applications even if requested by members of the public who may be affected by emissions from a proposed facility. Procedures exist in other state agencies to require public hearings when applications for permits are validly protested. In order to provide similar opportunities for persons potentially affected by actions of the TACB, permit hearings should be required when requested by those with valid concerns.

b. The agency's list of standard exemptions from permit requirements should be adopted as rules.

The statute provides that facilities may be exempted from permit requirements if they are insignificant sources of air contaminants. The agency maintains an informal list of types of facilities that are standard exemptions. This type of list, which informs the regulated industry of what is subject to agency requirements, is usually included in an agency's formal rules and regulations. In order to provide the public and the regulated industry access to requirements which have the effect of rules, the list of standard exemptions should be adopted as formal rules under the APA.

c. Defining the term "facility" in agency rules would clarify the scope of permit requirements.

The statute requires that a permit be obtained for construction and operation of any facility which may emit air contaminants. The term "facility", however, is not defined in the statute and the agency interprets the term on a case-by-case basis. In order to provide clear guidance and a consistent interpretation of a term

which carries substantial statutory requirements, the agency should adopt a definition of "facility" in rules and regulations.

2. Enforcement

a. Use of administrative penalties would increase the agency's ability to obtain quicker compliance and provide an additional deterrent to violators.

The agency does not have the statutory authority to issue administrative penalties or fines. This authority would provide a mechanism to address compliance problems quickly without having to enter the lengthy litigation process in all protracted enforcement cases. The statute should therefore be amended to authorize the use of administrative penalties.

b. Raising the statutory limits of civil penalties would increase incentive for compliance.

The civil penalties in the statute were set in 1965 and authorize a minimum fine of $50 and a maximum fine of $1,000 per day, per violation. The size of these penalties does not provide an effective deterrent, particularly to large companies. In addition, other state and federal pollution control agencies have significantly higher financial penalties available to deter non-compliance. For these reasons, the statute should be amended to increase the maximum fine to $25,000 per day, per violation.

D. Public Participation

1. Memoranda of Understanding between TACB and other state agencies should be adopted as rules of the board.

Several state agencies are responsible for administering the state's environmental protection laws. "Memoranda of understanding" are developed between agencies to address certain situations where jurisdiction needs to be clarified. These memoranda of understanding possess many of the characteristics of rules as defined by the Administrative Procedures Act. The agency's statute should therefore be amended to require that these memoranda of understanding be processed through the APA's formal rulemaking procedure, thereby allowing the opportunity for public input through the APA hearings requirement.

2. **Placing signs on locations of pending permit applications would improve public awareness of the permitting process.**

The agency currently requires permit applicants to publish notices of intent to seek a TACB permit in a newspaper in the county where the facility is located. This procedure is carried out to inform the public of the proposed project and the agency's permit process. Because many people do not see public notices in newspapers, efforts to inform the public could be improved. Placing notices on the property where the proposed project is to be located would provide an additional means for the public to become aware of a project and of their right to become involved in the agency's permitting process.

II. OTHER POLICY CONSIDERATIONS

1. **Should the agency allow reconstruction of destroyed or damaged facilities under existing permit conditions.**

The statute requires a permit for construction or modification of any facility that will emit air contaminants including facilities that are destroyed or extensively damaged by a catastrophic event. During the permit review these facilities may be required to include control equipment that had not been previously required on the damaged facility. It can be argued that a company should be allowed to replace a destroyed source under existing permit conditions, as long as the new facility would not cause an increase in emissions. An opposing view is that allowing reconstruction under the old permit would result in new facilities without best available control technology being installed. This approach would result in a slowdown in efforts to improve air quality.

2. **Should "land use" be considered as a factor in agency decisions on permits.**

It can be argued that limiting permit consideration for a proposed facility to the effects of direct air emissions does not protect the public from a number of related problems such as noise, danger from increased commercial traffic, dust from increased commercial traffic, and depreciation of land values. An opposing view is that these other conditions are not germane to consideration of an air permit and are actually the responsibility of local authorities. In addition, considering

land use could put the board in the position of becoming a statewide zoning authority.

3. **Should the board continue to consider "economic reasonableness" as a factor in making various determinations.**

The statute requires "economic reasonableness" to be considered in board orders, and in determining best available control technology requirements for a construction permit. It can be argued that when the act was created there was a need for economic reasonableness to be considered in order to minimize the severity of many new requirements on industry in Texas. However, now that requirements to control air pollution are firmly established and the regulated community is well aware of the requirements, there is no longer a need to soften the economic impact of control requirements. On the other side of the issue, it can be argued that not allowing any consideration of economic reasonableness would inhibit economic growth in Texas by requiring controls that are prohibitive in terms of cost.

4. **Should the Department of Public Safety be authorized to institute additional vehicle inspection programs that meet federal requirements.**

A vehicle emissions inspection and maintenance program is currently required only in Harris County. However, there are indications that EPA may require additional, and possibly different types of programs in other Texas counties. The DPS statute only allows the one type of program used in Harris County to be instituted in the state. Arguments for broadening the DPS statute to allow other types of inspection programs center on avoiding sanctions that can be instituted by the federal government if the state does not comply with EPA requirements. Allowing DPS and the TACB to consider establishing other types of inspection programs would give the state the ability to respond to any future changes in federal requirements. On the other side of the issue, it is argued that other inspection programs may not be more effective than the program used in Texas, and would increase inspection and repair costs for automobile owners. In addition, EPA may be more willing to accept the current program if they are aware that the Texas law does not allow other programs.

AGENCY EVALUATION

The review of the current operations of an agency is based on several criteria contained in the Sunset Act. The analysis made under these criteria is intended to give answers to the following basic questions:

1. Does the policy-making structure of the agency fairly reflect the interests served by the agency?
2. Does the agency operate efficiently?
3. Has the agency been effective in meeting its statutory requirements?
4. Do the agency's programs overlap or duplicate programs of other agencies to a degree that presents serious problems?
5. Is the agency carrying out only those programs authorized by the legislature?
6. If the agency is abolished, could the state reasonably expect federal intervention or a substantial loss of federal funds?

BACKGROUND

Organization and Objectives

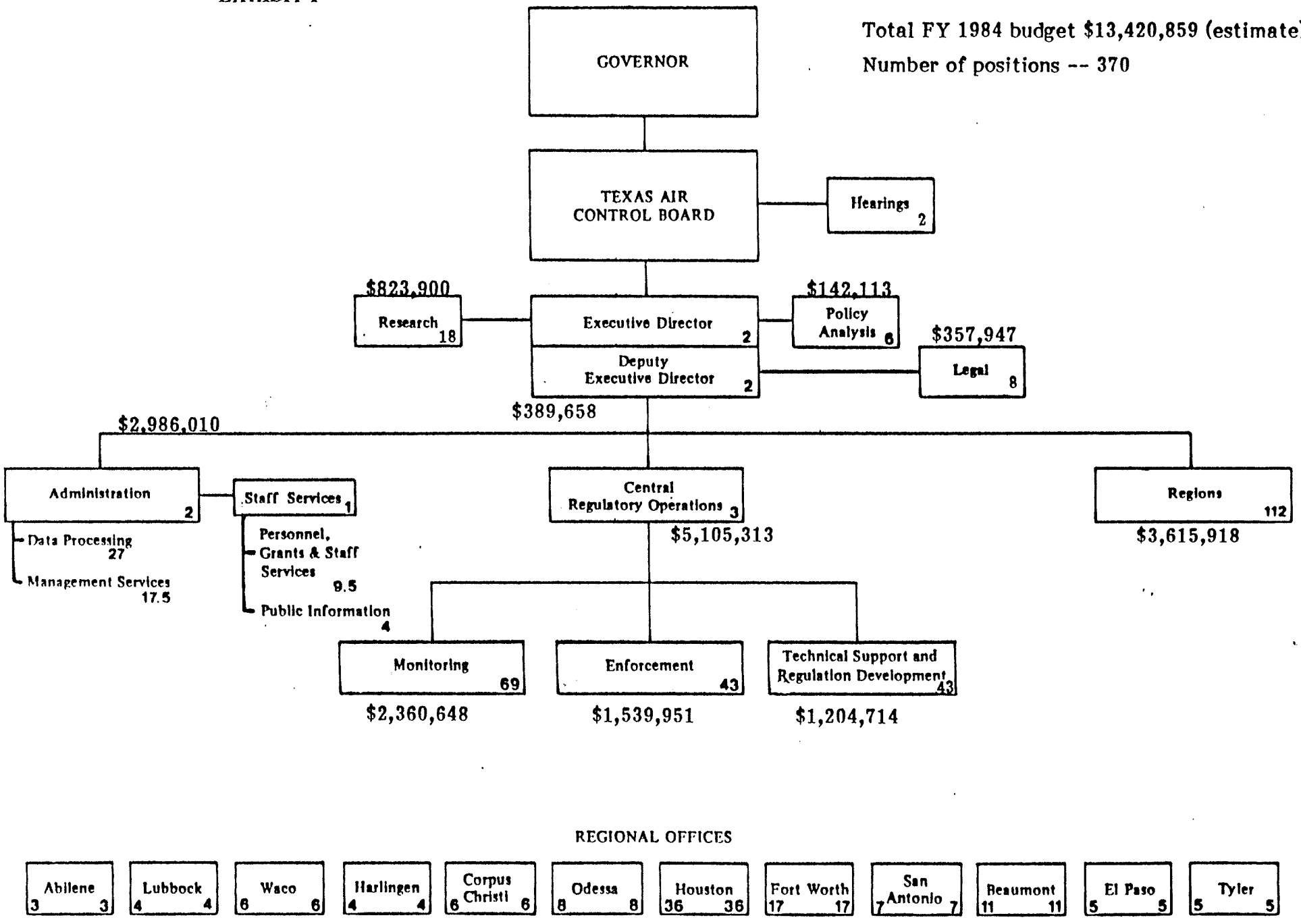
The Texas Air Control Board was created in 1965 and is currently active. The board is responsible, under the Texas Clean Air Act (TCAA), for safeguarding the air resources of the state from pollution. The board originally operated with staff support from the Texas Department of Health and had limited responsibilities for regulating pollution from industrial facilities. However, the board's responsibilities and activities have increased significantly since 1965.

Board duties and powers were expanded in 1969 to include monitoring and research activities. The board was also allowed to establish air quality control regions throughout the state. In 1970, revisions to the Federal Clean Air Act required the board to determine emission reductions needed by the state to meet national air standards and to prepare plans for meeting the standards. The legislature, in 1971, expanded the board's responsibilities to require that entities constructing or modifying contaminant emitting facilities obtain a permit from the board before beginning construction and operations. Because of the substantial growth in the agency's activities, the board was separated from the Texas Department of Health and made an independent agency in 1973. Finally, as a result of requirements of the Federal Clean Air Act of 1977, the Texas statute was revised in 1979 to:

1. allow the board to collect permit fees and regulate radioactive air contaminants,
2. change the composition of the board to include five public members and four members with specific qualifications, and
3. require a pilot project for inspection/maintenance of vehicle emissions in the Houston area.

Currently, the Texas Air Control Board is a nine-member body with members appointed by the governor to staggered six-year terms. The TCAA sets out the board's membership to consist of a professional engineer with at least ten years experience in the area of air pollution control; a physician with experience in industrial medicine; an individual engaged in the management of a private manufacturing or industrial concern for at least ten years prior to appointment; an agricultural engineer with at least ten years of experience; and five public members. Exhibit I sets out the organizational structure of the agency.

EXHIBIT I


Total FY 1984 budget $13,420,859 (estimate)
Number of positions -- 370
GOVERNOR
TEXAS AIR CONTROL BOARD
Hearings 2
$823,900
Research 18
Executive Director 2
$142,113
Policy Analysis 6
$357,947
Deputy Executive Director 2
Legal 8
$389,658
$2,986,010
Administration 2
Staff Services 1
Data Processing 27
Management Services 17.5
Personnel, Grants & Staff Services 9.5
Public Information 4
Central Regulatory Operations 3
$5,105,313
Regions 112
$3,615,918
Monitoring 69
$2,360,648
Enforcement 43
$1,539,951
Technical Support and Regulation Development 43
$1,204,714
REGIONAL OFFICES
Abilene 3 3
Lubbock 4 4
Waco 6 6
Harlingen 4 4
Corpus Christi 6 6
Odessa 8 8
Houston 36 36
Fort Worth 17 17
San Antonio 7 7
Beaumont 11 11
El Paso 5 5
Tyler 5 5

Funding for the board in fiscal year 1984 totalled $13,420,859. About $10 million of this amount came from general revenue, with the remaining $2.5 million coming from federal sources. The board has 370 employees and operates from a headquarters in Austin and from 12 regional offices located throughout the state. Exhibit II sets out the agency's activities functionally, and shows the percentage of the agency's budget and personnel used for each activity. The location of each of the agency's twelve regional offices is illustrated in Exhibit III.

As mentioned earlier, the primary responsibility of the agency is to safeguard the air resources of the state. In order to meet its responsibilities the board performs two primary functions -- permitting of emission sources and enforcement of permit requirements and agency regulations. These functions are supported by various other agency activities such as monitoring and technical support. Descriptions of these functions and support activities are set out below.

Permits

The Texas Clean Air Act requires that all new and modified pollution emitting facilities obtain a construction permit before construction begins. The permit division reviews applications for construction permits to ensure that the operations of a new or modified source will include the use of best available control technology (BACT) and will not prevent the attainment or hinder the maintenance of any applicable federal air quality standard. The statute also authorizes the board to grant an exemption from the permit process if the completed facility will be an insignificant source of air emissions. An operating permit must be applied for within sixty days after a facility has begun operations.

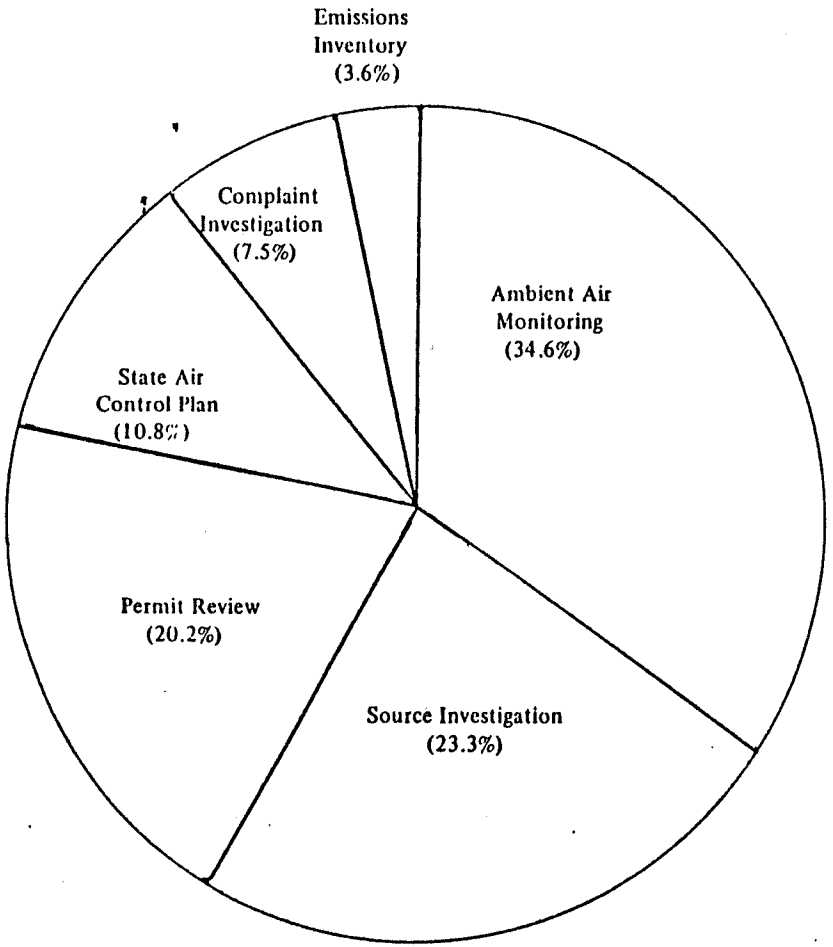
Since the board began requiring and issuing permits in 1971, approximately 8,500 construction permits, 6,200 operating permits, and 6,000 exemptions from permit procedures have been issued.

EXHIBIT II

TEXAS AIR CONTROL BOARD

Functional Breakdown of Programs
September 1, 1983 - August 31, 1984

Total Estimated Budget - $13,258,133



Number of Positions - 370

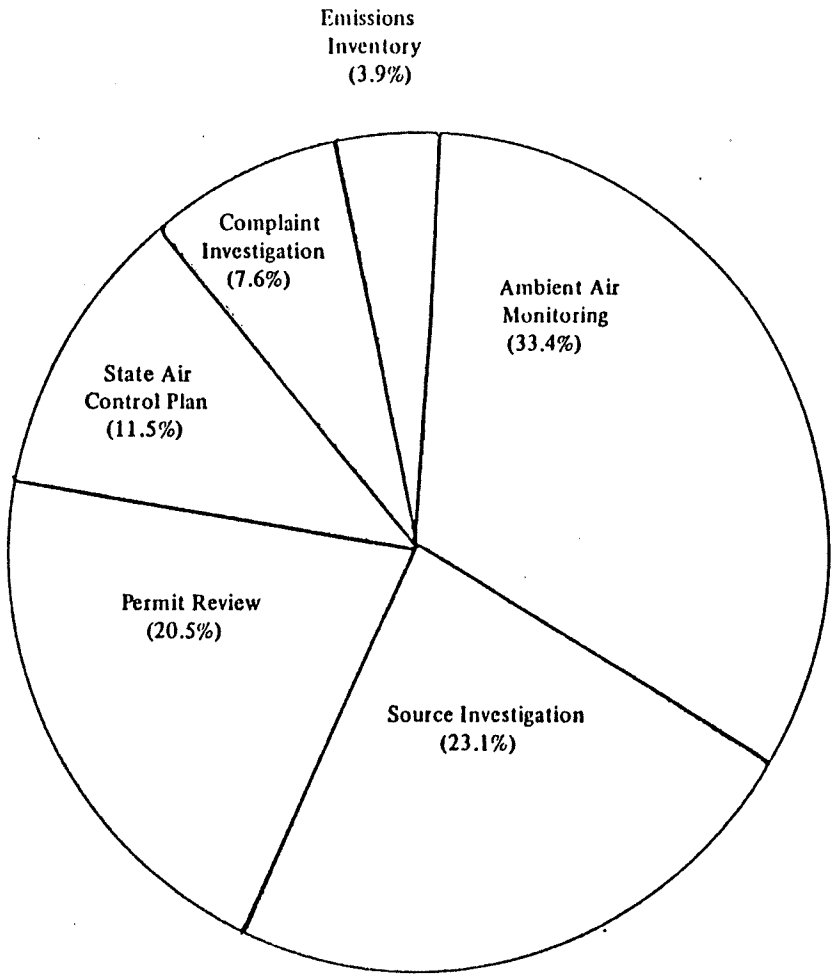
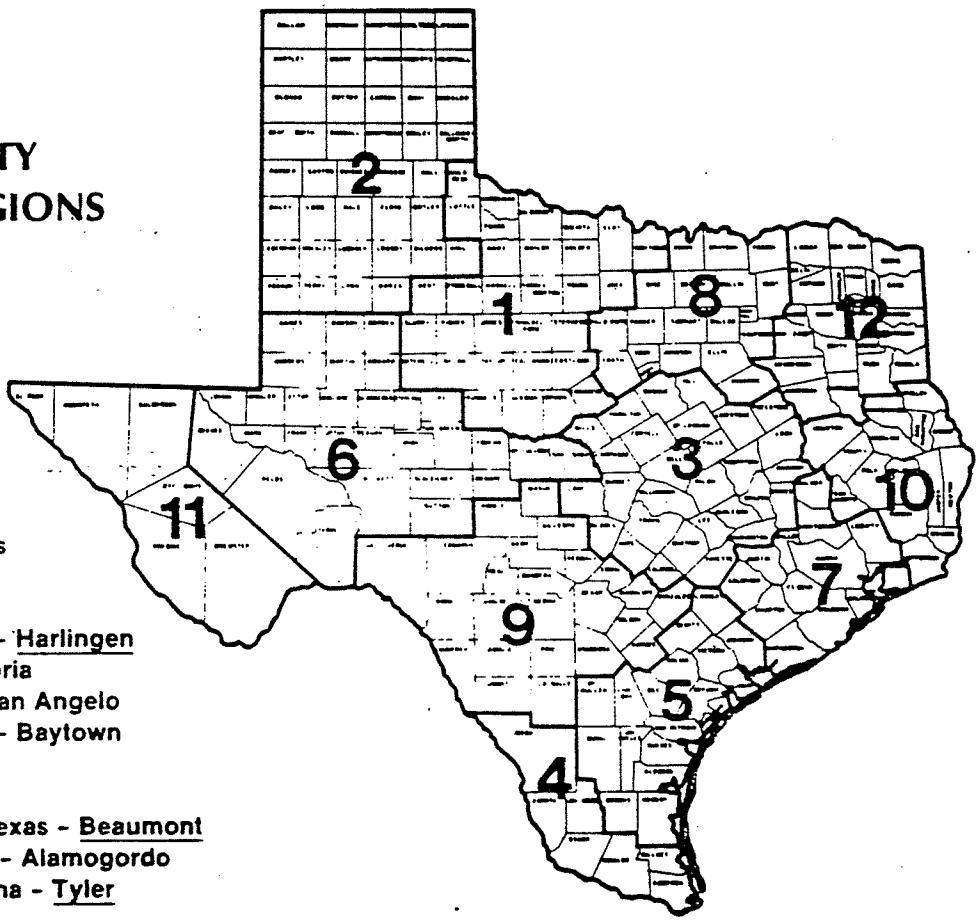


EXHIBIT III

AIR QUALITY CONTROL REGIONS



1. Abilene - Wichita Falls
2. Amarillo - Lubbock
3. Austin - Waco
4. Brownsville - Laredo - Harlingen
5. Corpus Christi - Victoria
6. Midland - Odessa - San Angelo
7. Houston - Galveston - Baytown
8. Dallas - Fort Worth
9. San Antonio
10. S. Louisiana - S. E. Texas - Beaumont
11. El Paso - Las Cruces - Alamogordo
12. Shreveport - Texarkana - Tyler

☐ Interstate Regions

Cities where Regional Offices are located are underlined.

Operating Permits by Region

Region Number	Office Location	# of Permits
1	Abilene	336
2	Lubbock	491
3	Waco	414
4	Harlingen	207
5	Corpus Christi	432
6	Odessa	435
7	Houston	1841
8	Fort Worth	913
9	San Antonio	397
10	Beaumont	356
11	El Paso	122
12	Tyler	362

Facilities built prior to 1971 are not required to obtain a permit, although they must comply with rules and regulations of the board. In fiscal year 1983, 199 permits and 944 exemptions were issued by the permit division.

The permit process begins with the submission of an application and required fees by the entity requesting the permit. The application and supporting documentation are reviewed by an engineer to determine if BACT is being applied, and whether the proposed facility will meet all other applicable requirements. If appropriate, computer modeling and a health effects review are done to estimate possible effects of a facility's emissions. During this time, the TACB regional office or a delegated local agency reviews the plans and the physical site. Public notice is placed in local newspapers by the applicant according to TACB requirements, followed by a 30-day period for comments. If there is opposition to the issuance of a permit, the executive director has the option of calling a contested case hearing or issuing the permit without a hearing. In some cases an informal public meeting is called where the public, the company and agency staff get together to discuss concerns about the facility and see if an agreement can be reached. If a hearing is denied by the executive director, a construction permit is issued and the director's decision can be appealed to the board. The appeal then

results in a hearing being called, although construction on the project may begin and continue through the entire appeal process.

An operating permit must be applied for within 60 days after construction is complete and the facility begins operations. An inspection is performed and various monitoring data may be required. The operating permit is issued if all permit and regulation requirements are met.

Enforcement

In order to determine if compliance with TACB requirements and federal air quality standards are being maintained, routine inspections are conducted by personnel from the agency's regional offices on most major sources including permitted, exempt, and non-permitted facilities (those constructed prior to the permit program). Major sources of emissions are those that emit or have the potential for emitting 100 tons of contaminants per year. The agency has identified 1,662 major sources in the state, of these, 1,156 are permitted and 506 are non-permitted sources. The regional offices also conduct investigations of all contaminant emitting facilities in response to air pollution complaints made to the agency by the general public, other governmental entities and public officials. These activities allow the agency to identify sources in non-compliance and take appropriate steps to bring the source back into compliance in a timely manner. In fiscal year 1983, the board was involved in 10,079 routine inspections and 2,473 complaint investigations.

Inspections and investigations that identify sources out of compliance with permit requirements or agency regulations result in issuance of notices of violation (NOV) by regional office personnel. The regional offices issued 1765 NOV's in fiscal year 1983. Once an NOV is issued, agency personnel strive to obtain voluntary compliance by requesting the company to submit a plan and a timetable to achieve compliance. Further actions such as formal conferences with company management, calling enforcement hearings, and issuing board orders may be taken if timely compliance is not achieved. In addition, if these efforts fail, the board is authorized to take civil actions against facilities in non-compliance.

Cases against these facilities are prepared by the board's legal staff and are filed with the Attorney General's Office for further action. Under statute, violations of board rules and regulations are subject to a civil penalty of no less than $50 and no more than $1,000 per day per violation. The board can also seek injunctive relief against facilities in non-compliance. In fiscal year 1983, the board

took legal action in seven cases. Fines were assessed in five cases for a total of $217,508. The review revealed that the number of cases initiated by the board has fallen off steadily after 1973 when the board initiated legal action on 87 cases. Agency personnel indicated that this reduction is due primarily to better overall compliance in the state.

In addition to the agency's enforcement activities, there are six federally assisted locally operated air control programs that assist in enforcement efforts. Under authority granted by the Federal Clean Air Act and the Texas Clean Air Act, a local government can create a local air pollution control program for the purpose of protecting and enhancing the quality of air in that locality, in accordance with TACB rules and regulations. The following six programs receive federal funds to assist the TACB in performing such activities as investigations, monitoring the quality of air in their area, and assisting in state permitting activities. These activities are described in "Letters of Agreement" between the TACB and local programs.

Federally Assisted Local Programs

Local Program	Date of Current Letters of Agreement
Galveston County	5/27/81
City of Houston	7/20/81
City of Fort Worth	5/27/81
City of Dallas	7/07/81
City of El Paso	5/27/81
City of San Antonio	5/27/81

Monitoring

The agency is involved in two types of monitoring activities which support the agency's enforcement function. Ambient air monitoring is conducted to determine if federal air quality standards are being achieved throughout the state, and localized monitoring and sampling are conducted to determine if an individual facility is complying with agency rules or with permit requirements. The agency performs these activities through its Monitoring Group, which consists of the Ambient Air Monitoring Division, Quality Assurance Division and the Sampling and Analysis Division. The group also performs analyses of ambient air and source emissions samples.

Activities of the Ambient Air Monitoring Division involve the operation of continuous (CAMS) and non-continuous (NCAMS) monitoring stations. These stations take ambient air samples in certain areas to determine compliance with federal air quality standards, and are not designed to determine an individual facility's compliance with rules or permit conditions. There are currently 31 CAMS and 101 NCAMS located in 35 counties across the state. The majority of the stations are in areas where most of the state's population and industrial and commercial activities are concentrated. In addition to determining compliance with federal standards, monitoring stations provide data which is used to support development of regulations to reduce air contaminants, and to assess the effectiveness of current strategies to attain and maintain air quality standards.

The Sampling and Analysis division is responsible for collecting and analyzing samples from specific emission sources. Sampling activities include stack sampling, evaluating the opacity of visible emissions, and property-line sampling. These activities are conducted to determine a particular facility's compliance with emission limits established in board rules and regulations and in its permit. Special non-routine ambient air monitoring is also conducted by this division in cases of localized, unusual pollution problems involving a toxic or hazardous air contaminant that cannot be evaluated by the CAM network.

The Quality Assurance division is involved in quality assuring the techniques and equipment used to obtain and analyze samples. Companies requesting the issuance of an operating permit must demonstrate the source is operating within emission limits imposed by the permit. The demonstration, usually accomplished by sampling the source emissions, is performed by the source operator or a contracted consultant. Most of the activities of the Quality Assurance Division are directed toward ensuring that these tests are conducted properly and result in valid emission data. The division also assures the quality of data generated by the agency's equipment.

Additional Support Activities

The agency conducts several other activities which provide support for the primary functions. These activities are conducted by the Technical Support and Regulation Development Group, the Policy Analysis Section and the Administration and Research Program.

The Technical Support and Regulations Development Group assists the agency in developing appropriate regulations and supports the activities of the permitting

and enforcement functions. Specifically, the group is responsible for evaluating and developing air control strategies and regulations for all facilities which emit air contaminants, including permitted, non-permitted and exempt facilities. The group also supports the agency's enforcement efforts by assisting development of emission control strategies for facilities built before permits were required in 1971. The group supports the permit process by conducting air quality modeling on a proposed facility to estimate what affect the type and amount of pollutants emitted by the facility would have on the surrounding air quality.

Further support for the agency's activities is provided by the Policy Analysis section and through research conducted by the Administration and Research Program. The Policy Analysis Section monitors state and national issues that may affect the board's activities. The Research Division is involved in efforts to identify new air contaminants and to determine potential health affects of contaminants so that control strategies can be developed. The agency received an appropriation of $600,000 for the 1984-85 biennium to conduct health effects research.

REVIEW OF OPERATIONS

The evaluation of the operations of an agency is divided into general areas which deal with: 1) a review and analysis of the policy-making body to determine if it is structured so that it fairly reflects the interests served by the agency; and 2) a review and analysis of the activities of the agency to determine if there are areas where the efficiency and effectiveness can be improved both in terms of the overall administration of the agency and in the operations of specific agency programs.

Policy-making Structure

In general, the structure of a policy-making body should have as basic statutory components, specifications regarding the composition of the body and the qualifications, method of selection, and grounds for removal of the members. These should provide executive and legislative control over the organization of the body and should ensure that members are competent to perform required duties, that the composition represents a proper balance of interests affected by the agency's activities, and that the viability of the body is maintained through an effective selection and removal process.

The Texas Air Control Board is composed of nine members appointed by the governor, with the consent of the senate, for staggered six-year terms. The agency's statute provides for experience qualifications for board members which require that one member be a professional engineer with ten years experience including work in air pollution control, one be a licensed physician with experience in the field of industrial medicine, one be a manager of a manufacturing or industrial concern for the ten years prior to appointment, one be an agricultural engineer with ten years experience, and five represent the general public. The intent of this structure is to provide for expertise in the areas for which the board has regulatory authority and to obtain input from those affected by the agency's activities with a balance provided by the public members.

The review of the agency's policy-making structure indicated that while the experience requirements of the board members had been helpful in setting agency policy, additional categories would achieve a better balance of interests. It was also determined that a geographical balance of board members would be appropriate for the type of regulation carried out by the agency. Finally, the analysis of the board indicated that it was assigned powers that were no longer necessary for

proper regulation. Improvements to the current structure are discussed in the following material.

Board composition should include members with expertise in toxicology and demonstrated commitment to safeguarding the environment.

The legislature has developed two general approaches to deal with experience requirements of board members: 1) members are required to have qualifications that will give the board a perspective on the experience of a particular class of persons such as employees, labor or industry; and 2) members are required to have qualifications that will bring to the board knowledge of particular types of subject matters that the agency will deal with on a regular basis such as engineering or medicine. Experience requirements for TACB members are a mixture of these two approaches. Three members are required to have experience requirements based on particular fields of knowledge and one member is required to have an industry or manufacturing background. The experience requirements have been changed during the agency's existence, in recognition of the changing nature of the regulatory function.

Discussions with various groups led to the identification of two modifications that could strengthen the existing experience requirements. The first modification would be to broaden the experience required of the member filling the industrial medicine slot to specify experience in the field of toxicology which is the science that deals with chemicals and their effects. The person currently filling the position has this broader range of experience and it has proved helpful to the board. Discussions with the staff of the agency indicate that there are enough industrial physicians with expertise in toxicology that there would not be difficulty in filling the slot in the future, if the requirement were added.

The second modification would be to balance the experience of the member who must have experience as a manager of a manufacturing or industrial concern with the experience of a person who has a background with a demonstrated involvement in efforts to safeguard the environment. This change could be accomplished by amending the statute to require at least one of the five public members to have demonstrated a strong commitment and involvement in efforts to safeguard the environment.

Commission composition should ensure representation of major geographical areas of the state.

The review indicated that a geographical balance was not required and does not exist on the board. The analysis showed that the current board membership is entirely from central and eastern portions of the state. In addition, since 1975 there have been only three members from the West Texas area.

Since facilities regulated by the board are found throughout the state and the board is responsible for safeguarding the air resources of all areas of the state, the statute should be amended to specify that one member be appointed from each of the following geographic areas of the state: the Gulf Coast, the Trans-Pecos, Central Texas, North-east Texas and the Panhandle-South Plains. The remaining four members should be selected from the state at large. The at large positions would enable the governor to ensure that areas with large concentrations of facilities that emit air contaminants are adequately represented.

The board's chairperson should be appointed by the governor instead of elected by other board members.

Texas Air Control Board members currently elect the chairperson from their membership for a two-year term. The procedure in many state agencies is for the governor to select the chair. This policy encourages and helps ensure continuity of policy from the state's chief executive down to the various agencies which serve the citizens and protect the resources of the state. A review of the board's procedures and types of policy decisions did not reveal any particular reason to deviate from this practice. Therefore, it is recommended that the statute be amended to provide for selection of the chairperson by the governor and to remove provisions related to a two-year term.

Statutory authority for the board to issue variances is no longer needed and should be removed.

The Texas Clean Air Act (TCAA), originally enacted in 1965, contains provisions for the board to grant variances. Variances allow a company to emit air contaminants beyond the limitations prescribed in a permit, rule or regulation whenever it is found that compliance would result in the taking of property arbitrarily or in closing a business without sufficient corresponding benefit to the people. Discussions with agency personnel indicate that it is very difficult for a

company to prove that a permit condition or regulation would unnecessarily put them out of business. However, in the late 1960's and early 1970's, this provision was used extensively by the board to allow companies time to come into compliance with what was then a new law and with new regulations promulgated to administer and enforce the statute. Over time, these regulations have been complied with and outdated facilities have ceased operation. Currently, in the case of new regulations, sufficient time is given in the implementation date for the regulated community to comply. In addition, the agency now enters into compliance agreements with companies who show sufficient cause to be given additional time to comply with an agency rule, regulation or permit condition. For the above stated reasons, there have been no variances granted since 1975 and only one was issued in that year.

Since the statutory variance provisions are no longer used, and there are sufficient internal procedures in place to provide time for compliance when necessary, the statute should be amended to remove the authority of the board to grant a variance.

Overall Administration

The evaluation of the overall agency administration was designed to determine whether the management policies and procedures, the monitoring of management practices and the reporting requirements of the agency were consistent with the general practices used for internal management of time, personnel, and funds. The review indicated that overall administration was effective but that one element of the agency's operation related to its fee authority could be improved, and this suggested improvement is described below.

The agency should be required to collect fees to offset the cost to the state of regulating the emission of air contaminants.

The Texas Air Control Board is designated by statute as the agency responsible for protecting and enhancing the air resources of the state. This responsibility is accomplished primarily through the regulation of all sources of emissions of air contaminants. The regulatory program basically consists of permitting and enforcement activities. The Texas Clean Air Act was amended in 1979 to allow the board to charge fees sufficient to cover the costs of permit and enforcement activities. The board adopted a fee schedule and the agency began

collecting permit fees in 1983. These fees were reviewed to determine their reasonableness, and whether they conformed to statutory provisions.

As a general principle, some portion of the state's cost associated with regulating an industry or business should be borne by the regulated group. This principle is demonstrated most frequently in "licensing" agencies for professions, where 100 percent of the cost of licensing a profession is usually paid for by fees. Other examples of fees supporting a significant portion of a regulatory program's cost are found in the Department of Water Resources wastewater area where fees recover about 33 percent of the program's cost, and the Department of Health's Bureau of Radiation Control where fees are designed to recover 50 percent of its operating cost.

The review of the agency's fee structure and collections showed that a significant portion of the costs of operating its regulatory program are not being recovered. The agency's fee structure is based on a charge of .1 percent of the capital cost of a proposed new or modified facility. The minimum fee is $300 and the maximum is $7,500. This system resulted in total collections in calendar year 1983 of $342,775 from 138 permit applications. Collections are broken down by amount in the following table:

No.	Amount of Fee	Amount Collected	Percent
22	$7,500 (max.)	$165,000	48
77	$300 to $7,500	$166,075	49
39	$300 (min.)	$ 11,700	3
138	all	$342,775	100

The amount collected for 1983 is about 15 percent of the amount the agency estimated as its cost of permit processing and enforcement. However, this estimated cost is based primarily on salaries and does not include a number of other budget items. Estimates of the full cost of permitting and enforcement indicate that it is about $5.5 million for fiscal year 1983. Two-thirds of this figure come from the state and the remainder from the federal government. The total of

fees collected in 1983 reflect only nine percent of the state's cost. Increases in economic activity and construction should result in greater fee revenues in 1984, although the percent of costs recovered will probably still be about 10 percent.

To conform to the general principle set out previously, the TACB should be directed in statute to implement an increased fee schedule for its program. An examination of the process used to set fees by the Bureau of Radiation Control of the State Department of Health reveals at least three important factors which should be required in setting the fees.

First, the Bureau of Radiation Control has set fees at a level anticipated to cover 50 percent of the program's cost. Using this amount as a rough guideline, it seems reasonable to require that fees be set to recover between 25 and 50 percent of the state's cost. The use of a percentage range gives the agency the flexibility to determine an amount most appropriate to these programs. This range also ensures a significant increase in funds to offset the cost of regulation without creating a strong disincentive to compliance.

The second factor which should be considered in the development of the fee structure is that the fees charged should be reasonably related to the costs incurred by the agency in performing the various aspects of regulation. For example, the size of the facility and number of emission sources usually bears a relationship to cost of permitting and inspecting the facility. The agency's current fee structure has adopted this approach by using a percentage of the capital cost of a project (size) to determine fees. This general approach should be continued.

The third factor which should be required in the development of the fee structure is the adoption of fees through the rulemaking process of the Administrative Procedure Act. The use of this process ensures that all affected parties have ample opportunity for input into the process, and will also assist in the development of complete information concerning the impact of proposed fees on the entities involved.

In addition, there are several other types of permits for which the agency should implement fees. The use of fees in these areas would assist the agency in conforming to the general principle set out above, and would spread the burden of cost recovery across a wider range of the regulated community. For example, the agency has authority to issue exemptions from the permit process for facilities that will make an insignificant contribution of air contaminants to the atmosphere. A number of types of facilities are on an agency list of standard exemptions and do not require an engineering review by the agency. Other facilities that are not

expected to make a significant contribution of contaminants to the air but are not on the list, must apply for a special exemption from the agency and go through an engineering review. There were 922 special exemptions processed in 1983, compared to 138 construction permits. It seems apparent that special exemptions utilize some portion of the agency's permitting and enforcement resources and that a fee should be required in this area. If the minimum $300 had been charged for special exemptions in 1983, an additional $276,600 in revenue would have been collected. The agency could also consider charging similar fees for permit amendments, revisions, and extensions, and for issuing operating permits.

Evaluation of Programs

For purposes of the evaluation, the functions of the Texas Air Control Board can be divided into two main areas. First, the agency reviews applications and issues permits for the construction and operation of facilities which may emit air contaminants. Second, the agency enforces permits and regulations, and monitors the air quality of the state. In addition to these functions, the agency engages in various support services such as research, data collection, and regulation development. The major areas of concern within these functions are set out below.

Permits

A permitting system should ensure that permits are issued in a reasonable length of time so that both the public and the regulated industry are safeguarded. To ensure fair and reasonable regulation it is also necessary that the regulatory process be based on adequate information. Finally, the regulatory process should ensure that the public is given adequate opportunity for participation, and that all regulations are clear and easily interpreted.

The review of these elements indicated that the Air Control Board's permitting process generally works in a timely fashion. Analysis of time periods to process permit applications indicated that the amount of time varies from two weeks to nearly one year. The average length of time for an application review is four months. If a hearing is called, two to three months are generally added to the permit process. This extra period includes time for pre-hearing conferences, and the drafting of a decision by the hearings examiner. The hearings themselves average about six days. There have been 47 contested case hearings called in the past four years.

The analysis of information gathered indicated that engineering reviews are appropriately applied to determine if estimates of emissions are correct, whether best available control technology will be used and whether the proposed facility

will meet all other applicable requirements. Additionally, analysis and discussions with permittees and industry groups indicated that permits are generally processed in a reasonable amount of time, and that the agency receives sufficient information to decide whether a permit should be issued. However, three problems were identified which relate to access by interested persons to the hearings process, lack of clear understanding of which facilities are exempt from the permit process, and a need to clarify the definition of facilities subject to regulation. Recommendations concerning these requirements are set out below.

Public hearings on permit applications should be required when requested by those with valid concerns.

The TCAA provides that a hearing may be held with respect to most actions of the agency. The board has delegated the authority to call hearings, which are considered contested case hearings under the Administrative Procedures Act, to the executive director. There are currently two ways a member of the public can get a public hearing called. First, a person makes a formal request to the executive director for a hearing on a permit application for a proposed facility. The rules of the board give the executive director the option of granting or denying the hearing. The second way of obtaining a public hearing occurs if a hearing request is denied. The executive director's decision to deny a hearing can then be appealed to the board. The board rules require that a hearing be granted on all appeals of actions of the executive director. Therefore, both of these methods will result in a public hearing being called. However, the review showed that there is a possible disadvantage for the person obtaining a hearing by appeal to the board.

The difference for the person(s) requesting the hearing is that once the original petition for a hearing is denied, the construction permit is usually issued by the agency. The permit holder may then proceed with construction while the appeal hearing is being held, although with the risk that the board may deny the permit after the hearing is held. However, the board has never denied a permit to an applicant. In addition, it can be argued that there is an inherent momentum to projects already under construction that makes a possible decision to cancel that project more difficult.

Members of the public should have an opportunity to be heard when they may be affected by an agency action, such as the granting of a permit to construct a facility that will emit air contaminants. This opportunity should occur prior to any official action which may affect those requesting the hearing.

The analysis showed that over the past two years, 37 hearings have been formally requested and eleven have been denied. One denial resulted in an appeal to the board and a hearing was granted. Discussions with agency personnel indicated that some of the 11 hearings were denied on the grounds that there was no indication that the proposed facility would violate the TCAA or the regulations of the board, although they may have been requested by persons potentially affected by air emissions from the facility. A review of policies of other state agencies showed that there are requirements for a hearing when applications are protested by persons with valid concerns about the issuance of a permit. For example, the Department of Water Resources' water quality applications and the Railroad Commission's transportation applications have this requirement.

The review showed that requests for hearings by those with a potential to be affected by a proposed facility have in some cases been denied. Although a public hearing will result upon appeal, facility construction can begin during the appeal and hearing process. This situation puts the protestant at a disadvantage in the decision process. Procedures exist in other agencies to require hearings prior to formal agency action when applications for permits are validly protested. In order to provide similar opportunities for persons interested in actions of the TACB, the statute should be amended to require a public hearing when requested by a person who might be affected by a decision on an application for a permit from the board. The request for a hearing should raise one or more issues within the jurisdiction of the TACB under the Texas Clean Air Act.

The agency's list of standard exemptions from permit requirements should be adopted as rules.

The TCAA provides that the board may exempt certain facilities or types of facilities from requirements to obtain permits from the TACB if such facilities will not make a significant contribution of air contaminants to the atmosphere. The agency maintains an informal list of types of facilities which are not required to obtain a permit from TACB when emissions are below levels determined in agency rules as significant. This list is referred to as the standard exemption list. Certain other facilities which are not on the standard exemption list may receive special exemptions if an extensive project review is judged to be unwarranted.

There are currently 119 types of facilities on the standard exemption list, and the list is reviewed annually for needed additions or deletions. As an example, the following types of facilities are included on the list: equipment installed at a residence for domestic use; food preparation equipment in restaurants; kilns used

for firing ceramic items, and sewage treatment facilities, excluding incineration equipment.

Entities that may be subject to regulation by state agencies should be able to receive from an agency some official indication of what is required of them. Moreover, both the public and the regulated community should have input into an agency's interpretation of statutory provisions. This access to statutory interpretation is usually provided for through the adoption and use of rules and regulations. This procedure allows those affected by agency rules and regulations to have a voice in the development of those rules through public hearings and by written comment.

The agency's standard exemption list does not currently go through the rulemaking process. This omission results in there being no official mechanism for industry and the public to affect what is included in the standard exemption list. The agency is now proposing to include the exemption list in the rules which would go through the standard rulemaking process. However, in order to ensure that industry and the public will have access to determining those types of facilities to be included on a list of standard exemptions from permitting requirements, the statute should be amended to require that such a list be adopted by the board as part of their rules and regulations.

Defining the term "facility" in agency rules would clarify the scope of permit requirements.

The Texas Clean Air Act (TCAA) requires a person who plans to construct any new facility or modify an existing facility which may emit air contaminants to apply for a construction permit from the TACB. Also, an operating permit must be applied for within sixty days after the facility begins operation. The term "facility", however, is not defined in the TCAA.

The agency interprets how much of a project is included as part of a facility on a case-by-case basis. Therefore, permits are issued for the modification or construction of facilities that may have just one or have many points of origin of air contaminants. This approach results in some confusion over what constitutes a facility. For example, a plant may have three separate buildings, each related in terms of the process to create an end product, and each with several point sources of different emissions. The agency must interpret the act to decide which parts of this plant need separate permits. In addition, the company needs to know which parts require a separate application for a permit. Finally, the public needs to know

what should be included, particularly if someone wishes to oppose a permit on the grounds that a relevant piece is not included in the permit application.

Terms which have specific requirements attached to them in an Act should be defined in some manner to allow all those affected by the Act to know how an agency will interpret those requirements. This result can be accomplished through context, if it gives a clear meaning, or the term can be specifically defined in the Act or in an agency's rules and regulations.

Most of the terms with specific requirements are currently defined in the TCAA or interpreted in TACB rules. However, the term "facility" for which permits are required, is not defined. The agency indicated that this situation has caused confusion in the past, although most of the regulated community generally understands how the agency interprets the term. However, in one recent contested case hearing, the question of what constitutes a facility was a major point of disagreement between the protestants, the applicant and the agency. In addition, a review of agency internal memoranda showed a number of different opinions by various staff members as to what constitutes a facility.

In order to provide a consistent and official interpretation of a term which carries substantial statutory requirements, the agency's statute should be amended to require the board to adopt in its rules and regulations a definition and interpretation of the term "facility". The interpretation should also explain the relationship of the term to the permit requirements of the TCAA. By requiring the definition to be in rules rather than in statute, there is flexibility for the agency to modify the definition if necessary to accomodate advancing technology or new conditions. The rulemaking process also allows for input from the public and the regulated community in defining the term.

Enforcement

The overall purpose of the board is to "safeguard the air resources of the state from pollution by controlling or abating air pollution and emissions of contaminants, consistent with the protection of heath, general welfare and physical property of the people." There are two ways in which the agency attempts to achieve this purpose. First, all facilities that emit air contaminants must comply with the regulations of the board. These regulations state specific standards for types of emissions and may require certain procedures to meet the standards. Second, all facilities constructed after the permit process was initiated in 1971 must comply with any additional requirements placed in their permit.

The agency's enforcement activities were evaluated to determine whether compliance is achieved in a timely manner, whether enforcement action is consistent between regions and types of industries, and whether the agency has an adequate range of penalties available to ensure compliance. The agency's compliance activities are directed toward ensuring that the above standards and requirements are met. The agency's compliance division provides overall direction, while the twelve regional offices physically inspect facilities emitting pollutants, investigate complaints, and take initial enforcement actions when necessary.

The agency's enforcement process includes the following steps. Upon discovery of a violation of a board rule, regulation, or permit requirement, the inspector first discusses the violation with the facility's personnel. A notice of violation (NOV) is sent to the management of the facility within three days after confirming the violation. The NOV states which rule or regulation has been violated and requests that the facility's management develop a plan and a timetable to achieve and maintain compliance. All confirmed violations are assigned a priority based upon considerations outlined in the agency's guidelines on compliance and enforcement matters. In fiscal year 1983, the board issued 1,765 NOVs. Most violations are initially assigned a low priority. However, they may become a high priority depending upon the duration and severity of the condition of air pollution, any deterioration in circumstances, or other extenuating factors that may require immediate attention.

If the violation is a low priority, the facility is required to submit and carry out a plan for achieving and maintaining compliance. If compliance is not achieved, the violation is upgraded to high priority status for further action.

If the violation is a high priority, an Administrative Enforcement Conference (AEC) is held involving central agency staff and high level source management to discuss the problems and possible resolutions. If the source owner or operator has failed to submit an adequate compliance plan, he is requested to do so prior to the AEC. Based upon the results of the AEC, recommendations are developed concerning appropriate action to ensure that the source achieves compliance. In fiscal year 1983, the board was involved in 22 administrative enforcement conferences. If subsequent investigations indicate that the facility has achieved and will maintain compliance, the violation is considered resolved. However, if compliance is not achieved and if the violator has not acted in good faith, the board can proceed with formal action.

Formal agency enforcement action may include one or more of the following steps. The board may conduct an enforcement hearing, considered a contested case hearing under the APA, against the violator and issue a formal board order which directs the facility in non-compliance to take necessary action to attain and maintain compliance. However, the review indicated that only one enforcement related board order has been issued since 1981. More typically, the board will refer cases to the Attorney General's Office for civil action against violators. Civil action can result in court ordered injunctive relief and/or the assessment of civil penalties. Civil penalties currently range from a minimum fine of $50 to a maximum of $1,000 per day, per violation. In fiscal year 1983, the board initiated civil action in seven cases. Two of these have been resolved in court and five are still pending.

A review of legal proceedings against companies in non-compliance showed that the process is often lengthy. For civil cases that were initiated in 1981, the average time for completion (settlement or trial) was about one year.

The review indicated that the agency's enforcement activities are generally adequate for obtaining and ensuring timely compliance with board rules, regulations, and permit requirements. However, it was observed that in some cases the agency's enforcement powers are not adequate to ensure timely compliance. In addition, the current level of civil penalties may not be sufficient to deter non-compliance. Two changes could be made to strengthen the board's enforcement authority in these areas. These improvements are discussed below.

Use of administrative penalties would increase the agency's ability to obtain quicker compliance and provide an additional deterrent to violators.

The enforcement authority of the Texas Air Control Board was compared to that of other agencies to determine whether the range of enforcement tools was reasonably complete. Through this review, it was determined that both the federal Environmental Protection Agency and the Texas Railroad Commission have the authority to use administrative penalties in certain areas, but the Texas Air Control Board does not.

An administrative penalty is different from other enforcement actions in that a fine is levied for a violation by the agency rather than through a court suit. The advantage of this type of penalty is that it can be levied quickly, without having to first go through a potentially lengthy litigation process. This advantage makes the

administrative penalty particularly suited for cases where a time delay in legal proceedings might be anticipated and where a violation might have serious consequences for human health or the environment. Both the Texas Railroad Commission and the federal Environmental Protection Agency have the authority to use administrative penalties in certain public health and environmental enforcement cases. Staff of these agencies indicate that administrative penalties are effective in producing quick results and act as a strong deterrent.

The review indicated that the authority to levy administrative penalties could be appropriately applied to TACB's enforcement efforts. The agency can respond effectively to air pollution problems that pose an immediate threat to the public health by seeking injunctive relief from the courts. However, in cases that are not life threatening, the agency's enforcement powers are not as effective in obtaining timely compliance. Many factors, such as the need to compile sufficient evidence to document a NOV and the technical nature of the violation can extend the time it takes to resolve an enforcement case. Agency personnel have also indicated that some facilities in non-compliance may take advantage of the board's efforts to obtain voluntary compliance and do not cooperate in good faith. The management of these facilities can then use the agency's negotiating process to delay compliance. As a result, the agency's preference for negotiating with facilities in non-compliance can result in a facility receiving more time than is necessary to achieve compliance. Consequently, if legal action is needed, a considerable amount of time will have already been spent in the negotiating stage without positive results. On the average, it currently takes approximately 286 days to resolve a high priority case. If legal action is needed these cases can take years to resolve.

Two reasons for the agency's preference to negotiate compliance are that it takes a considerable amount of the agency's time and resources to compile sufficient evidence to document a successful court case and that the agency strives to maintain a good working relationship with industry. However, given the possible severity of the consequences involving extended cases of air pollution, administrative penalties would provide a means for the agency to obtain more timely compliance and would also provide a significant deterrent to non-compliance.

The procedure used to administer the penalty could be patterned after that used by the Railroad Commission, but modified to fit the unique organizational structure of the Texas Air Control Board. This process would include an initial assessment of the penalty by the executive director, who could also negotiate a

settlement with the violator. A penalty agreed upon by both parties would be approved by the Texas Air Control Board in a board order. In the case that an agreement could not be reached between the executive director and the permittee, a contested case hearing would be held and a hearing examiner would make a recommendation to the Texas Air Control Board, which would determine the action to be taken. If a violator wished to appeal an order of the board, the appeal should be heard under the substantial evidence rule. In addition, as implemented by the Railroad Commission, before an appeal can be made the penalty should be paid into an escrow account. Finally, based on the Railroad Commission's experience with administrative penalties, a $10,000 maximum fine per day per violation would appear to provide a significant deterrent and would give the agency the flexibility to establish lesser fines based on the situation and severity of the violation.

Raising statutory limits of civil penalties would increase incentives for compliance

The review also focused on the statutory range of civil penalties to determine if they are effective in ensuring compliance with board rules and regulations. Civil penalties are designed to provide a deterrent against non-compliance with a particular law or regulation. The board's civil penalties were compared with other state and federal environmental agencies to determine whether they provided a sufficient deterrent against non-compliance. The review indicated that other environmental agency's maximum civil penalties were somewhat higher than those of the board as indicated in the following chart.

AGENCY	AREA OF VIOLATION	PENALTY
EPA	Air Pollution	Maximun $25,000 First Conviction
	Air Pollution	Maximum $50,000 After First Conviction
	Air Pollution	Maximum $10,000 for False Statement, Representation, or Certification
TDWR	Wastewater	Maximum $10,000
	Underground Injection	$50 - $5,000
	Solid Waste	$100 - $25,000
TDH	Non-Hazardous Waste	$100 - $2,000
	Hazardous Waste	$100 - $25,000
RRC	Surface Mining	$5,000 Maximum
	Oil and Gas	$1,000 Maximum
TACB	Air Pollution	$50 - $1,000

(All penalties are for each day a separate violation occurs.)

The TACB's civil penalties, established in 1965, are set at a minimum of $50 and a maximum of $1,000 per day, per violation. A suit to recover a civil penalty is conducted in state court by the Attorney General's Office at the request of the TACB. The amount of the penalty is actually assessed by the judge presiding over the case. The judge has the discretion to assess a penalty at or below the statutory limitation.

Since 1979, the agency has been involved in 59 cases that resulted in civil action. Civil penalties were assessed in 25 cases for a total of $641,200. In these cases the fines ranged from $500 to $208,000. The largest fines were assessed against the Owens Corning Corporation in July of 1982 and the RSR Corporation in

October of 1983 for $95,000 and $208,000 respectively. Agency personnel have indicated that the total amount of civil penalties assessed for a separate violation varies widely and depends to a large degree on the judge and the merits of a particular case.

An effort was made to determine if these fines, at their current levels, are an effective enforcement tool. The agency's personnel indicated that in most cases, a combination of possible civil penalties, and the potential bad publicity stemming from the violation, act as an effective deterrent to non-compliance. However, it was also pointed out that the current level of civil fines are viewed by some other companies as a minor cost of doing business. In addition, if inflation is taken into account, the maximum fine of $1,000, established in 1965, has currently depreciated to approximately one-third of its original value. Agency personnel indicate that the $1,000 maximum penalty is too low to provide an effective deterrent in some situations and needs to be increased to address this problem.

In order to make civil penalties a better deterrent against non-compliance with board rules and regulations and increase incentives for proper compliance, the maximum cap should be lifted to $25,000 per violation, per day. This amount is the same as EPA's maximum fine for violation of federal air pollution laws and regulations and the Texas Department of Health's maximum penalty for violation of statutes governing the handling of hazardous waste. The increased maximum cap will also provide a judge with greater discretion in assessing fines for cases of non-compliance.

One additional concern, involving the agency's treatment of "upsets", was identified in the review. Upsets are unscheduled emissions of air contaminants by a particular source. A condition of upset can result from mechanical failure, a problem in the manufacturing process of a facility, or from an error on the part of the personnel operating the facility. It is a violation of board rules and regulations when the emission from the source in upset exceeds allowable standards.

The agency's upset policy is designed to provide flexibility in cases of non-compliance that are the result of an unavoidable upset and not due to negligence or deliberate actions of the facilities personnel. Under the board's regulations, a facility must notify the board as soon as possible that an upset condition has occurred which causes or may cause an excessive emission. A facility may be allowed to exceed standards during a condition of upset if a determination is made by the executive director that the upset conditions were unavoidable and that a shut-down or other corrective actions were taken as soon as practicable. The

agency, not the facility in upset, must make the final determination of whether an upset is unavoidable. A determination that the upset is allowable exempts the facility from formal enforcement action by the agency in that case.

The review indicated that 3,234 upsets were reported by industry from September 1, 1983 to April 1984. Investigations are conducted in cases of upsets involving volatile organic compounds, a threat to the public health and environment, or nuisance conditions. In addition, personnel in the region attempt to track upset reports from specific facilities to identify trends or problem areas. However, the review indicated that only 12 cases were fully investigated with formal determinations made to exempt an upset or issue a NOV.

The review focused on improving the agency's performance in this area. Upset reports are currently processed by hand which, given the large volume of reports received by the agency, results in an inability to process and analyze the reports in a timely manner. This situation, in turn, causes very few upset reports to be fully investigated.

The problem could be addressed by using the agency's computer system to compile upset reports. The computer system could then be used to process upset reports, to indicate patterns in certain facilities' reports and to identify problems that the agency needs to respond to quickly. This practice would allow the agency to conduct more investigations of upsets to determine if they should be exempted or if formal enforcement action should be taken. Agency personnel indicate that this type of information would also be useful in their permitting and enforcement activities.

The agency should take steps to improve its capacity to respond to upsets in the manner described above. The agency estimates that expanding the computer system to process upset reports may require two to four personnel and cost approximately $40,000 to $60,000. However, the agency should also study means to perform this activity with existing personnel and equipment.

EVALUATION OF OTHER SUNSET CRITERIA

The review of the agency's efforts to comply with overall state policies concerning the manner in which the public is able to participate in the decisions of the agency and whether the agency is fair and impartial in dealing with its employees and the general public is based on criteria contained in the Sunset Act.

The analysis made under these criteria is intended to give answers to the following questions:

1. Does the agency have and use reasonable procedures to inform the public of its activities?
2. Has the agency complied with applicable requirements of both state and federal law concerning equal employment and the rights and privacy of individuals?
3. Has the agency and its officers complied with the regulations regarding conflict of interest?
4. Has the agency complied with the provisions of the Open Meetings and Open Records Act?

EVALUATION OF OTHER SUNSET CRITERIA

This section covers the evaluation of the agency's efforts in applying those general practices that have been developed to comply with the general state policies which ensure: 1) the awareness and understanding necessary to have effective participation by all persons affected by the activities of the agency; and 2) that agency personnel are fair and impartial in their dealings with persons affected by the agency and that the agency deals with its employees in a fair and impartial manner.

Open Meetings/Open Records

The review indicated that the agency has complied with requirements of the Open Meetings and the Open Records Act. In compliance with the Open Meetings Act, notices of meetings have been filed with the Office of the Secretary of State in a timely fashion. In addition, executive sessions of the board have been conducted in accordance with that law.

The board has a records management policy which provides public access to agency records in accordance with the Open Records Act. Those records closed to the public include personnel files, files pertaining to litigation, and information in permit files considered to be a trade secret by the permittee.

EEOC/Privacy

A review was conducted to determine if the agency has complied with applicable provisions of state and federal statutes concerning equal opportunity and the rights and privacy of employees. The agency submitted an affirmative action plan in April 1980 which has not been updated. However, the agency does have guidelines for following affirmative action policies and procedures. Compliance with these guidelines is monitored by the personnel section. In addition, the agency operates under the personnel system of the Texas Merit System Council. The Council operates a recruitment program which includes specific efforts to reach minorities. The review also indicated that the agency has a formal employee grievance process and complies with all state and federal policies dealing with the rights and privacy of employees.

Public Participation

The agency's policies and practices were reviewed to determine whether the general public and those affected by the agency have been kept adequately

informed of these activities, and have been provided an opportunity to participate in the policy formulation process. The agency publishes two newsletters designed to inform and notify the public of agency activities and policies: The TACB Bulletin, published monthly; and the Clear Blue, published quarterly. The agency also provides educational information used by school teachers concerning the board's activities, types of air pollution, and efforts to control pollution. In addition, agency personnel give talks when requested about air pollution issues affecting Texas.

The agency holds public hearings to provide opportunity for public participation in rulemaking and in the permit process. Publicity for these hearings is provided through announcements posted with the secretary of state and published in the Texas Register, official notices placed in classified sections of newspapers in affected areas of the state, news releases distributed to the media, and public hearing notices sent to interested parties included on the agency's mailing list.

The results of the review indicated that, in general, the public and the regulated community have access to information and agency processes. However, two improvements could be made in the agency's attempts to involve the public in its regulatory processes. These improvements are discussed in the following material.

Memoranda of understanding between TACB and other state agencies should be adopted as rules of the board

Several state agencies are involved in the effort to prevent adverse effects of pollution on the environment and general public health. At least three agencies, the Department of Health, the Department of Water Resources, and the Air Control Board, all play key roles in regulating various activities that pose serious threats to the environment or general public health if not carried out properly.

The separate duties of each of these agencies are broadly set out in statute. Through either rulemaking or a joint written agreement called a "Memoranda of Understanding" (MOU) these agencies typically have defined each other's responsibilities in regulating areas where jurisdiction is shared, in order to avoid duplication of effort and to enhance cooperation between the agencies.

The Air Control Board is currently operating under MOU's with the Department of Water Resources and the Department of Health. The Air Control Board's agreement with the Department of Water Resources is designed to coordinate the

agencies' activities in the regulation of wastewater treatment facilities, certain parts of industrial solid waste facilities, and incinerators used to process hazardous industrial solid waste. In a similar fashion, the board's MOU with the Texas Department of Health seeks to coordinate the agencies' efforts in the regulation of incinerators used to process hazardous waste. The agency indicates that, although the MOU's discussed here were published in the Texas Register (February 5, 1982), none of the board's MOU's have been adopted as formal rules under the Administrative Procedure Act.

The APA defines a rule as "...any agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency" (Art. 6252-13a, V.A.C.S.). The agency's MOU's with the Department of Water Resources and the Department of Health take specific areas of regulation, such as wastewater treatment facilities and hazardous waste incinerators, and describe the responsibilities and procedures of each agency in regard to the regulation of these facilities. It could be reasonably argued, as a result, that these MOUs typically fit the definition of a rule as stated above.

A major purpose of the APA rulemaking procedure is to provide for public comment in the agency's interpretation of general law. Under the APA the public must be given at least 30 days notice of a proposed rulemaking action to allow all interested persons the opportunity to submit data and express their views in a public hearing.

The general character of MOUs as rules and the importance of public comment in rulemaking suggests a need to remove any question as to how these agreements should be handled in the future. Adopting the agency's MOU's as formal rules will allow the general public to participate in this area of the agency's policy-making process. The agency's statute should therefore be amended to require that all MOUs with state agencies, or revisions to existing agreements, be processed through the APA rulemaking procedure.

One additional concern related to MOU's was also identified during the review. The Texas Railroad Commission has the statutory responsibility for permitting surface mines, and must consider all aspects of the mining operation during the permit application process. The review showed two areas where the activities of the Railroad Commission and the TACB overlap, although no MOU has been developed between the agencies.

First, although the Railroad Commission has overall responsibility for mines, certain aspects of surface mining operations are also permitted by other agencies such as the TACB. TACB currently requires a permit for ore loading facilities and related storage piles, and is responsible for enforcing these permits. This situation is similar to the overlap of permitting and enforcement responsibilities with TDWR and TDH (discussed previously) for which MOU's were developed.

The second area concerns possible confusion over responsibility for the overall effect of air contaminants from surface mines. The Railroad Commission, as part of its permit review process, is required to look at the effect of air contaminants from the mine. However, the TACB has statutory responsibility for protecting and enhancing air quality in Texas. Currently, the only formal interaction between the two agencies occurs when the Railroad Commission solicits comments from the TACB during the Texas Review and Comment System (TRACS) process. The review showed that these comments have been limited to informing the Railroad Commission of the TACB permitting requirements mentioned earlier, and do not include any analysis of potential effects of air emissions from the mine. This type of situation, where one agency has expertise or information that could be utilized by another agency in its regulatory process, is another area where an MOU agreement would be useful.

The above information indicates that both agencies have jurisdiction in the area of controlling air contaminants emitted by surface mines. However, the respective roles and responsibilities of each agency have not been clearly defined. One way of addressing this concern would be for the TACB and the Railroad Commission to develop an MOU defining the responsibilities of each agency in this regulatory area. As with the other MOUs, it should be considered and adopted through the rulemaking process under the APA.

Placing signs on locations of pending permit applications would improve public awareness of the permitting process.

TACB rules require a permit applicant to publish, at the applicant's expense, a public notice of intent to seek a TACB permit to construct a facility. The notice must appear for two consecutive days in a newspaper of general circulation in the county where the proposed facility is to be located. The general public then has 30 days to comment on the permit application or request that a public hearing be held. If there is opposition to the issuance of a permit, the executive director

has the option of calling a contested case hearing or issuing the permit without a hearing. In some cases an informal public meeting is called where the public, the company, and TACB discuss concerns about the proposed facility and see if an agreement can be reached.

Proper and timely public notification is important to the public's awareness of a proposed project as well as the public's ability to participate in the agency's permitting activity. The review indicated that the public notice requirements generally provide timely notification of permit applications. However, since many people never see the public notices in a newspaper, efforts in this area could be improved.

One way to improve the process would be to utilize signs that inform the public of a proposed project and that request comments. These signs would be placed on the property where the proposed facility is to be built. This method is similar to that used by local governments to notify the public about proposed zoning changes or variances.

The agency would have responsibility for printing and maintaining the signs during the period set aside for public comment. A fee should also be charged in addition to permit fees to cover the costs of printing and maintaining the signs. This fee should be authorized in the statute with the amount set in board rules and regulations.

Conflict of Interest

The review in this area focused on agency efforts to inform board members and agency employees of their responsibilities regarding conflicts-of-interest statutes. The results of the review indicated that agency efforts in this area are adequate. Newly appointed board members are furnished a copy of a memorandum entitled "Conflict of Interest Requirements of State Officers and Employees." This memorandum describes and analyzes the statutory requirements relating to conflicts of interest. In addition, the review showed that board members have submitted the necessary financial disclosure documents to the Office of the Secretary of State. New employees are provided with a memo entitled "General Information for New Employees" which sets out the agency's conflict of interest policy as it relates to supplemental employment outside of the agency. Finally, copies of Article 6252-9b V.A.C.S. (Standards of Conduct of State Officers and Employees) are provided to all new employees, who are required to sign an affidavit indicating that they have received and read these documents.

OTHER POLICY CONSIDERATIONS

During the review of an agency under sunset, various issues were identified that involve significant changes in state policy relating to current methods of regulation or service delivery. Most of these issues have been the subject of continuing debate with no clear resolution on either side.

Arguments for and against these issues, as presented by various parties contacted during the review, are briefly summarized. For the purposes of the sunset report, these issues are identified so they can be addressed as a part of the sunset review if the Sunset Commission chooses to do so.

OTHER POLICY CONSIDERATIONS

This section covers that part of the evaluation which identifies major policy issues surrounding the agency under review. For the purpose of this report, major policy issues are given the working definition of being issues, the resolution of which, could involve substantial change in current state policy. Further, a major policy issue is one which has had strong arguments developed, both pro and con, concerning the proposed change. The material in this section structure the major question of state policy raised by the issue and identifies the major elements of the arguments for and against the proposal.

Should the agency allow reconstruction of destroyed facilities under existing permit conditions.

The TCAA requires a permit for construction or modification of any facility that will emit air contaminants. There is no provision for an exemption from this requirement, except for insignificant sources. If a facility has been extensively damaged or destroyed by a catastrophic event, the reconstruction of the facility is considered the same as the construction of a new facility. The owner must go through the agency's permit process, including requirements for using best available control technology on the facility.

An issue has been raised in the past as to whether the board or executive director should have the authority to allow the re-construction or re-installation of a facility that has been destroyed, without modifying its existing permit requirements. Proponents of this authority argue that when a facility or source is destroyed by an explosion or fire it is essential to replace the source as rapidly as possible. Proponents also indicated that since the failure of a source is not planned or expected, a company should be allowed to replace the source under current permit conditions as long as the new facility would not cause an increase in emissions. Opponents of allowing facilities to be reconstructed under existing permits argue that the agency has the ability to quickly process new permits in emergency situations and has done so in the past. Moreover, the permit system was created to require best available control technology on all new construction or major modifications of a facility in order to improve the air quality as older facilities were closed. Allowing BACT requirements to be avoided by allowing reconstruction under the old permit would result in the replacement of old facilities with new ones that emit more contaminants than other new facilities

with similar industrial processes. This situation would cause a slow-down of progress to improve the quality of the air.

Should "land use" be considered as a factor in agency decisions on permits.

The TACB does not currently consider whether the location of a proposed facility is compatible with the surrounding area. They do, however, consider the effects of air contaminants from the facility on the health and physical property of the people in the area.

Proponents of "land-use" consideration argue that limiting consideration to the effects of direct air emissions does not protect the public from a variety of related factors such as noise, danger from commercial traffic, dust from commercial traffic on nearby public roads, pollution from air emissions resulting from upset conditions or violations at the facility, and depreciation of land values resulting from location of a facility in the area. In addition, when facilities are constructed outside city limits, counties do not have ordinance-making power for zoning purposes. This situation limits the options available for the public to oppose construction of a facility. If "land use" were considered in decisions to issue permits, the agency could then weigh the overall effect of a proposed facility on the public.

Opponents of adding land-use considerations for permits argue that the board should only be considering effects of air emissions. Other considerations are not germane and are the responsibility of local authorities. Considering land use would put the board in the position of becoming a statewide zoning authority which could cause a conflict with local governments who have decided zoning is not appropriate for their community. In addition, greater resources would be needed by the agency to provide the expertise needed to assess the effects of these additional factors during permit application reviews.

Should the board continue to consider "economic reasonableness" as a factor in making various determinations.

The TCAA requires "economic reasonableness" to be considered in board orders and determinations. The act also requires consideration of economic reasonableness in determining whether BACT requirements should be mandated for construction permits. For example, in one agency report the board has interpreted

this requirement by stating that it "attempts to assure that a favorable business climate is preserved and enhanced in Texas while controlling air pollution."

It can be argued that when the act was created there was a need for economic reasonableness to be considered in order to minimize the severity of many new requirements on industry in Texas. However, now that requirements to control air pollution are firmly established and the regulated community is well aware of the requirements, there is no longer a need to soften the economic impact of control requirements. Since there are still a number of areas of the state that are unable to meet national air quality standards, the agency's primary responsibility should be to improve air quality.

On the other side of the issue, it can be argued that without considering the economic reasonableness of its decision, the board could be put in the position of placing requirements on industry that would harm industrial expansion and inhibit new industries from locating in Texas. Economic factors should also continue to be considered in BACT determinations in order to prevent issuance of permits with requirements that are prohibitive in terms of costs, thereby resulting in abandonment of plans to build the facility.

Should the Department of Public Safety be authorized to institute additional vehicle inspection programs that meet federal requirements.

Vehicle emissions inspection and maintenance (I/M) programs are designed to reduce levels of emissions from automobiles in order to improve air quality. There are two basic types of I/M programs: a "parameter" program, which essentially checks for the presence of emission control devices and misfueling (using leaded gasoline in an unleaded vehicle); and an "idle" program where vehicle exhaust content is actually measured.

The Environmental Protection Agency (EPA) is currently requiring vehicle I/M programs to be included in state implementation plans for counties that exceed certain federal air quality standards. EPA has the authority to impose economic and no growth sanctions in these counties if EPA requirements are not met. These sanctions can include loss of federal highway funds, loss of federal wastewater treatment funds, loss of federal funds for TACB, and a ban on construction of new sources that will emit air contaminants.

Harris was the first county where an I/M program was required. The legislature authorized a pilot program for Harris County in 1979 which was

completed in 1980. In 1983, the legislature authorized the Department of Public Safety to establish a parameter vehicle emissions I/M program in any county which does not meet national ambient air quality standards and for which the TACB has adopted a resolution requesting that a program be instituted. The parameter I/M program in Harris County began on July 1, 1984.

There are two other counties, Dallas and El Paso, where EPA is expected to require a vehicle I/M program. The EPA is also considering whether an I/M program will be required in Tarrant county. In addition, an I/M program may eventually be required for a number of other counties which are either close to exceeding relevant standards or are next to counties that already exceed standards.

EPA has indicated that for Dallas County a parameter vehicle I/M program, such as the one in Harris County, will not be acceptable. This is due to vehicle emissions being the cause of a much larger portion of the air problem in Dallas County than in Harris County. Therefore, EPA has indicated that the more stringent "idle" I/M program, which measures actual vehicle exhaust emissions, will be necessary in order to improve air quality. For example, estimates of the sources of pollution in Harris County in 1983 show that about 71 percent is from stationary (primarily industrial) sources, and 29 percent from mobile (primarily automobile) sources. For Dallas County, it is estimated that 40 percent of emissions are from stationary sources and 60 percent from mobile sources. Since the majority of air pollutants in Harris County are emitted by industrial sources, improvements in air quality can be obtained from directing the most stringent controls in that area. However, in Dallas County, the majority of air pollutants are emitted by automobiles, and therefore EPA believes a greater effect on improving air quality can be obtained by ensuring proper operation of pollution controls on automobiles.

Estimates of the cost to automobile owners and businesses in Dallas County of implementing and operating an idle I/M program are greater than for a parameter I/M program. For example, it is estimated that first year costs for Dallas would be about $29 million for the idle program and $21 million for the parameter program. Thereafter, annual costs are estimated to run about $17.5 million for an idle program and $15.5 million for a parameter program. These cost figures primarily include an inspection fee (about $10), estimates of cost of repairs ($30 average per vehicle repaired), and cost to inspection stations acquiring necessary equipment (about $4,000 each).

Texas law does not allow DPS to institute any vehicle I/M program other than the "parameter" program. If Dallas and other counties are required by EPA to have an idle program or some other more stringent vehicle I/M program, Texas could not institute the program under current law and would be subject to federal sanctions. One method of avoiding this conflict would be to allow, but not require, DPS to institute any vehicle I/M program that meets EPA requirements.

Those in favor of giving the DPS the authority to institute alternative vehicle I/M programs argue that this authority is necessary to avoid federal sanctions. EPA has indicated that a parameter I/M program will not be acceptable in Dallas County. Since other programs cannot be instituted, it is possible that Dallas County could lose federal highway funds and not be allowed to construct any new facilities that emit air contaminants, which would halt industrial growth. Other federal sanctions are also possible.

Those against allowing other vehicle I/M programs to be considered argue that idle programs will not result in greater improvements in air quality and will cost more. In particular, costs for the automobile owner required to participate in this program can be much higher than those incurred under the parameter program. The fee for the parameter program in Harris County is $2.75 and estimates show that fees for an idle program could be $8 - $10. Moreover, more cars will probably fail the idle test and require repairs that could range from $10 to $300. Other arguments include considerations that EPA may be more willing to accept a parameter program if they know that Texas law does not allow other programs. Also, it can be questioned whether it is feasible to have DPS administer a number of different programs in various parts of the state.

ACROSS-THE-BOARD RECOMMENDATIONS

From its inception, the Sunset Commission identified common agency problems. These problems have been addressed through standard statutory provisions incorporated into the legislation developed for agencies undergoing sunset review. Since these provisions are routinely applied to all agencies under review, the specific language is not repeated throughout the reports. The application to particular agencies are denoted in abbreviated chart form.

TEXAS AIR CONTROL BOARD

Applied	Modified	Not Applied	Across-the-Board Recommendations
			A. GENERAL
X			1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
X			4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
X			5. Specify grounds for removal of a board member.
X			6. Require the board to make annual written reports to the governor, the auditor, and the legislature accounting for all receipts and disbursements made under its statute.
X			7. Require the board to establish skill-oriented career ladders.
X			8. Require a system of merit pay based on documented employee performance.
X			9. Provide that the state auditor shall audit the financial transactions of the board at least once during each biennium.
X			10. Provide for notification and information to the public concerning board activities.
*			11. Place agency funds in the Treasury to ensure legislative review of agency expenditures through the appropriation process.
X			12. Require files to be maintained on complaints.
X			13. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
*			14. (a) Authorize agencies to set fees. (b) Authorize agencies to set fees up to a certain limit.
X			15. Require development of an E.E.O. policy.
X			16. Require the agency to provide information on standards of conduct to board members and employees.
X			17. Provide for public testimony at agency meetings.
*			18. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.

*Already in statute or required.

Texas Air Control Board
(Continued)

Applied	Modified	Not Applied	Across-the-Board Recommendations
			B. LICENSING
		X	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
		X	2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
		X	3. Provide an analysis, on request, to individuals failing the examination.
		X	4. Require licensing disqualifications to be: 1) easily determined, and 2) currently existing conditions.
		X	5. (a) Provide for licensing by endorsement rather than reciprocity.
		X	(b) Provide for licensing by reciprocity rather than endorsement.
		X	6. Authorize the staggered renewal of licenses.
		X	7. Authorize agencies to use a full range of penalties.
		X	8. Specify board hearing requirements.
		X	9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
		X	10. Authorize the board to adopt a system of voluntary continuing education.

*Already in statute or required.